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## Authors and Abstracts

**Mark Abe Keisuke, Equitable Estoppel in Family Law: Intent and Reliance as Determinants of Parenthood (abekei.seikei@gmail.com)**

In 2006, the highest court of the state of New York held that, where a child justifiably relied upon the representation of a man that he was the father, with the result that the child would be psychologically harmed by the man's subsequent denial of paternity, the man should be estopped from asserting that denial. The court imposed fatherhood although the DNA test results clearly indicated that the man was not the biological father. Likewise, the Japanese Supreme Court recently denied a putative parent's claim for declaration of non-existence of the parent-child relationship, where that putative parent was the very person who had filed the false notification of birth with the municipal office years ago. The putative parent in this case apparently wanted to leave the entire estate to the other child.

The judicial emphasis on intent and reliance can be understood as a reflection of modern legal consciousness, which generally attaches great importance to personal autonomy. An individual is deemed to be capable of making a rational decision, so the law holds him responsible when another individual has reasonably relied on his statement. This individualistic approach to family relations may have multiple implications for the future of family law, especially as it relates to issues such as surrogate motherhood, because, under this view, a person who has expressed his intent to be a parent should be legally treated as such, when others have relied on his statement and changed their position detrimentally.

**Simone Abram, Owing people and owning policy: Property in time, space and perspective (s.abram@leedsmet.ac.uk)**

In the pantheon of neo-liberal government (eg in the not-so 'New Public Management'), the idea of investing ownership in policies is central to creating legitimacy for governing strategies. When these policies involve the demolition of people's homes, feelings of 'owning policy' might be disrupted by feelings of ownership over the property that constitutes home. Whether or not a house is owned by the inhabitants, or whether it is rented from others, feelings of ownership often constitute the house as a person (as Levi-Strauss suggested in his definition of 'house society'). But can we equally understand policy as person? Does policy have properties or property-like aspects that correspond to house-property, or is it a different kind of person? This paper examines policy as person, property as person, and person as property through a study of urban regeneration policy and 'housing renewal' in the UK

**Hadeel Abu Hussein, The Palestinian Arab Minority of Israel (H.ABUHUSSEIN1@nuigalway.ie)**

Due to the nature of the Israeli-Palestinian conflict in 1948 – the creation of the state of Israel and the deportation of some 750,000 Palestinians Arabs – the demographic set-up was completely changed. And the majority of Arabs replaced by Jewish one, and the Arabs within the new state of Israel became minority of 20% of the Israeli citizens, the Palestinian Arabs who remained in the state after 1948, as "present's absentees".

This Paper will examine how does the legal system of Israel analyses the Arab-Palestinian minority in Israel. I will argue that they treat them as an equal to other immigrant ethnic groups, which have limited political, civilian and ethnic rights, with a partial willingness to recognize political aspects, insofar as this recognition does not infringe on the ideological structure of the state as a Jewish state. This I will address by examine the "Kaadan" verdict model [Bagatz 6698/85 Adal Kaadan vs. Israel Land Administration, verdict number 54 (1) 258]. The Dilemma this paper will discuss is the possibility for equal privileges for the Arab-Palestinian minority as Native minority.

Critical reading of the judgment can describe the lack of recognition of the Arab Palestinian as a native inhabitant, as a nation-building populace. A minority group that had struggled to recognize its character as a national minority, and had stoutly resisted to treat its status as an ethnic minority group, entitled solely to civilian-political rights (there had also been a similar struggle during the 1990s for equal national budgets, et cetera.) obstructed them to entitle for self-determination within the state, as opposed to an ethnic population which does not reside in its homeland.

**A Agapiou, Scots Lawyers and ADR: A survey of attitudes and experiences  
(andrew.agapiou@strath.ac.uk)**

It is widely acknowledged that lawyers generally perform a gate-keeping role, advising clients on the most appropriate form of dispute resolution for particular cases (Agapiou & Clark, 2010). Is it reasonable to believe that the attitudes of the legal fraternity in Scotland creates a real limit on what could be implemented by a government that seeks to promote modern methods of dispute resolution as part of its civil justice reform agenda? Drawn from questionnaire -based research, the principal aim of this paper is to fill a gap in the literature and establish baseline data on Scots lawyers' awareness, attitudes and experiences relative to ADR in construction disputes. There is evidence from the survey that more education in ADR procedures and their application could provide further opportunity to develop them as settlement tools in Scotland by building on more positive aspects of responses within the survey sample. Only some in the legal fraternity have embraced the challenge of what the study has found to be regarded widely as an opportunity. Further education, training and publication of successful execution may be necessary to convince doubters that ADR needs to be part of the menu of methods of dispute resolution for the modern practitioner.

**Chioma Agomo & Rhoda Asikia Ige, Teaching Gender Studies in an African University:  
Prospects and Challenges (ckagomo@yahoo.com;  
asikiaige@gmail.com/rld61@ilpj.keele.ac.uk)**

The teaching of Gender as a subject in the University Curriculum in most part of the developed world attained prominence in the 1970s and the 1980s with the proliferation of Departments of Women's Studies or Gender Studies. In Africa, there has been a slow response to the discipline of Women's Studies or Gender Studies. However, the 1990s witnessed the emergence of Centres for Women's Studies or Department of Women's Studies in some African Universities notably University of Ibadan Nigeria, Obafemi Awolowo University Ile-Ife in Nigeria, University of Cape Town South Africa and Makerere University, Uganda.

The paper will contribute to the debate about the slow response of African Academics to the theory and practice of Gender in African Universities. The paper therefore will chronicle the experience of law academics at the University.

**Paul Almond, Communication and Social Regulation: The Criminalization of Work-Related Death**

This paper will address the movement towards the use of the criminal law as a tool for the regulation of work-related deaths, both in the United Kingdom and elsewhere, which has occurred in the last twenty years. It will seek to argue that the introduction of the Corporate Manslaughter and Corporate Homicide Act 2007, and the liberalisation of modes of attribution of criminal fault to corporate bodies in other jurisdictions, can be understood as a coherent trend, and that the reasons for this trend can be traced to the role and nature of regulatory law within those societies. This is a topic of interest given that it brings together two (apparently inconsistent) concerns of criminology; a desire to achieve 'justice' in relation to wrongdoing which avoids criminalisation due to power inequalities, and a concern over the potentially damaging implications of extending criminal liability into new areas. The law has typically struggled to impose criminal liability here, preferring instead to conceptualise these cases as 'quasi-crimes' rather than mainstream forms of offending. The desire to break down this distinction reflects some of the limitations inherent in regulatory systems, specifically, their instrumental, rational and juridified nature. Following Habermas (1973; 1988), it will be argued that the advances in instrumental attainment achieved by regulators have been offset by a breakdown of normative legitimacy. Health and safety law, as a social entity and a legal institution, is downgraded and objectified, resulting in both a loss of effectiveness and a loss of public confidence. It will be argue that the turn to the criminal law as a regulatory tool reflects this lack of normative weight, and also the impact of social and cultural contexts upon health and safety regulation, for it is in jurisdictions with liberal market economies and majoritarian, centralised political systems that the use of criminal law in this context is most pronounced. The criminal law is a mechanism to 're-norm' the regulatory law, but in many ways, it is a crutch to offset the limitations of the regulatory law and its political context. Corporate manslaughter reforms aim to communicate loudly in contexts where regulation is constrained to 'speak softly'.

**Tola Amodu, Regulatory Chaos? Obstacles to steering local activity in the context of food safety regulation (T.Amodu@lse.ac.uk)**

The limited capacity of government to steer and manipulate (sometimes with pathological outcomes) local activity is often overlooked when assertions are made that local regulatory strategies are more effective (given their inclusivity that tends towards an absence of hierarchy (Ellickson: 1991)). Thus the quest for effective regulation focuses often on the conundrum of how to harness the capacities of regulated actors (thus optimizing local knowledge) without sacrificing the benefits of control. This endeavour is exemplified in an orientation towards and the continuing interest in self-regulatory practices extending to more loosely defined frameworks and principles-based regulation. Each has been shown to run the risk of compliance deficits and counterproductive effects. On this reading the quest for overarching control can have, at best, moderate success only. What remains perplexing are the reasons for the potential for the failure.

Local authority enforcement remains an area of both policy concern and academic interest. Here we see deficits in the 'reach' of central oversight which can have significant practical implications. Investigation reveals a presence of a plurality of norms and cultural understandings which combine often to frustrate the prospect of regulatory efficacy. The context of food safety enforcement illustrates how different cultural understandings can inform and shape the regulatory arena causing resistance to central control. Here whilst an array of strategies are available to and used by government these are often less than effective. This paper looks at how it is that different perceptions of role and responsibility can perpetuate sites of local power beyond the reaches of central control.

**Georgina Andrews, Challenging Equitable Ownership when Equity is not Equality (Georgina.Andrews@solent.ac.uk)**

This paper discusses the challenge to the recognition of equitable ownership caused by the abolition of the presumption of advancement by the Equality Act 2010. It considers whether the presumption constitutes a 'right', a 'responsibility', or a rule of evidence. The paper crosses traditional subject boundaries by exploring the relationship between Property Law and Trusts, Equality and Diversity, Human Rights and European Law.

The presumption of advancement is an equitable doctrine which rebuts the presumption of resulting trust. Thus, a transfer of legal title without evidence of intention to transfer the equitable interest will in certain circumstances also result in the transfer of the equitable interest. The presumption of advancement discriminates on the grounds of gender. A transfer of property from husband to wife, or from father to child invokes the presumption, but a transfer from wife to husband or from mother to child does not.

The Equality Act 2010 is a wide ranging statute which consolidates and extends protection from discrimination by aligning British legislation more closely with European Union law. Section 199 of the Equality Act 2010 abolishes the presumption of advancement. However, s199 is not yet in force. The wording of the section has provoked academic critics, and the Law Commission have indicated that recent case law developments require further consideration before the provisions are brought into effect.

This paper explores the controversy surrounding the abolition of the presumption of advancement and considers whether, and if so, how, the abolition should be completed.

**Diamond Ashiagbor, Unravelling the embedded liberal bargain: Labour law in the context of EU market integration (da40@soas.ac.uk)**

Drawing on insights from economic sociology, that economic activity is embedded in social institutions (Polanyi), this paper examines the role of labour law and labour market institutions under conditions of economic liberalization, in particular, as part of an array of adjustment mechanisms cushioning the adverse domestic effects of market exposure (Ruggie).

Trade adjustment, wherein an interventionist state is able to ensure the losers from globalization – or from regional market integration – are compensated, is a well-established feature of industrialized economies and within some regional trading blocs such as the European Union. At the member state level, national systems of employment protection and social welfare serve as social stabilisers, softening the impact of EU market integration. In addition, the EU itself has utilized its economic, legal and political capacity to redistribute

between Member States, responding to both internal liberalization and global trade through its social, regional and industrial policy.

Although the effectiveness of the embedded liberal bargain in absorbing the adjustment costs of global trade is beginning to unravel, the EU still stands in stark contrast to its developing country trading partners which have never enjoyed adjustment mechanisms of the sort described above. My central argument is that – in addition to their lack of resources and institutional capacity – current EU approaches, as exemplified by the EU-ACP Economic Partnership Agreements, reduce the policy space available to developing countries to construct appropriate labour market institutions. Accordingly, this paper examines the scope for and limits of equitable social development in the global South – focusing on the Southern African Development Community to explore ‘social regionalism’ as a means by which regional social and labour regulation may inject a social dimension into neo-liberal trade liberalization.

**Eleanor Aspey, Labour Considerations in Utilities Procurement: The Impact of the EU Legal Regime (lxea7@nottingham.ac.uk)**

This paper examines the impact of the European Union (EU) procurement rules on the inclusion of labour policies in utilities procurement.

Background: Procurement in the utilities sector is regulated by the EU with the aim of opening the procurement market to competition (the rules are mainly found in the free movement provisions of the Treaty on the Functioning of the European Union, supported by Directive 2004/17/EC). The potential for including labour-related considerations in procurement (for example, excluding suppliers which use child labour from the procurement process) under the EU regime is unclear, with significant grey areas in the law, making including social issues legally risky. However, the pressure from, inter alia, consumers to examine such issues may mean that utilities include such policies despite the risk.

Methodology: This paper will first discuss the constraints on considering labour issues in procurement and the grey areas in the law based on doctrinal research. It will then set out the result of empirical research conducted as part of the author’s PhD, in which qualitative semi-structured interviews were conducted with a sample of procurement practitioners in the regulated utilities sector, examining the response of those practitioners to the EU rules in practice.

Findings: The study will show the relative impact that the EU rules had on buyers’ decisions over whether or not to include labour policies in procurement, as compared to other factors such as the cost of implementing such policies. It will also discuss the labour issues which buyers consider to be the most important and their preferred methods for including labour issues in procurement covered by the EU rules.

**José M. Atilés-Osoria, The Law and its Repressive Ways: An Analysis of the Use of Law as an Instrument of Repression in the Students Strikes at the University of Puerto Rico in the Years 2010 and 2011 (joseatiles@gmail.com)**

The neoliberal model of governance, public administration and conflict resolution has been mainly based on the use of state law and the creation of new legal categories to cover those situations which are not defined by the existing law. This use of law as a administrative-repressive instrument becomes hyper-visible when the state and economic elites that represents it, use it to legitimize state violence, co-opt, delegitimize and criminalize the social movements that struggle for recognition of certain rights. This situation is radicalized when conflicts occur in the context of colonized countries, where already existing colonial conflicts and confrontations between the colonial-hegemonic actor, intermediary actors and anti-colonial-counter-hegemonic actors. I understand that this conflictive duality is perfectly exemplified by the case of Puerto Rico, an U.S. colony since 113 years ago, and the most recent student strike developed at the University of Puerto Rico. During that strike process, the Puerto Rican colonized administration has use in a intense and expansive ways the criminal law, the courts and there have even been created new laws to co-opt the student manifestations and legitimize the use of violence by the law enforcement agency over the students. In this article I want to show the use of law as an instrument to depoliticized the UPR conflict and the politics itself. To do this I will present three areas of development: 1) an analysis of the socio-legal-political and economic precedents of the conflict, showing the

positions of the colonized administration, students and the main reason for the current strikes; 2) I will briefly describe the uses of law and legal discourses, the court decisions and the creation of new laws by the legislative branch in order to delegitimize the university strike; 3) finally I will do an analysis of the negative effects that such legal measures will have for the socio-political Puerto Rican life. Thereby, I intend to point the way for discussion on the deficiencies and impossibilities to solve socio-political conflict through a one-way; the law.

### **José Atilés-Osoria, Reflections on Transitional Justice; For the Return of the Politics and Searching for Other Epistemologies (joseatiles@gmail.com)**

The state of exception, the enemy criminal law including laws like the Patriot Act, and transitional justice, represent the three discourses or analytical strategies that have led to overlap law with politics, resulting in a depoliticization of it. I will explore the discursive categories, the historical, epistemological and academic trends that have led transitional justice to become one of the three forms of depoliticization above presented. For these purposes, and based on a critical approach, the article will be divided in three parts: 1) I will present a general approach to the historical-epistemological perspectives and the current academic development of the concept of transitional justice. With this analysis, I shall describe the sociopolitical processes that have led to the conceptualization of the transitional justice imposed from above to below, as the leading strategy for conduct the transition to the democracy; 2) I will explore the semantic content of the concept of Transition as a socio-political discourse. Thus, I will show that the concept of Transition implies a historical-linear analysis of the processes of political transformation. What it the same, the passage from the dictatorial, authoritarian and totalitarian political system to a capitalist-liberal-democratic system, where government and the elites who represent it, are responsible for making this transition process. In this context, I have identified different discourses, strategies and socio-political positions that are excluded from the official conception of transition, such as the gender, social movements, workers, religious and minority communities perspectives; 3) Finally, this paper addresses the concept of Justice. I will exemplify the processes that result in the subordinating political practices to law, in the use of legalistic discourse and in the socio-political practices that merges or blurs with the state legal system. Also, I shall present how the legal system by dealing with actors who committed violations in the past eliminates the possibilities of spontaneous demonstrations and other forms of collective action against them. These transitional justice approaches, give rise to a proposal for (re)meaning the semantic content and the legal discourse of political process, including strategies that emerge from below, from communities and from all those who belong to the broad social and political context in transition.

### **Ayodele Atsenuwa, Doing Justice: Plea Bargaining and Sentencing in Lagos State**

The 2007 Lagos State Administration of Criminal Justice Law is the first overhaul of the colonial law relating to sentencing. It introduces plea bargaining and victims' rights and remedies but there are concerns that these developments will undermine the integrity of the sentencing stage and "undo justice" unless well-managed.

The practice of plea-bargaining in Nigeria precedes this law. The Economic and Financial Crimes Commission has used it with judicial assent although its legality is still widely contested. A *quasi plea-bargain* practice has evolved in which offenders "plea bargain" with victims at the police investigation stage and negotiate a "penalty" (often entailing material cost to the offender and material benefit of a compensatory nature to the defendant) which is endorsed by the Police. These experiences offer insights into how sentencing may play out under the new law. EFFC cases, for example, demonstrate how inequality of justice can inure from plea-bargaining when the privileged in society are involved and this has negatively impacted public perception of sentencing. The trend in the *quasi plea-bargain practice* is ready acceptance of plea bargain by victims raising questions of whether vulnerability does not disadvantage them in the bargaining process so that fairness of agreements reached are questioned.

The paper examines the prospects for sentencing under the new law in the light of experience and borrows lessons for remediation from other jurisdictions.

### **Rosemary Auchmuty, Integrating Socio-Legal Perspectives into Equity and Trusts**

This paper, consisting of thoughts towards a contribution to a forthcoming book on integrating socio-legal studies into the undergraduate law curriculum, considers how and why we might incorporate socio-legal perspectives into the teaching of the Equity & Trusts syllabus and what this might mean in terms of accessibility, relevance, and student understanding of this often difficult subject. If we think of 'socio-legal' in its widest sense, incorporating insights from the humanities as well as the social sciences and also critical legal studies, there is scope for a range of different and supplementary ways of looking at topics within Equity & Trusts e.g. critiques of equity's alleged 'protective' jurisdiction, its claim to intervene in instances of 'unconscionable' behaviour, and its reluctance to interfere with established privileges e.g. of men; or an examination of equity's claim to effect a 'balance' between personal and commercial rights. These can be tested against the information provided by sociological data (e.g. statistics of home ownership, gender roles in the home, or gender pay inequality), media reports (individual accounts of legal experiences and journalistic analyses of legal situations), commercial information and, indeed, historical and literary representations. Judgments may be read as historical documents or literary texts, focusing on authorship, audience, language, context, policy and the specific mischief to be addressed; and may be considered in terms of providing an alternative view, or instead reflecting and reinforcing the representations of other sources. The paper will consider how these perspectives could be 'taught', what resources would be needed, and how they could be assessed; and finally what would be the value of a move beyond the substantive legal rules and what skills, knowledge and understandings we would hope to develop in our students.

### **Bode Ayorinde, A Critical Analysis of Legal Control of Banking Capitalisation in Nigeria**

The banking industry is over a century old in Nigeria, the first bank having been established in 1883. The industry has not been stable due mainly to absence of laws in the first instance and later a combination of inadequacy of capital and lack of professionalism. The mass failure of banks before the 1952 Banking Act was blamed on the absence of laws and Regulatory Agencies. Banking laws emerged first in 1952 and then Regulatory Agencies. Several laws had since been promulgated since 1952 but the long desired stability is yet to be found in the Nation's banking industry.

In 1996, 26 banks got liquidated in one swop. Licenses of 64 banks were revoked on January 2, 2007. The latest episode was blamed on the inability of the affected banks to garner twenty five billion naira as minimum shareholders fund.

This paper critically examines the essence of adequacy of capital in the growth and stability of banking industry. It traces the history of legislation to control bank capitalization in the country and did a comparative analysis of bank capital requirements in other countries. The growth and stress in the industry during the period revealed that heavy capital alone can not engender growth and stability in the banking industry. Rather the strength of a bank lies more on professionalism and crime free environment, more than the size of capital of the banks. The paper concludes that the latest increment from N2b to N25b was too sharp an increment and was forced on the banks in a hurry which led to the closure of most banks. The paper suggests some legislative reforms to the Nigerian banking laws to prevent the abuse of its present provisions by regulatory authorities.

### **Elif Babul, "Smells Like Translation:" Pedagogies of Human Rights and the Management of the Foreign in Turkey**

Governmental circles both in Turkey and Europe continue to discuss Turkey's European Union (EU) accession in terms beyond the single market economy and regional integration. Turkey's so called "harmonization process" targets the country's political regime, emphasizing democratization, human rights and "good governance." Inspired by many anthropologists' continuing endeavor to explore projects and processes bearing claims to universal validity (i.e. democratization and socioeconomic development), I study human rights training programs for state officials and government workers in Turkey, held to meet the EU membership requirements. Conducted since 2002, training programs on international human

rights law, women's human rights, prevention of torture, children's rights etc. are run collaboratively by the Turkish government and various national/international NGOs. Human rights training programs in Turkey are "translation processes" (Merry 2006), where the universal human rights discourse is reframed for application within the governmental realm in Turkey. This reframing bears significant effects on how human rights and their universality is currently registered within the Turkish official imaginary. The reforms that the government is obliged to undertake for realizing Turkey's pending EU membership oversee a reframing of the universal human rights as a technical bureaucratic ordering rather than a transnational moral one. Human rights, consequentially, is transformed from being a medium of radical political action to one of apolitical governance, contracting the space of politics, and putting the human rights movement in disadvantage.

This paper analyzes the politics of simultaneous translation in human rights seminars for state officials and government workers. It focuses on translators and the work of translation as windows onto the learning experience. I argue that translation processes serve as mediums through which human rights and their foreign origin are both mediated and managed in highly nationalist training environments.

### **Rebecca Badejogbin, The Emerging Paradigm of Clinical Legal Education in Nigeria: The Nigerian Law School as a Case Study (Badejogbin\_re@yahoo.com)**

Clinical legal education, a teaching method that adopts a technique which enables law students to learn by doing has gained adoption in a host of jurisdictions for decades. In a bid to institutionalize Clinical Legal Education in Nigeria, several colloquiums have been organized by stake holders from as far back as 2001 till date with many more slated for the near future. These concerted efforts to improve legal education appear to be quite comprehensive.

The Nigerian Law School the sole institution that provides vocational training for law graduates who wish to practice law in Nigeria is just at the moment undergoing major reformations in its curriculum after producing well over 60, 000 lawyers since its inception. This is the first since 1959 in response to the compelling need to change legal education in significant ways albeit past achievements; by developing a simulation based, empirically relevant curriculum with contents and methodology that can most effectively prepare students for practice. This is a marked deviation from its former curriculum which teaches less skills and heavy doctrinal content.

Remarkably, within a short time, giant strides have been taken to prepare for the full adoption of this marked change in curriculum. Despite the progress made so far, there are current core and structural problems which cannot be ignored in order to achieve a more adequate and properly formative legal education to the over 4,000 students enrolled at the Law School every year for the one year vocational program.

This paper will therefore dwell on the progress made thus far in the adoption of this new curriculum, the problems currently being encountered and the hitches to be surmounted in order to achieve the best practice for the Nigerian Law School. It is undeniably a 'historic opportunity to advance legal education' in Nigeria.

### **Anna Bagnoli, A.L. Keeling, A.J. Holland, M. Redley, M.J. Gunn, F. Thompson and I.C.H. Clare, Applications for Deprivation of Liberty Safeguards authorisations: practitioners' decisions and the everyday practice of form-filling (ab247@medschl.cam.ac.uk)**

The Deciding about Deprivations of Liberty (DECIDE) Project, funded by the Department of Health, is being carried out at the Cambridge Intellectual & Developmental Disabilities Research Group, University of Cambridge, to investigate the interface between the Mental Capacity Act Deprivation of Liberty Safeguards and the Mental Health Act. As part of this project, we have examined the application forms that must be completed for Standard Authorisations (Form 4) and Best Interests Assessments (Form 10), from three different areas of England. This presentation will focus on the qualitative analysis of these forms, carried out with the aid of Atlas.ti software, with particular attention to themes and to the practitioners' use of language. We will highlight the issues that are emerging as crucial in practitioners' decision-making and to the practical issues involved in this rather cumbersome task.



**Estella Baker, Visions of the future: EU penal policy in the post-Lisbon era (e.baker@shef.ac.uk)**

Following hot on the heels of the entry into force of the Lisbon Treaty, the European Council adopted the Stockholm Programme: the third five year programme to turn the EU into an area of freedom, security and justice ["AFSJ"]. Between them, these two events usher in a new era of Union engagement in the penal field and the texts therefore offer a certain kind of vision of the future. However, as products of the political bargaining process, its candour and ambition is necessarily constrained by the need to reach a sufficient consensus for the bargaining process to be concluded.

By contrast, since their adoption, a number of senior figures have made public statements that provide more enriched visions of the Union's penal future and the place of the AFSJ in the scheme of its affairs. Some, such as the policy pronouncements by the Justice Commissioner, Viviane Reding, are directed at this very objective. Others, such as observations made by Advocates General in the course of relevant Opinions, are more tangential, although it does not follow that they are any the less far sighted.

Taking the post-Lisbon treaties and the Stockholm Programme as its foundation, this paper will examine the ways in which these formal texts have unleashed the potential for deeper, intensified visions of the Union's penal role to come to the fore. How plausible are they? And what are their implications for the ongoing constitutionalising process, and for the prospective nature and character of the Union as a whole?

**Richard Ball, Legitimacy of EU Law (Richard.ball@uwe.ac.uk)**

Much of the focus of debates on legitimacy in the past has centred on democracy and the so-called democratic deficit when analysing the polity of the EU and its laws. However, according to Scharpf there are two aspects of legitimacy, input and output-oriented legitimisation. The former has been filled predominantly with the debate on democracy and has been described as emphasising "government by the people" whilst the latter has received little attention and can be described as "government for the people". The measurement of input-orientated legitimisation can be assessed through elections and the voting procedure but the measurement of output-orientated legitimisation has proven less forthcoming. It is submitted that political actions and their legitimacy, grounded in legal doctrine, can be analysed through the principles of legal rationality. Thus for Union legal doctrine to be rational it must display the requirements of formal, instrumental and substantive rationality, each mutually exclusive and essential, and examined within the relative political context. This paper will outline a model within which the EU's political actions can be analysed for legitimacy.

**Andrea Ballesterio, The Pricing of a human right: Water, Profit Control, and Ethics in Costa Rica (aballes2@asu.edu)**

The last 20 years have witnessed an intense period of reform in the water sectors of most developing countries. Strong privatization programs implemented in the 1990s in Latin America left the region with a sour taste for making water "private" and with growing social skepticism toward policies that overtly transferred water management and/or ownership to the private sector. In the new millennium, however, the privatization rhetoric has lost purchase and none of the former international promoters of the approach feel compelled to aggressively uphold its policy significance. Furthermore, after the 2002 and 2010 commitments by the UN to recognize water access as a human right any discussion of policy involves mechanisms for the implementation of such right. This has required new articulations of notions of the private/public domain, human rights, and modalities of capitalist pricing. In this context, economic regulatory agencies overseeing the provision of public services, such as ARESEP in Costa Rica, are facing the challenge of creating pricing mechanisms that can speak both to the notion of human rights and to the capitalist logics of value creation. In that context, this paper asks how do ethical commitments by non-judicial actors shape rights regimes?

I examine the case of Costa Rica, a country characterized by an anti-shock reform style and a strong social-democratic State. While rejecting overtly privatizing measures, and recognizing water access as a human right through its constitutional court, the country has committed to increase the price of water services by 150% from its 2005 level. I examine this

apparent contradiction by following economic regulators in the design and implementation of an "ethical" pricing system and explore the techniques they use to "control profits" as a way to be consistent with what they understand as the ethos of human rights.

**Anne Barlow, Pre-Nuptial Agreements and the Reconstruction of Fairness  
(a.e.barlow@ex.ac.uk)**

In the light of the Supreme Court's decision in *Radmacher v Granatino* [2010] UKSC 42 on the current law of pre-nuptial agreements and the Law Commission's recent consultation paper *Marital Property Agreements* (CP198), this paper looks at the relative merits of autonomy, certainty and judicially ascribed fairness in financial provision on divorce in the light of public attitudes to these issues. Drawing on an empirical study comprising a nationally representative sample and a qualitative follow-up study, it will consider whether the implications of binding pre-nuptial agreements may be gendered, assess any shift in judicial and societal thinking on 'fairness' in this context and reflect on what reform might mean for the concept of marriage in wider society.

**Lucy Barnes, Individualising the 'Big Society': We are all in this (for ourselves) Together?  
(L.Barnes@kingston.ac.uk)**

This paper considers the termination of lifelong tenancies in the context of the coalition's 'Big Society' agenda, arguing that the removal of lifelong tenancies will create considerable difficulty in establishing some aspects of the 'Big Society' (whether or not this is desirable) within social housing communities. It will be argued that the removal of lifelong tenancies would create changeable communities characterised by high residential turnover, which thus decrease the potential for generating some of the collaborative networked projects identified by David Cameron as demonstrative of the 'Big Society'. These projects may only continue to be viable if we identify the individual him or herself as the unit by which the 'Big Society' is to be measured, yet, this 'individualism' may not necessarily correspond well with the coalition's premise that "we are all in this together". Thus, this paper argues that whilst Cameron's 'Big Society' policy may refer to communities as sites of social entrepreneurial initiative, it is, rather, the individual who is to be 'networked' with other individuals. Social housing is therefore envisaged within state policy as a site of multiple make-shift communities of individuals, which may appear rather antithetical with some of the broader aims of 'Big Society', yet resonant with some previous Conservative administration initiatives in social policy.

**Peter Bartlett, Is there a Future for Wilkinson Hearings?**

In 2001, the Court of Appeal held in *R (Wilkinson) v Broadmoor* that judicial review of decisions to treat psychiatric patients without consent were judicially reviewable under the Human Rights Act 1998. Since that time, few cases have been brought, and none have been successful.

This paper considers the potential for Wilkinson hearings. In particular, it looks to the case law both nationally and at the European level, to determine what sorts of criteria should govern the use of compulsory treatment. By arguing that, at least implicitly, there are legal standards that should be met for compulsory treatment, the paper provides a framework for courts to consider Wilkinson-type cases.

**John Bates, Push me/Pull you? Tensions in establishing negligence liability of sports instructors and coaches (John.Bates@northumbria.ac.uk)**

In two recent cases (*Anderson –v- Lyotier (t/a Snowbizz)* [2008] EWHC 2790 (QB) and *Gouldborn –v- Balkan Holidays Ltd* [2010] EWCA Civ 372), the courts have considered the nature of the duty of care in negligence, and the corresponding standard of care, owed by sports instructors to pupils. Both cases involved ski-ing, but the principles under discussion are of wider impact to coaches engaged in professional and amateur instruction of pupils who willingly seek that coaching and training to improve and develop their skills in sports and recreational activities which may naturally carry a risk of injury without any breach of any duty of care by anyone.

The duty of care in negligence does not exist in a vacuum, and there are important tensions in principle and practice when considering whether an instructor (along with, by extension of

vicarious liability, an employer, and beyond, an insurer) must compensate an injured claimant pupil in these circumstances. How far does any duty reflect the imbalance of knowledge, experience and control between the parties (particularly when children are involved)? To what extent do principles of personal autonomy, freedom of choice and voluntary assumption of risk shape the duty and/or the standard? How are factors, including the fast-moving nature of some sports and activities, momentary lapses of judgment, recognised professional standards and jurisdictional aspects, weighed when shaping the standard of care? What of causative potency – can any failure by an instructor necessarily be said to lead to a conclusion that injuries flow from the breach? Finally, what of the defences of consent and contributory negligence – what tension exists between the autonomy of adults and their own ‘fault’?

This paper examines those tensions in establishing or negating liability in negligence of coaches and instructors in sports and recreational activities to their pupils.

### **Karine Bates, Roles of para-legal workers in the process of accessing justice in India**

The individuals who have developed the expertise to become para-legal workers do not have formal legal training, that is, they do not hold law degrees. Their knowledge of the Indian law and legal procedures is acquired in the course of practical assistance, which they deliver to people belonging to socio-economic deprived sections of the society in order to help them when they are caught in various difficult situations, such as familial tensions. Thus, para-legal workers possess knowledge derived from personal experiences and practical fieldwork shaped by their association with an NGO. Because they were not trained within the formal institutional setting of a Faculty of Law, their activities are considered to belong to the realm of informal justice.

However, in practice, the conflict resolution strategies they have developed form an innovative syncretism because they create dialogues between Indian legal traditions and the state legal bureaucracy. Hence, through their actions they facilitate legal literacy as well as concrete access to police, lawyers and tribunals. The ethnographic account of their active role in the process of accessing justice in India contributes to better understanding legal changes and the impact of legislative reforms.

### **Caron Beaton-Wells & David K Round (with Fiona Haines), Cartel Criminalisation and the Competition Authority: Public Value, Authorising Environment, Operational Capability**

The role played by an independent competition authority in the introduction and enforcement of criminal sanctions for cartel conduct is both significant and complex. The authority may actively promote criminalisation, or it may passively accept a government-led change in policy. Criminalisation may have significant operational and strategic advantages for the authority, or it may result in a high risk drain on limited resources, or, worse, re-allocation of prosecution and enforcement powers at the expense of the agency. This paper will adapt an existing conceptual framework, previously applied to competition law enforcement generally, so as to provide a theoretical tool for analysing cartel criminalisation specifically, and its impact on the operations of a competition authority. The framework revolves around three particular concepts. First, the paper will examine the notion of ‘public value’ as a means of understanding and testing the case made by enforcement agencies and governments for criminalisation. Second, through the concept of ‘authorising environment’, the paper will explore the formal and informal government, bureaucratic, legal and commercial constraints on a competition authority in pursuing criminalisation and enforcing cartel offences. Third, the paper will highlight the importance of ‘operational capability’, both in relation to the decision to criminalise and in relation to the implementation of the criminal regime. Each of these three concepts has its own significance. However, the interactions between them are also revealing of the complexities of cartel criminalisation from the competition authority’s perspective. Drawing on a series of interviews conducted with enforcement agency personnel and other stakeholders in Australia and the United Kingdom in 2009 and 2010, the paper will use the different experiences of the competition authorities in these two jurisdictions to illustrate the analytical power of the framework.

**Thomas Beke, The evolution of Litigation Public Relations in England (thomas.beke@stir.ac.uk)**

This paper examines the field of Litigation PR, focusing on its role, scope and history in the English legal jurisdiction since 1990. This paper discusses the evolution of this new and, arguably, under-researched branch of public relations and reflects on the academic writings of different scholars who argue that public relations history need more detailed academic works to add value to the discipline. Based on my PhD research, I will discuss the careers of key figures such as Mr. Richard Elsen, Miss Melanie Riley and Mr. Stephen Lock, and the work of Bell Yard, Byfield Consultancy or Ludgate Communications, so developing an historical evolution of Litigation PR in England.

This historical research interprets the key events, personalities and institutions (such as judiciary, legal profession and PR occupation), and how these were shaped by the liberalization of the English legal market. The key aim of this research is concerned with analysing reforms of the legal and legal communication market (Flood, 1981, 2008; Twining, 1980, 1982; Zander, 1980, 2004, 2007). This helps to understand when, how and why the new institution of Litigation public relations evolved in England.

**Nadia Bernaz, Delivering Justice in the Caribbean: A Human Rights-based Assessment of the Caribbean Court of Justice (n.bernaz@mdx.ac.uk)**

In 2005 ten Caribbean states/territories established the Caribbean Court of Justice (CCJ), reaffirming their independence from Britain and reinforcing the region's position by providing the Caribbean Community (CARICOM) with a proper judicial organ. The Court combines appellate and original jurisdictions, making it both the final court of appeal for Caribbean countries and the dispute settlement body of CARICOM.

So far, only three countries (Barbados, Guyana and Belize) have joined the appellate jurisdiction system and accepted to make the CCJ their final Court of Appeal. To do so, two of them had to delink from the Privy Council (Guyana is the exception), thereby becoming truly independent, decades after the formal end of colonisation. The reasons for such little enthusiasm towards the Court are complex and have been explored before. On this point, the paper will simply provide an update on Caribbean states' positions vis-à-vis the CCJ. The aim of the paper is to determine whether the CCJ has delivered proper justice to the countries that have accepted its appellate jurisdiction. Using a human rights-based approach to assess the CCJ's performance, the paper will argue in favour of the CCJ, as opposed to the Privy Council, as the best forum to handle final appeals from the Caribbean region, hence rejecting the oft-made argument that human rights of the Caribbean people are better protected by a British Court.

Finally the paper will briefly explore the British perspective on the Court, building on Lord Phillips' and other key British judicial figures' positions. It will conclude by arguing that appeals to the Privy Council emanating from independent Caribbean countries are likely to end, due to the growing legitimacy of the CCJ, and the lack of support for appeals from the Caribbean within the Privy Council itself.

**Chiara Berneri, EU Citizenship and Family Reunion (Chiara.Beneri.1@city.ac.uk)**

The concept of European Citizenship was officially introduced in 1992 with the entry into force of the Maastricht Treaty.

A detailed analysis of the Treaty provisions (now articles 20 to 25 Lisbon Treaty) shows how the European Union, through the concept of citizenship, has never (officially) intended to protect anything but the political and civil rights of its citizens. In spite of this approach, nevertheless, the European Court of Justice (from now on ECJ) has started to utilize European Citizenship as a tool to protect the fundamental rights of the citizens of Europe. In particular, this trend is evident in family reunification cases involving EU citizens and third country national family members. Starting from Carpenter, passing through Metock, up until the recent Ibrahim this approach seems apparent.

The scope of my research is to evaluate the legitimacy of this jurisprudential trend.

Concretely, I will try to understand whether or not the role played by the ECJ in solving cases regarding family reunion of third country national family members of EU citizens is correct and its possible consequences on Member State's sovereignty on migration issues. In order to give an answer to these problems, I will first begin with the analysis of the most recent law cases.

Subsequently, I will address the question on whether or not the ECJ should engage itself as a Human Rights guarantor, especially considering the recent accession to the ECHR. Finally, I will analyze the domestic trend in some Member States (Italy and UK) on the same issues in order to understand the possible consequences of the EU jurisprudential approach on national sovereignty on migration issues.

### **Elisabetta Bertolino, Speech, actions and an account of oneself**

This paper is about resistance, dissidence and refusing at times the language and order provided by law and politics. Resistance is intended in the sense of beginning, point of beginning and making new beginnings. One begins to become aware, then one speaks and acts, then one fails or succeeds and begins again. Resistance is this Arendtian ability to begin again and again. Resistance also comes from one's voice as corporeal and thus from the body and results then in speech and actions. Hence, there is a profound connection with a gender and sexuality stream as it is assumed here that for resistance to happen an awareness of one's voice, body and vulnerability is necessary.

Whereas rights such as freedom of expression, association and assembly and the right to security and liberty enshrined in the European Convention of Human Rights, as secured by law and politics, only articulate resistance through the repetition of the same sovereign knowledge, texts, speech and actions of law and politics. When one speaks and acts using the symbolic order, one might speak without an account of oneself and using a voice that is separated from oneself, a voice that rather belongs to the symbolic order.

This is precisely the main point of the paper. Resistance and dissidence are not possible without an account of oneself that allows beginning speech and actions. The Arendtian whonness and the Cavalerian singularity and corporeality of the voice provide good examples of what an account of oneself can be. One's unique account of oneself is stranger to the imposed subjectivity of law and politics where the language of abstract equality and reasonable belief become regulatory and normative perspectives on speaking and acting. The paper reflects on dissidence and resistance in terms of a bodily and unique beginning for resistance, a politics of awareness and an ability to listen to one-self as corporeal when speaking and acting.

### **Brenna Bhandar & Helen Carr, Housing and technology (B.Bhandar@kent.ac.uk; H.P.Carr@kent.ac.uk)**

In this paper we take an unusual approach to housing and consider the impact of technological innovation on the design of housing estates. In particular we consider the problem of waste, one which had to be solved in order that an affordable density of housing could be provided in urban settings.

### **Phil Bielby, Deep Brain Stimulation and the Challenge for Mental Health Law (p.bielby@hull.ac.uk)**

Potentially groundbreaking novel physical treatments for mental disorder have emerged over the last decade, including transcranial magnetic stimulation (TMS), vagus nerve stimulation (VNS) and deep brain stimulation (DBS) (for a discussion, see Merkel *et al* 2007). Of these, arguably the most controversial is DBS, a psychosurgical procedure developed initially to treat movement disorders, which involves the stereotactic implantation of electrodes in the brain which stimulate brain activity (rather than conventional ablative neurosurgery). Several recent neuropsychiatric studies have shown it to yield positive benefits as a last resort treatment for patients with severe and longstanding depression and obsessive compulsive disorder for whom psychopharmacological and psychotherapeutic treatments have proved unsuccessful (Kuhn *et al*, 2009; Wichmann and DeLong, 2006). Though rarely used, and still regarded as an experimental treatment in the context of psychiatry (Kuhn *et al, ibid.*: 137), it has already been utilised as a psychiatric treatment in the UK.

The physically invasive nature of DBS, combined with concerns about long-term efficacy and possible side-effects such as unwanted personality change and intense panic reactions demand reflection on the safeguards that should apply to its use. The need for such reflection is further highlighted by the discrepancy between the failure to regulate the procedure in England (despite repeated recommendations from the Mental Health Act Commission and, latterly, the Care Quality Commission that it should be subject to the safeguards of s. 57 of the

MHA 1983) and the regulatory position in Scotland, which is governed by secondary legislation made under the Mental Health (Care and Treatment) (Scotland) Act 2003. Indeed, as the MHAC observed, DBS “could, in theory, be given against a detained patient’s will under the direction of a Responsible Clinician, or under the Mental Incapacity Act [sic] to any patient lacking capacity to refuse it.” (MHAC, 2009: 169).

In light of the above, the paucity of ethico-legal discussion concerning the normative framework that should inform the regulation of DBS and the safeguards to which it should be subject is surprising. In this paper, I argue that the incipience of DBS, the severity of the possible side effects for the patient and, as Berghmans (2008) observes, the particular vulnerabilities of the types of patient likely to be considered for such treatment require both the application of s. 57 safeguards and an informed consent process that fully utilises the benefits of supported decision-making / patient advocacy (a form of which, Independent Mental Health Advocates, is available under the MHA as revised). I will also indicate how such an approach is consistent with an understanding of patient autonomy in circumstances of heightened vulnerability and the ‘participation principle’ set out in the 2008 version of the MHA 1983 Code of Practice.

### **Michael Blackwell, Old Boys’ Networks, Family Connections and the English Legal Profession (M.C.Blackwell@lse.ac.uk)**

A decade and a half on from Lord Taylor’s promise that “there will be more [female judges]... and they will not all be the sisters of the Lord Chancellor!”, this paper assesses the changes to the composition of the higher judiciary over this period, in terms of gender and educational, professional and socio-economic background. Descriptive statistics are presented on how these characteristics have changed over the period, for members of the High Court, Court of Appeal and House of Lords. These show only slight improvement in the representation of women and little change to the proportion educated other than at Oxbridge and public schools. Obituaries and other sources are used to illustrate the high socio-economic class, often with legal connections, into which many judges were born.

To show that this is not solely, at least in respect of educational background, a result of the pool from which such judges are recruited, this paper contrasts these statistics with those of QCs appointed since 1965. It also uses event history analysis to see how these diversity characteristics have affected propensity to be appointed to the High Court and subsequently promoted during this period.

Finally, to assess the potential for future increases in judicial diversity, this paper contrasts the gender and educational background of the solicitors and barristers profession and the speed of change thereto in recent years – showing both a greater diversity and rate of change with solicitors. The significantly lower rate of solicitor applicants appointed in selection exercises to the High Court is noted. The paper concludes by suggesting a reappraisal of the appointment criteria to increase the representation of solicitors and so facilitate improved judicial diversity.

### **Sarah Blandy, Property in common (s.blandy@leeds.ac.uk)**

This paper explores property rights and concepts of ownership through interviews with owner-occupier residents in a range of housing developments. Although these developments have different legal frameworks, in each of them a collective legal entity owns the whole site including the common parts. Therefore, in addition to individual property rights in their own dwelling, the residents enjoy rights over access routes, roofs, stairs, lifts, gardens and grounds, car parking and/or other collective facilities. These common parts challenge conventional models of property and ownership, and in doing so illuminate the problem that ‘the common law world has never really resolved whether ‘property’ in land is to be conceived in terms of socially constituted fact, of abstractly defined entitlement, or of some kind of stewardship of a community resource’ (Gray and Gray, 2009, p. 104). The Grays’ second conceptualisation refers to an individual, liberal model of property which rests on rights to exclude and control, while the third emphasises responsibilities to the community as a whole. Neither explains the lived realities of sharing rights (and responsibilities) in common property, as discussed by the residents in this research.

The first conceptualisation of property in land, referred to by the Grays as ‘socially constituted fact’, is the focus of this paper. My research takes a social constructionist approach,

examining how, in practice, residents live with their neighbours on a daily basis, how collective rules about property and boundaries are developed, how decisions are taken about the maintenance and management of this shared property, and how any disputes are tackled. A constitutive approach to legality (rather than law as narrowly defined) is adopted. The legal framework as set out in the lease and/or other governing documents for a particular housing site is seen as only part of the social process involved in constituting and maintaining property relations in shared space, to which residents continuously contribute. This approach, drawing on legal anthropology and legal consciousness, enables property ownership to be seen as a lived process rather than as a set of static legal relationships.

**Andy Boon, Professionalism and the Legal Services Market (boona@westminster.ac.uk)**

The Legal Services Act 2007 created a Legal Services Board with statutory duties for the legal service market and a new regulatory structure and paved the way for the introduction of Alternative Business Structures. To what extent has the considerable ethical autonomy enjoyed by the legal profession in England and Wales been compromised by these developments and what are the implications for legal professionalism?

**Christos Boukalas, Law, Politics, and the State: a Strategic-Relational Approach to Law (c.boukalas@lancaster.ac.uk)**

This paper introduces a 'strategic-relational' approach to law, presenting the notion of the 'law form' as pivotal in understanding the relation between law and politics. Developed mainly in relation to the state, the strategic-relational approach conceptualises the latter as a social relation and as a strategic terrain and agency of social dynamics. In its context, the 'state form' is a nodal notion referring to the historically-specific articulation among the institutions and strategic orientations of the state, and its relation to the population. Consequently, the strategic-relational approach to law conceptualises the latter as a social relation – a particular codification of social and state dynamics. On this basis, and partly as an attempt to overcome the binary between "rule of law" and "state of exception", the notion of the 'law form' is introduced, to refer to the historically-specific articulation among the institutional shape of the legal system, its relation to other state apparatuses and the population, its operational modalities and areas of application, and the content of the legal framework. As law constitutes a blueprint of the institutional outset of the state and a strategic codification of its powers, the law form provides important indications regarding the state form. To highlight this interrelation between law, state, and politics, the paper proceeds to a brief examination of main shifts in the law form over the course of the last 40 years in reference to shifts in the state form.

**Simon Boyes, Modelling Sports Law (Simon.Boyes@ntu.ac.uk)**

The approach to the relationship between sport and the law and the nature of legal intervention in sporting matters is growing as an area of both practical and academic interest. Academic writing on these issues has developed both in terms of quantity and quality over the past decade. However, much of that work has focussed upon specific issues or topics and, thus, has provided a useful but sometimes narrow insight into such matters. This paper seeks to take a broad overview of the relationship between sport and law. It is the result of a project undertaken with the support of the SPUR (Scholarship Projects for Undergraduate Researchers) Scheme at Nottingham Trent University. The project involved identifying a graphical means of representing the application of the law in selected English cases.

The method selected was a simple x/y axis graph measuring relative approaches to access (x) and then to the application of the law (y). The position of each case on the graph was calculated by reference to various indicators drawn from the report of each case. The patterns created reveal that while there is some influence as to the approach to each case based upon cause of action that, equally, the subject classification can have a significant impact.

The paper explores and charts these patterns, as well as considering the efficacy of the modelling process and its possibilities as a diagnostic tool for both research and teaching purposes.

**Anthony Bradney, Austerity Politics, Neo-Liberalism and English University Law Schools  
(a.bradney@law.keele.ac.uk)**

During the last few decades English university law schools have become increasingly academic in their focus. The notion of a liberal education has become dominant in debate about the role of law schools. However the recent Browne Report on tuition fees, premised on neo-liberal assumptions about the private benefit that students get from higher education, seems to be a move in a very different direction. With its strong emphasis on employability and the economic returns that students will get from their education Browne seems to push law schools into marketing the vocational impact of what they do. However this paper will argue first that there is little that is new in the underlying theoretical position of the Browne report, neo-liberalism having characterised both major political parties' attitudes to higher education since the 1980s. Secondly it will suggest that it is very unlikely that changes to university funding will in fact significantly alter the market for student places. Finally it will argue that even if law schools do come under pressure to move in a vocational direction they are in a sufficiently strong position to refuse to do this.

**Julia Bradshaw, Does the Citizenship of Al-Andalus hold lessons for modern day European Union Citizenship? (jules\_ellie@yahoo.co.uk)**

European Union citizenship has reached a crossroads. The Lisbon Treaty presented an opportunity to enhance the scope of an idea that extends back to Monnet's initial hopes for the European project, an opportunity that, largely, was allowed to pass by. With voter apathy increasing with each round of European Parliamentary elections, it is possible to say that the "peoples of Europe", for so long held at the centre of the Union idea, have lost the faith and neither understand, nor care for, the possibilities that European Citizenship holds for them. This paper will look back at a polyglot society that existed in Europe some 1300 years ago. While the rest of Europe dealt with in-fighting, feudal rivalry and dodgy plumbing, Al-Andalus, as the Moorish part of Spain was known, was first conquered and then civilised, boasting street lighting, marvellous architecture and a peaceful co-existence between peoples of different ethnicities and religion.

Modern Europe faces many of the challenges seemingly overcome by the Moorish occupiers: expansion East has led to an influx of citizens who do not share the Western European Greco-Roman history. Religion is a cause for increasing conflict both socially and politically, with tensions rising even in long-standing, liberal Member States. This paper will, therefore, assess whether features of citizenship in Al-Andalus, a citizenship that encompassed natives and foreigners alike, can be applied to European Citizenship, helping it to transcend traditional limitations and making it into something that will, once again, make the citizens of Europe excited to be part of a highly beneficial supranational organisation.

**Kimberley Brayson, Redefinition through communication: Can human rights discourse ever adequately articulate an intersecting legal subject? (k.brayson@qmul.ac.uk)**

This paper analyses the way in which the European Court of Human Rights and House of Lords (now the UK Supreme Court) deal with applicants who present intersecting issues before the courts. The legal subject of human rights discourse as originally conceived by the Council of Europe in 1950 and crystallised in the ECHR, concentrated on the civil and political rights of white, male, western Christians similar to the political elites who drafted it. However, 60 years on, the courts find themselves dealing with social shifts not envisaged by the drafters of the Convention. Taking the case of *EM Lebanon* which highlights the plight of an applicant who was at one and the same time a woman, a Muslim, an alien and a mother, I will argue for a retention of a universal human rights framework which can support the redefinition of the substance of human rights through an ongoing process of communication. I rely on the communicational theory of Habermas to provide the paradigm in which court decisions can be seen as "democratic iterations", a notion developed by Seyla Benhabib. I argue that through seeing court decisions as such, we can move towards a more transparent, dynamic concept of human rights which is constantly being redefined to reflect social reality and is capable of accommodating this "new" legal subject in all of its intersecting incarnations. Human rights on this approach, will always be aspirational, never concretised. Human rights in this form, it is suggested, create a legal space for the interests of all groups in society and can articulate a more holistic notion of equality.



### **Anna Marie Brennan, common Article 3 to the Geneva Conventions and Transnational Armed Groups: Exploring the Threshold of Armed Conflict**

Two requirements define the scope of application of Common Article 3 to the Geneva Conventions: (1) the existence of an armed conflict; and (2) that it is a non-international armed conflict. Complexities surrounding the interpretation of Common Article 3 need to be addressed. For instance some evidence suggests that Common Article 3 only applies to civil wars. Moreover, uncertainty within the provision provokes even more questions about whether it regulates Transnational Armed Groups. This paper proposes to consider whether attacks orchestrated by Transnational Armed Groups can be considered the initiation of an "armed conflict" within the meaning of the Geneva Conventions. It can be generally acknowledged that these types of armed attacks do not fit into existing concepts of "armed conflict" and "war." For instance, the attacks which have been orchestrated by Transnational Armed Groups do not appear to have been perpetrated by or on behalf of any state. The attacks themselves are sporadic and infrequent while at the same time elaborate and severe. Recent legal developments have shed light on the definition of armed conflict of a non-international character. Three significant events in particular warrant further examination: Additional Protocol II to the Geneva Conventions, the judgement of the ICTY Appeals Chamber in *Tadic* and the Rome Statute establishing the International Criminal Court. All three developments have formulated a more rigid conception of "armed conflict" and as a result restrict the application of Common Article 3. After evaluating each development, it will be concluded whether these significant developments limit the application of Common Article 3 to Transnational Armed Groups.

### **Sue Bright and Nick Hopkins, Evaluating legal models of affordable home ownership in England (susan.bright@new.ox.ac.uk; nph1@soton.ac.uk)**

In England, as in the United States, the majority of households live in homes that they own: owner-occupation is the tenure of choice, part of the dream of modern life. As traditional forms of home ownership have become increasingly unaffordable to certain income groups, the promotion of low cost home ownership has become a central plank of English housing policy in order to expand the opportunity to own. The major route to low cost home ownership in England through the last three decades has been the Right To Buy (RTB), available to existing council tenants. RTB has been incredibly popular, in part because it involved a generous discount being given to purchasers; but RTB sales are now withering, and the high costs of RTB – both in economic terms and in relation to the impact it has had on the affordable housing stock – have been recognised.

In recent years, alternative models have been developed under the umbrella of low cost home ownership, ranging from grants towards house purchase, through part-ownership schemes, to co-operative housing models. Whereas RTB was driven by the single minded mission of giving people what they want – full ownership – the newer models are more sophisticated and take account of a wider range of objectives.

In order to evaluate these products this chapter:

- a) Explains the legal frameworks used to deliver the main low cost home ownership products available in England;
- b) Explores the ways in which the products deliver the benefits of home ownership to the individual in the form of wealth creation, security of place and 'mainstreaming'; and
- c) Discusses the ability of these products to support key additional policy objectives: introducing and supporting tenure mix (sustainable communities) and sustaining the opportunity for continued use of the subsidy to provide access to low cost home ownership for intermediate income households.

### **Jennifer Brown, Divergence and Convergence: Power to detain the mentally ill under the European Convention on Human Rights in England and Ireland**

England and Ireland had similar paternalistic mental health legislation where clinicians had an unfettered power to involuntarily detain a patient with a mental illness. The Irish Courts found that this power did not infringe the Irish constitutional rights of patients with mental illnesses. However, the European Court of Human Rights decided that such a power is incompatible with the Convention.

England and Ireland took divergent approaches to this incompatibility. The English legislature enacted the Mental Health Act 1983 to ensure compatibility with the Convention. Ireland was much slower to address this incompatibility which was eliminated with the enactment of the Mental Health Act 2001. A consequence of the 1983 and 2001 Acts should be convergence between England and Ireland concerning compatibility with the Convention. This paper examines the extent of any convergence by analysing the statutory power of detention and the courts' interpretation of this power of detention. If this analysis discloses that significant divergence remains, the paper seeks to identify the reasons for this divergence. The paper considers the extent to which the respective powers of detention are more or less compatible with the Convention.

**Kevin J. Brown, Specialist Anti-Social Behaviour Practitioners: A New Criminal Justice Profession? (k.j.brown@ncl.ac.uk)**

Since the 1990s, Parliament and Central Government have sought to empower, persuade and cajole local authorities and registered social landlords into tackling the perceived problem of 'anti-social behaviour'. In response, many of these local agencies have established dedicated anti-social behaviour units. Based on the findings of an empirical study, this paper addresses the questions of whether the specialist anti-social behaviour practitioners who staff these units constitute a new criminal justice profession and what shared ethos if any guides their work.

Despite claims by practitioners to be undertaking their work on behalf of their communities, this paper reports on findings, which suggest that this developing profession adopts an authoritarian approach to governance, coupled with a pervasive lack of democratic accountability. It is argued that anti-social behaviour practitioners tend to adhere to an authoritarian communitarian ethos, which exposes a number of contradictions in their work. They view themselves principally as defenders of community, although due to the subjective nature of 'anti-social behaviour' it is not always clear what they are defending communities from. The work of practitioners provides relief in individual cases, however, their presence risks undermining the social capital in the very communities they seek to protect.

Furthermore, it is argued that in seeking to govern the behaviour of others, practitioners view individuals as having responsibilities as well as rights to the communities to which they belong, with practitioners acting as enforcers of those responsibilities if necessary. In achieving compliance, practitioners borrow from both criminal and social work governance strategies. This inter-meshing of strategies leads to the criminalisation of social policy where social and pathological explanations of human behaviour are sidelined by an over-riding adherence to a belief in perpetrators as responsible human actors.

**Kevin J. Brown & Colin Murray, Socrates is Dead: Developing Interactive Law Lectures using Educational Technology (k.j.brown@ncl.ac.uk; colin.murray@ncl.ac.uk)** Educational theorists have long recognised the limitations of the traditional didactic lecture as a basis for student learning and engagement with degree-level problems. Nonetheless, such lectures still dominate timetables within UK law schools. A common criticism of the lecture as a mode of teaching is that there is little scope for interaction between the student body and the lecturer. This is a criticism which is often voiced most strongly by students fresh from secondary level education where the learning environment is markedly different. This paper reports on the findings of an empirical study which has examined the use of instant response technology as a tool for improving interaction and feedback between the lecturer and students during large-cohort law lectures.

The study investigated the use of 'Turning Point' devices (handsets of roughly 7cm x 4cm interfacing with a hub computer) which an increasing number of universities in the UK now use. These allow students to respond in real-time to questions posed in a lecture by using the handsets to select one of a number of options enumerated on the lecture slides. They therefore offer an alternative to more traditional methods of encouraging class participation in lectures, such as the Socratic Method. In the course of this study the use of these devices was trialled in first and second year undergraduate law lectures at Newcastle University. Subsequently, students' views on the use and benefits of the technology were investigated through questionnaires and focus groups. The results of these surveys, reported in this paper,

were largely positive, suggesting that the use of such technology has an important role to play in improving the student learning experience.

**Mark Brunger, Chasing the democratic panacea: From Northern Ireland's policing partnerships to England's elected police Commissioners (mark.brunger@canterbury.ac.uk)**

The paper will attempt to offer a comparative analysis of the different challenges facing the on going debate around the democratisation of policing governance and accountability within the United Kingdom. In this respect, the paper examines the trajectory of recent democratically based forms of policing governance in both Northern Ireland and England. First, the paper regards the current evolution of policing in Northern Ireland and offers analysis on the various policing partnerships as well as the role of the Northern Ireland Policing Board, which were put in place post-the Independent Commission on Policing that reported in 1999. Second, the paper will also compare the performance of these institutions with the proposed establishment of new modes of democratic policing institutions in England, particularly the proposal to establish elected policing Commissioners.

**Trevor Buck, Administrative Justice Theory (tbuck@dmu.ac.uk)**

Theorising on administrative justice has been fashionable in recent years. This paper will explore the importance of such theory and will outline the implications of this theory for socio-legal study in this area.

**Heath Cabot, The Ethics and Aesthetics of Eligibility at an Athenian NGO**

This presentation examines the determination of client "eligibility" at an NGO that provides pro bono legal and social assistance to asylum seekers in Greece, a fraught external border of the EU. This Athenian NGO is formally positioned as an advocacy organization, "outside" and often in opposition to state legal bodies that adjudicate applications for protection. Yet asylum seekers who visit the NGO seeking assistance repeatedly characterize it as a state office. This illustrative (mis)interpretation highlights the fluid boundaries between formal and informal agencies of adjudicative power. Through its practices for assessing which potential clients – and lives – are "eligible" for assistance, the NGO mimics procedures through which state agencies examine asylum claims. Further, while they never officially determine outcomes at the state level, eligibility decisions have concrete, lasting effects, shaping which applicants have access to lawyers, and thus, which cases persist (and in rare cases, succeed) in the asylum system.

This tension between the NGO's role as both an advocacy organization and an adjudicative power presents individual workers with difficult ethical problems, as NGO lawyers and interpreters are pulled between multiple obligations and frameworks of value that most often collide. This paper examines how NGO workers engage these ethical dilemmas through the aesthetics of eligibility practices. Drawing on the Greek root of aesthetics, which connotes sensory perception, I highlight the role of emotion, the senses, and images in eligibility assessments. I suggest that aesthetics furnish crucial epistemological tools in the formulation of judgments at the NGO, providing also an apparent way through the ethical maze of eligibility determinations. This presentation thus sheds light on the ethically creolized environments of organizations devoted to rights advocacy, and the role of aesthetic elements in determining which lives are – and are not – "eligible" for protection.

**Steven Cammiss, "It is not my intention to be a killjoy..." Objecting to a Licensing Application: The Complainers (sc293@leicester.ac.uk)**

How do those who come to the law pitch legal complaints? Yaeger-Dror (2002) identifies a tension between the "Cognitive Prominence Principle" (CPP) and the "Social Agreement Principle" (SAP) when speakers wish to express disagreement. The CPP suggests that important information contained in any utterance should be unambiguous while the SAP is based on a preference for the avoidance of conflict in conversations. In short, should we make ourselves clear or be polite?

Adding to our understanding of the socially constructed nature of legal claims, this paper adopts a socio-linguistic analysis to explore how legal complaints are composed. The data was collected for an empirical project on the operation of the Licensing Act 2003 and the complaints of those who objected to a premises licence application are analysed. Data was

collected from three sources; letters to the licensing authority, interviews with researchers and transcripts of hearings held to determine contested cases. The paper explores how objectors frame a complaint, such as the utilisation of strategies of objectification (i.e. the co-opting of others, extreme case formulations and script formulations), how and when speakers adopt "politeness strategies" (Brown and Levinson, 1978) and how the setting and course of any interaction influence form and content. The paper will show how, within different contexts, objectors appear to adopt different strategies in framing their complaints. While the CPP appears prominent, the SAP has important implications for understanding how accounts may differ in different contexts.

### **Anna Carline, The 'Frames of Trafficking': Critical perspectives on the construction of, and responses to, trafficking for sexual exploitation**

Eliminating trafficking for the purpose of sexual exploitation was one of the key strands of New Labour's prostitution policy. This paper will provide a critical analysis of the discourses contained within the official documentation and the ensuing reforms. In order to engage in this critique, the paper will draw upon Judith Butler's insights in to the notion of vulnerability and the precarity of life, with particular reference to the notion of 'framing'.

In *Frames of War* Butler argues that 'frames' not only 'organise visual experience but also generate specific ontologies of the subject' (Butler 2009: 3). The manner in which we perceive the other is framed via certain discourses and 'schemas of intelligibility' and our responses to the suffering of the other are likewise framed. Frameworks operate to inform our interpretation of the world. They delimit who can be recognised and whose life is worthy of protection. Drawing upon this insight, it will be argued that throughout reform process the official discourses problematically framed trafficking in a rather narrow and exclusionary manner. In contrast, it will be contended that a more affirmative and inclusionary response to trafficking may be drawn from the work of Butler, with particular reference to her assertion that the 'recognition of shared precariousness introduces strong normative commitments of equality and invites a more robust universalizing of rights that seeks to address basic human needs for food, shelter, and other conditions for persisting and flourishing' (Butler 2009: 28-29).

### **Helen Carr, Introducing Spa Green and Dolphin Square (H.P.Carr@kent.ac.uk)**

In this panel we introduce our project to examine two remarkable housing estates in London built in the 1930s and 40s. Our purpose is to use a variety of theoretical approaches to uncover multiple meanings of home and housing in two very specific locations. Each estate was designed in response to the aspirations of the time, and we are interested in the way those aspirations have been fulfilled, compromised or abandoned.

### **Helen Carr, Re-conceptualising the tenancy for life (H.P.Carr@kent.ac.uk)**

This paper tests Fineman's claim that a 'vulnerability analysis may ultimately prove more theoretically powerful (than the concept of dependency) in making wide reaching claims for broader manifestations of social responsibility' by applying it to contemporary debates about British welfare provision, particularly those that question the future role of social housing. It concludes that Fineman's work not only enriches those debates, it has the potential to avoid the 'deadends' of much British social welfare critique.

The paper begins with a brief explanation of Fineman's theoretical approach. It then considers the British state's responses to the persistent and ongoing crises of housing to demonstrate that the post world war 2 ambivalent and limited commitment to the state provision of housing has gradually been replaced by the aim of assisting citizens to achieving autonomy via home ownership. This reconfiguration of welfare makes Fineman's work relevant, despite its location in the specificities of the United States. The focus of British welfare is no longer social insurance. Instead its role is to enable each of its citizens to become a 'fully competent social and economic actor, capable of playing multiple and concurrent societal roles'. The paper notes how vulnerability has been used as a technical device within welfare provision to justify continued support to particular groups and to manage political claims for more extensive provision.

The paper then considers home ownership as critical to the form of citizenship preferred by the liberal state. Yet, it argues, home ownership is limited in much the same way as the equality legislation which is the starting point of Fineman's analysis. As Fineman observes, it

'ignores contexts, as well as differences in circumstances and abilities .... (it) ignores existing inequalities and presumes an equivalence of position, and possibilities. It argues that home ownership offers very different opportunities to different people depending upon where and when they purchase, and what resources are available to them to support their new status. The paper then turns to consider whether there is any longer an argument for the state providing a life time tenancy for some of its citizens. The arguments against are outlined, and it is noted that they cannot be simply dismissed as right wing knee jerk responses to state provision. Many on the left and the right share a concern that social housing estates result in social failure, and a belief that the state is not the best provider of housing. Arguments for lifelong tenancies seem to rest in a nostalgia for the old welfare state, and fail to acknowledge criticisms of it as paternalistic and authoritarian. Fineman's analysis is applied to see what, if anything it can add to the debate. The paper suggests that there are at least three ways in which the current debate can be enriched. First, the life long tenant has to be understood, not as a privileged or a dependent subject, but as vulnerable. Second, Fineman's work enables us to understand that local authorities, the state institutions who bear primary responsibility for social housing, are themselves vulnerable, a vulnerability they share with all institutions. The solution is not to dismiss them as authoritarian and failing but to imagine new ways of increasing their accountability. The third is to conceptualize the life long tenancy as an asset that assists in providing resilience to vulnerable subjects. The paper argues that the life long tenancy is a particularly rich asset, which has human, social, physical, environmental and existential dimensions.

**Helen Carr, The limits of administrative justice: the EDMO as case study (H.P.Carr@kent.ac.uk)**

The Housing Act 2004 was in many ways an extraordinary administrative law initiative extending the powers of local government to respond to well documented and apparently intransigent problems of the condition of housing stock in England and Wales. Unsurprisingly, given the emphasis of the coalition government on reducing the role of the state, its provisions are under scrutiny. The EDMO is apparently at the forefront of that scrutiny. On January 7th 2011 Eric Pickles, Minister of Communities and Local Government announced 'powerful safeguards to restrict the use of Empty Dwelling Management Orders.

They will be limited to empty properties that have become magnets for vandalism, squatters and other forms of anti-social behaviour - blighting the local neighbourhood a property will have to stand empty for at least two years before an Empty Dwelling Management Order can be obtained, and property owners will have to be given at least three months' notice before the order can be issued.

The suggestion is that responsible individuals are being deprived of their property by an over-zealous state.

This paper examines that suggestion. It begins by outlining New Labour's attempts to manage the risk to its project that the EDMO posed, it then sketches the administrative law safeguards designed to prevent excessive use of state powers and reflects upon why, despite these safeguards, the EDMO is particularly unsettling for those concerned by the size of the state. The paper then focuses on the decisions of the Residential Property Tribunal which must authorise EDMOs to see what evidence there is of unjustifiable interventions in property ownership. In particular it considers what the decisions reveal about the affective dimension of property rights.

**Helen Carr & Nick Dearden, What is 'Research-led' Teaching in the Context of the Undergraduate Law Curriculum? (H.P.Carr@kent.ac.uk; n.dearden@mmu.ac.uk)**

Many universities include research-led teaching as a strategic priority. Indeed 'research-led' is a 'taken for granted' indicator of quality teaching. However there appears to be limited research on what this means in general and to what extent it impacts upon the teaching of law in particular. This paper takes as its starting point the proposition that research-led teaching is better teaching. It begins by reflecting on the origins of and the meaning and aspirations, indeed the politics, inherent in the proposition. After considering the dissonance between what universities and what academics understand by it, what it includes and what it excludes, and how it actually affects practice in the classroom we suggest that research-led teaching may be a vehicular idea (McLennan 2004). Vehicular ideas are useful as they

serve as a way of managing and avoiding conflict about changes in practices by accommodating everyone's understandings of an idea.

The paper tests its argument by comparing and contrasting the literature on research led teaching with qualitative data gathered by the authors in focus groups and surveys within four law schools with distinct research and teaching profiles. The paper then turns to consider strategies used by different universities to deliver research led teaching in the core LLB curriculum, and how this is made meaningful to students, who frequently have little understanding of what is meant by research and even less on how it impacts upon their learning.

The paper then focuses on a practical and reflective effort to bring research into the classroom. It uses the work of the feminist judgment project, which strives to re-energise critical and feminist scholarship through the feminist re-writing of significant judgments, and the subsequent workshops which developed and disseminated teaching materials from the project. The workshops raised questions about learning outcomes, assessment, student engagement and student resistance. The aims were two-fold (i) to produce materials which would make the research available to a wider body of law teachers to use in their classroom and (ii) to ensure that those materials were informed by pedagogic expertise.

The paper draws on and seeks to make a contribution to critical and feminist thinking on legal education but also suggests that for research led teaching to be an effective indicator of quality and not simply a meaningless and potentially divisive concept requires collaborative work between teachers and researchers, effective communication with students and critical scrutiny.

**Olive Cheung, Regulation sex work in Hong Kong and China: Protecting or Endangering women? (olivenycheung@gmail.com)**

This paper concerns the regulation of sex work in Hong Kong and China. Hong Kong was returned to Chinese rule in 1997 under the "one country, two systems" principle. As a result, the two regions have different criminal laws. Being a former colony of the British Empire, the current law related to prostitution in Hong Kong did not change significantly and it has remained the same since the Crimes (Amendment) Bill was passed in 1978. While the Chinese Government adopts a zero tolerance policy to the selling and the purchase of sexual services, in Hong Kong selling sexual services itself is not illegal, but activities surrounding prostitution, in a range from soliciting to brothel-keeping and living off immoral earnings, are criminal offences. Apparently the Chinese and the Hong Kong Government have different attitudes towards prostitution. Nevertheless, given the fact that Hong Kong is part of China, the influence of Chinese legislation on the policy-making system in Hong Kong should not be ignored.

Drawing on findings of my PhD research, this paper examines the existing problems of prostitution laws in both regions. Despite the fact that sex worker advocacy groups stressed that the existing problems of prostitution laws in Hong Kong may lead to injustice against sex workers, and urged the government to reform prostitution laws, limited research has been conducted on this area. While some commentators argue that the legal framework in some Western countries have made different forms of sex work more dangerous (Kinnell 2006; Scoular and O'Neill 2007; Sanders 2008), little attention has been paid to the situation in non-Western societies. This paper argues that punitive prostitution laws, adopted in both Hong Kong and Mainland China, reinforce the stigma associated with prostitution. Most importantly, while the laws apparently aim to protect women, the hostile legislation and law enforcement may endanger women.

**Alison Clarke, Common Law and Norwegian approaches to conflicting land use rights: the individual versus the collective (a.c.clarke@surrey.ac.uk)**

In modern times common law ownership regimes are inherently individualistic, in the sense that the basic unit of rights holding is the individual, human or corporate. State ownership and even public ownership are relatively easily accommodated within such a regime, even where individualism remains the central organising concept. However, collective resource use rights, where the rights holder is an indeterminate group defined by reference to some characteristic such as kinship, ethnicity or locality, cause more problems. The specific problem this paper considers is how common law systems reconcile potentially conflicting

land use rights and interests, where the potential for conflict arises out of demands on the same resource which are made by individual rights holders, by collective rights holders and sometimes also by the public interest. In English law we have some limited experience of this in relation to the collective rights currently regulated under the Commons Act 2006. Comparable problems also arise, on a much larger scale, in post-colonial common law jurisdictions, not least where the divide between individual and collective users is marked by ethnic differences and disparities in wealth. However, in considering how such conflicts might best be resolved in our more limited domestic context, this paper looks outside the common law world to Norway, which has a long history of shared resource use by individuals and diverse ethnic groups, and considerable experience. of developing property rights structures to accommodate shared resource use.

**Emilie Cloatre, Actor-Network Theory, materials and regulations: exploring the socio-technical networks of global intellectual property and access to health in Africa (E.Cloatre@kent.ac.uk)**

This paper explores how the transnational networks surround TRIPS and access to medication can be described using actor-network theory (ANT). It demonstrates how ANT, by enabling materials to be brought back to the centre of socio-legal analysis as “actors”, can allow us to seize aspects of the global networks of intellectual property and their links to healthcare that might have otherwise been overlooked. It also interrogates the challenges of using ANT in a field such as international economic law, and discusses in particular how the method can be deployed in the transnational context, the difficulties of using it in this context, and whether these can they be outweighed by the opportunities it offers to reintegrate materiality into the study of transnational “socio-legal” networks.

**Rob Clucas, The Anglican Church today: the bedroom, the Communion, and integrity (r.j.clucas@hull.ac.uk)**

Despite recent positive social and legislative shifts in attitudes to LGBT people, one institution of social ordering, the Anglican Church, has maintained its attitude of non-inclusivity at an institutional level and in some quarters intensified its resistance to the full acceptance and participation of non-heterosexual people in church life.

Official Anglican teaching on human sexuality limits the proper sexual expression of love to heterosexual marriage; declares that those who are unmarried must be celibate; recognises that a conscientious ‘homophile’ person may reject abstinence and should not be stigmatised for this, but cannot advise the ordination of persons in sexually active homosexual relationships due to ‘the distinctive nature of their calling, status and consecration.’ Nonetheless, there is a respected body of theological opinion, and church tradition and practice, which accepts the potential for holiness of not-straight love. Current tensions between these views threaten the integrity of the Communion in more than one sense. This paper discusses the political, legal (adopting a pluralist perspective according to which any rules by which the Church attempts to govern its members’ lives are law) and ecclesial context of recent developments: the Episcopal Church’s vote to end the post-Windsor Report moratorium on non-heterosexual appointments, resulting in the consecration of Mary Glasspool as the Anglican Communion’s first partnered (and presumably non-celibate) lesbian bishop in May 2010; the shortlisting of (gay, partnered, avowedly celibate) Jeffrey John as Bishop of Southwark in July 2010 – and the rejection of his candidature due to conservative opposition; Rowan Williams’ September interview in the *Times* in which his position on celibate gay clergy seems ambiguous; permitted discrimination in Para 2 Schedule 9 of the Equality Act 2010, and the likely impact of the Anglican Covenant, if accepted. The tensions between official teaching, divergent practice and wiggleroom in norms are explored.

**Neil Cobb, Crown Prosecution Service Hate Crime Scrutiny Panels: An Empirical Study (n.a.cobb@dur.ac.uk)**

Regional Crown Prosecution Service (CPS) Areas across England and Wales are now required by CPS Headquarters to establish and maintain one or more Hate Crime Scrutiny Panels, following the success of a pilot hate crime scrutiny panel in the West Yorkshire Area. These panels, made up of representatives from communities affected by hate crime, are given

access to closed hate crime prosecution case files and evaluate the quality of CPS decision-making. The stated aim of the Panels is to improve prosecution of hate crime by the CPS, and improve relations with those communities affected by hate crime. Without specific direction from CPS Headquarters about how Panels should be structured there is considerable divergence in the constitution, coverage and working practices of panels across CPS Areas. The author is Independent Legal Advisor to the North-east England Homophobic/ Transphobic Hate Crime Panel. In this paper he outlines the findings of a British Academy-funded pilot project, in which he travelled across England and Wales to observe six other Hate Crime Scrutiny Panels, and interview the Independent Facilitators and Legal Advisors. His aim was to investigate how different CPS Areas have approached panel scrutiny, and gather the views of Panel members about the future of the scrutiny panel system, in light of a CPS National Review of the panels, spurred by the 2010 Comprehensive Spending Review. Are Panels cost effective ways to improve the work of the CPS and its often fractious relationship with minority groups like the LGBT community? How should they be designed to ensure they best represent the communities they seek to serve? And what changes to their structure and practices might they face in the near future?

**Renaud Colson & Stewart Field, Transnational discourses of reform in criminal justice: a bilateral comparison (renaud.colson@univ-nantes.fr; FieldSA@cardiff.ac.uk)**

Various terms have been used to capture the notion that traditional distinctions in the criminal justice processes of different European jurisdictions are becoming attenuated: there is talk of convergence, rapprochement and even unification. In this presentation we seek to scrutinize these claims through a bilateral comparison of certain contemporary discourses surrounding criminal justice reform in France and England and Wales which seem to have a particular resonance in both countries: the appeal to the concept of 'fair trial', the growth of 'penal populism' and the development of new managerialist models for the administration of criminal justice. Examining the construction and impact of these themes in our two jurisdictions, we argue that there is a need to be conceptually clearer in our use of terms like convergence and rapprochement in order to make sense of both differences and similarities. Finally we ask whether these apparently disparate reform discourses may have something important in common which gives them their transnational and international resonance.

**Sarah Lucy Cooper, Marriage, Family, Discrimination & Contradiction: The European Court of Human Rights and the Rights of Sexual Minorities (sarah.cooper@bcu.ac.uk)**

The European Court of Human Rights (ECtHR) has been considering whether same-sex couples should have the right to marry and to be recognised as a family under the European Convention of Human Rights ('the Convention') for over thirty years. In the nineteen-eighties the Commission of Human Rights and the ECtHR respectively refused to hold that same-sex relationships constitute a 'family life' under Article 8 of the Convention, and that post-operative transgendered persons had the right to marry under Article 12. However, throughout the nineteen-nineties and the first decade of the new millennium, a body of cases that incrementally liberalised these rights (albeit not always smoothly) in favour of sexual minorities steadily built up. This led to a landmark decision on June 24<sup>th</sup>, 2010. In *Schalk and Kopf v. Austria* the ECtHR made two major, but seemingly contradictory, rulings. For the first time the Court held that same-sex relationships categorically constitute a 'family life,' but simultaneously held that member states are under no obligation to recognise and protect that 'family life' by providing same-sex couples with access to marriage or an alternative registration system.

This paper considers the general legal recognition of sexual minorities to be safeguarded against discrimination in the spheres of 'family life' and marriage in Europe; explores the boundaries of the provisions of the Convention that seek to protect those rights, namely Articles 8, 12 and 14; and examines the ECtHR's evolving jurisprudence in relation to those rights. It concludes that the decision in *Schalk* is overall a positive one, because it demonstrates that it is now a case of *when* same-sex couples will be able to demand full legal recognition of their relationships from member states, not *if* they will ever be able to demand it at all.



**Sarah Lucy Cooper, Using Developments in Law and Science to Re-examine Evidential Issues in Post- Conviction Claims of Innocence in the United States (sarah.cooper@bcu.ac.uk)**

In 1976 William Wayne Macumber was convicted of killing a couple in Arizona in 1962. According to the evidence Macumber had confessed, his partial palm print was present on the victims' car, and *only* his gun could have fired the fatal bullets to the exclusion of "all other guns in the world." However, subsequent investigation has revealed that Macumber's alleged "confession" was ill-founded, and the fingerprint and ballistics evidence adduced at trial was severely tainted because of a broken chain of custody and misleading expert testimony respectively. Furthermore, the jury did not hear about Ernest Valenzuela – a psychotic killer – who had confessed to the killings multiple times, and who was corroborated by an eye witness to the killings. In 2009 the Arizona Board of Executive Clemency branded Macumber's case an "injustice," but his release was denied by the Governor of Arizona.

**Marios Costa, European Agencies' Accountability Revisited (mcostav@essex.ac.uk)**

This paper points at the inadequacies found in some of the contemporary European agency literature. Investigation of the agencies' remarkable institutional development reveals that currently there is no homogeneous legislative regime setting out the *de jure* requirements for their creation. In light of this, an alternative argument is put forward for the adoption of a legislative framework regulating the establishment of European regulatory agencies which aims to demonstrate how this type of framework would contribute to clarify problematic aspects of the European agency regime identified in the current agency debate. The repercussions that would flow from this legislative framework for the agencies' regime are herewith discussed. The paper concludes by demonstrating how accountability, control, coherence and effectiveness in the case of European regulatory agencies could be improved.

**Roger Cotterrell, Transnational economic networks and legal theory (R.B.M.Cotterrell@qmul.ac.uk)**

Why might a general theory of transnational law be useful? One answer (similar to Austin's justification of general jurisprudence) is: to provide a 'map' of the field, a means of ordering and generalising about it and so gaining orientation in it; and a means of analysing where the authority and legitimacy of this law are to be found. But transnational law (law intended to have jurisdictional reach or effects across nation-state borders on citizens, groups and organisations) might seem too amorphous and contested in scope and nature to be unified theoretically in any convincing way at present. This paper focuses on a narrower field that Calliess and Zumbansen call 'transnational private law'. Criticising their analysis, it asks whether a socio-legal theory of this law can now be developed, and argues that the idea of transnational networks of community is important and illuminating for such a project.

**Jane K. Cowan, Who's talking? and why do they talk like that? Reviewing a state's human rights performance at the UN Human Rights Council**

Precipitated by its institutional predecessor's alleged "politicization", the reformed Human Rights Council was established in Geneva in 2006. It includes a new mechanism: the Universal Periodic Review, a state-led peer scrutiny of the "human rights performance" of each of the UN's 192 member states. UPR is envisaged as a "cooperative process" where each state is reviewed in "an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner" that guarantees "universal coverage and equal treatment of all states". This presentation draws on ongoing research which ethnographically explores UPR as a public audit ritual, constituted through specific encounters, institutional codes, norms and knowledge practices, and documentary processes.

A salient feature of UPR is its explicitly "non-legal" and "non-expert" framing. Although frequent reference is made to international treaties, special procedures, treaty body reports and national laws, UPR talk about human rights is structured more by managerialist, diplomatic and institutional considerations than by international law. Similarly, the "experts" of the former Commission have no recognised place in the new mechanism. Rather, only "states" may speak in the "interactive dialogue" that constitutes the major public element of UPR, although in the months before the review, NGOs strategise, write recommendations and lobby receptive states to articulate those recommendations. Drawing on Mikhail Bakhtin's

theorisation of speech as well as the growing literature on “transparency”, audit and governance, I will pose questions such as “who’s talking?” and “why are they talking like that?” in order to explore the ways that non-legal, non-expert actors engage with this new space of international human rights monitoring and its specific discourses, and to begin to unpack its complex politics, etiquettes, affects and ethics.

**Fiona Cownie, Examining Legal Skills (F.Cownie@law.keele.ac.uk)**

Over recent years there has been a proliferation of legal skills textbooks published by all the main legal publishers. Recent examples include Carr et al Skills for Law Students, Wilson & Kenny The Law Students’ Handbook, Finch & Fafinski Legal Skills and Hanson Legal Method, Skills and Reasoning, to name but a few. However, it is unclear whether these textbooks are used in modules whose purpose is to systematically introduce students to the subject-specific academic skills they need in order to become successful law students or whether they are only being used by students for self-study purposes.

The project on which this paper is based seeks to ascertain the extent to which academic legal skills are systematically taught in university law schools offering law degrees which qualify graduates to enter upon legal professional training (known as ‘qualifying law degrees’ or QLDs). It will examine the reasons why law schools do/do not provide formal training in legal academic skills and, in relevant cases, the ways in which they do so. Adopting a constructivist theoretical framework, it will seek to argue that in order to improve student learning in law, academic legal skills need to be expressly taught in a rational and logical manner, using teaching methods chosen to facilitate active student learning.

The paper will explore the theoretical context of skills teaching and the debates which surround it, as well as indicating some preliminary empirical findings.

**Richard Peter Craven, A Qualitative Investigation into Public Sector Compliance with EU Procurement Regulation (llxrc10@nottingham.ac.uk)**

The EU regulates public procurement in order to open Member States’ markets in public contracts to EU-wide competition. Since the 1970s, it has done this through a series of harmonising directives; these essentially require Member States to implement rules providing for certain public contracts to be awarded in accordance with transparent and non-discriminatory procedures.

In 2004 a new procedure was introduced: the competitive dialogue procedure. The new procedure is designed specifically with the procurement of complex contracts, such as contracts procured under the UK’s Private Finance Initiative (PFI), in mind. Prior to 2004, in the UK these contracts had been procured in a way that the European Commission perceived to lack transparency and competitive tension. The new procedure requires major changes to past UK PFI procurement practice. UK authorities must now procure these complex contracts in much more of a straight jacket, leading many to question whether the new procedure is in line with the commercial realities of complex procurement where flexibility is needed to keep bid costs low and to allow the public sector to negotiate the best possible deal.

Taking a socio-legal approach, the paper will present the findings of semi-structured interviews with UK legal advisors and procurement officers with experience of competitive dialogue procurement, and will consider how these findings fit with understandings of regulatory compliance in the fields of economics, sociology and psychology. It will be seen that there are many legal grey areas within the legal rules; the paper will discuss factors that influence public sector authorities’ decision making when legal rules are uncertain, and will also consider the role played by ‘soft law’ (non-binding advice and guidance issued by central government) in shaping UK procurement practice.

**Katie Cruz, On the Complexities of Feminisms, and Feminist Engagement with the State: Governance Feminism, Radical Feminism and Sex Work in the UK (llxkc4@nottingham.ac.uk)**

Previous critical work on radical feminism and sex work in the UK has focused on its *influence* upon policy and law in the UK and its *presence* within state structures. In these discussions there has been a tendency to describe radical feminism as asserting large amounts of power with *considerable success*. Whilst the arguments presented here are similarly advanced with significant skepticism as to the ability of radical feminism to account for the complexities of sex work, it takes a different tack to prior commentary. Interrogating radical feminism in the

UK through Janet Halley's framework of 'governance feminism' I hope to show that the relationship between feminisms, sex work and the state - or what Diane Otto describes as the '*power of feminist ideas*' - are more complex than Halley, and UK theorists such as Jane Scoular & Maggie O'Neill allow for.

Concentrating on four moments in Halley's theorisation of governance feminism, I'll ask whether radical feminism conforms to this construction. I'll suggest that breaking with Halley's tendency to reify radical feminism as the paradigmatic example of 'governance feminism' not only questions the existence of a UK based hegemonic radical feminist force, but also offers important contemporary insights into the possible dangers and pitfalls of feminist engagements with state and legal structures. Instead of accusing feminists of having 'blood on their hands' and suggesting that we abandon 'feminism', the recent encounter of radical feminism and the state can be seen to raise questions regarding the processes of translation of feminisms into, and out of, state and legal structures and the relationship between those structures and the economic, political and moral contexts in which they operate, as well as the need to engage the explanatory power of alternative feminist approaches to sex work.

**Brenda Daly, Engaging NGOs in Aceh - analysis of the EU's effectiveness as a mediator (brenda.daly@dcu.ie)**

The EU took a back-seat role in the mediation efforts in the region which led to the Memorandum of Understanding of 2005, ending 25 years of conflict between the GAM and Indonesia. The EU acted in a supporting role in the mediation processes, first undertaken by Centre for Humanitarian Dialogue (CHD) and then Crisis Management Initiative (CMI). However, its involvement in the peace process, through the deployment of the Aceh Monitoring Mission to oversee the peace plan, as well as the promise of funding, were vital in the brokering of the peace deal.

This paper explores the role of the EU as a mediator in the Aceh peace process. This analysis will help develop understanding of the EU as an actor in armed conflict mediation and will predict how the EU can optimise its unique position as a mediator in future conflicts.

**Helen Dancer, Realising women's equal rights to land in Tanzania (H.Dancer@sussex.ac.uk)**

[Land is] 'God's gift, given to all His creation without any discrimination', wrote Nyerere, First President of Tanzania in 1958 (Mali ya Taifa) as a comment on proposals for new legislation regarding land holding. Over 40 years later, with the passing of the 1999 Land Acts, women's equal rights to land became enshrined in Tanzanian law for the first time. Yet, in an era of land reform, social change and growing pressure on land in both urban and agricultural areas, for many women their security of access to, and ownership of land is under threat. Following a year of ethnographic fieldwork in Arusha, Tanzania, my research explores how the law in practice is dealing with one of the most important socio-economic issues facing women in Tanzania today and the extent to which women are able to realise their equal rights to land through legal processes of dispute resolution.

My paper will consider the social context in which women litigants are bringing and defend themselves against claims to land and issues surrounding disputing and access to justice. I will discuss various processes of dispute resolution – both formal and informal, through which women's claims to land are adjudicated, focusing particularly on the Ward and District levels of Tanzania's new specialist land tribunals. Drawing upon extended case studies including interviews with litigants, lawyers, tribunal members and community leaders, I reflect on the way disputes involving women's claims to land progress, from their genesis in society through informal and formal legal processes. I consider the impact of non-legal factors such as gender, language and social status as well as legal factors in the litigation context and the obstacles and pathways to justice women encounter in making claims to land.

**Fernando de Castro Fontainha, The Strategic Dimension of Legal Teaching: The Debriefing of a Role-play Activity to Prepare an Oral Exam (fontainha.fernando@gmail.com)**

This paper proposal is the result of a two-day observation carried in October 16th and 17th 2007 in Montpellier Law School, in southern France, inside a classroom. The situations observed were not actually the classic teacher-student context. It was a role-play, an oral exam simulation, where the students were playing the candidate role and the lecturers were playing the jury role. The activity tried hard to reproduce the real conditions of a very

particular oral exam: the general culture oral exam, one important part of the general examination to access the judicial career in France. I observed the passage of ten candidates, and I focused my interest on the moment just after the simulation: the debriefing, when the teachers evaluated the students' performance, giving advice, criticizing and complementing.

The framework of my paper is essentially Goffman's strategic interaction and Mehan's ethno-methodology of education. The first author will bring the notion of expression engineering and expression control. This notion will show how this kind of training will develop the students' sense of expectation prediction and practical accomplishment in front of their jury. The second author will bring the idea of intelligence assessment by the interactive competence in teacher-student relations. This idea will improve the observer's capacity to acquire what's actually learned: a set of complex interactive strategies, extremely well adapted to the specific context in question.

The conclusion will show how the law schools can produce also the teaching of skills completely distinct from the law (as a learning program), and even the lawyer's method and ideology (how to think as a lawyer). The students observed have learned about: (1) formal correctness (expressions and gestures), (2) the delicate limits of self-distinction and ceremonial expression (keep neutrality without being neutral), (3) the importance given to avowals, and (4) the correct use of the "I don't know" answer.

**Catrina Denvir & Dr Nigel Balmer, Surfing the web - recreation or resource? Exploring how young people in the UK use the Internet as an advice portal for problems with a legal dimension (catrina.denvir@legalservices.gsi.gov.uk)**

Internet use and access in the UK has increased rapidly in the last decade, with the concept of 'information superhighway' recognised as an axiom of Internet technology. Despite this, few studies have sought to investigate the incidence of use of the Internet as an advice resource outside of the health information arena. With an increasing impetus in the public sector towards the provision of online delivery mechanisms for civic orientated activities, including advice provision, it is timely to better understand the appropriateness of online advice-seeking. Of particular pertinence is the use of the Internet for advice seeking by young adults, who are commonly presumed to have greater Internet proficiency. Utilising data extracted from a large-scale household survey of adults' experience of civil justice problems conducted across England and Wales (10,512 adult respondents), this paper explores an alternate dimension to the interaction between cyberspace and the law - looking at how Internet advice facilitates the resolution of legal problems. Specifically, this paper focuses on the extent to which young survey respondents turn to the Internet when faced with problems, how successful they are and how they compare to older respondents. Results revealed significant growth in the use of the Internet to obtain information about civil justice problems, rising from 4 percent in 2001 to around 18 percent in 2008. The responses of the 18-24 year olds to the survey illustrate that despite having comparatively high levels of Internet access, this age group utilises it to a lesser degree than similarly 'connected' age cohorts, and are less successful when doing so. Our study highlights aspects of the second digital divide, going beyond access to explore use and outcomes of use. The dynamic between use of the Internet as a mechanism for signposting individuals towards offline advice, and use of the Internet as a means by which to solve problems without recourse to professional assistance are discussed, as are the implications of these findings for future developments in advice provision.

**Catrina Denvir & Nigel Balmer, Determining the mental health cost of debt - the interaction between debt and mental illness (catrina.denvir@legalservices.gsi.gov.uk)**

It has long been recognized that a connection exists between personal indebtedness and health and these concerns have, in part, acted as a policy catalyst to the Labour Government's 2004 indebtedness strategy. The Royal College of Psychiatrists (RCP) and Rethink have recently brought renewed attention to the importance of understanding the way in which debt problems bring about or exacerbate ill-health, with the coexistence of justiciable debt problems and mental ill-health forming the basis of their 2009 international review of literature. Tackling indebtedness through the provision of legal advice, indeed advocating for the need to better understand the broader implications of mental illness, must

be underpinned by an understanding of the rate at which those with coexistent debt/mental health issues present to advice agencies in England and Wales. Utilizing data extracted from a large-scale household survey of adults' experience of civil justice problems conducted across England and Wales (10,512 adult respondents) this paper details the rate at which justiciable debt and mental illness co-occur by measuring the mental health of those self-reporting a debt problem through a number of clinical measures including GHQ-12, MCS-12 score and self-reporting. Our results find that the experience of problem debt/financial difficulty has a highly significant impact on the likelihood of respondents self-reported mental health problems, GHQ-12 'caseness' and MCS-12 scores of 45 or less. Additionally, we find that the reporting of stress-related ill health as a consequence of problems is far higher where advice is obtained (50.9% vs. 28.3%), suggesting that whilst mental illness may not play a significant role in determining whether advice is sought, it may be an outcome of the act of obtaining advice itself. Our results further substantiate arguments in favour of the provision of integrated advice in the fields of law and health, emphasising the need for co-location of services and/or integrated referral pathways. It discusses the implications of these findings in the context of the challenges posed by recent legal aid funding cuts.

**Deval Desai, A qui l'homme sauvage?: Discours and discourse on agreements between mining corporations and indigenous communities (deval.desai@trinity.oxon.org)**

This paper undertakes a critical analysis of mining agreements between indigenous communities and transnational corporations. It argues that mining agreements are becoming increasingly popular with International Financial Institutions (IFIs), companies and indigenous rights professionals as a way of regulating, and providing a discursive frame for, the company-community relationship, coming under the broader rubric of '(legal) empowerment' tools for governance in development. By foregrounding the hidden politics of these agreements and challenging the idea of 'neutral' empowerment, it seeks to explore whether these tools can bear the weight of global governance of transnational economic activity that IFIs in particular are asking them to bear.

The paper first situates these agreements in the frameworks of international law and IFI administrative law relating to the rights of indigenous groups. It builds on examples from the differing legal frameworks of Australia, Canada, Indonesia, South Africa, PNG and the Philippines, using the literary narrative of Rousseau's *homme sauvage* as a starting point. It proceeds to unpick narratives of law – public/private, formal/informal, and law-and-economic-development – and narratives of actors – indigenous community, transnational corporation and the state – in an agreement from the point of view of the indigenous rights professional, a term of art building on David Kennedy's insights into the human rights professional. The paper argues that the narrative of law in these agreements is one of legalism, which ignores law's strategic element. Furthermore, the narrative of actors can be understood through Lacanian binary opposition, which acts to restrict the (identity-)political space available to the professional and to the actors themselves. Finally it looks at the role of the indigenous rights professional, arguing that she is engaged in creating space and a role for herself, limiting the scope of action for the indigenous community and privileging the position of the professional, to the community's potential detriment and disempowerment.

**Elaine Dewhurst, Labour market needs and labour migration law in Ireland: An analysis of the factors influencing the development of Irish labour migration law in the past decade (Elaine.dewhurst@dcu.ie)**

In the past decade, Ireland has experienced a vast divergence in labour migration. During the period 2000 to 2006, Ireland experienced its highest ever levels of labour immigration, yet 4 years later in 2010, Ireland experienced one of its highest ever levels of labour emigration. This divergence in migration trends reflects significantly the labour market needs of Ireland during this 10 year period. However, while it might be expected that labour market needs, and the subsequent changes in migration, would be the most important factor in the development of labour migration law, an analysis of these legislative enactments reveals that other factors also play a pivotal role in the development of Irish labour migration law. An examination of labour migration trends in Ireland in the past decade will be conducted and the results correlated with the development of labour migration legislation in Ireland. An analysis of the content of this legislation will be conducted through a qualitative analysis of

the Dáil and Seanad debates relating to the introduction of such legislation and through an examination of the substantive content of the legislation. This analysis will highlight the significant factors influencing the development of labour migration law to Ireland over the 10 year period. The paper will reveal whether labour market needs and labour migration trends are a determining factor in the advancement of legislation or whether other factors, such as the need to control labour migration in general, are more significant.

This analysis will inform the conclusion that the development of Irish labour migration law is, to a certain extent, disconnected from labour market needs in Ireland and demonstrates a culture of control rather than a facilitation of the labour market. This analysis will also inform the debate as to the future of Irish labour migration law, considering the very different economic climate which Ireland now faces.

### **Joy Dillon, Sexts, files and red tape: An analysis of the bureaucratic challenges of prosecuting contemporary sexual harassment offences**

Sexual harassment promotes a workplace culture of intimidation and disrespect. It compromises the integrity of the employer-employee relationship. Even where this type of harassment abounds outside the context of a conventional work environment, the dynamics of power relations persist.

The collective global thrust towards enhanced communication has benefitted the Commonwealth Caribbean. Instant messaging, better known as texting, alongside the use of electronic mail and the Internet promote the ease and efficiency with which tasks are received and executed. In spite of these laudable achievements, the Electronic Age has given birth to innovative means of sexual harassment.

Sexually-suggestive text messages or sexts, is one contemporary form of manipulation by sexual predators that is internationally recognized as an affront to work interactions. Yet, in the Commonwealth Caribbean, attempts to promote its awareness as a labour issue with legal implications remains mired in red tape and public indifference.

Sexting presents an acute challenge as a prosecutable offence. Owing to the dubious nature of the origin of an alleged offence, questions of forum and jurisdiction arise. The difficulties of securing witnesses and preserving evidence also surface. Numerous affected parties may not have the possibility of a class action suit as an option, and even substantial proof of a sext offence may not be admissible under current Commonwealth Caribbean evidentiary laws. Even cultural perceptions of sexual harassment and power relations affect the progress of debate and action on this matter.

This paper contrasts the effectiveness of existing Caribbean sexual harassment statutes and protocols against the framework of similar contemporary global developments. It showcases its main arguments through the use of selected scholarly articles, cases and comparative legislation. It summarises with an outline of recommendations to reduce the degree of red tape hurdles while it simultaneously proposes avenues to invoke and sustain public awareness and participation.

### **Fabiana di Lorenzo, Corporate Social Responsibility (CSR) and international labour rights in West Africa. How labour rights and labour market's stakeholders can shape CSR**

The present article looks at the role played by employers in protecting labour rights in cocoa production of West African countries and how labour standards and labour market's stakeholders have helped shape CSR practices. It will specifically look at the strategies that some of the companies have implemented in the attempt to eliminate child labour from cocoa plantations. This article will firstly define the concept of child labour and how this is shaped by both international labour law and local economic structures and culture; it will then move on presenting case studies about big companies which have lost their credibility following international accusations of resorting to child labour and how they have responded to bad publicity. The article will then outline examples of strategies implemented by employers in the attempt to prevent international embarrassment and rebuild their credibility. It will be argued that international labour law, workers' and employers' organisations as well as civil society and governments play a key role in promoting CSR and effective labour inspection in cocoa production, ultimately reducing child labour.

**Robert Dingwall, A 'melancholy, long, withdrawing roar': The abdication of state concern for civil and family justice (Robert.dingwall@ntlworld.com)**

Civil and family justice tend to occupy separate spheres in socio-legal discussion. However, it is sometimes helpful to consider them together. Without this, there is a danger of generating partial explanations for policy developments that are driven by common underlying philosophical or policy positions. In doing so, I plan to return to ideas that I first explored in a group of papers published in the early 1990s and based on reflections about the impact of the libertarian conservatism of the 1980s on the newly-emerging democracies of Eastern Europe. My argument proposed a need to examine the place of the family, and its relationship to law, within a wider body of thinking about the relationship between states and civil society. The present UK government, like its predecessor, sees the reconstruction of civil society as a key dimension of its programme. However, it is not clear how far this rests on a coherent intellectual foundation or recognizes the potential social costs of this approach. My presentation will examine these and consider the future projected by these present actions, a future that has not been expressly presented as a policy choice for civil society, as opposed to being a choice for its governing elite.

**Michael Doherty, Build it and they will come – The Posted Workers Directive, transient labour and trade unions (Michael.doherty@dcu.ie)**

The Posted Workers Directive (Directive 96/71) has recently generated a voluminous amount of literature, owing to its central role in key European Court of Justice decisions on collective bargaining rights (the so-called 'Laval Quartet' judgments). This is the more remarkable given the comparatively scant attention the Directive had previously received. However, little, if any, of the recent literature has focused on the operation of the legislation outside of the collective bargaining context, and, in particular, how successful the Directive has been in protecting the working conditions of temporarily posted workers.

This paper, by focusing on an economic sector- construction- for which the Directive has particular relevance, looks at how the legislation has operated in the UK and Ireland. The paper considers the extent to which the posting legislation is enforced at national level, the manner in which control is exercised over posting firms and workers, and assesses the level of compliance with the Directive in the two jurisdictions. The paper considers how the Directive can be more effectively relied upon by workers and by trade unions representing their interests.

**Jane Donoghue, Specialist and Problem Solving Courts: Breaking the Judicial Mould**

Over the past two decades, there has been a rapid proliferation of specialist and problem-solving courts in jurisdictions across the world including the United States, Canada, Australia and Great Britain. Examples of such courts include domestic violence courts, drug courts, community courts, mental health courts and youth courts. The introduction of these courts represents a significant departure from the current operational structures of the judicial system in England and Wales, and indeed elsewhere. Therapeutic jurisprudence, which is the study of the role of the law as a therapeutic agent, is often the theory that underlies problem-solving courts, as well as some specialist courts. According to the principles of therapeutic jurisprudence, a defendant's physical and psychological well-being should be elevated to a mainstream consideration by the courts. Consequently, therapeutic jurisprudence raises a series of normative questions about the role of legal actors and the broader conceptualisation of justice system outcomes.

In particular, the role of the judiciary in problem-solving courts differs fundamentally from traditional courts: the judicial officer plays a pivotal role as motivator, sanctioner and enforcer. Consequently, the judge moves from being a detached, neutral arbiter to the central figure in the justice process. While proponents argue that judicial involvement can promote rehabilitation by helping to bring about and sustain desistance from crime, critical commentators contend that this changed role for the judiciary raises serious questions about the independence of the bench; civil liberties; paternalism; due process; and procedural fairness. This paper reflects upon the normative, social and legal implications of the growth of specialist and problem-solving courts.

**Nicholas Dorn, A Dream Come True for Some: Financial Services, Crisis, Capture, Consolidation**

The financial crisis and policy responses to it entail a shift of resources from the public sector to the private sector. This paper tries to theorise how bailouts and other crisis-management actions have arisen in forms that protect bondholders while shifting losses and liabilities onto public budgets. However is more at stake here than a shift of liabilities. Crises are game-changing moments, in which opportunities can shift to the advantage of the largest and most political agile of international firms.

Both the crisis per se, and policy and regulatory responses to it, provide opportunities for firms to expand in size through takeovers and mergers. Further regulatory harmonisation favours large firms' cross-border activities, winking out local firms. For some players, then, a crisis is not a nightmare, it is a dream come true. The question arises, what are the specific political tactics, and what are the general social conditions, which make this possible? This paper explores the above in terms of two theorists of conflict and cooperation, the rightist economist Joseph Schumpeter and the leftist sociologist Pierre Bourdieu.

**Gillian Douglas, Attitudes to inheritance law in England and Wales in the context of changing family structures (DouglasG@Cardiff.ac.uk)**

The law of inheritance in England and Wales is currently under review by the Law Commission. This paper reports on a recently completed study on public attitudes to the law involving 1500 respondents and 30 in-depth interviews. It argues that the findings show that, for the purposes of inheritance, far from the assumption that the 'family', and particularly the nuclear family, is in terminal decline, people in England and Wales still view their most important relationships as centred on a narrow nuclear family model consisting of one's spouse or partner and one's children and grandchildren, with parents, siblings and more remote relatives or friends having much lower significance. This is not to say that such a model also assumes a 'created family' based on a permanent relationship through an unbroken marriage between heterosexuals. There is widespread acceptance of changes in social attitudes and cultural practices, including re-partnering and cohabitation, leading to generally high levels of support for including cohabitants in the intestacy rules and for ensuring that children from former relationships are protected after one's death. It is suggested that wishing to give primacy in inheritance law to one's spouse or partner whilst at the same time seeking to ensure the protection of one's children may reflect the current tension between the central importance placed on intimate partnerships for emotional self-fulfilment and the recognition of the fragility and impermanence of such relationships, as described by sociologists such as Giddens and Beck and Beck-Gernsheim.

**Ron Dudai, Truth and Reparations from Armed Groups? Non-State Armed Groups and Extending Transitional Justice beyond the State (rdudai01@qub.ac.uk)**

Does it make sense to ask illegal armed groups to provide symbolic reparations to their victims? While this question is fraught with legal, conceptual and practical difficulties, this paper suggests that neglecting the potential of armed groups to provide reparations and truth to their victims is an important gap in the theory and practice of transitional justice in the aftermath of conflicts. While transitional justice scholars and advocates have been developing concepts and tools relating to the rights of victims of human rights abuses to truth and reparations from states, the question of whether non-state armed groups could and should provide such measures has been largely ignored. As many of the abuses committed in conflicts worldwide in the past two decades are by non-state armed groups, rather than by states, this gap leaves the transitional justice increasingly insufficient to address the full needs of victims. The paper offers a critical appraisal of the current state of international law and practice in relation to reparations from armed groups, and then demonstrates the capacity of armed groups to engage in measures of truth and reparations using a hitherto unexplored case study: recent actions of the IRA in relation to its past attacks against suspected informers. These involved mainly non-material, or symbolic, reparations, including truth-recovery, apologies, and "exonerating" individual wrongly accused as being informers. The paper argues for extending transitional justice norms to armed groups, while contending also that this will involve risks and challenges, and will require adapting some standards and methodologies to adjust to the context of non-state armed groups.



### **Marian Duggan & Mark Walters, Gender: A Rightfully Excluded Hate Crime Category?**

Extreme hatred towards women in the UK is routinely manifested through abuse, violence and the continued rate of two women a week being killed by a current or former partner. In light of several recent violent cases and the recognition of gender as a protected category in the new Single Equality Act 2010, now seems like a good time to revisit discussions about the exclusion of gender from hate crime laws. This paper addresses the arguments for and against extending current hate crime legislation to include crimes motivated by gender hatred. Beginning with the reasons why gender should be included as a legally recognised motivator in UK laws, the analysis uses several recent cases to illustrate how certain crimes disproportionately affect women or place them at risk on the basis of their gender. Taking a symbolic position, the argument suggests that in order for gender-based activism to remain relevant it is important to align gendered violence with other forms of identity-based prejudice. The debate problematises the remit of 'domestic' or sexual violence legislation in fully accounting for the reasons behind gendered violence and the various manifestations of this particular type of victimisation. As gender is not recognised but gender identity is (for transgendered persons), this paper will also address the parity issue involved in allowing transwomen access to a law that biological women are currently denied recourse to. The debate then moves on to provide an opposing argument, suggesting several areas of objection to the proposed extension. This exploration begins with the fact that hate crime laws do little to address currently included minority groups, so would be similarly ineffectual at dealing with gender-based violence. This point is expanded to show the social and political need to keep hate crime groups limited and specific. The argument then moves on to consider whether policies concerning violence against women would be effectively watered down by a widening out of hate crime laws to include all genders rather than women-directed violence specifically. In addressing these issues, the authors problematise both the implications of expanding current understandings of 'hate crimes' to cover other forms of identity-based violence, and the limitations 'hate crime' legislation can have on challenging prejudice in UK society.

### **Sherif Elgebeily, The UN Security Council referral of the situation in the Sudan to the International Criminal Court – ultra vires or misapplication?**

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The Rome Statute is often cited as the primary legal source in support of the United Nations Security Council power to refer a situation to the International Criminal Court, couching the theoretical relationship between the two bodies firmly in its article 13(b). However, such a reliance would be erroneous, since the Rome Statute, as a Treaty, is only legally binding upon such States as have entered into it- hence, according to the foundational pillar of international treaty law, Third Party States are not legally obligated by its stipulations. Thus, an important debate arises regarding the legitimacy and legality of the Security Council referral of the situation in Sudan under Resolution 1593. The reach of the ICC in this scenario stems not from the establishing document of the Rome Statute itself, but rather the seemingly omnipotent Security Council resolutions that serve as a political means to bypass fundamental international legal principles and codified law, such as State sovereignty and the Vienna Convention respectively.

Furthermore, in the event that one accepts the theoretical premise of Security Council referral as both legitimate and legally sound, the practical terms of the specific referral made in Resolution 1593 have clear discrepancies with this hypothetical model shaped by the Rome Statute in terms of such examples as financing, temporal jurisdiction and immunity clauses. This has set a dangerous precedent which threatens to undermine both the ICC and the wider field of international criminal law as a whole. As a relatively nascent field of international law, I argue that the efficacy, legitimacy and success of the ICC hinges around the central element of an unbiased application of international criminal law rooted in existing tenets of international legal principles.

**Vivienne Elizabeth, Inescapably Gendered? Counselling As A Conciliation Process In The New Zealand Family Court System (v.elizabeth@auckland.ac.nz)**

Non-litigious means of resolving conflicts between separated parents over care and contact arrangements for their children have become well established, and continue to grow in importance across the western world. A number of benefits are thought to arise from the use of conciliation processes as opposed to judicial processes. First, conciliation is thought to grant participating parties a high degree of input and control. Second, decisions made through conciliation are believed to generate higher levels of compliance and to last longer. Third, conciliation processes tend to be much cheaper than litigation and, hence, tend to be more accessible to those in need.

In New Zealand, counsellor-led conciliation has been central to family dispute resolution since the passing of the Families Proceedings Act in 1980. Like other conciliation strategies, Family Court counselling has not been well documented or researched. As a consequence, little is known about whether counselling, as a process of conciliation, lives up to the claims made for it. More specifically, little is known about whether gender operates within Family Court counselling to reproduce or undermine pre-existing inequalities between women and men. This paper examines Family Court counselling from the vantage point of twenty-one women who had encountered difficulties in negotiating care and contact arrangements for their children within the New Zealand family law system. Overwhelmingly, these women spoke about counsellor-led conciliation in negative terms. In particular, these women were highly critical of counsellors' pretensions to gender neutrality and impartiality because this stance merely disguised the gendered issues at stake. Their critiques point to the continued salience of gender to conciliation processes and the need for counsellors (and others involved in conciliation) to be more cognisant of the way gender impacts on the processes and outcomes of conciliation if gender inequalities are not to become more entrenched.

**Cecilia Flores Elizondo, Reflexive international economic law: A journey to the internal dynamic of law in a social context (cecilia.flores-elizondo@postgrad.manchester.ac.uk)**

International Economic Law is characterised by a strong emphasis on economic efficiency and the proliferation of colliding regulatory bodies and laws. This is epitomised by the complexity and fragmentation of the international economic system and the clear distinction between economic and non-economic factors. In this context, claims are made in the sense of developing International Economic Law with due acknowledgement of social values and interests. Herein a reflexive law approach is proposed to analysing International Economic Law. Reflexive law theory is based upon autopoiesis in which law – as a subsystem of society – reproduces itself by means of references to previous law, doctrine or legal decisions. The self-referential nature of the system develops by means of communications in which law remains normatively closed but cognitively open to the environment. The potentiality of this theoretical perspective derives from its capability to recognise not only the intricate relation between law and society, but also the multiplicity of stakeholders in international economic relations. In so doing, it acknowledges that law, economics and politics are subsystems of society sharing the same world of meaning. Indeed, it provides an opportunity to understand the internal dynamics of the law upon communication, i.e., the rationale behind the selection, variation and retention mechanisms in the construction of the law. This paper aims to explore these potentialities as a means of developing International Economic Law that is more open to the interests and values of society. In unravelling the internal operation of the law, reflexive theory provides a promising methodological tool for the transformation of the international economic system by means of changing the structure of meaning – from mere efficiency to social values- in International Economic Law

**Stewart Field, The concept of legal cultures and comparative youth justice research**

One of the most evident trends in research on criminalisation and punishment in general, and on youth justice in particular, has been the move towards comparative analysis. Yet comparative legal research remains an emerging practice that is surrounded by a number of conceptual and methodological debates. One such debate revolves around the coherence and usefulness of the concept of 'legal cultures.' In this presentation I will draw on the results of an ongoing empirical research study which compares the youth justice 'cultures' of Italy

and (England and) Wales. Conducted with Professor David Nelken (University of Macerata) and financed in part by the Economic and Social Research Council in the United Kingdom (Reference number R000239418) and in part by the Italian Ministry for the Universities, the research draws on matched interviews and case-file analyses. Using the research study as an example of the use of a legal cultural approach, I will engage with some of the critical comments that have been made about the dangers of using 'legal culture' as a generalizing and totalizing abstraction. I will use ideas derived from the work of the Welsh cultural theorist Raymond Williams to suggest ways of better using the concept by breaking it down into constituent elements: traditions, institutions, intellectual formations and 'structures of feeling'.

**Maria Fletcher & Nina Miller, Overlap and Friction between EU free movement rules and UK immigration law (Maria.fletcher@glasgow.ac.uk; N.Miller@ed.ac.uk)**

EU free movement rules facilitate the movement of EU citizens and their families throughout the Member States and the Citizens Rights Directive 38/2004/EC expresses the intent that such freedom to move and reside be fully actualised and exercised with dignity. These rules, in a variety of ways, require exceptions to be made to national immigration law- in some instances this is uncontroversial and foreseen (eg as far as MS national/EU citizens themselves are concerned) and in some instances this can be controversial and/or to a large extent unanticipated (eg as far as entry and residence of third country national family members of EU citizens or removal of EU citizen prisoners is concerned).

As part of a research project funded by the Nuffield Foundation, the authors of this paper, together with Prof. Jo Shaw, have undertaken a desk-based survey of the application of EU free movement law in the UK with a view to identifying areas where friction is occurring/recurring. Taking our cues from a variety of sources - clusters of case law in national courts and tribunals and at the Court of Justice, (threats of) Commission enforcement proceedings, density of academic literature in the field, anecdotal reports of strategic behaviour of individuals working around the rules, campaigns by NGOs on particular issues and evolving press coverage - we have identified four such areas of friction. This paper will present the detail of those areas together with our intuitions as to *why* friction is occurring there. The intuitions will be empirically tested through a series of semi-structured interviews with stakeholders in the next phase of our funded-research project.

This paper seeks to evaluate the relationship between the two areas of law beyond simply a conformity check or traditional legal implementation study. It seeks ultimately to provide a more coherent picture of how the legal systems interrelate in this field (taking account of the wider institutional, political and economic factors at play.)

**John Flood, Global Legal Education**

The English lawyer is a desirable commodity on the global legal stage. The UK exports a large number of lawyers. The paper discusses whether changes in the content and processes of English legal education and the profession will lead to a diminution in the prestige and value of the legal profession in the global market. Two examples of these are the introduction of alternative business structures with potentially few lawyers and commoditized legal services and the opening up of non-qualifying law degree routes to qualification as equivalent modes of entry to the profession. In addition to analyzing the UK situation, the paper looks at the US, commonwealth and European legal professions for comparison.

**Eilionóir Flynn, Combining Mental Health and Mental Capacity Law: A Capacity-Based Approach to Mental Health Treatment? (eilionoir.flynn@nuigalway.ie)**

Northern Ireland is proposing the introduction of combined mental health and mental capacity legislation in early 2011, which would make Northern Ireland the first jurisdiction to introduce such a combined approach (although there are some examples of jurisdictions, such as Scotland, which have introduced a capacity test in mental health legislation). This combined approach is based on the contention that the presence of mental disorder should not warrant a removal of decision-making capacity. Proponents of the combined approach describe the current system as discriminatory, since it allows a competent patient to refuse life-saving treatment for a medical condition, but can force the same patient to undergo treatment for a 'mental disorder' which is not life-threatening.

However, those opposed to the combined approach argue that this kind of reform is unlikely to have much of an impact on clinicians in making decisions about treating mental disorders and that mental illness cannot be equated with other medical conditions in terms of capacity to consent. In addition, some scholars argue that such an approach further embeds the 'myth' of the autonomous, rational, individual as the basis for the right to make one's own decisions, when in fact most people make decisions in a more collaborative and intuitive manner.

This paper will examine whether a combined mental health and mental capacity system would be more compliant with international human rights norms, especially the UN Convention on the Rights of Persons with Disabilities – in prioritising autonomy and capacity (rather than diagnosis of mental disorder and risk of harm) as the key principles in determining whether compulsory treatment or detention can be authorised.

**Elizabeth Fortin, Multi-stakeholder initiatives to regulate biofuels: The Roundtable for Sustainable Biofuels (e.fortin@bris.ac.uk)**

Over the last decade, dramatic growth in production of biofuels across the globe has been supported by domestic, bilateral and intergovernmental policy instruments. However, concerns have been raised in relation to adverse environmental and socio-economic impacts of large-scale biofuels production, as well as the threat of land alienation for smallholders. In responding to such concerns, the Roundtable on Sustainable Biofuels is a high profile multi-stakeholder initiative to formulate sustainability standards that are to regulate the production process. This paper introduces research that is to explore the process of formulating and implementing the standards. This process is mediated by formal governance structures and institutional context, shaped by informal practices, and knowledge of the different participants. The paper will consider some of the implications of the case study for knowledge formation in global participatory policy processes, the theorisation of the formulation of supranational consensual regulation and, together, their implications for global citizenship and democracy.

**Jane Fortin, The ups and downs of a research project on children's contact arrangements (jane.fortin@sussex.ac.uk)**

The new government is coming under increasing pressure from the fathers' groups to introduce a new legal obligation on divorcing parents to share their children's time between each other equally. Australian research suggests that such a change would be disastrous. It is this policy context which makes an ongoing 18 month research study on children's contact arrangements particularly topical. This paper describes how the study entitled 'Taking a longer view of contact: the perspectives of young adults who experienced parental separation in their youth' became a workable scheme funded by the Nuffield Foundation. When discussing why the research was considered necessary, the paper briefly assesses the gaps in our knowledge about what contact can and cannot achieve for children's well-being, especially in the longer term. It also comments on the reasons for using young adults as a source of information and on the US research studies which have adopted this method of obtaining data about childhood experiences.

Having discussed the research's rationale, the paper describes the obstacles to mounting the project. The findings of a small pilot study reinforced the research team's view that young adults have an important story to tell about their childhood contact arrangements.

Nevertheless, finding a big enough sample of young people to interview proved extremely problematic. The paper reflects on the substantial adaptations made to the study's original design. The result is a very different project to that originally envisaged. Finally the paper briefly assesses in general terms the progress made by the present study and the extent to which the methods adopted have proved to be worthwhile.

**Rosa Freedman, Innovative Mechanisms of the UN Human Rights Council**

The United Nations Human Rights Council was created in 2006 to universally protect and promote human rights. Failures of the Council's predecessor, the Human Rights Commission, had been attributed to politicisation and bias. In order to overcome these, and other Commission failings, two innovative mechanisms were created to assist the new body with fulfilling its mandate. Universal Periodic Review provides a mechanism for examining the

human rights records of all UN member states during a four year cycle. Special Sessions enable the Council to deal with grave human rights crises as they occur. However, those mechanisms have been used by states and regional groups to achieve political aims. This article examines those mechanisms in order to assess whether the Council is adhering to its founding principles and whether it is effectively protecting and promoting human rights.

**Sabine Frerichs, Rethinking law, economy, and society in the global age  
(sabine.frerichs@helsinki.fi)**

In this paper, I will explore the role of the economic sociology of law for a redefinition of problems of law, economy, and society in times of economic globalization and an increasing search for global governance. The economic sociology of law is here understood as an approach, or a field of study, that is located between the established disciplines of sociology, economics, and jurisprudence, on the one hand, and the interdisciplinary research fields of economy and society (E&S), law and society (L&S), and law and economy (L&E), on the other hand. It builds on classical as well as contemporary scholarship at the intersection of law, economy, and society and notably offers a sociological re-embedding of what is today known as law-and-economics scholarship. In the present context, the economic sociology of law will be used as a framework to analyze recent discourses about transnational economic and social regulation within and beyond Europe. Special attention will be given to what types of argument are used, be it legal, economic, or law-and-economics reasoning, and how conflicts between different social spheres, or functional subsystems, are modelled and meant to be solved. Relevant discourses include, first and foremost, transnational constitutionalism and conflict-of-laws approaches. A sociological backing will be provided with the help of the concepts of normative and cognitive embeddedness which notably draw on Karl Polanyi's work. Taking everything together, the economic sociology of law would thus help to specify the legal dimension of the globalized market society.

**Maryssa Gabriel, The Legal Test for Novelty: Not So Easily Swept Away (m.r.gabriel@lse.ac.uk)**

This essay attempts to illustrate that the 'Sweeping Device with Two Heads' created by the 'boy wonder' Samuel Houghton falls short of the patent hoopla that it has created. Although this invention may be a useful improvement on the every-day broom, it cannot be said that it is a patentable invention within the terms of the UK Patent Act 1977.

According to the legal test for patentability, five year old Sam Houghton's 'Sweeping Device with Two Heads' fails because of its lack of novelty and inventive step. What are the ramifications, if any, of this product being awarded an undeserved patent? The main critique of the patent system is that it impedes the free flow of information and allows an unjustified monopoly on a product allowing exploitation of commercial profit. In this case, the patent does not restrict use of an idea nor does it monopolise the broom industry. It is not a product that is particularly useful nor is it exceptionally commercially desirable. However, when a trivial patent is granted such as this one, the justification of the patent system as a whole is undermined. When a patent is awarded to a product of this calibre, the patent system is seen by other inventors and research and development companies as a tool that can be manipulated by clever lawyers. This can open the door to undeserved patents being awarded in other more important industries, such as biotech or pharmaceutical, where their effect will truly stifle the progress of development and growth. In *Genentech Inc. v. Lord Mustill* rightly stated the following:

'There is a high societal cost if the patent requirement is satisfied too readily...if the patent system is judged from a public policy perspective, a crucial factor should be that the product contributes to society so that it is worth rewarding. The evolution of inventive step reflects the courts awareness that awarding patents must be conditioned by the awareness of the public interest.'

**Claire Gammage, The Protection of Indigenous Rights and Non-State Actors: The Case of Loliondo (cg7110@bristol.ac.uk)**

The UN Declaration on Rights of Indigenous People adopted in September 2007, provides an international legal framework protecting the individual and collective rights of indigenous peoples. Under international law the Declaration operates only at the state level and is not legally binding. The Declaration provides that the state should ensure protection for

indigenous peoples through the use of effective mechanisms (Article 8.2). This paper explores the role of non-state actors in forced evictions of indigenous peoples from their land, in contravention of Article 10 of the Declaration. Drawing on the case of forced evictions in Loliondo Division (Ngorongoro District, Tanzania) this paper will examine the ongoing struggles facing the Maasai in asserting and realising their rights as indigenous peoples.

Historically, the Loliondo Division has been the home of pastoralists with the Maasai free to graze their livestock in accordance with their cultural beliefs. Transnational corporations are operating in the Loliondo which has had a negative impact on the pastoralist culture of the Maasai. Reports from local organisations detail cases of forced eviction, harassment, and land grabbing. In his most recent report, the Special Rapporteur has highlighted the role of transnational corporations such as the Ortello Business Corporation (OBC) in restricting the Maasai's access to land. Since 1992, OBC has been granted hunting rights in the Loliondo Game Controlled Area but the legality of this contract has been questioned by the Maasai who claim that they were not consulted at the time. Under Article 11 of the Declaration, the state should implement effective mechanisms to ensure redress where the rights of the indigenous people have been infringed. In the case of Loliondo, the state has so far been unwilling to intervene.

This paper challenges the effectiveness of the international framework and proposes that in signing the Declaration, states are doing little more than paying lip service to the protection of indigenous peoples' rights. Using the Maasai in Loliondo as a case study, this paper illustrates the gap between rhetoric and practice of state actors in failing to ensure adequate protection of indigenous peoples. It will be argued that without an effective and binding legal framework at the state level, the rights of indigenous peoples are not adequately protected from non-state actors.

#### **Claire Gammage, A reflectivist constructivist approach to regionalism: Challenging the international legal framework (cg7110@bristol.ac.uk)**

International economic law provides for the creation of regional trade arrangements under the auspice of Article XXIV GATT. This provision permits the formation of customs unions and free trade areas as exceptions to the World Trade Organisation (WTO) principles of non-discrimination and most-favoured-nation. With a focus on market integration and economic gain, the neoliberal international economic system assumes that the same principles of economic development apply across a broad range of developed and developing countries, which is simply not the case. This paper therefore challenges the relevance of the rationalist international economic framework.

Analysing the processes of regionalism in Southern Africa, this paper challenges the rationalist and institutionalist approach to regional integration. Drawing on the work of Söderbaum and Hettne, this paper discusses regionalism as a social construction and highlights the importance of the private sector (and civil society) in making and un-making regional relationships. The role of corporate actors as "hegemonic actors" within the Southern African region will be explored while considering the importance of "identity" within the corporate strategy. Furthermore, the nature of sovereign fragmentation and "regime boosting" as integral parts of the regionalization process will be analysed. This paper will examine the processes of regionalism in SACU and SADC in order to contextualise the reconstruction of Southern Africa in a post-colonial and post-Apartheid era.

Using an interdisciplinary approach to the study of regional integration, this paper argues that Article XXIV must be reconceptualised to accommodate the nuances of regionalism. In failing to recognise the vast diversity among developed and developing countries, the "one-size-fits-all" approach advocated by Article XXIV leads to uncertainty and inequity within the global economy. The framework of Article XXIV does not consider regionalism to be a fluid concept affected by dynamic internal forces and external constraints. While Article XXIV may fit the market integration model of regionalism, this paper submits that the state-centric approach of this model is outmoded and inappropriate for analysing processes of regionalism and regionalization across the African continent.

**Fae Garland, Financial Provision on Relationship Breakdown in New Zealand and Australia: An Empirical Comparison of the Homemaker's Experience (fsg201@ex.ac.uk)**

Australia and New Zealand have found very different ways of settling property disputes on divorce, respectively embodying discretion and certainty at the heart of their legal frameworks. Australian courts have very wide discretion when altering property interests; no overarching principle exists, instead a broad range of factors are taken into consideration. Consequently, whilst outcomes are difficult to predict it allows the courts a great deal of flexibility when settling property disputes. In contrast, New Zealand operates a deferred community of property system meaning that (after three years) matrimonial property division is governed by the principle of equal sharing. Subsequently, settlements are very predictable and it is extremely unusual (especially for homemakers) for awards to achieve anything other than 50%.

Yet, what impact do these two conflicting approaches have on homemakers? Does Australia's system actually encourage litigation to the detriment of the financially vulnerable or does it enable a greater access to justice through the wide flexibility of the courts meaning that outcomes can be tailored to suit individual cases? Does New Zealand's approach promote a less confrontational approach focusing on out of court settlements to the benefit of the financially vulnerable, or is it at the expense of reducing the ability to litigate to vary awards where equality is not appropriate? This paper (based on my PhD research) hopes to answer these questions by using interviews carried out on legal professionals from these jurisdictions. It will consider implications on practicality and fairness that the legal systems will have on the traditionally female homemaker role. This feeds into my wider study that addresses how domestic contributions should be valued on relationship breakdown in England and Wales.

**Matthew Garrod, 'Protective Principle Jurisdiction over War Crimes and Crimes Against Humanity' (M.Garrod@sussex.ac.uk)**

The punishment of war crimes and crimes against humanity immediately after the Second World War are regarded as a landmark development for international criminal law and, more particularly, universal jurisdiction over gross human rights offences. There were numerous instances where municipal courts of the Allied States, or 'United Nations', tried and punished offences committed outside of the State by individuals belonging to the 'enemy' against the nationals of another Ally, as well as offences committed by Germany against its own nationals in Germany. This paper is concerned with the prosecution of war crimes and crimes against humanity on the basis of the protective principle of jurisdiction under international criminal law. It examines the prosecution of war crimes and crimes against humanity at the end of the war and also the International Military Tribunal at Nuremberg and the Far East and shows that the right of the State to punish foreign nationals in its custody for such crimes was restricted by international law and the practice of States to situations where the accused belonged to an 'enemy' belligerent and the victims were treated as 'Allied' nationals. The paper will argue, in particular, that jurisdiction was based on the collective exercise of protective principle jurisdiction for the protection of vital interests common to the Allied States. The prosecution of these offences on the basis of universal jurisdiction, it is submitted, is based on hollow foundations. Thereafter, the paper considers jurisdiction for the prosecution of war crimes under the Geneva Conventions and the various other post-WWII developments leading up to and including the International Criminal Court. The paper seeks to question our present understanding of the nature and purpose of international criminal law and concludes that jurisdiction over war crimes and crimes against humanity is better understood as the protection of vital interests common to the international community of States.

**Jean-Pierre Gauci, Human Rights for Trafficked Persons: Priority or Mere Rhetoric (jean-pierre.gauci@kcl.ac.uk/gaucijp@gmail.com)**

The aim of this paper is to provide an analysis of the human rights protection mechanisms available for trafficked persons through the international and European criminal law instruments addressing the issue. It seeks to answer the dual question of whether the human rights provisions are sufficient and, second, whether and how (if at all) other instruments within

the international human rights framework can supplement these provisions to extend the protection available to trafficked persons.

It will start by analysing the protection provisions of the international trafficking protocol, the CoE Trafficking Convention, the existing EU Directive (Council Directive 2004/81/EC of 29 April 2004) as well as the proposal for a revised directive presented by the European Commission in March 2010 (COM(2010)95). The paper will seek to assess these instruments against a human rights and 'victim-centred' approach that places the rights of trafficked persons at the core. In doing so, it will examine whether the promise of human rights and protection concerns as a priority of these instruments goes further than mere rhetoric. It will address issues of conditionality (including the condition of collaboration), time-scales and duration. It will then also delve into the actual content of the protection granted such as access to medical and psychological support, consideration of vulnerability, access to legal assistance, access to the state's labour market and education system as well as long-term residence and stability issues.

The difficulties in accessing long term and stable protection, which marks the challenging scenario for trafficked persons will be highlighted in reflecting how difficult the way out can be for trafficked persons. The paper concludes that whilst some human rights elements have been incorporated within the relevant international criminal law instruments, the rhetoric has yet to be matched by concrete prioritisation.

**Robert George, "Life is untidier than that": Could Jones v Kernott tidy the mess of cohabitants' property rights? (robert.george@law.ox.ac.uk)**

Jones v Kernott [2010] EWCA Civ 578 is the latest case on unmarried cohabitants' property rights. Ms Jones and Mr Kernott purchased a home together in joint names in 1985. They separated in 1993, and it was agreed that, at that point, they owned the house in equal shares. However, since then, Ms Jones had lived in and paid all outgoings on the house; Mr Kernott had purchased another property. The trial judge held that the parties' shared common intention had changed over time, and declared that Ms Jones now owned 90% of the house. The High Court upheld this decision, but a majority of the Court of Appeal held that there was no evidence of a changed intention, and so the property remained owned 50:50.

Wall LJ described Jones v Kernott as 'a cautionary tale'; Jacob LJ (dissenting) said that, while that might be true, 'decisions of this Court will not change the way people behave'. Jones v Kernott has now been given leave to appeal to the Supreme Court. This latest decision, purportedly applying Stack v Dowden [2007] UKHL 17 to somewhat unusual facts, presents the Supreme Court with yet another opportunity to speak on this controversial and important issue. What might we hope for from the Justices?

This case offers the Supreme Court the chance to clarify a number of problematic issues left by Stack. In particular, it is crucial that the Justices give clearer guidance on what constitutes an 'exceptional' case, falling outside the 50:50 presumption that putting a house into joint names creates. Drawing on existing empirical research, from both before and after the Law Commission's report on cohabitants' property, this paper offers some thoughts on the extent to which the Supreme Court could accommodate the reality of cohabitants' lives in setting down guidance.

**Pedro Heitor Barros Geraldo, Practical Solutions: Praxeological Analysis of Judgments in Civil Hearings (pedroheitorbg@yahoo.com.br)**

This paper aims to analyze how judges take decisions in civil hearings in France. I propose a praxeological comprehension of the activity of judging grounded on observations made in Sète District Court in Southern France. Firstly, I will explain how I developed a different approach by using ethnomethodological tools. I am rather interested in apprehending judging as a meaningful ongoing activity rather than merely analyzing the development of this methodological perspective. Then I will describe the contextual and procedural characteristics of a French Civil Hearing in a District Court are described to emphasize the presence of laymen pleading a case which is an important feature of these hearings and how the analysis will focus on interactions between the judge and laymen. Afterward, two phenomena will be analyzed through descriptions of one judge taking decisions during the course of the hearing. These phenomena are skills displayed by the judge in cooperating with



laymen and in anticipating forthcoming procedures, which he uses to deal with ordinary cases. The results of my analysis point to a pragmatic accomplishment of judging via an empirical understanding of the case the judge solves by applying practical solutions. In addition, I suggest that the hearings are loosely structured due to this interaction, which leads to mutual understanding of the meaning of the categories used in the context.

### **Saptarshi Ghosh, Examining the Role and Scope of the Bank Regulator in a Post-Financial Crisis World**

The recent banking and financial crisis has highlighted not only the lapses and lacunae in the banking system but also it has forced upon countries to re-examine the role and scope of the banking regulator as an institution that can prevent the incidence of such systemic and widespread banking problems and failures. Right from Germany to the United Kingdom, the debate has sharply swung away from focusing only on the nature and contents of banking regulation to the role and powers of the bank regulator. It is now being recognised that the key functions of the bank regulator is to maintain systemic stability of the banking sector and ensure sound management of risks. In doing so, the regulator has to find the right balance between enhancing risk management and maintaining the competitive edge without adversely affecting the dynamics and efficiency of the banking system. This paper intends to examine the future agenda in the banking regulatory debate by scrutinizing the role and locating the scope of the regulator within the current UK financial and banking reforms process. In doing so, the paper examines some of the lapses of the FSA as the bank regulator/supervisor, why and how such lapses took place and how the issues can be redressed by the Central Bank as the bank regulator/supervisor. A key question the paper would raise is whether the bank regulator can enforce capital adequacy standards effectively as part of a prudential banking regulatory paradigm if the too-big-to-fail problem is not sufficiently addressed. In other words, can the bank regulator be relied upon to mediate effectively between the regulatory processes of ensuring effective crisis prevention, risk management and the stability of the banking system in the absence of governments and policy-makers resolving the issue of banks being too big to fail.

### **Cedric C. Gilson, Illuminating the legal dilemmas of assisted dying. The clarity afforded by orthodox systems theory**

In English law, the Suicide Act 1961 prohibits rendering assistance in dying to a person, even at their behest. Societal debate and petitions to law reveal agitation for legal change, sometimes championed by medical ethics. Law resists pressure to amend the legislation, save for procedural clarifications. Viewed through orthodox Luhmannian systems theory, decriminalizing assistance in dying would involve transposing a social action from one side of the lawful/unlawful form to the other, which is to expect a great deal. The problem amplifies the very conditions of legal autopoiesis. How could transformations be effected in the way law communicates about assisted dying for the previously unlawful to be regarded lawful, without sacrificing its core values? Morals and ethics promulgate ideas pervasively over assisted dying but what is their conceptual home? Does systems theory assign them a place or must they remain forever ethereal? Depending on the answer, what rôle would they have in the discourse and what prescriptive authority? Medicalization of assisted dying accords clinical medicine a rôle in end-of-life decisions but on what basis can it undertake this responsibility, as seen via systems perspectives? What nexus exists between the epistemological underpinning of medicine, its curative function and as an arbiter of desirable social action? And how is this 'society' that agitates for change identified? Functional differentiation creates a social order of constituent systems. So, which of them now can speak to law about assisted dying? And is law not also part of this social order, so must involve itself in its own reflections? The abstraction of systems theory illuminates issues germane to the central problem with brilliant clarity and permits their exploration without external contagion. It is offered methodologically as an *excursus* in orthodox systems theory that also disabuses some misconceptions about rôles and responsibilities in the central problem of assisted dying.

### **Kris Gledhill, The Overriding Objective in the Tribunal Procedure Rules**

This is a traditional analytical paper. The aim is to review the impact of the comparatively unheralded changes to the procedural rules governing Tribunal practice, and in particular to

review the introduction into the Tribunal arena of the “overriding objective” of dealing with cases justly. The origin of this “overriding objective” is the Civil Procedure Reforms introduced by Lord Woolf, designed to put judges in charge of administering and managing cases rather than simply deciding on what the parties asked the judge to decide; it was then extended to the criminal courts, where the judicial function is somewhat different. It has now been extended to the Tribunal arena, where it features in each of the Tribunal Procedure Rules for the different chambers of the First-tier Tribunal: the difference between the Tribunal and the general civil and criminal areas is that the Tribunal has often been thought to have a more inquisitorial role.

The paper will review the authorities in which Upper Tribunal judges have commented on the impact of the overriding objective, and make suggestions as to whether the new rule makes or should make a difference. Included in this is an analysis of what exactly should be the “overriding objective”.

### **Kris Gledhill, The Teaching of Criminal Law: Are We Stuck in a Timewarp?**

**(k.gledhill@auckland.ac.nz)**

This is a mixed empirical and traditional analytical paper, designed to encourage discussion. The underlying research question is whether the tendency for criminal law courses in law degrees to teach comparatively rare crimes such as homicide and rape and not to teach much more common offences such as drugs offences, driving offences and public order offences is the appropriate approach. Less serious offences against the person and theft offences are both commonly taught and common in practice. The question is whether this is done because it is the way it has always been done? And, if so, whether that is nevertheless the best structure for a criminal law course?

This paper sets out the initial research on which the project is based, namely an analysis of what is taught in law degrees in common law countries and what is covered in the legal textbooks that are marketed for such courses, and an analysis of what crimes are most common, to show the partial overlap between what is taught and what is met in practice by students who will usually be exempt from further study of substantive criminal law before being accredited to practice on the basis of what has been covered in their degree. The final part of the paper discusses what principles should govern the structure of an academic criminal law course.

### **Ioannis Glinavos, The bonus culture revisited: legal and ethical dimensions of economic regulation (I.Glinavos@kingston.ac.uk)**

This paper contributes to discussions on responses to the financial crisis of 2008, focusing on the regulation of the bonus culture in the financial sector. The paper offers a theoretical critique addressing legal and ethical issues involved in regulating bonuses. It relies on the work of GA Cohen, to critique arguments put forward by orthodox economists and legal scholars on the supposedly unassailable nature of private contracting. The discussion addresses the connection between wealth inequality and distortions in legal and political systems, focusing on the experience of the US and the UK. It also addresses arguments suggesting that the wealthy are entitled to their possessions due to supposedly natural, apolitical legal rules which form the basis of market democracy. The paper shows that recognition of the politically constituted bases of law, allows for different ways to conceptualise the state market relationship and helps de-construct the methodological limitations neoliberalism has imposed on our understanding of the role of law. By re-evaluating the functions of law in the regulation of the economy, and the role of the state in controlling private actor behaviour, we can begin to understand how capitalism ought to be reformed to avoid a repeat of the crisis we are currently experiencing.

### **Samantha Godwin, Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Rights and Equal Protection (Sg429@law.georgetown.edu, uctysgo@ucl.ac.uk, sgodwin3@googlemail.com)**

This paper considers psychiatric diagnoses and its role in the legal system. Judges and juries rely on psychiatric expert testimony to inform themselves on the facts of cases that present questions of mental health, and legislators draft civil commitment statutes with the understanding that mental illness is a phenomenon that exists in the world and not only in the

opinions of psychiatrists and the public. Adopting analytic philosophy of science methods, I will challenge the assumption that psychiatrists can be relied upon in this way by demonstrating how the disconnect between the possible evidence that psychiatrists have to work with and psychiatric theories of mental illness limits the reliability and verifiability of psychiatric diagnostic categories and diagnoses.

Having established a theoretical basis for challenging psychiatric diagnoses, I will consider the legal and ideological effects of granting psychiatrists unparalleled authority and psychiatric diagnoses evidentiary status. Categorizing a population as mentally ill with similar certainty as physical pathologies allows an extraordinary transformation of the way our society feels it is permissible to treat them. Normal considerations for personal dignity and autonomy evaporate in the face of a comfortable paternalism given the myth that psychiatrists always know best and the mere allegation of mental illness is sufficient to demonstrate an already compromised autonomy. The public perception of the dangerousness of the mentally ill also has little basis in the statistical reality when substance abuse is controlled for, yet it sets much of the tone for public discourse on the issue. In conclusion, I will offer possible reforms in mental health law to preserve normal due process considerations and evidentiary standards in line with scientific verifiability.

**M. Isabel Garrido Gómez, Intersectionality and Transnationalism of Law  
([misabel.garrido@uah.es](mailto:misabel.garrido@uah.es))**

The birth of new paradigms in Law arise from the awareness that a monistic and monolithic context is not possible, particularly when it is seen that new forms of Law have emerged which are both above and below the State. One of the new paradigms which has developed is that of a logic of flexibility. This helps us to transcend the complexity of institutional regulation which occurs when jurisdictions overlap.

This paper looks to interrogate the way that discrimination paradigms operate at different levels - and is an argument for a more flexible approach that mirrors the reality of social relations and recognises the multiple institutional levels in which discrimination occurs.

**Anthony Good, Asylum Narratives in the Refugee Status Determination Process**

When someone flees their home country to seek asylum, they can generally take with them little or nothing in terms of personal documentation. Consequently, when asked to demonstrate their entitlement to be granted asylum under the 1951 Refugee Convention, all they have to fall back upon is their asylum narrative, their own personal story of persecution and suffering. That story will perforce be judged, not by usual legal standards of evidentiary corroboration, but largely in terms of its credibility. There are obvious difficulties, however, in assessing the credibility of a person whose life experiences and cultural understandings are vastly different from one's own. This paper, based on field research in the UK, looks at the role of asylum narratives in determining refugee status, and at the methods whereby these narratives are elicited and assessed by government officials and legal representatives: in asylum interviews; in the taking of witness statements; and during cross-examination in court.

**Jamie Grace, Learning from Papal Infallibility to Redefine and Harness Parliamentary Sovereignty (J.Grace@derby.ac.uk)**

Parliamentary sovereignty is a construction which can be best, but not only, viewed as a political necessity: but as lawyers we must move on from this initial recognition of political reality. Contemporary constructions of Parliamentary sovereignty will be discussed briefly and a human rights discourse based around the Simms principle will be outlined: allowing us to frown on *R (Ellis) v Chief Constable of Essex Police*. In some situations, it will be argued, and perhaps in many, clear and unambiguous legislative language is what we require and indeed deserve from our politicians and public authorities; with commensurate shifts away from what is "reasonably incidental" alone. Critical comparisons will be made between Parliamentary sovereignty and papal infallibility, and suggestions will be made as to how Parliamentary sovereignty might be restructured and reconfigured to allow for greater transparency and political certainty, using privacy rights and the role of the State in electronic governance as an example, and as a model, for discussion. Nissenbaum's notions of privacy rights as part of a framework of contextual integrity are key here.

**Laura Graham, Street Sex Work in the UK: A Human Rights Approach  
(llxlg6@nottingham.ac.uk)**

It has been argued that the high level of police interference required by the current (and new) laws relating to prostitution serve to make prostitution a more dangerous activity. However, in a recent period of reform of these laws, the UK Government rejected the option to legalise sex work, instead opting, among other things, to create a new strict liability offence of paying for sexual services of a prostitute subject to force, threats or other types of coercion (Policing and Crime Act 2009, s.14).

During this reform period, there was little to no examination by the Government of the effects of the law on the Human Rights of the sex workers. This is particularly striking because: Parliament has an obligation under the Human Rights Act 1998 to provide a statement of compatibility with the European Convention on Human Rights (ECHR) of the proposed Bill before it can be passed into law (s.19); and all public bodies, including the police, have an obligation to act compatibly with the ECHR (s.6).

This paper will assess the extent to which a more thorough Human Rights analysis of street prostitution could help to promote a move towards legitimating sex work in the UK. It will discuss the UK's obligations and sex workers' rights under the European Convention of Human Rights, and an explore the argument for legalisation. It will also discuss the competitive nature of Human Rights, noting that Human Rights arguments could also be made in the argument against legalisation of sex work. The ultimate question will be whether a Human Rights analysis can add anything to the call for legalisation.

**Jackie Gulland, 'Quoting the law' and 'knowing what's relevant': welfare rights advisers' use of knowledge in the advice relationship (Jackie.gulland@stir.ac.uk)**

This paper considers the role of welfare rights advisers in supporting claims for Employment and Support Allowance (ESA), a new UK social security benefit. Since its introduction in 2008, ESA has come under considerable criticism regarding the methods used for assessing claimants 'capacity for work'. Based on a small piece of research involving interviews with welfare rights advisers, the paper looks at how they describe the work that they do in supporting claimants. Welfare rights advisers are usually not legally trained but they have specialist knowledge of social security procedure and law. In this research advisers described how they used this specialist knowledge to support claims, to appeal unsuccessful claims and to explain the complexities of the system to their clients. As well as this specialist 'legal' knowledge, advisers also stressed their knowledge of the 'real world', something which they believed was lacking in benefits assessment and administration. This knowledge came from their experience of working in the advice field but also from their day-to-day contact with claimants. Those working in specialist agencies, with clients who had mental health issues, learning disabilities, drug or alcohol problems or particular health problems, believed that they were able to use their knowledge of the realities of people's lives to support claims for benefits. Most of these advisers were working at the front-line of advice, dealing with individual cases, while others were part of wider campaigning organisations which attempted to influence policy.

This paper will consider the types of knowledge used by lay welfare rights advisers to support claims for benefit on an individual level and, on a wider stage, to challenge the discourses used by policy makers.

**David Gurnham, How All Right Are the Kids Really? Sexuality and Donor Insemination in Law and Film (david.gurnham@manchester.ac.uk)**

This paper examines certain cultural norms that emanate from legal discourse and from film, and argues that both may be analysed and understood more fully in light of each other. To the extent that the recent film "The Kids Are All Right" aims simply to reflect ordinary bourgeois social norms (as Lisa Cholodenko and her actors claimed) it serves as a useful opportunity for reflecting on the treatment of its themes across these apparently distinct discourses, namely the significance in cinematic and legal narratives of sex and sexuality for families and notions of parenthood status. In 'reading' Cholodenko's "The Kids Are All Right" alongside the judgments of the family courts, this paper will argue that the dramatisation and characterisation of 'law' (as normativity) in the film and conversely the 'legalisation' of the

drama of the personal anxieties attaching to family and sexuality are cultural phenomena that together produce a coherent, though controversial cultural narrative. The dramatic core of the film, which has annoyed many feminist critics of the film, rests on the premise that heterosexuality is a dangerously potent force in family in comparison to lesbian sexuality, and therefore homonuclear families will struggle to assert their integrity and autonomy in cases in which a sperm donor lays claims to 'fatherhood'. I will argue that this heteronormative family concept is presented duplicitously both in legal and cinematic discourse by being presented as being naturally evident as a 'fact of life', and confirmed by the supposed perspective of the child, which naturalizes the heteronormativity of it, effectively diverting critique.

**Esra Demir Gürsel, The ECtHR's approval of public interests on the regulation of women's bodies (esra.demir@marmara.edu.tr)**

National laws regulating women's bodies by setting limits to women's coverage of their bodies or banning abortion have in general been justified by states with a discourse on sexual equality and/or the secular or religious values of their population. When these issues have appeared before the European Court of Human Rights (ECtHR), justifications of the regulations are articulated in accordance with the language of the relevant provisions of the European Convention on Human Rights (ECHR) determining the legitimate aims to restrict the rights set forth in the ECHR -namely *the protection of public order, the protection of public morals and the protection of rights and freedoms of others*. What is crucial here is that appeals to such presumably nation-wide public interests -or to the interests of a smaller but again an abstract entity like the 'unveiled others'- by states while regulating women's bodies have therefore been a requirement stemming from the ECHR itself. This paper will discuss the implications of the language of the ECHR that thus allows, encourages, and confirms the States' regulations of women's bodies for public interests which implies the existence of an abstract singular entity. In order to do this, the ECtHR case-law addressing the so-called headscarf issue and the bans on abortion will be explored. Keeping in mind that the ECtHR is an international tribunal promising the ensurance of individual justice, the paper will particularly focus on the the contradictions revealed in the related judgments that weigh the rights of a woman on her own body *against* public order, public morality or the rights and freedoms of others.

**Jessica Guth, Re-thinking 'real link': Doctoral Mobility, Citizenship and EU Law (J.guth@bradford.ac.uk)**

This paper examines the free movement rights of doctoral candidates in the EU. Having to show a 'real link' with the host state before being able to access certain social advantages is familiar from student cases such as *Bidar* and *Förster*, but how does it apply in the context of scientific mobility at doctoral level? This paper considers whether establishing a real link with the host state is a sensible way to determine eligibility for rights in this context or whether there may be alternatives. The European Higher Education Area and the European Research Area provide policy frameworks for increased mobility in the research and higher education fields and this paper explores the extent to which seeing EU free movement law in the context of these frameworks might provide a more holistic and coherent way of thinking about scientific mobility and the rights necessary to make it a reality.

**Jessica Guth & Edward Mowlam, Understanding Good Teaching: What do Students Say? (J.guth@bradford.ac.uk; e.t.mowlam@bradford.ac.uk)**

This paper reports on an empirical research project examining the idea of 'good teaching'. 'Teaching matters in higher education institutions. Although quality teaching encompasses definitions and conceptions that are highly varied and in constant flux, the initiatives aimed at improving the quality of teaching are spreading within institutions' (OECD 2010). The notion of what exactly good teaching is, according to Skelton (2009) a 'highly contested concept'. While debates about enhancing teaching quality in higher education and improving the skills of higher education teachers generally have been ongoing for some time and have also received some discipline specific attention, there seems to be an assumption that we all know what 'good teaching' is. The lead author received the Bradford University Baroness Lockwood Award for Distinguished Teaching in 2010 to carry out a research project in the teaching and learning field. The chosen project seeks to unpick what students and higher

education teachers consider to be good teaching. The first phase of the empirical work was an online survey aimed at university students in the UK. The survey was then supplemented by focus groups in a number of universities. The results are first examined in the current general literature drawn from the teaching and learning field before considering how the findings apply in the specific disciplinary context of law teaching.

### **Fiona Haines & Caron Beaton-Wells, Law and order in the suites? Insights from cartel criminalisation in Australia**

Criminalising the harms of the powerful has considerable appeal for those who desire a more tractable, ethical and sustainable business sector. Yet, the establishment of criminal offences applicable to society's corporate elite faces perennial challenges. This paper analyses these challenges through an analysis of the recent reform initiatives criminalising 'hard core' cartel conduct in Australia. The case study reveals three particular challenges. The first arises from the inherent ambiguity that accompanies business harm. This ambiguity encompasses economic, legal and moral dimensions where clear lines between degrees of harm and harm and benefit; between legality and illegality and illegality and criminality; and between morality and immorality and immorality and criminality are difficult, if not impossible to draw. Such ambiguity provides ample room for those with access to the ear of government to prosecute the case against criminalisation for fear of governments losing investment or precipitating an economic crisis of some sort. The challenge of surmounting political risk is the second challenge that we identify, that is the risk which is contoured by the need for government to simultaneously nurture the conditions for a productive economy whilst reassuring the citizenry of their safety and security. In the face of ambiguity and political risk, criminalisation, if it is successful, will tend towards the most expedient legal formulation where competing interests are appeased. The third challenge discussed in the paper is the challenge of ensuring that expediency does not result in incoherent, ineffective or even counterproductive law. We suggest that these three interrelated challenges of ambiguity, political risk and expediency are likely to arise in any attempt to criminalise harms of the powerful. However, the way in which they are played out will differ depending on the content of the harm and the context for its criminalisation - in this instance, the collusive practices of business and in the context of the capitalist democracy of Australia.

### **Margaret I. Hall, Contextualised capacity? mental capacity and the equitable doctrines of relational autonomy**

The cognitive model of mental capacity is deeply enmeshed with the liberal ideal of individual autonomy (innate/internal and disconnected from relationship context) as the essential human quality; legal interference with individual decision making is justified only where it can be shown that the individual has fallen below this (human?) threshold. This paper, part of a larger study, suggests that, despite the theoretical dominance of the liberal autonomy ideal/mental capacity threshold, that model has not been consistently applied on a de facto basis. I conclude that the abstraction of the mental capacity threshold is not sustainable at the particularised and individual level of "the case" (the larger study will also explore this conclusion in the medical "case" context). To the extent that this disjunction has been recognised, it has been criticised as evincing a failure by the courts to respect and uphold the autonomy ideal underlying the mental capacity threshold; I propose that consistent "failure" illustrates the inadequacy of that ideal as a theory of human nature, and supports the emerging theory of relational autonomy and its correlate, contextual capacity. In particular, in cases involving gifts and transfers (to which the doctrine is traditionally limited) the equitable doctrine of undue influence, in which "impaired consent" is established through an analysis of relationship context and its impact on decision-making, creates permitted space for the courts to consider the impact of social context alongside mental capacity. Mental capacity and undue influence frequently appear as parallel arguments; if we read these cases as holistic (rather than parallel) narratives, an (implicit) analysis of contextual capacity, considering the relationship between cognitive factors and relationship/social context, emerges, that may form the basis of a new (explicit) conceptual model with potential application outside of the gift/transfer context.

**Miia Halme-Tuomisaari, The State is One (miia.halme@helsinki.fi)**

In the absence of an international human rights court, UN human rights treaty bodies hold a primary role in monitoring that state parties fulfill the obligations they undertake by becoming parties to UN treaties. A central element of their operations is the processing of State Reports that treaty parties are required to submit at the intervals specified by each treaty.

Officially State Reports are paramount sources of factual information of a given country's human rights situation, yet unofficially they acquire more diverse roles and their status as a source of information may be contested. This paper contrasts the information status assigned to the state reports of Finland and China, and argues that the standing of a given country as a participant in the 'human rights dialogue' also impacts the manner in which its report is received.

This paper invests particular attention to the 'Core Document' prepared by the Foreign Ministry of Finland in Spring 2010 according to recent UN guidelines. It examines how in the compilation of the core document, in the words of a Finnish civil servant, 'The State is One'. Thus for the report, all data derived from diverse government sources is treated as factual and unified information.

Simultaneously this approach masks internal political controversies such as the Finnish 'plate dispute' over who – the President or the Prime Minister – leads the Finnish foreign policy, and thus assigns state reports an additional role as adjudicators of domestic tensions. The paper further analyses the recent acclaimed practice of Finland to incorporate NGO 'shadow reports' to its state reports, discussing how impossible a similar practice would be in regards to China.

**Rachel Hanly, Direct Liability of Hospitals in Hospital-Acquired Infection Actions in Ireland and the UK (105031567@umail.ucc.ie/rlhanly@yahoo.ie)**

Hospital-Acquired Infection (HAI) is a groundbreaking issue in terms of medico-legal litigation as although cases have been initiated, no case has reached the Irish courts for final determination as of yet, and few cases have been litigated in the UK. While there is potential for many more cases to be brought, plaintiffs have been discouraged from seeking redress as, to date, claims for HAI usually fail.

This paper proposes to take a narrow focus on the direct liability of hospitals in HAI actions. Under this category, claims are made on the basis that the plaintiff acquired the bacterium which caused the infection due to the negligence of a hospital or its staff. Actions under this category engage negligence simpliciter rules due to errors caused by organisational failure, rather than professional error. It is proposed to consider whether a duty of care exists in the HAI context, or if such a finding would fail on the basis that HAI represents a novel duty of care in the hospital context which would not represent an incremental development as required by *Caparo Industries p.l.c. v. Dickman*. Following this will be a consideration of the potential scenarios where a plaintiff might be successful in proving a breach of duty on the part of the hospital for contraction of a HAI, either for organisational negligence or breach of non-delegable duty.

**Yoshiaki Haraguchi, The Changing Role of the Japanese Supreme Court: Towards the Active Exercise of Judicial Review (yoshiaki@aoni.waseda.jp)**

It is widely believed that the Japanese Supreme Court has followed a policy of judicial restraint and not been sufficiently dynamic in the review of legislation in respect of its unconstitutionality, although it is expressly authorized by article 81 of the Japanese Constitution. There are the following possible reasons: the appointment of Justices of the Court by a single party (the Liberal Democratic Party) due to the lack of change of government until 1993, the powerful control by the political branches, insufficient identity as final expounders of the Constitution among Justices, excessive workload on the Court, and the influence of authoritative pre-review by the Cabinet Legislation Bureau.

Recently, however, some signals have appeared that the Court is more active. Although there were only six cases in which it declared a statute of the Diet null and void by 2000, it has already declared as such in three cases after 2000. One reason is that the political situation around the Court has been transformed from ex-ante regulations to after-the-fact ones and shifted decision-making responsibility from bureaucrats to politicians, where the role of the

Court to check various cases and statutes would be more significant. In the age of globalization, drastic social change can show more room for judicial review of out-dated statutes, too. Another reason, as ex-Justices implied, is that internal legal culture or judicial philosophy of the Court has been gradually transforming itself partly because of generational change in the composition of members.

In the U.K., the traditional judicial role is subject to change under the Human Rights Act 1998 and the creation of the Supreme Court of the United Kingdom. My analysis of the transformation of the Japanese Supreme Court hopefully has some implications for understanding the judicial role in parliamentary government from the viewpoint of comparative law.

### **Christopher Harding, A Theoretical Framework for the Assessment of Cartel Criminalisation (csh@aber.ac.uk)**

Significant theoretical and practical questions have arisen in recent years concerning the policy of criminalisation of business cartels in an increasing number of jurisdictions outside North America. It is important to gain an understanding of the origins and dynamic of this legal development. Studies of cartel criminalisation require a theoretical framework which enables a clear and usable collection of data and organisation of argument. This paper sets out such a theoretical framework which may be used for critical and comparative study across jurisdictions. It is proposed that a viable critical assessment of cartel criminalisation should be constructed around the following elements of analysis.

(a) The aims of the legal control of cartels, and routes of enforcement, in particular: elimination of cartels; compensation; penalty; economic justice; management of power relations.

(b) Agency – the subject of legal control: human individuals, corporate actors, and the cartel as an organisation.

(c) Victimhood: the damage inflicted by cartel activity, and the distribution of that damage.

(d) The nature of cartel delinquency, as a justification for legal (and especially criminal) sanctions.

(e) The balance between retributive and utilitarian components of legal control (in particular, the retributive deficit arising from leniency programmes, and the commitment to deterrence as an enforcement objective).

(f) Penal expansion as a feature of legal control (increase in the quantum of sanctions, their distribution, and their diversity).

The above elements of analysis may be used as a measure in the assessment of criminalisation as a route of legal control. Taken together, they provide a structure for legal and institutional debates on the reasons for and likely consequences of criminalisation in this context.

### **Rosie Harding, Caring about Capacity: A socio-legal analysis of dementia care (r.harding@law.keele.ac.uk)**

Recent research has highlighted that over 820,000 people are currently living with dementia in the UK, and that dementia costs the UK economy £23 billion per year. Most of this cost (55%) is attributable to the value of care provided by unpaid or informal carers. Previous research about carers' experiences has focused on important issues such as carer stress, elder abuse and decision making around work and care. However, very little is known about informal carers' experience of navigating the complex legal frameworks surrounding access to care services for PWD. Drawing on empirical data, this paper will explore the interrelated concepts of 'care' and 'capacity' through the early findings from an empirical investigation of the experiences of carers of people with dementia. The data presented will be tentative findings based on responses to the 'Caring for People with Dementia' Questionnaire, due to be collected in early 2011. In the paper I will interrogate the possibility that a focus on 'care' for people with dementia can lead to blanket determinations of (in)capacity, contrary to the principles underpinning the Mental Capacity Act 2005 (MCA). Through the data analysis, I will explore lay carers' understandings of capacity and their duties and responsibilities as set out in the MCA, and the multiple ways that the regulation of care and capacity are experienced, understood and encountered by carers of people with dementia.



**Phil Harris, Article 1F(b) of the Refugee Convention 1951 : is the classification of actions as 'political' or 'non-political' itself a political decision? ([philip@harristw12.freeserve.co.uk](mailto:philip@harristw12.freeserve.co.uk))**

My paper constitutes an examination of Article 1F(b) of the 1951 UN Convention on the Status of Refugees. In particular, I intend to describe and subsequently analyse the construction given to this Article by the UK courts in the case of *T v SSHD* and since. Employing the critical methodology of immanent critique (as developed by the Frankfurt School under Adorno and Horkheimer) I will argue that when engaged in the interpretation of Article 1F(b) of the convention the courts can be argued to have conflated the term 'political' (or 'non-political') with the term 'politically legitimate' (or 'politically illegitimate'). I assert that the exclusion from refugee status of persons who have taken part in the planning or carrying out of 'atrocities' on the grounds that such actions are to be regarded as 'non-political' in nature (and, therefore, as falling within the exclusion from refugee status contained in article 1F of the UN Convention on the Status of Refugees) involves the making of political judgements on the part of the judiciary. This political decision results in a negation of the very real socio-historical phenomenon of political violence. I shall argue, paraphrasing Katherine Mackinnon, that politics is violence when it is practiced as violence. Thus, through the employment of a critical methodology whose genesis lies within social theory, I will be able to articulate the essentially political response of the judiciary to contemporary concerns regarding the use of violence (often violence which is 'atrocious' in its effects) in pursuit of political objectives.

**Andy Harvey, Regulating Homophobic Hate Speech: Back to Basics about Language and Politics? ([andrew.harvey@bbk.ac.uk](mailto:andrew.harvey@bbk.ac.uk))**

The previous Labour Government introduced a raft of legislation designed to combat hate speech and hate crime. The passage of the legislative proposal to outlaw incitement to hatred on grounds of sexual orientation was marked by controversy both within and outside of Parliament. Unusually, there were two separate debates in Parliament in the space of a few months to consider both the proposal and the 'free speech' amendment introduced by the House of Lords during the first debate in 2008. These Parliamentary deliberations offer a timely opportunity to consider anew the issue of the regulation of what is generally called 'hate speech'. In this paper I discuss the legislation in the context of current debates around free speech and artistic autonomy. Making use of post-structuralist, psychoanalytic and discourse theories I argue that there are conceptual and practical difficulties attached to the regulation of hate speech if analysed through a politics of subversive repetition and resignification of language. I conclude that a better approach is to think about language as an 'opening up' to the social world and to develop a politics of sustained engagement with society that utilises creatively the space implied by that 'opening up' and which ultimately adopts a more voluntary approach to changing the hateful usage of language.

**Jen Hendry, A Lack of Harmony? Comparative Law in light of Europeanisation – Some Internal Tensions ([j.hendry@leeds.ac.uk](mailto:j.hendry@leeds.ac.uk))**

Since the inception of the European project, comparative law has been inching from its arguable position on the periphery of the debate to a position far closer to the centre. The 'umbrella term' comparative law has, as a result, come under increased scrutiny as to both what its disciplinary identity is and what a comparative method involves. Contemporary comparative law (and legal studies) thus finds itself caught in a perpetual oscillation between characterisation as either a discipline or a method; indeed, these attempts to self-characterise appear to occupy much of its proponents' time.

At a time when superficial formalist studies of (specific features of) Member States' legal systems are falling out of vogue, and the ongoing processes of Europeanisation in the European Union are serving to blur the lines between these legal systems to the (increased) detriment of a functionalist approach, this article takes the approach that both of these avenues of study are now of questionable utility. These are, of course, not new observations; nevertheless, this article will draw on the insights of systems theory to argue that the mere identification of sameness or alterity within the borders of the EU contributes little if these observations and discoveries cannot be operationalised, and that it is to this locus that the internal debate should shift.

**Sean Hennelly, Researching Sexualities: The Researcher and the Researched (smh45@le.ac.uk)**

The ethics and ideology of research have long been discussed in a number of contexts. Of particular interest has been the concept of objectivity in research, and this concept has been explored in a number of contexts. While researchers strive for objectivity, it has long been understood that in the context of sociology, researchers explore their subjects through a number of lenses, including gender, class, sexuality, and race, and furthermore, that researchers construct knowledge through their own experiences.

I will explore how my sexual identity impacts on my research in the wider field of sexuality and the law. My paper will explore how I construct my own identity, and drawing on research in other fields, how my identity affects my research with a focus on objectivity and also the relationship between the researcher and the research subject, drawing on the concept of otherness.

**Carlos Herrera-Martin, The Mexican Kelo: the 'Pascual Boing' case (uctlche@ucl.ac.uk)**

In this paper I analyse a case where the Government of Mexico City decided to expropriate the area where the most important workers' cooperative in Mexico had its plant. This cooperative produces soft drinks and they had an ongoing conflict with the owner of the land where the plant was located. The cooperative tried to buy the land but the owner refused to sell at any price. In this case, when the factory looked set to be closed, the government decided that keeping this plant functioning was in the public interest and they decided to proceed with the acquisition of the land using their expropriation powers on the February 14 2003. The owner was granted judicial review. In this case the Supreme Court had to decide whether or not the decision made by the lower court in which it declared unconstitutional the law that allowed expropriation to benefit specific companies that were in risk of going bankrupt, was correct. The Supreme Court reversed the lower court's decision and ruled that the law was constitutional but that the decision by the Mexico City government was invalid because it had not proven that there was a public interest in this specific case. I plan to use this case to highlight what is behind a property conflict and how social and political issues are transformed by the legal system in order to manage these issues and transform them into legal categories.

**Tamara Hervey & Aniek de Ruijter, Healthcare and the Lisbon Agenda (t.hervey@sheffield.ac.uk)**

In 2000, the European Union proclaimed (at a summit in Lisbon) that, by 2010, it would become 'the most dynamic and competitive knowledge-based economy in the world'. Part of a project that seeks to provide a systematic and theoretically-informed review of the 'Lisbon Agenda' against its overall objectives in its various policy fields, this paper considers the relationships between the EU's Lisbon Agenda and its emergent healthcare law and policy. Drawing on the documentary record and interview data with key actors in the European Commission, the paper will assess the successes (if any), failures, synergies and disconnects between the institutional, procedural and substantive features of the Lisbon Agenda (and in particular, its 'open method of coordination') and those of European healthcare law and policy.

**Noelle Higgins, The Need for Language Legislation: The Case of Northern Ireland' (noelle.higgins@du.ie)**

The Irish language is the vernacular language of thousands of people in Northern Ireland. Unlike Scotland and Wales however, Northern Ireland does not benefit from a specific language act. In fact, legislation which prohibits the use of Irish, and indeed, other languages, in the legal system is still in force in Northern Ireland. The Administration of Justice (Language) Act (Ireland) 1737 prohibits the use of any language, apart from English, with regard to the administration of justice in Northern Ireland. However, equivalents of this 1737 act were repealed in 1863 for other parts of the United Kingdom. Welsh speakers now have numerous rights with regard to their language under the Welsh Language Act 1993, as do speakers of Gàidhlig under the Gaelic Language (Scotland) Act 2005. Numerous call have been made for a language act for Northern Ireland, and various promises regarding the adoption of such a piece of legislation have been made by the government of the United

Kingdom, under the Good Friday Agreement 1998 and the St Andrews Agreement 2006. In addition, the United Kingdom ratified the European Charter for Regional or Minority Languages 1992 in 2001. However, a language act has not yet been adopted in the jurisdiction. The need for such a piece of legislation was highlighted in the recent case of *Mac Giolla Catháin v The Northern Ireland Court Service* [2010] NICA 24 in the Court of Appeal in Northern Ireland.

This paper will set out how the rights of Irish speakers in Northern Ireland are currently protected. It will then analyse the case of *Mac Giolla Catháin* and its implications for Irish speakers in the jurisdiction. It will conclude with a discussion of why a language act is needed in Northern Ireland.

**Rob Home, The significance of an address: Legal historical influences upon African urban governance (Robert.Home@anglia.ac.uk)**

Rapid urban growth in Africa poses great challenges to local government, complicated by spatial divides between urban areas created by past colonial 'masters' and peri-urban areas of hybridised communal/customary land ownership. Recent work in legal history and legal geography has explored the post-colonial legacies in land law, and this paper will draw upon the author's current task of editing a new book collection on African land law, and upon his recent field research in Kisumu, Kenya. Three aspects will be explored: the colonial and postcolonial institutions of urban government, particularly related to town planning; the legacy of colonial labour control in housing provision (or lack of); and the different land tenure and ownership arrangements found in urban and peri-urban areas, which create obstacles to effective urban land management and infrastructure provision. The 2010 new Kenyan Constitution and associated land policy reforms, including a reformulated division between state, private and communal land tenure, will be examined for their potential for better urban governance.

**John Horne, Is the Mental Health Tribunal really a Safeguard?**

The First-tier Tribunal (Mental Health), like its predecessor the Mental Health Review Tribunal, is seen by many, not least the judiciary, as a safeguard against unlawful/unjustified detention under the Mental Health Act 1983. But is it? This presentation will suggest that although there has been progress in recent years towards the Tribunal being a greater safeguard than hitherto, there is still some distance to go before the Tribunal can be as effective as it could/should be. It will recognise that the twin straitjackets of easy-to-satisfy statutory criteria and limited powers enable the Tribunal to readily adopt the role of a toothless tiger.

**Erica Howard, School Bans on the Wearing of Religious Symbols: claiming a Breach of Human Rights or Anti-discrimination Law in the British Courts? (e.howard@mdx.ac.uk)**

Bans on the wearing of religious symbols in education have been said to violate the fundamental human right to freedom of religion as well as breaching anti-discrimination legislation. This article will analyse British cases where a ban was claimed to be a breach of freedom of religion, as well as cases where the claim was based on a breach of anti-discrimination legislation. Cases of the European Court of Human Rights on bans as both a violation of freedom of religion and of the right to be free from discrimination will be examined as well because they are influential in the British cases. This analysis leads to the conclusion that, under British law as well as under European Human Rights law, a claim based on anti-discrimination law does not appear to have more chance of being successful in court than a claim based on freedom of religion because similar issues are taken into account in both decisions.

**Helena Howe, Changing models of ownership in land and copyright law (H.R.Howe@sussex.ac.uk)**

The paper argues that there is a dominant ideology of property in land, the 'liberal model', in which the rights of the property owner are perceived as being absolute. However, there is an alternative model, the 'stewardship model', in which property rights are intrinsically limited by obligations to the community. The community can be understood as having certain claims in respect of privately-owned land. The accommodation of these 'community claims' necessitates the imposition of constraints on the rights of the property owner. Whichever

model of property is dominant will have a significant impact on the development of constraints on property rights that can accommodate the community claims effectively. Although various constraints on property in land do exist, the influence of the liberal model has meant that many of these constraints have failed to develop into tools which could accommodate the community claims effectively. In the context of copyright law the community has claims to access and use copyright works that are analogous to the community claims in the context of land. Copyright law has long been influenced by the law of property in land and is currently being influenced strongly by the liberal model, which is undermining the development of limitations on the rights of the copyright owner which would be necessary to accommodate these community claims. It is suggested that the liberal model is, to some extent, being replaced by the stewardship model as the dominant ideology of property in land. The stewardship model provides a more sympathetic environment for the development of constraints on property rights that could accommodate the community claims effectively. If copyright law adopted the stewardship model as the dominant ideology of property, in place of the liberal model, this would facilitate the development of limitations in copyright law.

### **Alastair Hudson, Creating the law of finance: the inter-action of substantive law and financial regulation**

One of the most significant questions for the law of finance is how it can be established as a coherent intellectual and legal field, as opposed to being merely a descriptive account of something which is "done" in practice. That activity was the underlying theme of my book *The Law of Finance* (Sweet & Maxwell, 2009) but this paper would analyse the questions which that project raises, and their social ramifications in the wake of the financial crisis, in greater detail.

It is suggested that one part of addressing the dangers which the financial system offers to the world economy is to create a coherent law of finance which commands obedience by those who would otherwise ignore it, and which introduces meaningful principle to financial practice: achieving conscience ahead of profit. This is, of course, only one of many root-and-branch changes which need to be made to the financial system (and indeed to the very idea of capitalism) in the wake of the financial crisis, but it is an important part of changing the culture of that financial system and making it subject to the rule of law.

### **Alastair Hudson, Conscience, the home and social justice**

This paper measures the various case law approaches to the law on trusts of homes against David Miller's model of social justice (Miller, *Social Justice* (OUP, 1976)). The different effects of the various case law approaches become apparent when their outcomes in terms of social justice are identified. That model divides between: rights, deserts and needs.

"Rights" approaches relate to pre-existing entitlements to rights in property (based, e.g., on contract or inheritance), and the very different claims based on human rights. Significantly, the various, controversial "common intention" cases suggest a rights-based approach.

"Deserts" approaches rely on some deserving action or forbearance – e.g., detrimental reliance in proprietary estoppel – which law recognises as entitling the claimant to some right in the home. Desert is a contested term in philosophy because it raises value judgments.

"Needs" approaches are typified by housing law and social security law. *Baker v Baker* and other estoppel cases show how a remedy can address a claimant's needs instead.

The equitable principle of "conscience" does not fit neatly into Miller's model. Nevertheless, conscience is a very useful notion. While cases based on "unconscionability" (in this area and others) has been criticised as a central, organising principle, too little thought has been given to what it means to have a "conscience" in legal terms. The work of Norbert Elias (*The Society of Individuals*, Blackwell, 1991) Sigmund Freud (e.g. *Civilisation and Its Discontents*, 1929) and others suggests that conscience is something which is formed by inter-action with other people from infancy throughout life, and therefore an objective concept of what one's conscience should have prompted one to do is entirely feasible.

Consequently, not only does the whole of equity become coherent but also a concept of unconscionability may be used to assert value judgments in allocating rights in the home and in preventing defendants from unconscionably denying rights to claimants.

**Stephen Humphreys, The rule of international economic law? (s.j.humphreys@lse.ac.uk)**

In this paper I look at the relations between two broadly transnational projects: international economic law, on one hand, and the phenomenon of transnational rule of law promotion, on the other. These two projects are mutually dependent and both are today entering crisis. The paper lays out their respective teloi and their mutual interconnection, and suggests how their crisis too is interrelated.

International economic law qualifies as a 'project' in at least two respects. First, the instruments that comprise it are consistently represented as incomplete and in need of further extension, towards a goal whose broad parameters are generally agreed in principle, even if the precise means of reaching them are deeply contested. International economic law is also a 'project', second, in that it presents itself as a vehicle for the progressive orientation of national legal systems towards a certain normative shape—through processes of membership negotiation and in-country implementation. Transnational rule of law promotion—by which I mean the dedication of multilateral and bilateral development funding towards building 'the rule of law' in recipient countries—is a self-proclaimed 'project', in that it is explicitly cast in terms of achieving desirable and equivalent results in numerous legal systems around the world.

These projects are intertwined. On one hand, international economic law assumes state-level mechanisms to facilitate its operation. On the other, transnational rule of law promotion draws on the normative authority of international economic law to justify its interventions. The first assumes the existence of formal legalism within and between states; the second actively generates the conditions for legalism to flourish. Together they generate the reasonably plausible spectacle of a transnational public sphere. And yet, following deadlock in Doha and the shifting fortunes of international development aid, both regimes are today entering crisis.

**Caroline Hunter, The tenancy for life – history, myths and reality (caroline.hunter@york.ac.uk)**

This paper considers the coalition government's proposals to end "the tenancy for life" for tenants of social housing. It does so by looking at the history of the secure tenancy and questioning the premises on which the justifications for the change in tenancy rights are built. The paper questions both the legal basis and the policy arguments which have been used.

**Caroline Hunter, Legal Disputes (caroline.hunter@york.ac.uk)**

This paper will look at the reported legal decisions that have involved the two estates. In Dolphin Square these arose out of the transfer of ownership in the 1960s to the local authority and a housing association resulting in a change in the status of the tenants. In Spa Green the dispute is much more recent and arises from the changes in ownership following on from the right to buy. The paper will examine what the nature of these disputes can tell us about the relationships between the different owners and occupiers of the estates at different times and how they may be disrupted by changes in legal status.

**Tina Hunter, Renewable Energy in Australia: the Socio- legal dimension (tihunter@bond.edu.au)**

Australia, like most developed nations, has made a commitment to develop its renewable energy resources. The vast majority of the renewable energy generated arises from the Snowy Mountains hydro-electric Scheme, where the power is utilised only in peak periods to provide maximum economic return for shareholders.

On face value, Australia seems like the perfect country to develop renewable energy. With falling oil and gas production and marginal petroleum fields, there is a need to find alternative sources of energy to ensure energy security. Australia is one of the sunniest climates in the world, making the development of solar energy resources attractive. In addition, the southern third of Australia is exceptionally windy, as a result of its location adjoining the southern Ocean. This means that the development of wind energy would be of particular value. Yet there is much resistance to the development of both of these forms of energy, from both the government and the community. Furthermore, there is no clear intent within the policy framework as to the role of alternative energy in coal-rich Australia.

This paper will focus on the socio-legal issues associated with the development of renewable energy in Australia, focusing on the changing policy framework and the legal responses to

the shifting framework. Firstly, it will provide an overview of the legal and political landscape that exists for renewable energy in Australia. Secondly it will focus upon the difficulties encountered and that continue in the development of wind energy in Australia. The legal issues will be examined within the political and social framework of the '20 by 2020' renewable energy promise made by the Australian government. Finally the paper will draw some conclusions as to whether the existing legal, political and social conditions in Australia are capable of delivering 20% renewable energy for the generation of electricity in Australia by 2020.

**Christopher Hutton, Objectification and transgender jurisprudence: the dictionary as quasi-statute (chutton@hku.hk)**

This paper reviews common law judgments on transgender rights, and traces the confusion in the case law about whether gender identity is a question of 'law' or 'fact'. Where a judgment presumes that questions of linguistic fact are primarily at stake, there is strong tendency to cite and even apply dictionary definitions in the determination of an individual's gender identity for purposes such as marriage. Appeals to current usage, or ordinary meanings, as well as to 'social consensus', are also widespread. This is true for example in the ongoing case of *W v Registrar of Marriages* HCAL 120/2009 (5 October 5 2010) in Hong Kong, which will be heard by the Court of Appeal sometime in 2011. The common law judge's search for orientation in the world beyond law frequently leads to the dictionary. Definitions are cited and applied as if they in some sense governed the domain of linguistic fact like a form of quasi-statute. The widespread use of dictionary definitions for terms like 'man', 'woman' and 'marriage' amounts to objectification through definition, and raises serious ethical questions. Courts which follow this method fail to distinguish meaningfully between cases where what is at stake is the classification of an object for tax purposes, and those in which the reflexive self-determination or self-definition of an individual is subject to legal contestation.

**Richard Hyde, (Not) Enforcing Following Outbreaks of Food-borne Illness: It's About the Evidence (l1xrh4@nottingham.ac.uk)**

Much consideration of enforcement officer discretion in the enforcement of regulatory crime focuses on decisions to take (or not take) formal enforcement action based on public interest considerations. The importance of co-operative compliance strategies and the positioning of the law as a 'last resort' have been explored. But what about cases where compliance strategies have failed and a moment of last resort reached – what factors determine whether enforcement action is taken in these cases?

Drawing on qualitative research (semi-structured interviews and documentary analysis) into the behaviour of environmental health officers and other actors dealing with outbreaks of food-borne illness this paper argues that in these cases, where officers express their desire to prosecute businesses following outbreaks, it is often evidential considerations that act as a break on this. The evidential difficulties in taking enforcement action following outbreaks are functions of the legal framework applicable to food safety and food hygiene law and the decisions taken by enforcement officers during their investigation of the outbreaks. The difficulties of taking enforcement action alleging that food was unsafe, where the product has often been destroyed by eating and where epidemiological evidence is necessary, are explored. The relative ease of proving hygiene offences is contrasted, but the difficulties with relying on these offence following outbreaks of food-borne illness are considered.

Further, this paper examines the dual goals of investigation, for the purposes of outbreak control and of obtaining admissible evidence on which to base enforcement action, and how this can impact on the possibilities for prosecution and other forms of enforcement action, particularly in relation to information obtained verbally from businesses and their staff.

**Rhoda Asikia Ige & Kemi Adekile, The women question in the workplace – Beyond the law**

Gender issues in employment have been one of the core principles which International Labour Organisation has tackled through since its inception.

Since the end of Second World War and the emergence of Human Rights, Women's Human Rights have been addressed especially after the UN Conferences which began in 1975.

However, Women's question in the economic sphere with particular reference to employment has been a thorny issue despite plethora of laws and policies. Gender inequality is a global problem; the paper's focus is on Nigeria. The paper will explore reasons why law has failed to address gender issues in the world of work and proffer solutions beyond the instrument of law.

**Robert James, What do 'Virocrats' and 'mini-Doctors' think about rights? (r.james@bbk.ac.uk)**

HIV activism was a hot topic in the first decade of the epidemic with an outpouring of research on its impact on society, politics and medicine. However, academic interest in HIV activism in the Global North disappeared almost entirely when successful treatment appeared and most work now focuses on the rest of the world.

The language of 'rights' remains a prevalent and powerful discourse among HIV activists across the world but since the advent of treatment HIV activists in the UK have become an integral part of the bio-medical systems; in treatment trial oversight, in providing of continuing medical education (CME) to clinicians and the management of patients. Some HIV clinics have also employed activists specifically for their activism role to enhance their governance system. These individuals have become state actors, 'virocrats', while others take on the role of medical advice providers, 'mini-Doctors', and the remaining community based organisations tender to provide health services.

Activists have moved from outsiders demanding their rights to insiders actively engaged in the negotiation of how those rights are managed and the care of people with HIV is provided. This ethnographic study looks at how this experience of continuing state integration has shaped HIV activists view of a 'right to health'.

**Michael Jefferson, Sheilas' Wheels: Recent Attempts to Rebalance Women's and Men's Legal Positions in the UK (M.Jefferson@Sheffield.ac.uk)**

The first Triennial Review of the Equality and Human Rights Commission, *How Fair is Britain?*, was published in late 2010. Some findings may be contrary to accepted wisdom. We all know that on average in the UK and throughout the world men die earlier than women, and that at A-level and indeed in all other UK exams women are outperforming men, but compare these four points.

- If Chinese ethnic females without free school meals are the best performers at A-level, which group is the second best performer? I'll disclose the answer in the session.
- In the UK more blacks proportionately are in prison than are in the USA!
- Is there any age at which women earn more than men in the UK? Women earn on average more per hour than men between the ages of 21 and 29. There are various occupations in which overall women earn more than men too.
- Which parts of the Equality Act 2010 has the Coalition refused to implement? See me for details.

(All points were put as questions to my incoming Employment Law students over the vacation.)

This session is devoted to recent developments across UK law including equality law, criminal law (the abolition of the defence of provocation), and insurance law which tell us something about the changing legal, social and economic position of men and women in 2011. The focus is on the advice of A-G Kokott in *Association Belge des Consommateurs des Test-Achats v Commission* but there is no expectation that anyone in the session will have read it.

**Gemma John, Do I have to use it?: Exploring the 'right' entailed in access information legislation in Scotland (Gemma.john@manchester.ac.uk)**

Providing people with a right to access information held by public authorities and various levels of government, the Freedom of Information (Scotland) Act 2002 came into force in 2005. Introduced with great pride and enthusiasm, the new legislation was seen as a marker of Scotland's openness and independence from the rest of the UK as it formed the foundations of the new Scottish Parliament established in 1997. Nevertheless, the Scottish Information Commissioner, responsible for implementing and enforcing it, has been left disappointed by its lack of use. Members of the public appear keen on having it but less keen on the idea of using it, and leave decision-making in the hands of campaigners, journalists, and politicians who regularly make information requests.

This paper explores the concepts of the person and knowledge framing the right to access information in Scotland and the way in which users' actions extend and challenge these concepts. It is as if a right in the context of access to information, for the users, is more about the equal status it grants them or the right to choose—suggesting users and implementers are working with different kinds of 'rights' in mind. As members of the public pick and choose the right to which they subscribe, the legislation's lack of use has led to lost momentum—there is little argument for increasing the Scottish Information Commissioner's power or budget, and extending the Act's influence to new areas.

### **Carolyn Johnston, Best interests in healthcare decision-making – tick box or real engagement?**

'Best interests' is well established as the standard for decision-making for adults who lack capacity. However it has been criticized as "self defeating, individualistic, unknowable, vague, dangerous and open to abuse." (Kopelman, 1997).

The Mental Capacity Act 2005 sets out the best interest checklist, which requires the decision-maker (usually the consultant with care of the patient) to consider certain and possible gains/losses flowing from proposed treatment options. Not only are the medical outcomes to be considered but also wider welfare issues, including specifically the patient's wishes and feelings and the beliefs and values that would be likely to influence his decision if he had capacity. These may be elucidated through discussion with relatives/carers and the decision-maker has a duty to take into account their views where it is practical and appropriate to do. My focus is whether these holistic issues are in fact given due weight. Within the hierarchy of factors included in the best interests appraisal it could be expected that clinical factors will predominate. Medical outcomes, although not always certain, may be seen as dependable and referable to evidenced outcomes (*DH NHS Foundation Trust v PS*, 2010). By comparison, family members may be unreliable in their knowledge of the patient's wishes, feelings and beliefs (Vig, 2006) and may find them difficult to articulate with sufficient authority and to the necessary evidentiary standard (Tonelli, 1997).

Clinicians are required to demonstrate objective reasons for their decisions. However, a study of intensivists in Canada reveals that documentation of patients' own perspectives was low, ranging from 2- 18% (Ratnapalan, 2010).

Multi-disciplinary meetings are often the best way to decide on a person's best interests. Clinical ethics committees can provide an appropriate format in arriving at a balanced view of a patient's best interests, widely perceived.

### **Caroline Jones, Public policy, birth certificates and donor-conception: Making their mark? (Caroline.Jones@soton.ac.uk)**

'Greater than the tread of mighty armies is an idea whose time has come.' (attributed to Victor Hugo)

This paper focuses on the debates around 'marking' the birth certificates of donor-conceived people (i.e. with the 'fact' of donor conception), with particular emphasis on the processes by which a recommendation initially made by the Warnock Committee, but rejected in the Parliamentary debates on the Human Fertilisation and Embryology Bill 1990, resurfaced as a serious policy option in 2007. Although ultimately this policy was not pursued, and therefore it does not form part of the Human Fertilisation and Embryology Act 2008 or associated legislation, its re-emergence as a potentially feasible option is nonetheless interesting; not least in the context of the ongoing debates in this field as to whether or not parents of donor-conceived children should be under a duty to disclose to their children the mode of their conception.

This paper will consider various aspects of policy formation in this field, including the significance or otherwise of the views of the public and stakeholders, in order to reflect on whether or not it seems likely that this idea's time will soon come.

### **Imogen Jones, Still Just Rhetoric? Judicial Discretion and Due Process (Imogen.jones@manchester.ac.uk)**

Judicial discretion is crucial in determining whether, in practice, those accused of crimes experience the protection of due process safeguards during the trial process. This paper evaluates two examples of evidential rules and their judicial interpretation, regulating the



admission of bad character and hearsay evidence. They are assessed in the context of the common critique that discretion is utilised primarily to the effect of denying due process protections in practice.

This analysis takes place in the particular context of the punitive turn in the politics of criminal justice. A detailed examination of the interpretation of s114(1)(d) and s101(1)(d) in conjunction with s101(3) of the Criminal Justice Act 2003 is carried out in order to gain insight into the modern role of judicial discretion. Conclusions are drawn by proposing some theoretical models of the relationship between statutory content, the interpretation of those provisions and the effects of these on the experience of criminal defendants.

**Jackie Jones, EU efforts on human trafficking: the new draft directive (jackie.jones@uwe.ac.uk)**

The paper looks at recent proposals in the area of human trafficking both for forced labour and sexual slavery. The new EU draft directive aims to help victims of trafficking, broaden the definition of human trafficking as well as address some of the concerns raised by Third Sector organizations. The UK has announced its intention to opt-out of the directive and the paper will assess some of the possible implications for victims of trafficking in the UK.

**Stine Jørgensen, The Free Movement of students (Stine.joergensen@jur.ku.dk)**

In recent years education has become a prioritized area within the European Union. Quality education is a central theme in the Lisbon 2020 strategy and in obtaining the goal of making Europe the most competitive knowledge strategy. Within the EU member states education and in particular the education of students from other EU member states is a very sensitive area. The aim of my paper is to look into the free movements of students within the European Union within in these different contexts. In particular, the principles of free movement and of non-discrimination on grounds of nationality have proved to be of central importance as the legal basis for facilitating the right of migrant students to obtain an education in another Member State.

**John Jupp, The Interim Criminal Procedure Code 2004. An appropriate legal transplant for the reform of Afghanistan's criminal law framework?**

Reform programmes undertaken following UN peacekeeping operations in the 1990's and military interventions in the 2000's have reflected a consensus amongst the international community firstly, that promoting transitions from conflict to peace in post-interventionist countries is dependent on the establishment of the rule of law and secondly, that the development of rule of law requires functioning criminal justice systems and criminal law frameworks that comply with international standards of due process, fair trial and human rights.

When seeking to install these ideals, international advisors have engaged in extensive programmes of legislative reform and, in doing so, have often resorted to transplanting foreign solutions. Yet a key area of concern is whether legal transplants actually represent legitimate tools for legislative reform in these environments. Contrasting theoretical views on their value and feasibility as well as conflicting UN recommendations during the last decade fail to provide any definitive reassurance for legislators on their potential as mechanisms for developing law.

This paper adds to this ongoing debate by examining the Interim Criminal Procedure Code 2004 ('ICPC'), drafted by international actors and developed by transplanting foreign legal provisions. It considers whether it was appropriate for this law to have been developed by legal transplantation. Drawing on information collected from interviews with Afghan legal personnel, international caseworkers and prosecutors it finds that there have been both positive and negative outcomes deriving from its transplanted nature and content but that the main constraints on its successful reception are connected to the challenges facing the Afghan state criminal justice system. Law reformers can be justified in employing legal transplants to promote legal change but the reception of transplanted law is tied to local contextual issues, highlighting a relationship between law and society and at the same time cautioning a need for legislators contemplating transplanting law to conduct assessments on the efficacy of developing law in this way by evaluating the potential for their successful reception prior to their introduction.

**Mwenda Kailemia, An ethnic neighborhood and its usual suspects; Policing, race and ethnicity among young people in the Southside of Glasgow (Mwenda.kailemia@gcu.ac.uk)**

The focus of this presentation is on the influence an ethnic neighborhood has on young people's perceptions of one another across race and ethnicity and the policing needs the environment forces on their everyday lives. Using data from a recent Case study on the interface of local policing and sudden demographic changes following the enlargement of the EU in 2004 to include the A8 countries I argue that to gauge the effectiveness of the reassurance policing agenda it is important to reach beyond the usual assessment of policing strategies and partnerships for young people from a police point of view (which focuses on quantitative measures of effectiveness such as 'the number of bodies on the ground', amount of arrests made, or the orders issued or the number of meetings held with the local young people) to qualitative questions of whether the local young people are benefitting from such strategies and how the policing arrangements could respond better to young people's policing needs while acknowledging their diversity- and the broader legal and institutional context of the apparatus, such as the National Action Plans (NAPs) and the 'No-recourse to public funds' framework of the national acceptance of EU migrants.

**Hyo Yoon Kang, Free and Public Knowledge? Assessing the Role and Effects of Patent Classification in the Dissemination and Retrieval of Patent Information (hyo.kang@unilu.ch)**

The fundamental quid pro quo in patent law entails the granting of a limited monopoly right in the use of an invention in return for the disclosure of the inventive knowledge through the patent document. Such a bargain assumes that the public benefits from the free disclosure of inventive knowledge in the form of patent documents. In order to fulfil this important requirement, it would seem essential that patented knowledge can be accessed and retrieved with ease by the public.

In this paper, I explore whether this public knowledge requirement is fulfilled by the patent classifications that identify and order inventions into categories in order to record them and to enable their retrieval. Taking a case study of the making of a new patent category in the International Patent Classification, I argue that the patent classification is designed as an epistemic and practical grid, which primarily serves the administrative purpose of identifying, routing and managing patent documents, but which does hardly take into account its subsequent ease of use to scientific or general public users. Drawing on patent information practice and socio-legal analyses of patents and documents, I ask whether public interest is sufficiently served by the current ordering of patent information to uphold the legitimacy of the patent bargain.

**Nicolas Kang-Riou, Confronting the Human Rights Act? (N.Kang-Riou@salford.ac.uk)**

This paper will give a short overview of the rationale behind the book 'Confronting the Human Rights Act: Contemporary Themes and Perspectives', forthcoming at Routledge. Initially, this book was meant to be a collection of different papers presented at the Salford Human Rights Conference in June 2010, which was concerned with the first 10 years of Human Rights Act 1998.

However, the book is not simply a compilation of diverse views. It is based on the insight that something different was needed from the standard approach of talking about the 10<sup>th</sup> anniversary of the implementation of a piece of legislation. Usually, at least when human rights law is involved, lawyers or legal practitioners form the overwhelming majority of speakers.

The idea of this paper is to consider why it is structurally necessary to confront the implementation of a constitutional document such as the Human Rights Act, not only from the internal dimension of the legal interpretation of norms, and of the legal discourse, but on a much wider scale. The internal interpretative debate, though needed, must be confronted with different perspectives in order to gain a clearer understanding of the issues faced within this field.

First, the structural issues affecting the human rights legal discourse must be explored. Second, a voice must be given to the people falling foul of the structural under-inclusiveness of the legal discourse, where individuals fail to be recognised as actors even if they seem to experience intense violations of human rights. Such is the case of so many asylum seekers or

'illegal' migrants, or in the case of blacklisting in the construction industry. The personal testimonies manage to put flesh on this under-inclusion, and give voice to people who are autonomous actors within their situations, not only 'victims'.

And finally, the practice must be analysed in its particular social context, through a political, sociological, historical or feminist analysis. It is only through such a kaleidoscopic approach that something akin to truth can be revealed, and the next moves planned. The second paper of this panel, delivered by Susan Millns, is a good illustration of this need.

### **Ilias Kapsis, Reform of financial regulatory and supervisory architecture in EU: will it help to prevent future financial crises? (i.kapsis@bradford.ac.uk)**

The financial crisis revealed serious weaknesses in the EU system of financial regulation and supervision, which put at risk the stability of the financial sector of EU. In response to the crisis EU presented a reform package that would be importing serious changes to the system of financial regulation and supervision.

In respect of regulation, new legislation was adopted aimed at strengthening the rules in areas where the crisis revealed serious weaknesses such as the capital requirements for banks, the deposit guarantee schemes, the remuneration of bankers and the regulation of Credit Rating agencies. More initiatives are currently under way whereas EU has intensified an effort to achieve international cooperation and coordination on a number of important regulatory issues.

In respect of supervision, the Commission took into account the proposals of the Larosière group of experts which found that despite the creation of the single market EU's supervisory framework remained fragmented along national lines suffering from insufficient supervisory powers and policy coordination. The Commission proposed the creation of supranational bodies capable of ensuring the desirable cooperation and of addressing weaknesses both at the macro- and micro-prudential supervision levels.

In this paper I am looking at the EU proposals seeking some early evidence about the ability of the new system to prevent future threats to financial stability.

### **Jeff Katcherian, Tolerating cultural rights, purifying experience: The limits of policy and the myth of legal pluralism in the EU**

Following my research on European Union bureaucrats and members of civil society, I examine the production of EU cultural policy recommendations and local projects that aim to foster intercultural dialogue and tolerance throughout Europe in order to manage cultural diversity. One such project I investigated was the "Days of Dialogue" initiative. More specifically, I joined a group of non-governmental organizations in a three-day seminar in Holland to learn about "dialogue tables" - community organized roundtables aimed at encouraging diverse individuals to talk with one another. This seminar focused on dialogue tables that occurred in both the Netherlands and in Germany. The focus of these dialogue tables was not on debating rights, history or power but rather on sharing experiences. In outlining my experiences in training sessions that develop this sort of dialogue, I trace how the notion of policy and the way it is implemented are being challenged and redefined through the practice of sharing experiences rather than through mechanisms of evaluation or discourses of human rights. Although many of my informants from the European bureaucracy and civil society constantly stressed the necessity of fundamental human rights, this paper will focus on the legal-like techniques shaping the contours of European identity and attempting to manage European culture that extend beyond "rights." The community roundtables, however, also demonstrate the inevitable limits that confound these challenges to "policy" production and implementation as not only a positivist approach but a national one as well; this was demonstrated through the two, often contested, ways in which dialogue tables were run in the Netherlands and in Germany, often revealing the specter of Nazism lurking in culture-talk in the latter. I ask, how does intercultural dialogue express the limits of the culture concept and the way legal pluralism animates a form of cultural pluralism that is paradoxically not about toleration but about purification?

**Heather Keating & Jo Bridgeman, Caring responsibilities and crimes of compassion?  
(h.m.keating@sussex.ac.uk; j.c.bridgeman@sussex.ac.uk)**

The focus of this paper is upon crimes of compassion, that is, recent criminal cases where a parent has killed or assisted to die a child, who may be an adult, and at the time of death that child was suffering from severe disabilities, debilitating injury or chronic illness. We examine, and contrast the nature of family responsibilities and responsibility as understood by the criminal law, the reasons given by the parents and the way in which the criminal law categorises and responds to such behaviour. The criminal law categorisation of such cases into murder, manslaughter on the grounds of diminished responsibility, and assisting suicide, while appropriate for some cases, does not allow for the full story of other cases that we explore to be both told and taken into account. A fuller account requires consideration of the invisibility, gendered nature, and lack of value, of care; the privatization of care; and, obstacles to caring. We conclude by arguing for an understanding of responsibility as both accountability and as response.

**Amanda Keeling, Challenges in Determining Deprivations of Liberty for Adults Who Lack Capacity (alk43@medschl.cam.ac.uk)**

The use of 'purpose' in determining the existence of a deprivation of liberty was introduced into English law in *Austin v the Commissioner for the Metropolis*. It has recently been applied to social care situations in *Re MIG and MEG* (subject to appeal) and *Re A* and *Re C*, both of which involve people with learning disabilities. These cases suggest that purpose can be used to determine the existence of, rather than simply as a justification for, a deprivation of liberty. In this paper, we argue that the framework that has resulted from the 'Bournewood' case was not initially intended for people living in their family homes or care homes, and that, therefore, it presents some challenges in situations in which restrictions are required to provide care that is needed to maintain and enhance the quality of life of individuals with enduring and complex difficulties in community-based settings.

**Tobias Kelly, The Shame of Torture (Toby.kelly@ed.ac.uk)**

This paper is about the shame of torture. Human rights organisations, of many different hues, seek to expose violations and bring about change through the use of shame. Without direct means of enforcement, human rights monitoring relies on the persuasive power of shame and exposure in order to bring states into line with the international commitments. Shaming is thought to work because it forces states to bring their actions in line with the normative values that they claim to uphold. If shame requires standards which can be judged against, and exposure when these standards are not met, international conventions and their monitoring committees provide both. Torture seems to be the perfect human rights violation for shaming strategies, as few states are willing to publicly acknowledge that they participate in torture. This chapter focuses on the interactions of the British government and human rights groups with two most prominent international human rights monitoring organisations that focus on torture, the European Committee for the Prevention of Torture (CPT) and the UN Committee Against Torture (CAT). Its central argument is that the shame of torture easily dissipates within bureaucratic regimes. Human rights monitoring is not simply a transparent form of information gathering, revealing information to the wider world, but can hide as much as it reveals. The particular methods through which monitoring produces knowledge about torture lead to a focus on standards and further monitoring mechanisms. As a result, the shame of torture is dispersed into arguments about procedure. If shame relies on an audience as well as a sense of failure, the focus on broad policies means that it is never clear when failure takes place, or if anyone is watching.

**Ursula Kern, Criminalising annual accounts – A way to transparency and trust?**

The trustworthiness of financial statements is crucial for economic behaviour of all actors involved. Without the presumption of a true and fair display of a company's financial situation trade is made more and more difficult as - especially when liability is limited - (potential) creditors and investors are more likely to enter and continue a business relationship with a solvent company. Therefore, and to avoid additional charges for risk compensation, it is necessary for the company to present its performance in the best possible way. Though,

there is only a thin line between the use of allowed options in financial statements and deceit. The paper analyses the possible responses in case this border is crossed and false or misleading statements in bookkeeping and accounting are used. However, the reality is even more complicated than saying that all misconduct needs to be penalized with the consequence that the main question is if criminalisation is necessary to secure transparency and trust. Hence, the question is raised if criminal sanctions are an efficient instrument of deterrence in the context of accounting and auditing. Moreover, the economical consequences of penalisation and non-penalisation are contrasted and it is explored if criminalisation of false statements in accounts can even work in a preventive way with the aim that subsequent misbehaviour like corruption or tax fraud can be detected more easily or even circumvented. Furthermore, the methods of criminal sanctions in the UK and Germany are briefly contrasted in terms of point in time, responsibilities and consequences. These results are particularly interesting in conjunction with the possibility of harmonisation in the area of criminal law through the Treaty of Lisbon and may lead to a common European approach on financial crime.

**Kirsten Ketscher, Intersectionality in the intersection between the argumentative model of the CEDAW optional protocol on the one side and the European Court of Justice and the European Court of Human Rights on the other side (Kirsten.Ketscher@jur.ku.dk)**

The UN Cedaw optional protocol came into force in 2000 and is accepted by a majority of European states. Until now 11 decisions have been made under the protocol. The Cedaw convention must be considered both part of the EU-acquis and part of the legal base for the European Human Rights Convention. The Cedaw-convention has been mentioned in the preamble to several EU-directives. But the European Court of Justice has hardly ever made any reference to CEDAW. The same goes for The European Court of Human Rights. The aim of this paper is to look into the argumentation of selected decisions from the three foras in order to pinpoint the kind of gender justice you get from them. The assumption is that each of these foras mirrors its own legal rationale. This creates a legal unrest which could be a weakness but also a strength.

**Smita Kheria, Copyright and Digital Art: Taking forward a study with individual creators (Smita.Kheria@ed.ac.uk)**

Copyright law has faced considerable challenges, both conceptual and practical, from the onslaught of digital technologies and consequently been strengthened. The digital environment enables creation of not only many different types of creative works in which copyright may or may not subsist, but also facilitates their creation, dissemination and experience in very diverse contexts and manifestations in different forms, both of which are continually growing in number. One of such contexts is digital art practice. This paper focuses on the interaction of copyright with the everyday life of creators and draws upon the findings of my earlier research, where I used first hand accounts from digital artists to explore what copyright law means in the local context of their creative practice based in the digital environment. It questions and explores possible routes of taking such findings forward, including investigating the emerging and prevalent business models in the area of new media art and the role played by copyright law in such models.

**Richard Kirkham, Measuring the impact of the ombudsman (R.M.kirkham@shef.ac.uk)**

In this paper I will present my early thinking on the empirical task of measuring the impact of the ombudsman. As has been commented on elsewhere, there is little empirical evidence to support the claims made in favour of the ombudsman institution. This is unfortunate, as we live in an era when the Coalition Government has made clear its desire to reduce the numbers of public bodies in operation. Although at present no direct attack has been made on the ombudsmen schemes currently in operation, it is important that consideration is given to the means by which a neutral evaluation of their effectiveness could be made.

**John Kleba, The Nagoya Protocol, International Justice and Legal Pluralism (J.B.Kleba@warwick.ac.uk)**

The recent established Nagoya Protocol, as part of the Convention on Biological Diversity, sets a new legal framework in international law concerning the rights of indigenous peoples

over their traditional bio-knowledge, when this is used in industrial development and in intellectual property (access and benefit sharing regime). There are many controversies about the implementation and interpretation of the Protocol. This article addresses specifically the subject of fairness and equality. First I ask if the access and benefit sharing regime represents a distributive or a commutative justice scheme, and which insights can be derived from different ethical-political approaches of justice. Second, I contrast the universalism from the demand of international justice and international law with the problem of legal pluralism and the particular views of indigenous peoples on the issue. The intended debate discusses in which ways fairness and equality are constructed and interact between the dimensions of principles of justice, of legal frameworks, of cultural otherness and of pragmatic applications in empirical cases.

**William Kovacic, Criminal Enforcement Norms in Competition Policy: Insights from US experience (wkovacic@ftc.gov)**

The US is the most experienced and on most accounts the most effective jurisdiction in relation to criminal enforcement of anti-cartel laws. It also has led advocacy efforts in support of criminalisation around the world. At the same time, it is important to acknowledge and understand the particular context in which criminal cartel enforcement has developed in this jurisdiction. This paper will draw on the concept of enforcement 'norms' to explain this context and elicit insights that may be relevant to other jurisdictions contemplating or embarking on cartel criminalisation. Understood as consensus views about how members of a group should behave, 'norms' transcend formal rules and institutional frameworks. They are affected by a range of forces, external and internal, to enforcement agencies and are prone to change and adjustment over time. Drawing on the experience of the US enforcers, the paper will identify the particular norms that an enforcement agency should strive to develop as a means of managing the internal and external environments and meeting the challenges entailed in criminal enforcement.

**Cheryl Lawther, Unionism and the Fearful Past: Unpicking the Opposition to Truth Recovery (clawther01@qub.ac.uk)**

In transitional justice scholarship and praxis, truth recovery is now considered an axiomatic element of the post conflict template. Given the legacy of over 30 years of violent conflict, untold destruction and continuing mistrust and division, there has been a considerable energy devoted to the question of whether Northern Ireland should have an official examination of its past. Existing mechanisms of truth recovery, including public inquiries and police-led investigations and the broader debate on a formal truth recovery process, have not, however, been welcomed uncritically. Some of the strongest and most visible opposition to a formal truth process has been from unionist and loyalist political parties and associations. Paradoxically, this opposition has been paralleled by a comparative absence of scholarly investigation of their views. Based on extensive and original fieldwork with key unionist and loyalist politicians and others, this paper seeks to critically 'unpick' their reluctance to engage with the truth debate and present a fuller understanding of the practical and ideological backdrop to their misgivings. Drawing on notions such as denial and blamelessness, this paper will argue that alongside concerns as to the effect of a truth process on political and social stability and the potential retraumatisation of participants, many of unionists and loyalists oppositional discourses to truth recovery are grounded in well established ideological beliefs and perceptions. The longevity of these factors poses significant questions for the future development of the truth recovery debate in Northern Ireland and the place of unionists and loyalists within it.

**Maria Lee, Tort, regulation and sustainability (maria.lee@ucl.ac.uk)**

Quite how tort and regulation relate to each other is far from straightforward, and notwithstanding established academic interest, still surprisingly under-explored. Even descriptively, what tort courts 'do' with regulation is unclear. And normatively, the relationship between tort and regulation raises perennial questions about the public and private, collective and individual, as well as the blurred lines between those categories. Tort and regulation interact along many different dimensions. Regulatory norms of quality can influence the point at which pollution becomes damage, or the nature and scope of

common law duties; regulation might affect the assessment of reasonableness in negligence or private nuisance, the nature of a defect in products liability, and even causation. This broad debate is of considerable relevance for renewable energy projects, and for environmental and sustainability issues more generally. As well as discussing the diverse aspects of the interaction between tort and regulation, I will examine the most obviously significant case law and legislation, that is the relationship between private nuisance and statutory authority or planning permission.

**Puseletso Letete, Between Tax competition and Tax harmonisation: Issues of VAT Policy co-ordination in SADC countries (letetp@unisa.ac.za)**

This research examines strategies which can be adopted for achieving regional integration through the harmonisation of Economic and Business Laws in Southern Africa. The research looks into the extent to which harmonisation of Value Added Taxes (VATs) in SADC member countries can be used as one of the tools towards economic integration and development. The other related important aspect which this research looks into is the issue of harmonisation of VAT laws and the question of tax competition in the broader context of impacting on economic activities of member countries and their full integration process. This analysis is especially applicable within a process of economic integration, for example, in a common market or economic union or a customs union.

VAT as a net turnover tax on all production stages avoids the so-called cascade effects and is also neutral regarding national competition. Because the final consumption price easily and clearly expresses the whole effective tax burden, the VAT makes the border equalization easy and controllable and is especially suitable for the promotion of trade within an economic union. Deeper integration means increased exposure to the consequences of the removal of barriers to trade and factor movements. The question which the research attempts to answer is, how will this approach towards regional integration enhance the improvement of economic and business laws within SADC member countries?

**Mike Levi, Criminalising Financial Crime: Some Lessons for Coherence**

The term 'financial crime' has come into increasing use in official discourse. This paper will unpack what it means and examine the diverse ways in which different sub-sets of activity have been criminalised in law and in practice, and what this tells us about media imagery, resource constraints and political power. Within this framework, the impact of the Global Financial Crisis on this criminalisation process will be explored.

**Ben Livings, Sports and Rights and Criminal Wrongs (Ben.Livings@sunderland.ac.uk)**

The Olympic Charter proclaims in its Fundamental Principles Of Olympism that '[t]he practice of sport is a human right. Every individual must have the possibility of practising sport', and human rights have come to assume an important place in the law as it relates to sport. However, does the very enterprise of sport bring with it positive rights of participation? If so, can these override, displace, or at least invoke exceptions within, the criminal law? This paper will examine a potential right to consent to harm, as derived from rights to autonomy and self-determination, and the interface between rights and the criminal law as it relates to contact sports.

**F Londras, Lawfare in the 'War on Terrorism': Whither Legal Ethics? (fiona.delondras@ucd.ie)**

Far from being a law-free zone, as some have argued, the War on Terrorism is—and has always been—saturated in law. At every step along the way, law and legal advice have been used by governments to legitimise and future-proof controversial decisions as to the use of force, the nature of interrogation, the lawfulness of detention etc. Corporate legal counsel have drafted, looked over and advised signature of contracts for the provision of services to governments involved in the war on terrorism that involved the corporations in question in unlawful activity, including extraordinary rendition. Third countries, such as Ireland, that have been tangentially involved through the provision of refuelling stops and fly-over rights to US military aircraft have received legal advice on the legal implications of these political decisions. And, of course, lawyers and legal advocacy groups have been heavily involved in trying to secure the liberty of individuals caught up in the web of the War on Terrorism, including by acting as special advocates for individuals subject to control orders in the UK.

Everywhere one looks in this protracted and complex 'war', one sees lawyers. This paper explores the complex and sometimes conflicting role that lawyers and legal professionals are asked and expected to play in the War on Terrorism (providing advice allowing for unlawful activity, on the one hand, and legal representation that vindicates individual rights, on the other) and the implications thereof for law as a professional discipline in which ethics, as much as (perhaps mythologised) 'values', are intended to act as powerful regulatory mechanisms.

### **Max Lowenstein, How best to punish theft offenders: Comparing English judicial perceptions towards their sentencing aims**

This socio-legal research paper critically examines judicial perceptions towards six theft specific sentencing aims in England. The sentencing aims that were posed consist of: retributive justice; deterring future theft; the use of custody to stop theft re-offending (general prevention); denouncing the theft offender's crimes publicly; reformation of the theft offender (individual prevention); financial reparation to the victim.

During 2008-2010, qualitative interviews of 12 Magistrate Court judges (half lay, half legally qualified) in 3 rural and 3 urban areas were conducted. Their repeated and common perceptions were qualitatively analysed (Kvale, 2007) in order to produce indicative, but still valuable new data. The lower Court judiciary sentence and punish the majority of theft offenders. This frequency means that their sentencing aims as to how best they can punish theft offenders impacts a significant part of the Criminal Justice Systems' daily workload. Lower Court judges remain the final sentence decision makers despite the shifts in influence from sentencing guidance sources, i.e.) legislation, sentencing guidelines and case law. Thus their judicial discretion as to what sentencing aims are influential and why is important to the wider punishment options debate. The results in terms of the most and least influential sentencing aims will be presented. Reformation and Deterrence appear to dominate the current judicial mindset, where as denunciation and retributive justice have limited influence. Why this is so and more specifically what is influencing judicial faith in various punishment options is further examined. It is anticipated that the conclusions will prompt a lively and interesting debate session afterwards.

### **Emily Barrett Lydgate, EU Biofuels sustainability criteria and the WTO: Sustainable development in principle vs. in practice (emily.lydgate@kcl.ac.uk)**

Sustainable development has been described by the WTO Secretariat as a central principle of the Doha round of negotiations. For this reason, it is particularly interesting to examine the WTO-compatibility of recent EU biofuels sustainability criteria, which aim to achieve sustainable development, or more specifically, sustainability. These criteria demonstrate that legislation based on the concept of sustainability may in fact be difficult to justify in a WTO context. In WTO Article XX terms, it is a goal of uncertain importance, if negative free trade impacts are the result. Problems emerge, for example, when attempting to establish causality between regulations and their sustainable result, as well as from the lack of strong relevant international standards, and the fact that sustainability regulation is founded upon differentiating between products that are, in all other respects, identical.

Underlying these judicial issues is the fundamental problem of balancing: the unavoidable, politically charged, process of weighting economic growth against other social and environmental goals. The balancing required among the three pillars of sustainable development – economic growth, social justice and environmental preservation – mirrors a core WTO challenge as it considers problems beyond the original GATT mandate, such as biofuels-related deforestation, or climate change prevention. Despite this conceptual similarity, the Doha Declaration reflects the rather facile view that trade and the goals of sustainable development are inherently mutually supportive. As the term itself invites this interpretational vagueness, sustainable development in principle is much easier than in practice; the former can mean little, while the latter poses a steep challenge. The EU criteria should prompt soul searching on the exact contours of this challenge, and how it can be met.



**Neil T Lyons “I’ve overseen the assimilation of countless millions. You were no different.”**

**Autopoiesis: Evolution, Assimilation, and Causation of Normative Closure**

A running theme throughout the paper is The Borg; the antagonist from the Television Show Star Trek: The Next Generation. I use The Borg as an analogy. Stating that the legal system is similar to The Borg in several respects but its main similarity is assimilation. In the paper, I introduce the both Luhmann and Teubner’s theories. However, I focus more heavily on Teubner’s Five stages of autonomous development. I furthermore discuss evolutive concepts within a legal system which include the development and operational use of filtration and stabilization mechanisms. Next, I discuss the relationship between concrete legal episodes and the entire system. Teubner refers to this as the relationship between ontogenic and phylogenic development. Next, I discuss Teubner’s idea of Structural Coupling specifically interference; whereby a legal system communicates with other sub-systems while maintaining normative closure. The final discussion section of my paper, and my overall thesis, consists of showing how a legal system evolves into an autonomous or autopoietic system. I use portions of Teubner’s development, evolutive, relationship, and interference concepts within my discussion.

In an attempt to show how a legal system evolves into an autonomous or autopoietic system of meaning, the paper offers a three phase approach. First, with the change from Status to Contract the legal system begins its initial step towards autopoietic closure. Many theorists agree, that the change within western legal systems from status to contract heralded the beginning of modern legal systems. I use this as the starting point or Phase I. Second, with the development and implementation of regulatory administrative agencies the legal system creates and utilizes in practice filtration and stabilization mechanism. In this phase, the legal system develops its structural mechanisms. The administrative agencies enable the system to communicate with other sub-systems (such as the economic system) while maintaining normative closure in the production of its communications. With the ongoing operation of the legal system in phase II, the system has sufficiently developed filtration and stabilization mechanisms preparing the way for Phase III. Finally, I introduce the concept of Individual Identity Recognition Categories or IRC’s. IRC’s originate within societal communications. IRC’s are societal based constructs which are given meaning by societal communications. They are not simply based on descriptive categorizations but instead are based on every aspect in which society defines an individual. IRC’s include—but are not limited to—societal descriptions about a person from their sex (or gender depending on different operative definitions), race, ethnicity, occupation, marital status, sexual orientation (which is complex depending on action and/or preference), etc. However, IRC’s eventually become absorbed and assimilated by the legal system. In this Phase, the legal system has already developed its own internal logic; and will continue to utilize its own internal logic in producing new communications. This is the phase in which the legal system becomes normatively closed. After already achieving structural and operative closure within phase I and II.

**Angus MacCulloch, Cartels: A ‘Moral Space’ within Economic Regulation?**

**(a.macculloch@lancaster.ac.uk)**

The debate leading up to the criminalisation of cartels in both the UK and Australia was highly focussed on the economic harm caused by cartel activity and the regulatory need to enhance the deterrence of an effective enforcement regime. That debate is well rehearsed, well established, and highly convincing; but, it only takes us part of the way towards successful cartel criminalisation. That debate explains why various regulators and legislatures sought to criminalise the most serious, and least justifiable, form of competition violation, but it does little to elucidate or explain how to successfully criminalise. The design and definition of the offence itself, and its associated enforcement practice, should follow a very different debate. It is that debate which has not been so well rehearsed in contemporary competition policy circles.

One of the key distinctions between a criminal cartel offence and the majority of administratively enforced competition law is that it occupies a very different ‘space’ than other competition enforcement. The criminal trial, and all the important cultural and legal trappings that go with it, is a very different environment to the SOs and Hearings that competition lawyers find much more familiar. The criminal trial is inherently a ‘moral space’

where guilt and innocence are established, and the guilty are punished because of their wrongdoing. The harm caused is not the key to a criminal trial: it is the actions of the accused, their wrongdoing, which is judged.

When one considers how cartel criminalisation fits within this 'moral space' you begin to see why the offences themselves are problematic. The definitions of cartel activity draw heavily on the economic harms felt on the marketplace, but are less clear as to why the actions of the accused are 'wrong' in and of themselves. Does the offence demonstrate why those particular acts, in that particular circumstance, are inherently wrong? Why are they singled out for punishment, when other acts are not? What is the 'wrong' that we are seeking to punish these individuals for, and why are they being held personally responsible?

By looking again at a cartel offence from this new perspective can we attempt to ensure that it truly belongs within that 'moral space'? If we are clear about the wrong we can clarify the offence and design it in a way which best captures only that behaviour. Investigations into potentially wrongful acts will be more straightforward. The investigatory tools employed by the authorities can be more focused. At trial the prosecutor will have a clearer task to convince the jury of the need to punish the accused for that wrongdoing. But, should we be unable to clearly establish a 'wrong' that requires correction, does that not suggest that the 'moral space' of the criminal trial may not be the best space to deal with such behaviour.

**Kathryn Mackay, Citizenship rights and 'wrongs': How are professionals and tribunals supporting or limiting legal and procedural rights under the Mental Health (Care and Treatment) (Scotland) Act 2003? (k.j.mackay@stir.ac.uk)**

The University of Stirling was commissioned by the Scottish Government to carry out research into the 'Named Person' (NP) role and to consider its interaction with other forms of patient representation under the Mental Health (Care and Treatment) (Scotland) Act 2003. The NP was created in response to concerns about the powers vested in nearest relatives under previous statutes. It allows for the appointment of a person who will gain a number of rights if the appointer becomes subject to the MHA. The new statute also established a universal right to independent advocacy for anyone defined as having a mental disorder, whether or not they were subject to formal powers. This presentation draws on the qualitative data gathered from mental health officers, solicitors, advocacy workers, tribunal staff and NPs. While the new statute was seen as being more supportive of people's rights, there are a number of factors that might limit them in practice. The presenter will first highlight the differences between the Scottish, and the English and Welsh statutes before discussing four key factors that may limit or support rights:

How the NPs took up their role; Whether informing people of their rights was more an event or a process; The variability in the accessibility, availability and skill of legal representatives and advocacy workers; The differing styles of the tribunal hearing chairperson. The presentation will finish with a brief overview of the current Scottish Government's proposals to improve the statute.

**Mavis Maclean, Family Law in Hard Times: the Perfect Storm (mavis.maclean@socres.ox.ac.uk)**

Family Law in this jurisdiction has benefitted for many years from rigorous and thoughtful empirical research and academic analysis, from the work of knowledgeable and determined officials under various regimes, and from the care and skill of practitioners and the judiciary. We now face a set of circumstances which give rise to concern arising from the combination of the proposed legal aid cuts particularly in private law, the recommendations of the Family Justice Review which despite its rigorous research and analysis is unlikely to be free of the need to find ways of saving resources, and finally the reemergence of the shared parenting legislation debate. A potential perfect storm. This paper looks back at some of the achievements of the past 20 years, and tries to think constructively about how to survive hard times ahead

**Mavis Maclean & Rosemary Hunter, A Debate on Fact-Finding Hearings (Mavis.Maclean@socres.ox.ac.uk; R.C.Hunter@kent.ac.uk)**

Fact-finding hearings are the method used to determine the veracity of allegations of domestic violence when they are raised in private law children's proceedings. Although such

hearings were mandated in 2000 in the case of *Re L*, they have only been seriously implemented following the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm, issued in 2008 and revised in 2009. In the context of the current Family Justice review and legal aid proposals, both of which appear directed towards a significant reduction in private law proceedings except when there are issues of violence involved, the way in which the question of the existence of violence is determined is likely to assume even greater importance. This paper will review the limited evidence available on the operation of fact-finding hearings, and present a debate on their merits as a mechanism for dealing with violence allegations. Are they a valuable weapon available to be used by women in a desperate situation, or, conversely, are they a high-risk strategy for women and have the effect of excluding important information relevant to the welfare of the child?

**Deborah Magill, Equality in the workplace: Strategies for change (Magill-d7@email.ulster.ac.uk)**

At present industrial tribunals have no investigatory powers. Thus their role in the protection of employment rights relies entirely on private individuals claiming those rights; with no legal aid available in England, Wales or Northern Ireland. Legal advice and support for cases may be obtained from trade unions; the Equality Commission and social movements. Recent research has highlighted the difficulties faced by tribunal users and raised important issues relating to access to justice. This would suggest that interest groups who pursue a litigation strategy not only have a crucial part to play in enforcing rights and raising rights consciousness, but also that the degree to which the industrial tribunal will play a part in eliminating discrimination against a minority group will depend upon the willingness of such interest groups to implement a litigation strategy. Furthermore, understanding why, when and how such groups go to law is necessary if we are to identify the true origins of the social change such a litigation strategy may create.

This paper will present initial findings of a project which is examining how social movement organisations engage with the tribunal service in the area of anti-discrimination. The project is currently gathering data from organisations working in the area of discrimination on the grounds of disability, religion and nationality in Northern Ireland, England and Wales and the Republic of Ireland respectively. The paper will employ key social movement theories including McCann's legal mobilisation model and Kostiner's Schematic theory to analyse the strategies of the Equality Commission for Northern Ireland and Disability Action, a group which provides information and support to disabled people. The analysis will draw on empirical data obtained through interviews with employees of both organisations and case analysis.

**Louise Mallinder & Catherine O'Rourke, Compiling, Categorising and Interpreting Transitional Justice Data: Exploring the Role of Database Research (l.mallinder@ulster.ac.uk, cf.orourke@ulster.ac.uk)**

Since transitional justice evolved as a field of scholarship and praxis in the mid-1980s, it has increasingly influenced decisions of domestic actors in countries moving away from tyranny and conflict and the policy priorities of intergovernmental organisations and donor states. However, efforts to evaluate transitional justice concepts and mechanisms systematically have only begun in recent years. Databases are emerging as a key part of this endeavour as the compilation of systematic and defined data sets enables researchers to conduct large comparative analyses of how legal processes operate at the domestic level, including their legal, political, social and cultural impacts, and to explore how they relate to international law. The authors of this paper have created two major transitional justice databases: the Peace Agreements Database (O'Rourke with Christine Bell) and the Amnesty Law Database (Mallinder). They will draw on these experiences, together with the findings of a SLISA-funded seminar hosted by the authors in Belfast in October 2010 that will bring together the scholars and practitioners who have created significant transitional justice databases, to explore the role of databases in categorising, compiling and interpreting data on transitional justice. The analysis will explore a range of conceptual, methodological and ethical concerns that arise from the construction of transitional justice databases. It will conclude by exploring the role of databases in consolidating and furthering transitional justice knowledge.

**Sabina Manea, Carbon Trading: Conceptualising the Ownership Right in the Instrument (s.manea@lse.ac.uk)**

The paper will focus on the legal nature of the new right that can subsist in the instruments created by carbon trading schemes the so-called carbon credits.

The paper will question the almost universal assumption among academics, practitioners and policymakers that this right is a property right, on the ground that this characterisation may not fit with legal theory. The property rights characterisation stems from the dominant neoclassical economic model which presents these rights as the solution to environmental degradation. The paper will argue that this view is unduly narrow and not sufficiently interdisciplinary; in particular, it discounts the discussion of property rights in legal theory. The paper will examine the approaches to property rights of Locke Hohfeld, and Hegel and will highlight potential divergences between the criteria for property rights set down therein and the right in carbon credits. The paper will indicate that a new conceptualisation of the right may be necessary, which would draw on the views of economic theory, legal theory, and potentially also other social sciences such as sociology and anthropology, as advocated by writers such as Elinor Ostrom.

**Styliani Margariti, Balancing the powers of the ICC and the Security Council in determining individual and state responsibility for the crime of aggression: can the ICC try individuals for the crime of aggression in the absence of any finding of an act of aggression by the Security Council? (stellanaxos@hotmail.com)**

As a result of the negotiations of the Rome Conference, the crime of aggression was included in the core crimes over which the Court can exercise its jurisdiction under Article 5 of the Statute. However, due to the highly political nature of this crime, two requirements for the exercise of the ICC's jurisdiction were agreed upon in Article 5(2): in the first place, the States Parties to the ICC must in future find a definition of the crime and secondly, they must set out the conditions under which the ICC can exercise its jurisdiction in a manner consistent with the United Nations Charter. Finding "a manner consistent with the Charter" means that the ICC has to respect the primary responsibility of the Security Council to maintain international peace and security. As regards the crime of aggression, this means that it may be the Security Council who will make the first and possibly exclusive determination of whether an act of aggression has or has not been committed. In other words, it is possible that the independence of the ICC may be compromised since it would be compelled to follow the Security Council's determination which may be based as much on geopolitical concerns as legal ones. On the other hand, allowing the ICC to make determinations on the commission of acts of aggression means that the Court would have to prejudge issues of collective international security, which is not envisaged by the Charter.

This paper examines a middle way through these potentially conflicting positions that bears in mind the separate powers and fields of competence of the two organs and the distinction between the political and criminal nature of the crime of aggression. It will be examined how the system of referrals, the proprio motu power of the Prosecutor and the mechanisms for triggering the ICC's jurisdiction for other international crimes can be applied for the crime of aggression without having the powers of the Security Council interfered with by the Court. The paper argues that international criminal justice requires the ICC to take independent judicial action on matters of aggression in parallel with the pure political action of the Security Council

**David Marrani, The King is Dead, Long live the President! The Real Nature of the Fifth French Republic (dmarrani@essex.ac.uk)**

The Fifth French Republic was established in 1958 under the guidance of Charles de Gaulle, 'the man who won the war' (World War II). He was called by the establishment of the previous regime (Fourth Republic) to 'save' the country 'once more'. De Gaulle clearly wanted a system with a strong leadership. The democratically elected president became somehow an elected monarch, receiving his legitimacy from the collective support of the people, rather than the divine anointment of the ancien régime monarch, the election becoming here equivalent to the coronation of a King, something very close to the specific ritual electio, onctio, coronatio (election, 'blessing', coronation).

If one reads the text of the constitution, it is obvious that no monarchy has been restored. But the spirit of the system reveals the presence of 'the monarchy in the Republic'. In addition, changes affecting the elections and term of office of the president since 1962 (2000 and 2008 changes), together with the way N Sarkozy has acted since 2007, have demonstrated a 'presidentialisation' of the Fifth Republic within and outside the Constitution.

In this paper I wish to discuss the problem of the nature of the Fifth French Republic, particularly since the election of N Sarkozy. I particularly want to look at the ambiguities found in both the text and the spirit of the Constitution, demonstrating that the 'presidentialisation' of the Republic is a return of elements of the monarchy.

### **N Marref, The implications of the Club Licensing and Financial Fair Play regulation on the training and retention of players**

In September 2009, UEFA's Executive Committee approved financial fair play regulations with the objectives to consider clubs' spending on salaries and transfer fees and introduce more discipline in club football finances.

Following the financial crises that affected countries around the globe, clubs have reported financial losses. This has negatively impacted revenue generation and creates additional challenges for the football sector. The UEFA'S initiative demonstrate that the sporting organization aim to have greater power in regulating every domain of the game. "Michel Platini has warned that Europe's biggest clubs will have to "face the music" if they do not comply with UEFA's new financial fair play rules". However, one could question if the ambition project will leave up to the expectation? Manchester City's recent £121million losses are facing the greatest difficulty to abide by the rules - even though owners are also allowed to inject £12million a year (15m euro) into their club.

This paper will examine the implication of such measures to the training and retention of players in England. The UEFA concept will introduce new redistribution mechanism: Clubs will be able to spend as much as they want on stadiums, training facilities and youth football. Therefore, taking the example of Crystal Palace and Arsenal academies, the paper will analyze the current structure of the training institution and review their guideline to comply with the national association and UEFA financial fair play rule.

### **Eva Marschan, No harm done? Considering the potential consequences of the enhanced governmental control over English and Welsh criminal trial judges ([e.marsc01@students.bbk.ac.uk](mailto:e.marsc01@students.bbk.ac.uk))**

For at least one and a half centuries the ideal judicial role in the English criminal jury trial has been viewed as that of a "neutral third party" whose main responsibility it is "to oversee the fairness of the proceedings and who only intervenes sparingly in the trial process. Underlying this idea was a procedural framework in which the defence and prosecution lawyers were responsible for representing their conflicting cases to a lay jury who would have the final word on the guilt or innocence of the accused. Any judicial intervention in such a setting would potentially bear the risk of showing judicial bias to the jury and may be a ground for the defence to appeal. However in recent years there has been a political demand for the judicial role to be more pro-active in the criminal trial. One main reason for this is that the workings of criminal justice agencies including the courts are now more closely monitored by central government and this impacts on the ways they are functioning. While the criminal justice system previously operated as a set of separate and independent agencies, each with their own objectives and ideologies, the transformed system functions as a coherent organ in which all agencies are working for the same government policies and targets. This paper therefore argues that judges, like other criminal justice professionals, are now expected to act as "policy-implementers" in the criminal trial which conflicts with the idea of a "neutral third party." As policy implementers judges are supposed to define their role in more "managerial" terms that is to be more "controlling" over the ways that cases are processed and hearings are conducted. Drawing on the work of Mirjan Damaska my paper explores the idea of judges as "policy implementers" in more depth and considers how it might potentially affect their role in the adversarial criminal jury trial, alter its dynamics and impact on the procedural safeguards for the accused.

This is work in progress.

**Jill Marshall, Personal Freedom and the Human Rights Act (j.marshall@qmul.ac.uk)**

One of the fundamental objectives of human rights law is to safeguard, and potentially develop, the human freedom of everyone. Courts need to interpret the HRA in light of this fundamental objective. More specifically, the European Convention on Human Rights' right to respect for one's private life contained in Article 8 has now been clearly interpreted by the European Court to provide a right to personal autonomy, identity and integrity. This provides protection against unwanted intrusions into people's lives in a traditional sense of guarding a person's private space, be it in their head or in their private surroundings. However, additionally, this right now includes a right to develop one's personality through a reconceived version of personal autonomy: such personality not simply existing alone but being developed in our relationships with others and the outside world. This stresses the importance of social conditions and relationships between human beings in creating and developing one's autonomy and one's human personality. Yet this social context can cause problems in terms of the ways of living and forms of personality some may wish to follow, bringing in issues of moral framework, and the problematic term 'human dignity'. Social conditions enable people to shape their identity and to become who they are. Depending on those conditions, people's abilities will be increased or decreased to be more able to make good informed choices for themselves and to live lives of meaning to them. Human rights law can be an enabling tool, allowing people to make their own choices including changing options and social conditions, or as a restricting tool, preventing certain choices and ways of life through legal prohibitions or bans. These issues are explored by reference to liberal, feminist and critical theory on personal freedom and agency, together with some relevant case law on the HRA.

**Jill Marshall, Ban the Burqa? Issues of equality and freedom in law (j.marshall@qmul.ac.uk)**

This paper follows on from work published in 30 (2008) Human Rights Quarterly 631-654; 14 (2008) Res Publica 177-192; and in the author's monograph Personal Freedom Through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights (Leiden: Martinus Nijhoff 2009). The paper interrogates feminist legal theory on women's choices and personal freedom together with gender equality and how the intersection of religion and sex impacts on these issues.

It focuses on arguments for and against legally banning the wearing of the burqa in Europe. Analysis makes use of the theoretical literature, Council of Europe documents, and the European Court of Human Rights' jurisprudence on national laws banning the wearing of the Islamic headscarf by adult women.

**Isla Masson, The Impact of Female Short-Term Imprisonment on Children**

Short prison sentences are particularly ineffective because they fail to help offenders address their offending behaviour, protect the public for any significant period of time, and assist in disrupting the lives of often especially vulnerable individuals who are already marginalised members of society. The ineffectiveness of short prison sentences is especially harmful for women prisoners, who although as a group make up a small percentage of the entire prison population are nonetheless particularly affected by short sentences. This group is unique because they predominately commit non-violent offences, have significant welfare issues and are the primary carers of children. As such, this distinct but under researched group of offenders in the prison population warrant further investigation.

Many children are affected by the departure of a male parent figure, however this does not usually result in a change in their accommodation as they continue to stay in their family home with their mother, or a female carer. However literature suggests that 91% of children of incarcerated female offenders are relocated to live with grandparents or temporary foster accommodation. With a steadily increasing female population this problem is only likely to increase. It is argued that the psychological effect of separating a parent from a child is bad enough, but the instability of accommodation often involved when a child loses a female parent has even greater consequences. Although there is a plethora of data that indicates that children of incarcerated parents have a greater risk of offending themselves during adolescence and adulthood, there is currently very limited data about what happens to

children when their mothers, or female guardians are incarcerated, particularly if the offenders only serve short prison sentences. This article argues that this instability, even if only for a short period of time will have profound effects on children.

**Yassin M'Boge, The Role of the International Criminal Court in Africa: A Worthy Investment? (yassin.mboge@ucd.ie)**

The International Criminal Court (ICC) currently five situations open in Uganda, the Democratic Republic of Congo, Sudan, the Central African Republic and Kenya. The ICC Prosecutor has encouraged a policy of self-referrals, and the sources of such four referrals have been from the African states whereas the ICC received the referral of the situation in Sudan from the UN Security Council. Thereby the initial policy of the ICC has been to focus on Africa; however this strategy has come under heavy scrutiny. The main criticism is that the ICC is targeting Africa and that it is engaging in a neo-colonial prosecutorial policy. Such criticisms are further buttressed by the fact that the ICC has received some 8733 communications since July 2002 from 140 countries. As a result, many would insist that the ICC has had ample opportunity to widen its jurisdiction and yet continually fails to move beyond the realms of the African continent. Thus, the debate continues as to whether the ICC is proving itself to be a help or a hindrance to justice in Africa.

This aim of this paper is to assess the role of the ICC in Africa in order to determine whether the ICC is a worthy investment in the Africa as a force for justice and the rule of law. The paper will demonstrate that there are a number of political and practical issues that challenge the operations of the ICC in Africa particularly given that many of the situation countries are in a period of transition or are seeking to the peaceful resolution of conflict. So in the context of Africa, the role of the ICC is complex one if it is to deliver justice and end impunity.

**Honor McAdam, Making the private public: Reflections on the viscosity of private/public classifications and the consequences for a sociology of international economic law (h.mcadam.1@research.gla.ac.uk)**

In a bid to assess what socio-legal research can contribute to the study of International Economic Law, my approach is to reverse the question and ask what the current state of International Economic Law can tell us about sociological approaches to the study of legal phenomenon. In particular, this paper will take as a case study the ongoing attempt to impose international human rights obligations on transnational corporations in order to comment on the malleability (or not) of legally cemented distinctions between what is public and what is private in the International legal order. Positioning itself between two recent events in the business and human rights field; namely the Kiobel decision of the US Court of Appeals for the Second Circuit under ATCA and the subsequent release of the draft UN operational guidelines for the respect, protect and remedy framework proposed by the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises; this paper will examine the conflicting legal and extra-legal terrain that has led to seemingly divergent institutional conclusions on the status of transnational corporations in International law. What is exposed in this juxtaposition, it will be suggested, is the shortsighted horizon of an object-centered sociology when it comes to the observation of legally entrenched classifications. While it can certainly be observed in this instance that certain object-centered discursive strategies paved the way for a limited UN recognition of the transnational corporation as a quasi-international agent, the Kiobel decision under ATCA reminds us that a sociological approach to legal phenomenon bereft of a cogent analysis of power relations will not suffice entirely when the stakes of the public/private debate threaten the unraveling of an already existing legal order as opposed to the making of an entirely new space for its jurisdiction.

**David McArdle, Banning Orders, Scots Law and the Juridical Field (d.a.mcardle@stir.ac.uk)**

This paper discusses a Scottish Executive-funded research project concerning the use of Football Banning Orders (FBOs) under the Police, Public Order and Criminal Justice (Scotland) Act 2006, s.51 whereby a Sheriff "may" grant an FBO if s/he is of the opinion that "(doing so) would help prevent violence or disorder at or in connection with football matches." FBOs were envisaged as a partial answer to Scotland's 'problem' of Sectarianism rather than with

'football hooliganism' in the traditional sense but they have been imposed with far less frequency than the Executive anticipated. The authors were tasked with explaining why this should be the case and, if necessary, to propose changes to the legislation. Sheriffs, prosecutors and senior police officers' perceptions of the FBO regime were garnered through a series of semi-structured interviews conducted in November 2010. Those interviews suggested that while there were policy, procedural, financial and evidential factors at play, the decision on whether an FBO would be sought - and ultimately granted - largely reflected the *habitus* of these actors in the field: those who were 'football fans' appeared far more likely to embrace the s.51 procedure than those whose enthusiasms lie elsewhere, and they were more willing to overlook the weaknesses in the drafting of s.51 in order to apply for, or to grant, an FBO. The interviewees' responses thus gave rise to some unanticipated questions about the impact of judicial/prosecutors' training on the s.51 procedure, the legitimate exercise of the police's and prosecutors' powers, the significance of judicial precedent and, ultimately, the merits of amending the Act in order to remove the discretion that the Sheriffs presently enjoy.

**Claire McCann, Controlling Women's Bodies through Law: Accessing Abortion in Northern Ireland ([claire.mccann@northumbria.ac.uk](mailto:claire.mccann@northumbria.ac.uk))**

Access to abortion is only available in very limited circumstances in Northern Ireland; where there is a real and substantial risk to the life and long term physical or mental health of the pregnant woman. The criminalisation of abortion in all other circumstances has been the subject of much debate and discussion. While the dominant voices of the anti-choice groups claim that there is no desire for abortion in Northern Ireland, this claim is belied by the number of women and girls who every year travel to other parts of the United Kingdom and Europe to access legal and safe abortions. In the aftermath of devolution of criminal justice powers to the Northern Ireland Executive last year, the prospect of liberalisation and decriminalisation of abortion access seems ever more distant.

Efforts by pro-choice groups to push for liberalisation of abortion law in Northern Ireland have historically been dwarfed by a dominant anti-choice contingent (supported by the Christian churches and the political elites). This pervading moral and political agenda has promoted a paternalistic approach to abortion access (saving woman from herself) which views the pregnant woman as an incubator rather than a person. The devolution of criminal justice powers and the relative lack of political figures prepared to publicly push for a pro-choice agenda within Northern Ireland has led to political stagnation on this issue, leaving women's reproductive choices controlled by an unforgiving moral and legal system. This continued regulation of women's bodies not only silences women who choose to have an abortion, it also criminalises them; it acts as both a social and legal control of the female body. This paper will challenge this pervasive agenda of control and make the case for a more woman friendly approach to abortion access in Northern Ireland which would locate the female body in a more benign legal and moral framework.

**Siobhan McConnell, Criminalising Commerce – the impact of the Bribery Act 2010 on corporate hospitality**

The Bribery Act 2010 (Act) comes into force in April 2011. It will replace the current outdated laws on bribery and establish offences for individuals and commercial organisations. The Act will apply across the United Kingdom and appears to be the Government's response to the global threat to business posed by bribery.

Section 7 of the Act will create an offence where a commercial organisation fails to prevent persons associated with it from committing a bribe on behalf of that organisation. A commercial organisation will have a defence where it can show it had in place adequate procedures designed to prevent associated persons from committing bribery. Section 9 of the Act obliges the Secretary of State to publish guidance on the procedures a commercial organisation can employ to prevent associated persons from bribing others. The Ministry of Justice is undergoing a consultation on these procedures.

The area I would like to explore further is how corporate hospitality will be dealt with under the Act and the associated guidance. Corporate hospitality is critical in many businesses and there have long been concerns about the circumstances in which corporate hospitality could amount to bribery. Corporate hospitality will be in the spotlight when the Act comes



into force and it is hoped the Ministry of Justice will be able to provide useful and workable guidance on this topic. Key questions are:  
what types of corporate hospitality will be acceptable? Will the guidance clarify this or will the courts be left to decide on a case by case basis?  
what kind of procedures will a commercial organisation need to have in place to establish a successful defence?

**Noel McGuirk, Profiling in the context of terrorism: legal legitimacy or illegal lunacy?  
(nxm004@bham.ac.uk)**

The 'war on terror' has dominated not only the political landscape but also has left an indelible imprint within the legal framework globally and domestically. A recurrent theme on the international and domestic stage has been how best to protect the people and institutions of a liberal democracy against those willing to pursue by violent means their opposition to the founding norms of such a state. It has been argued by many academics that a particularly important strand within the debate concerns the extent to which it is acceptable to compromise liberal democratic values in order to protect them. The key theme for academics has been to identify the point at which the protection of liberal democratic values becomes paradoxical. As emergent counter-terrorism frameworks are designed to protect liberal democratic principles, they become undermined and flawed from a human rights perspective when they impact upon the human rights and fundamental freedoms they are designed to protect.

The primary responses to terrorism adopted by Western governments throughout the past five decades has been focused on creating a separate and distinct counter-terrorism framework to administer justice for terrorist offences or those suspected of terrorism. Counter-terrorism frameworks have represented a fusion of national security and criminal justice policies in an attempt to move towards pre-emptive strategies of 'prevention and control' of terrorism threats. The strategies of 'prevention and control' have resulted in a shift towards anticipatory risk which aims to allow law enforcement agents to identify, interrupt and prosecute those suspected of terrorism offences before their commission. Although the UK has a particular history in managing terrorism with the Northern Ireland conflict, the current threat presents a unique dynamic being formed on a religious radicalisation of Islam emanating from the Middle East. This paper will seek to investigate the legitimacy of the use of profiling by police forces as a pre-emptory tool in the identification of terrorists.

**Claire McIvor & Maurice Zeegers, Educating the UK courts about the value of using epidemiological evidence to resolve disputes about causation in cases of negligent misdiagnosis**

The UK courts have a poor track record in interpreting statistical evidence. They are notoriously suspicious of such evidence and uncomfortable with the idea of basing legal conclusions upon it. However, this paper will argue that most of this suspicion stems from a simple lack of understanding about how to use such evidence, particularly where the issue in question is one of factual causation. Using the high profile House of Lords decision in *Gregg v Scott* [2005] UKHL 2 as an example, this paper will highlight the common and fundamental errors made by UK lawyers in assessing issues of probabilistic causation. It will then demonstrate how these errors could be easily redressed through the employment of epidemiological expert witnesses. While epidemiological evidence has been relied upon in the past in toxic tort litigation, it has never before been used in the context of an individual claim for negligent diagnosis.

**Ronagh McQuigg, Domestic Violence and the Use of Human Rights Law Mechanisms  
(r.mcquigg@qub.ac.uk)**

Domestic violence has only been recognised as being a human rights issue relatively recently. This is due to the fact that rights were developed in such a manner as to create a public/private divide, whereby human rights law was upheld in the public sphere where the state was involved, but was not applied in the private sphere. Domestic violence did not therefore come within the ambit of the traditional interpretation of human rights law. For example, although domestic violence seems to constitute a clear violation of articles 2, 3 and 8 of the European Convention on Human Rights, until 2007 domestic violence had not been

directly addressed by the European Court of Human Rights. However, the European Court has now clearly established that domestic violence constitutes a human rights abuse, as highlighted by recent judgments such as *Bevacqua and S v Bulgaria*; *Opuz v Turkey*; and *E.S. and Others v Slovakia*.

This paper will discuss the approach of the European Court in these cases and will also examine the issue of whether the courts in the United Kingdom could use the Human Rights Act 1998 to assist victims of domestic violence. Potential difficulties will be analysed, for example, the deferential approach adopted by the judiciary in questions surrounding the allocation of resources and the problems involved in using the Human Rights Act in relation to an “unseen crime” such as domestic violence. The paper will also examine the question of whether other human rights law mechanisms, such as the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, hold greater potential as regards the issue of domestic violence.

### **Leon McRae, The Personality Disorder Strategy: Scope and Potential Implications**

Antisocial Personality Disorder (ASPD) is a complex characterological condition which has been linked to violent offending. For those 'visible' minority of people with PD who have committed a crime, therapeutic interventions - whether in prison or more specialist psychiatric services - aim to address criminal behaviour by treating the behaviours common to the disorder. Such interventions, however, have not proven particularly effective at reducing risk, and government ministers are currently rethinking the provision of NHS services in an effort to provide more effective treatment. In a recent document, The Personality Disorder Strategy, a variety of changes were proposed. The impact of these changes (if implemented) remains to be seen. This paper explores the possibilities of the Strategy by drawing on the results of a recent empirical study which explored personality disordered offenders' experiences of current prison- and psychiatric-based treatment services.

### **Angela Melville & K Laing, Closing the gate: family lawyers as gatekeepers to resolving non-legal issues (Angela.L.Melville@manchester.ac.uk)**

In 2001, the Legal Services Commission (LSC) introduced a new pilot, the Family Advice and Information Network (FAInS), which recognised that family law clients typically face a cluster of legal and non-legal issues. Family lawyers involved in FAInS were encouraged to address a client's legal problems, and then refer the client to other services for assistance with non-legal issues. In this way, family law clients were to be offered a holistic service, with the lawyer acting as a 'case manager' who helped match services to their client's individual needs. We argue that this approach follows a recent trend in the recognition that legal services should provide a joined-up approach to address client's legal and non-legal issues. Our paper will present empirical data drawn from an evaluation of FAInS, and shows that lawyers did not regularly refer their clients to other services, with referrals largely being limited to mediation. We consider the barriers that prevented referrals, and conclude that family lawyers are not necessarily the most appropriate gatekeepers to other services

### **A Melville & F Stephen, “Victims of medical accidents require highly specialised legal advice...” But how does specialisation really effect medical malpractice claiming?**

It is often claimed that specialisation improves the quality of legal services, in that outcomes are better and cases are resolved quicker. These claims, however, are difficult to test and for the most part, researchers have relied on interviews with specialised solicitors who emphasise the advantages of specialisation. Our research presents analysis of data relating to closed medical negligence claims provided by NHS Scotland's Central Legal Office. The database contains information about all medical negligence claims notified to the CLO since its creation in 1989, and allowed for analysis of what specialisation adds to a case. We also interviewed medical negligence specialists in Scotland. Contradictory to expectations, we find that specialisation only indirectly improves outcomes, however, specialised solicitors succeed in resolving cases quicker than non-specialists, and we consider the reasons for these effects.

### **Sam Middlemiss, Legal impact on employers where there is a sham element in contracts with their workers**

In this paper I will analyse the use of sham clauses or contracts in employment law and how the courts in the UK finally undertaken to outlaw them. As a consequence of recent legal decisions (particularly over the last three years) employers that introduce clauses into contracts or makes contractual arrangements with his workers, need to ensure that the clause or contract is genuine and operates as it states that it intends to in practice. Otherwise, as the title of this paper suggests there might be serious legal implications for employers. The clause or the contract itself must not simply be a device to circumvent the correct application of the law in other words a sham. The recent development of legal rules that potentially invalidate sham clauses or bogus contracts in employment have proven beneficial to workers in particular those that want to be treated as employees. As will be seen when a court or tribunal has a reasonable suspicion that the clause or contract is a sham designed, for example, to exclude employee status (to those persons working under a contract with an employer) they may decide to treat the contract as a contract of service and the affected worker will then have entitlement to the full range of employment rights. The full impact of these developments on employers and employees or workers will be considered in this paper.

### **Jo Miles, Marital obligation after Radmacher and the Law Commission (jkm33@cam.ac.uk)**

The equal sharing principle from Miller, McFarlane was a new departure for English law. Many have likened it to European community of property regimes. But what English law lacks which all those European regimes provide, is a mechanism for spouses to contract out of equal sharing in favour of some other view of the marital economic partnership. Radmacher brings us closer to that European model by affording greater scope for couples to use pre- and post-nuptial agreements to exclude the operation of equal sharing in their case. Interestingly, and again like many European jurisdictions, the Court made it more difficult for couples to exclude needs-based obligation. Some of the options for reform offered by the Law Commission adopt a similar approach.

This paper will explore the nature and extent of the entitlements and obligations between spouses following divorce, in light of the Supreme Court decision in Radmacher v Granatino and the thinking emerging from the Law Commission's current consultation on marital property agreements. How far, if at all, should it be possible for spouses to exclude the operation of some or all of the principles that would otherwise permit the adjustment of their financial resources post-divorce? And would permitting them to do so result in the death of marriage?

### **P Miles, Mobilising Legal Resources, Securing Legal Representatives: A Symbolic Interactionist Perspective on the Pursuit of LGBTI Rights in Chile (MilesPL1@cardiff.ac.uk)**

This paper explores the role of human rights and reformist lawyers in their representation of members of LGBTI (lesbian, gay, bisexual, transgender and intersex) communities as they seek to advance and/or uphold their rights through the Chilean judicial system. Given the inaccessibility of the legislative arena for securing legal change, legal mobilisation strategies are increasingly being deployed by civil society actors promoting rights pertaining to sexual diversity. Drawing on ethnographic research, I examine the difficulties for members of these populations in securing legal representation and articulating their voice. I examine how barriers, such as mitigating the 'stigma contagion' in a highly heteronormative socio-cultural and political context, to accessing legal resources are being overcome, and how associative capacity expands as a consequence. From within the broader sociological field, Erving Goffman's interactionist work on stigma acts as the point of departure for studying the interaction between lawyers and claimants. I explore how meaning-making and process at the individual level is ultimately impacting upon the ability of members of LGBTI communities to assert their rights. In recent years, a handful of public interest lawyers have begun to openly challenge the moral legitimacy and associated deviancy discourses that have served to marginalise those whose sexual orientation or gender identity do not conform to dominant heterosexual and/or gender roles. Often framing these debates within the human rights discourse, such lawyers are both challenging the boundaries of said discourse, and the moral

conservatism present in the Chilean judiciary. This paper is discussed in light of the Inter-American Commission of Human Rights' recent application to the Court to file its first discrimination case on the basis of sexual orientation against the Chilean state. This follows the 2004 Supreme Court ruling which denied judge Karen Atala custody of her children on the basis of her sexual orientation.

**Jo Milner and Lisbeth Bourne, The Human Rights Act & Assisted Suicide: Towards a Fairer Death? (J.milner@salford.ac.uk)**

2010 saw the 10<sup>th</sup> anniversary of the entry into force of the United Kingdom Human Rights Act 1998 (HRA), and recently the announcement and publication of the Coalition Government's Comprehensive Spending Review (CSR) in Autumn 2010.

This changing backdrop of extreme austerity measures and cutbacks in public expenditure, which disadvantages people with long standing and/or life threatening illness and disabilities, therefore casts the current topical campaign for legalisation of assisted suicide and voluntary euthanasia, led by such prominent advocates as Terry Pratchett, and lobbying groups, including Dignity in Dying, in a very different light, and one which may separate the rich from the poor, that is, those who have the resources to exercise choice over the manner of their death by facilitating a final trip to the Dignitas clinic in Switzerland, or by challenging the 1961 Suicide Act, which rules that it is an offence to assist another person to die by suicide under Section 2(1), using Article 8 HRA, as Debbie Purdy did in 2008 in the High Court in *Purdy, R (on application of) v. Director of Public Prosecutions*.

This paper will therefore examine the legal context on the one hand, as illustrated by the House of Lords 2009 ruling in *Purdy, R (on application of Purdy) (Appellant) v. Director of Public Prosecutions (Respondent)*, which notwithstanding, its dismissal of Purdy's claim, looked sympathetically on her situation by holding that the issue of ending suffering by means of assisted suicide was one "many would regard as something that the law should permit", but however noted that this should be subject to a change in legislation by Parliament, and the position of people vulnerable to coercion and/or despair, who have little choice, on the other.

**Susan Millns, Feminism and the Human Rights Act (S.Millns@sussex.ac.uk)**

Much debate surrounded the introduction of the Human Rights Act in relation to the potential that the new legislation harboured to ameliorate the situation of women and to promote gender justice. For some, 'bringing rights home' promised the creation of a new legal space in which rights claims could be articulated by women and offered a new set of legal tools to promote women's equality with men. For others, however, the legislation presented nothing more than a false promise – unsuitable for dealing with the particularity of violations of women's rights and interpreted by unelected, unaccountable judges whose lack of sympathy for women's rights claims is renowned. This paper will look back at the successes and failures of the HRA over the past 10 years in order to assess the accuracy of feminist aspirations and concerns about the legislation. Has women's situation improved in the HRA era? Have the courts promoted sex equality through recourse to human rights? And how has the terrain of the courtroom been used by individuals, advocates and campaign groups to promote gender justice through rights based litigation?

**Al Hanisham Mohd Khalid, Prospering Traditional Knowledge Through Complementary Medicine in Law: Prospect and Challenges in Malaysia (a.h.mohd-khalid@newcastle.ac.uk)**

Traditional Knowledge has spur international debate in last few decades, although it comes with different terms, some of which loaded with controversial and sometimes racist insinuation. Nevertheless it is irrefutable that traditional knowledge plays an important part in our civilisation which encompasses diverse ranges of traditional based innovation and creation which helps daily human livelihood.

Western Science has long being deep rooted and attained a dominant position in societies now days. The imposition of western scientific ideas and methods has brought enlightenment to mankind in developing the world for past few centuries. However we cannot ignore the fact that other valid knowledge systems exist. Although there are tensions between western science and traditional knowledge, but if effort in bridging between the two rivalries; the outcome would be beneficial for present and future generations.

Alternatively, traditional knowledge and complementary medicine (TKCM) is a promising field to be developed as cohabitation between western science and traditional knowledge. Since there are lots of plant genetics resources origin from developing countries, by developing TKCM would be beneficial for developing countries socially and economically. However some issues need to be tackled before TKCM could be manifested for example in area of law. This paper will focus prospects and challenges in introducing TKCM law. By selecting Malaysia as case study, this paper will examine the law which will introduce by the government as part of its approach for traditional knowledge preservation and the benefits for Malaysian societies.

**Mark Monaghan, Ecstasy and Agony: Evidence-Based Drug Policy and Legislation? (m.p.monaghan@leeds.ac.uk)**

That policy and by association legislation should be based on some kind of evidence, research or expertise has become common-sense. In recent years this has come to fruition under the banner of evidence-based policy-making. It is widely understood even by enthusiastic adherents, however, that the influence of evidence on policy and legislation is fragile and often trumped by political considerations. The use of research is always mediated, as when policy-makers trawl or cherry-pick for evidence favouring their plans. Recently the relationship between the scientific and legislative and policy making communities became newsworthy after a high-profile quarrel between the former Home Secretary and some members of the main scientific advisory group on illicit drugs policy; the Advisory Council on the Misuse of Drugs (ACMD). This culminated with the sacking of the Chair, Professor David Nutt. The schism centred on the Government's decision to change the legal status of cannabis and not to change the legal status of ecstasy, in both instances seeming to ignore expert guidance. This left the Government open to the now familiar accusation of favouring policy-based evidence rather than evidence-based policy in politically sensitive areas. Drawing on the authors own research, this paper argues that the reality is more complex and that (in most cases) policy formulation is usually a blend of evidence-based policy and policy-based evidence. Explaining this comprehensively is a difficult task. Existing models of research utilisation have been employed to this effect, but tend to offer only limited descriptions of the evidence and policy link. This paper puts forward a newer 'processual model' which it claims can account for the many subtleties involved in explaining the evidence and policy connection in politicised domains like drugs, crime and criminal-justice.

**Daniel Monk, Reading Gay Wills: Before/beyond equality (D.Monk@bbk.ac.uk)**

While not suggesting that lesbians and gays are in any way a monolithic group this paper argues that focusing on sexuality in the context of wills and inheritance can add to and complicate debates within socio-legal scholarship about intestacy reform and sociological scholarship on intimate and sexual citizenship and identity politics. The starting point is the principle of testamentary freedom. Drawing on literary and media sources as well as case law in the UK and other jurisdictions it argues that the principle provides both a radical potential for the expression of alternative forms of kinship and, at the same time exposes sexual minorities to particular risks and represents a highly contingent space for political expression.

**Riccardo Montana, Adversarialism in Italy: using the concept of legal culture to understand resistance to legal modifications (R.Montana@kingston.ac.uk)**

Based on the author's empirical study on Italian prosecutors, this article uses legal culture to analyze the reasons why prosecutors are resisting certain legal modifications. In so doing, this paper tries to offer a fresh perspective over (comparative) global issues, such as: the meaning of inquisitorial and adversarial in modern criminal justice systems, the impact of legal transplants and legal translations and the centrality of prosecutors' powers in contemporary criminal justice systems. In particular, the analysis of legal culture in a comparative perspective can stretch our imagination about what is the true extent of prosecutors' powers, and how these can be related and balanced against the defendant's rights. If one wants to explain and interpret contemporary criminal justice systems, it is necessary to pay attention to the differences between the 'law in books' and the 'law in action'. And legal culture seems to be useful to explain if and why a distance between 'books' and 'action' is generated by

legal actors' commitment to a certain legal tradition; and how and how far this commitment influences the practice. This is not by any means an invitation to insulate the study of modern criminal justice from the impact of socio-economic dynamics. This paper tries to demonstrate that legal rules and traditions must not be underestimated. Agencies of crime control perceive their role and respond to pressure in different ways. Investigating legal culture is crucial to explain and interpret these variable processes and, ultimately, to understand contemporary criminal justice systems and responses to crime.

**Francis Moore, Evaluating the statutory authority defence – exploring the justifications for state-endorsed infringements on private property rights (F.Moor@edu.salford.ac.uk)**

UK homeowners and tenants appear to hold an uncertain position in relation to the enforcement of their private property rights, depending on whether their neighbouring property is privately held, or held by a developer or operator with statutory authority for the use of that property. The defence of statutory authority means that these developers or operators can compensate their neighbours for nuisances caused, but will not be prevented from continuing the nuisance, as an injunctive remedy will not be available. This anomaly in private rights provision has been noted by academics such as Linden and McLaren but the justifications for the inception, and ongoing use, of such a defence have not been adequately explored.

This paper aims to examine the common law origins of the statutory authority defence, which developed as a response to the property disputes arising from the proliferation of railway developments in the 1800s. These pioneering cases provided the ultimate 'public benefit' argument and acted as the justification for a further two centuries of private property rights infringements. As a result the defence became enshrined in public law and has, since the recent reforms regarding Nationally Significant Infrastructure Projects in s.158 of the Planning Act 2008, been extended to a variety of further uses.

This paper will demonstrate that the defence originated from a time when the need for new industries and infrastructure was high and the amount of property ownership was low. At present property ownership in this country is high and the need for industry and trade is diminishing, as the UK ceases to be a strong figure in global manufacturing. This would make any 'Industrial Revolution' justifications seem implausible and any inequalities in private property rights more questionable. This paper will identify whether such justifications for the use of the defence are appropriate in the current social and economic climate.

**A Morris, R. Moorhead R. Cahill & J. van Der Schalk, Understanding Perceptions of Claiming – A Pilot Study (MoorheadR@cardiff.ac.uk)**

The legitimacy of the personal injury compensation system has repeatedly been questioned in recent years and the perceived existence of the 'compensation culture' is said to have damaging effects. Against this background, we conducted a small but novel pilot study of 56 law students in order to examine how deep-rooted explicit attitudes to claiming are and to explore whether non-legal factors influence those attitudes. One such factor on which we will concentrate in this paper was the influence of lawyer funding arrangements on perceptions of the legitimacy of claims.

The conventional way of examining perceptions is simply to ask what people's attitudes are in a survey. In order to probe more deeply, however, we developed an experimental design using simple standardised personal injury case studies on which respondents were asked to pass judgment. Using controlled variation of these vignettes, we were able to assess the impact of specific factors (such as claimant and defendant identity, funding arrangements and the existence of insurance) on the perceived legitimacy of claims and judgments on liability and levels of compensation payments. We then compared these attitudes with the respondents' general views on the compensation system.

Our study indicates that non-legal factors influence judgments so that perceptions of claiming may be socially constructed independently of formally and legally relevant factors. For example, we explored the impact of different funding arrangements, including no-win no-fee agreements, trade union funding and legal expenses insurance and found that when a case was brought on a contingency fee basis, scepticism towards that case, particularly the fairness of the compensation award, increased. As such, the study provides some insight into the social, political and moral influences on what constitutes a 'good' or 'bad' claim.

The research method also highlighted the important distinction between general attitudes as expressed in the abstract and specific and implicit attitudes identifiable in response to particular cases. Implicit and explicit attitudes can and do differ and in sometimes surprising ways. This should be borne in mind during debates on civil justice reform. Overall, the study showed that, for this group of respondents, perceptions were framed within a general context of cynicism towards the personal injury claims system. Whether such perceptions continue into legal practice merits further investigation. More broadly, the research provides a way forward in terms of evaluating, in a cogent and meaningful way, what attitudes to compensation claims really are.

**Paulette Morris, They didn't do it then but do they do it now? (Paulette.Morris@brunel.ac.uk)**

The family justice system in England and Wales is currently under review and it has been suggested that more couples should use mediation to resolve their issues following separation.

Academics have, in the past, expressed concern about the practice of mediation from many perspectives including screening for domestic violence. Such screening was researched by Hester and colleagues in 1997 who concluded that mediators 'did not do domestic violence'.

This paper focuses on screening for domestic violence in mediation and will answer the question posed by academics, prior to the partial enactment of the Family Law Act 1996, "How would they know there is a risk of violence?"

**Maria Federica Moscati, What's the Future for Same-Sex Marriage in Italy? Analysis of the Decision of 138/2010 of the Italian Constitutional Court**

The present paper analyses recent legal developments on same-sex marriage in Italy. The paper considers the issue of same-sex marriage in Italy and carries forwards some of the preliminary reflections presented in my earlier papers analysing related socio-legal developments. As a case study, the paper focuses on recent decision of the Italian Constitutional Court on same-sex marriage.

In March 2010, the Italian Constitutional Court was called to decide whether the exclusion of same-sex couples from the legal framework on marriage represented a violation of relevant constitutional principles. Notwithstanding the acknowledgment that same-sex couples deserve legal protection, the Constitutional Court has argued for marriage as a mere heterosexual union. In addition the Constitutional Court has pointed out that legislative decisions in this area are dependent upon the willingness of the legislator.

The decision of the Court creates uncertainties in relation to the future legislative developments in support of same-sex marriage in Italy. In addition, both the language and the legal reasoning adopted has been a recent source of debates on the interpretative approach used by the Constitutional Court.

Overall, it is argued here that the ruling of the Italian Constitutional Court is very cautious, and the reasons for this approach might be found in the Italian debate on the boundaries between the different powers of the State. Indeed, the Court has clarified that it does not deliver political decision.

**Edward Mowlam, Extraordinary Extradition: A Study of the European Arrest Warrant (etmowlam@bradford.ac.uk)**

This paper examines the implementation of the European Arrest Warrant (EAW) under the headings of double criminality, proportionality and human rights. A number of recent cases which highlight the uses and limitations of the EAW in its present form are scrutinized and I explore potential development of this extraordinary legislation.

There are issues of compatibility with Human Rights, the Rule of Law, traditional UK common law safeguards, and European Union member states' sovereign autonomy. Can it continue in its present form? Should it be condemned as unfit for purpose and demolished? Perhaps it can be refurbished or dismantled and rebuilt. Like much associated with The Treaty of Rome is it simply that it was built in rather fewer days than necessary?

The EAW was the 1999 brainchild of the Tampere Summit and was formally proposed to the European Parliament on the 6th September 2001, by rapporteur Graham Watson MEP.

According to Watson, '... [the] proposal would still be on a shelf gathering dust if it hadn't

been for the events in New York five days later. Mr. Bin Laden helped make it a reality.' Why Mr. Watson would want to downplay his abilities as rapporteur and the significance of the EAW in this way is unclear. Was its implementation something of a knee-jerk reaction? Former EU Justice Commissioner Antonio Vitorino, says not '...the need [for] effective tools against terrorism and serious crime merely resulted in speeding up the procedure'. It is unsurprising that this haste brought about a 'defective instrument', which is '...extremely difficult to apply in practice'.

**Mpakwana Anastacia Mthembu, Bank-Customer Relationship in the Age of Internet (mthemma@unisa.ac.za)**

Banking law proper deals with the relationship between the bank and the customer. Traditionally the relationship is that of the mandator and mandatee. This relationship not only embraces mutual duties and obligations for the parties, but also offers privileges. The internet is used a medium of transmission of a customer's mandate and communication of information between the parties. Internet improves the efficiency of the bank's systems of collecting and transmitting orders for execution, regardless of the location of the customer. In a typical internet banking transaction, the relationship between the online bank and the customer gives rise to a hybrid nature of the contract between the parties. The relationship of the bank and the customer does not arise unless both parties intend to enter in a relationship. This paper will analyse the pitfalls created by the existing laws regulating the bank-customer relationship and make recommendations regarding the regulation of internet bank-customer relationship.

**Peter Muchlinski, Corporations and the uses of law: International investment arbitration as a 'multilateral legal order (pm29@soas.ac.uk)**

This paper seeks to examine the claim, made by certain legal scholars, that international investment law, though based mainly on Bilateral Investment Treaties (BITs) is in fact a multilateral order that introduces principles of an emergent "global administrative law" into the regulation of state conduct in relation to foreign investors and their investments. Such scholars argue that this order develops through the decisions of investor-State arbitral tribunals which are creating a harmonised understanding of the meaning of BIT provisions and an institutional system of adjudication that furthers the development of global administrative principles. Through a critical examination of this approach the paper argues that this field is not a multilateral order but an unstructured process of privatised legal entrepreneurship which seeks to further a professional interest in developing an extensive, investor friendly, regime of BITs. Furthermore, that process is fails as a means of providing effective or legitimate legal review of administrative action. The argument is made both on a theoretical level and by a review of a specific issue in international investment law, namely, the development of wider types of claims and the rise of so-called "treaty shopping" by means of corporate group structuring. In particular the multi-jurisdictional location of various affiliates in a multinational enterprise creates a network of potential claimants in investor state disputes, giving rise to the risk of multiple claims, while the possibility of setting up affiliates in various jurisdictions creates opportunities for 'treaty shopping'. 'Treaty shopping' involves the enterprise locating an affiliate in a jurisdiction that has signed an investment protection treaty with the host country, allowing various affiliates and/or the parent in a group enterprise to benefit from treaty protection even though they possess the nationality of a state that has no such agreement with the host. In addition "treaty shopping" can be practiced by claimants possessing the nationality of the host country itself by way of the incorporation of a "shell company" in a country that has an investment protection agreement with the host country. It is argued that interpretations of treaty provisions in this area lack real legitimacy and create unacceptable procedural burdens on the host country.

**Janine Mulcahy, The role of legal and social judgements in accessing reproductive treatment: the welfare of the child (j.mulcahy@shu.ac.uk)**

Section 13(5) of the Human Fertilisation and Embryology Act 1990 (as amended), known as the welfare of the child principle, is a condition of all licences to provide assisted reproduction treatment services and states that:



"A woman shall not be provided with treatment services unless account has been taken of the welfare of any child born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth."

One of the amendments made to the 1990 Act by the Human Fertilisation and Embryology Act 2008 was the inclusion of "supportive parenting" in place of "a father".

This paper aims to examine how the welfare of the child principle is implemented and interpreted in practice. An area of interest is whether staff members in licensed assisted reproduction treatment centres feel that practices in assisted reproduction treatment centres have changed following the changes in legislation and guidance and if so, in what way and to what extent.

The paper will focus on initial findings from the researcher's empirical research and is therefore a work in progress. The study involves a survey of licensed assisted reproduction treatment centres in the UK, followed by a small number of qualitative case studies in individual clinics. Within each case study semi-structured interviews with staff members are being conducted in order to explore staff perceptions and experiences of implementing the welfare of the child principle.

### **Nell Munro, Promoting the human rights of people with mental disorders in the criminal justice system: defining an agenda (nell.munro@nottingham.ac.uk)**

Based on work conducted at the request of the Mental Disability Advocacy Center in Budapest, this paper will report the findings of a number of interviews with policy makers, criminal justice practitioners and mental health professionals in Hungary. This pilot study examined whether aspects of criminal justice and penal practice have a disproportionate adverse effect upon people with mental disorders and ask what actions are likely to be most effective in redressing this.

It will ask whether efforts to promote the human rights of people with mental disorders through legal advocacy should be narrowly focussed on the distinct concerns of this population, or whether alliances with other civil society organisations promoting a penal reform agenda are more likely to bear fruit in delivering meaningful and enforceable reforms to the law.

### **Vanessa Munro, Cultures of Disbelief? Exploring Decision-Makers' Responses to Narratives of Sexual Violence in the Context of Women's Claims for Asylum in the UK**

The barriers which prevent or delay female victims of sexual assault from disclosing to criminal justice authorities, and the obstacles which often stand in the way of professional and lay decision-makers finding such narratives sufficiently credible have been well documented. Though arising in a very different context, and governed by distinctive probative and procedural rules, this paper explores the extent to which such difficulties may be replicated, and compounded, in the case of female asylum-seekers who, in applying to the UKBA for refugee status, rely on an experience of rape as part of their alleged persecution and / or claim a well-founded fear of persecution (including sexual assault) in the event of their return 'home'. Drawing on data from a national study of asylum decision-making (at both initial and appeal stages) across selected regions in the UK, this paper will examine the ways in which the structure and processes, as well as the heavily politicised context, of asylum decision-making may contribute towards a (partial) silencing of sexual assault narratives. It will explore the ways in which the intersection of race, ethnicity, gender, culture, religion, language and nationality present distinct challenges to women asylum applicants for whom rape is a part of their claim, and will reflect on the difficulties which this presents in terms of assessing the credibility of sexual assault allegations, and of the overall asylum claim.

### **Claire Murray, Feminist theories of rights – boundaries in mental health law (c.murray@ucc.ie)**

This paper will draw on feminist theories of rights to interrogate the role of traditional liberal rights discourse in constructing boundaries. Rights discourse is deeply political. Boundaries operate to validate certain groups within society as rights subjects and simultaneously exclude other groups from recognition as such. Significantly traditional liberal rights discourse does not engage with the fact that the people in the group that delimit the boundaries are those with power in society. Those outside of the boundaries of rights discourse are usually the weaker groups in society and those most in need of protection.

The discussion of boundaries in this paper will be grounded within Irish mental health law and in particular within the statutory framework established in the Mental Health Act 2001. The focus will be on the boundary between voluntary and involuntary patients. Within the current rights-based model of mental health law only those patients who are involuntarily admitted/detained are entitled to the automatic statutory safeguards. This is because the traditional liberal right to liberty is at issue. The objective of the paper is to interrogate this particular boundary and to unpack the intersectional factors that contribute to a person or a group of people being classified as outside the statutory framework and therefore not recognised as acceptable rights subjects and to explore the consequences of this for the individuals involved. The paper will draw on statistical data which highlight that in an Irish context factors such as gender and age can contribute to the location of a person within the voluntary category and therefore unable to access the statutory rights protections.

**Colin Murray, International Counter-Terrorism Co-operation from the United Kingdom's Perspective (colin.murray@ncl.ac.uk)**

This paper examines the fragile web of positive obligations which international law weaves in relation to counter-terrorism co-operation. Whilst recent United Kingdom governments have stressed the *erga omnes* nature of obligations to share information in the fields of security and intelligence, such general obligations remain nascent, placing a large burden upon bilateral agreements with partner countries. When one of the UK's partner countries threatens these arrangements for geo-political advantage, or where their actions draw the UK into complicity in breaches of the Torture Convention, the domestic courts have been required to consider these security arrangements, requiring judges to assess classically non-justiciable issues. This paper considers the how the courts have exercised their remit in this field in the recent cases of *Corner House Research* and *Binyam Mohamed*, and what these cases indicate with regard to the shifts in power between the UK's intelligence and security services and their international counterparts.

**Andre Naidoo, The regulation of ambush marketing (anaidoo@dmu.ac.uk)**

Ambush marketing continues to be a problem for organisers of sports events. There is a legitimate, sport objective to maximise revenue from sponsorship which helps to ensure that the costs of the event are covered. However, this revenue stream can be compromised by the practice of ambush marketing, often with the ambusher gaining a larger commercial benefit from the event than the official sponsors. This paper considers whether sponsors (and event organisers) should be protected, and if so, the strategies employed to protect the exclusive rights of sponsors (and therefore event organisers). These strategies take the form of self help measures by the event organisers themselves, but also there is the experience of legislative measures that have been used as well as legislative measures that will be used in 2012. This paper evaluates the effectiveness of these measures and considers what alternatives could be developed.

**Janette Nankivell & Christine Parker, Researching illegal activity by business (janetten@unimelb.edu.au; c.parker@unimelb.edu.au)**

This paper reflects on the challenges and opportunities in empirically researching the causes of illegal activity by business people and their responses to enforcement. It describes the methodology used in our own research project that involved interviews with more than 20 business people who had been prosecuted for illegal cartel activity. We describe the approaches that were and were not successful in getting people to agree to be interviewed and what this means for the type of data that can be collected the conclusions that can be drawn.

**Mohammed Nayyeri, Minority Rights: The Case of Baha'is of Iran (mnayye01@mail.bbk.ac.uk)**

Every year since 1984 until now, except 2003 and 2004, Iran has faced United Nations resolutions on situation of human rights in Iran, while one of their permanent parts has dealt with the ongoing violations of human rights of Bahā'is. The Islamic Republic's refusal to accept the Bahā'ī community as a religious minority has been the permanent part of an ongoing battle between the United Nations Monitoring Bodies and the Iranian government. The debate has not solved yet and both Iranian government and UN bodies do not change their

path. What is the main problem and how can it be solved? What are the justifications of Iranian government and the reactions by International authorities? Do Bahā'is meet all criteria to be considered as a religious minority?

This article is a neutral effort to review the situation of Bahā'i faith and its followers in Iran and to find its legal status in Iranian national law as well as in International human rights law. In order to analyze this issue, after telling a brief introduction about the history of the emergence of the faith and its core beliefs, I review the violations of human rights of Bahā'is in Iran. The discussion will then move on to evaluating the legal status of Bahā'i faith and Bahā'is both at national and International level. Turning to this article's central theme, I will argue that Baha'is meet all required criteria in order to be considered as a religious minority. It is obvious, then, that Islamic Regime of Iran, like some other Muslim States, denying the universal right to freedom of religion, not only have violated Bahā'is special minority rights, firstly their identity, but also have ignored and violated their general human rights. Therefore, defining the term 'minority' in international instruments is crucial to establish an effective system of protection for minorities and cannot be left to States to apply their restrictive religious and political opinions.

### **M Nestor, Community economic development lawyering: a new legal strategy in redressing urban poverty in Ireland and the UK (nestorma@tcd.ie)**

In addressing the social realities brought on by the current economic crisis in Ireland and the UK, this paper seeks to introduce a novel public interest law strategy. This strategy is aimed at widening our understanding of access to justice, and how lawyers and the legal profession can further influence social change. This is called community economic development lawyering ("CED lawyering"). CED as a movement, as a concept and as a lawyering strategy, originated in the United States during the 1960s, amidst the social, economic and political changes brought by the War on Poverty of the Kennedy and Johnson administrations. CED lawyering can be described as a strategy for redressing urban poverty in which economic justice initiatives can receive input from lawyers, where points of legal intervention can be addressed and where issues of accountability can make progress. CED lawyering, therefore, acts as a facilitator by building and empowering communities through the use of different legal tools and approaches. These tools and approaches can be directed towards the improvement of the socio-economic infrastructure and personal development of those communities. When viewed from a law and social policy angle with respect to ending poverty, CED has been shaped by the history and the broadening of urban development and by the decline of entitlements among the poor. Moreover, issues of decentralisation from national to local level, market outsourcing and the use of public-private partnerships have additionally influenced the contours of CED. The present paper, therefore, discusses the theory behind CED lawyering, followed by a case-study illustrating its practice. The paper will additionally endeavour to formulate ideas for further research which will elucidate how CED lawyering is, or can be, applied within Irish and UK jurisdictions.

### **Alex Newbury, Key Barriers to Restorative Outcomes in the English Youth Justice System – Lessons from Research**

The paper focuses upon young offenders' experiences of the use of restorative justice in the English youth justice system. It will present findings drawn from observations of 41 young offender panels and interviews with 31 young offenders who were the subjects of referral orders. The importance of respect and self-integrity, and perceptions of unfairness or disproportionality in the process were key factors found to be potential barriers to restorative outcomes. Many young offenders exhibit fragile self-esteem and a keen desire to be respected, which makes apologising in front of a group of adult strangers very difficult, if not impossible, for them. Many offences are not clear-cut with elements of both victimisation and offending behaviour in relation to both parties to the offence. Young people who were convicted as 'offender' were very aggrieved if they felt there was a lack of justice because the victim had 'deserved it', was equally to blame for the incident, or had provoked them. This made it very difficult to engage in restorative processes. Particular tensions will be illustrated by the use of case studies including very young offenders and playground fights; fights between rival gangs and the importance of perceptions of respect and self worth; and racially aggravated incidents where racist writing and taunts on school premises by one

school child resulted in an assault occasioning actually bodily harm against that child, perpetrated by the victims of the racial abuse. These findings will be informed by discussion of restorative justice theory. The paper will conclude with proposals for addressing some of the key tensions highlighted.

#### **Annika Newnham, Autopoietic theory and the current (mis)use of shared residence orders**

Shared residence, where children alternate between two separated parents' homes, is known to be demanding for all involved, but particularly for the children. Under Section 1 of the Children Act 1989, a court choosing a residence arrangement must have the child's best interests as its paramount consideration. It has, therefore, previously been thought that shared residence should remain limited to a small number of committed families. Instead, it is increasingly used in high conflict cases litigated under S.8 of the Children Act 1989. This paper uses autopoietic theory to explain why the case law has developed this way, and why this new strategy is unlikely to be successful.

An order, which was rejected as *prima facie* wrong prior to the 1989 Act, and was then for a long time held to require exceptional circumstances, is now made almost as a matter of routine, not only where it reflects the practical realities but also in circumstances that would more comfortably be labelled contact, in order to teach parents to cooperate.

This new understanding of shared residence has no support in the legislation or in empirical research. Instead, it has originated purely within law's circular chains of communication, as the result of a selective reinterpretation of knowledge from the child welfare sciences and a need to respond to pressure from the political subsystem; separated fatherhood has become a problem, which is perceived to require a legal solution.

This paper traces the interaction between the three autopoietic subsystems of law, child welfare science and politics, examines the influence that systems' internal perceptions of power have on these relationships and argues that since parents, too, use the processes of re-entry and redundancy to reinterpret or reject the legal subsystem's messages this use of the law is more likely to harm than to benefit children.

#### **Anne Neylon, Integration and naturalisation in the Refugee Convention 1951**

Refugee status is identified as a temporary status. It is a status must be resolved. The Refugee Convention 1951, as well as UNHCR, identify three durable solutions to the so called "refugee problem". These are repatriation, resettlement and integration/naturalisation. States in the industrialised world appear to solely use the durable solution of integration and naturalisation. Arguably, this has contributed to the development of integration and citizenship tests. Since many states, particularly industrialised countries, believe that refugees will stay indefinitely, they wish to ensure the cohesiveness of their society. By asserting the liberal values of the State through integration testing, it is felt that the status quo of society may be maintained. The link between assimilation and naturalisation is clearly identified in the travaux préparatoires of the Refugee Convention 1951. The delegates expressed that assimilation facilitated the naturalisation of the refugee. They noted also that the State might be reluctant to offer a refugee naturalisation if assimilation had not occurred. Although there were objections to the inclusion of the reference to naturalisation, it nonetheless made it in to the final draft of the Convention. Guided by the travaux préparatoires of the Refugee Convention 1951, the paper discusses the significance of the inclusion of the naturalisation clause in the Refugee Convention 1951. The paper also reflects on how the intentions that were expressed during the drafting of the convention compare to modern integration law and policy, particularly that of the European Union.

#### **Richard Nobles & David Schiff, Legal pluralism and systems theory: a dialogue with Brian Tamanaha**

In his work on legal pluralism and socio-legal studies, most notably his book 'A General Jurisprudence of Law and Society', Brian Tamanaha has questioned the usefulness of autopoietic theory. In this paper, we offer a reply to his criticisms and, in turn, question the usefulness of his own non-foundational approach to socio-legal studies and legal pluralism.

**Marco Odello, UN Peacekeeping (mmo@aber.ac.uk)**

United Nations Peacekeeping operations and other international military operations have been increasingly deployed in many crisis contexts. The practice has been established by the UN and other international organisations to ensure peace and protect victims of different types of armed conflict. Unfortunately, during the last ten years, several cases of serious misbehaviour, which may lead to human rights violations, committed by peacekeepers against people who should be protected by them have emerged. They include cases of bribery and corruption, prostitution and sex-related crimes, smuggling, etc. The UN has gone through a widespread analysis of the issues involved, from the managerial, administrative and legal point of view. The 2005 Zeid Report has provided the basis for further action within the UN system. Since then, several policy and legal measures have been discussed by relevant UN bodies and organs, and some new developments have taken place. This paper offers an account and an analysis of the different steps taken within the UN to face difficult cases of misbehaviour, including human rights violations, by peacekeepers. Most cases are related to acts which may lead to forms of criminal conduct and accountability. The paper takes into consideration the suggestions provided by the Zeid Report and subsequent UN documents. It focuses on legal developments and discusses the main problems in understanding the legal complexity of this phenomenon and its regulation. The paper includes updated documents and proposals until the most recent reports and developments in the UN system. It also considers the relationship between human rights and criminal law in the context of the law applicable to peacekeeping operations and personnel.

**Darren O'Donovan , Legislating for Cultural Rights: Lessons Learned from the Irish Housing (Traveller Accommodation) Act 1998 (darren.odonovan@ucc.ie)**

This paper critically reflects on Irish housing legislation concerning the Travelling Community and the degree to which it secures the right to culturally appropriate housing in line with international human rights standards. In doing so, it will identify key touchstones for designing successful legislation in the sphere of socio-economic rights and in tackling minority disadvantage. It will be shown that in failing to provide for an adequate enforcement strategy, has led to the differing levels of provision and accommodation quality that have facilitated the continued constructive assimilation of Travellers.

I argue that the position of Travellers and other nomadic groups can inform our understanding of the recent turn away from multicultural citizenship within Europe and the concomitant growth of culturalist racism. The refusal to view the affirmation of the right to cultural identity as central to anti-racism, and the growing reductive invocation of concepts such as social capital and integration, obscure the prevalence of indirect and structural discrimination. Cultural racism is best interrupted through the affirmation the causal role of earlier subordination and structural factors, and the refusal to attribute differential outcomes to cultural pathologies. The situation of the Irish Travelling Community lays bare vulnerabilities that must be taken into account upon the further development of international human rights norms to further cultural diversity and combat discrimination.

**Annet Wanyana Oguttu, The role of Tax Havens in the Global Financial Crisis: A Critique of International Initiatives and Measures to Curtail Resultant Fiscal Challenges in South Africa (oguttaw@unisa.ac.za)**

When the global financial system collapses, it is reasonable to find out what caused it and what factors were at the centre of this crisis. At the 2009 G20 summit, National leaders stated that "major failures in the financial sector and in financial regulation and supervision were fundamental causes of the crisis." They also noted that unregulated shadow banking and offshore tax havens were at the heart of the financial crisis. Thus, although tax havens did not "cause" the crisis many of the roots of the global economic crisis can be traced back to tax havens.

In this paper the tax haven problem and their historical development is described. Then the role of tax havens as catalysts in the global financial crisis is described. Although over the decades, there have been international initiatives against the tax-haven harmful tax practices, certain factors hampered these initiatives. It is postulated that if these initiatives had been fully supported, perhaps the magnitude of the crisis would have been less. Indeed

it has been noted that countries that adhered to international recommendations appear to have been less adversely affected by the financial crisis. It is in this respect that the article zeros down to the South Africa perspective of the problem, analyzing some of the fiscal measures that South Africa has come up with in curtailing the role that tax havens play in fueling financial imbalances in the country. The comments and recommendations in this paper provide some guidance as to how financial recovery can be effected and how the adverse effects of a possible future crisis can be averted in South Africa, through taking a firm stand against tax havens.

**Liz Oliver, 'I get grants, I employ people for three years, I look after them as well as I can'  
Researchers, Universities and the Legislation on Fixed-term Employees: Examining the role of the Principal Investigator in shaping employment rights (e.a.oliver@lubs.leeds.ac.uk)**

This paper draws from an empirical research project conducted across 2010. The project explored responses to the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 within universities. The Regulations, which implemented a European framework Directive (Council Directive 1999/70/EC), are a general measure designed to work within a broad range of employment contexts. However they raise a number of specific issues for universities where fixed-term employment has become a feature of working life, particularly in the context of researcher roles.

Upon the introduction of the Regulations, different stakeholders envisaged a variety of different scenarios ranging from a radical reduction of fixed-term employment to a continuation of existing practices. Sector-wide guidance drawn up by the Joint Negotiating Committee for Higher Education Staff (JNCHES) reflected the tension between the apparently competing goals of flexibility and security inherent in the contested and long negotiated framework Directive.

Through four institutional case studies involving semi-structured interviews and focus groups with key staff at various institutional levels, this study contributes new empirical insights into how institutions are dealing with these changes 'on the ground'. The focus of this paper is on the role of 'Principal Investigators' in shaping the experience of researchers on fixed-term contracts. This group straddle research and management roles and have emerged as the 'missing link' in the implementation of institutional policies. This study found PIs to play a key role in shaping researchers' understanding of, and engagement with their legal rights.

The study was commissioned by an organisation called 'Vitae', a national organisation that champions the development of doctoral researchers and research staff in higher education institutions and research institutes. It was funded under a remit to develop a more comprehensive evidence base and designed to contribute to the knowledge base in implementing a Concordat to Support the Development of Researchers.

**Mercy Emetejife Onoriode, The Effect of the Amnesty Granted Militants in the Niger Delta: Who Pays the Price?**

There is no gainsaying that human rights are inherent, inalienable, indivisible and universal. In recent times, the international community has focused on fundamental human rights and indeed this has engendered intense debate. However, it is increasingly interesting to note that an aspect often discountenanced is, whose rights are in issue and grossly violated? Is it that of a criminal when sanctions are meted out for the crime committed or that of a victim? The centrepiece of this paper focuses on the gross neglect of the victims of crimes in the grant of amnesty in the Niger Delta.

The current development in the grant of amnesty to militants has altered the true position significantly. In the retributive theory of punishment, an aspect of the rationale is to assuage the victims of these crimes. Is it possible then that there can be a peaceful society where criminals are celebrated? Is the law re-defined to abolish what constitutes crime and the legal consequences which follow? Crime such as kidnapping, hostage-taking and the vandalisation of oil pipelines and wells are no doubt crime against the State, yet one aspect often overlooked is the fact that these crimes are gross violation of the fundamental human rights of certain persons, violation of rights such as their right to life, right to liberty, economic and social rights.

The idea of amnesty is one geared towards fostering peace and harmony in the society. The primary focus of amnesty was structured to check human rights abuses and must not be

perverse to include condoning and glorifying crime. This no doubt will encourage persons who are perversely proud of their criminal records. A critical appraisal and whether this has yielded any dividend or will yield any dividend are the main focus of this paper.

**Kieran O'Reilly, The protection of LGBT Rights in post-Soviet states – post-Soviet hangovers? ([loughatorick@gmail.com](mailto:loughatorick@gmail.com))**

While states have worked together to author and ratify many international and regional human rights conventions and treaties, there is often a broad scope for interpretation and implementation of such documents between states. Even within the Council of Europe system major differences between the national human rights systems of member states can be observed. This paper aims to develop a deeper understanding of the origins of some of these differences within the post-Soviet territory, taking as a case study the protection of LGBT rights. This paper looks at the impact of the Soviet model of human rights law in post-Soviet states. In particular, it examines the impact of the Soviet experience on LGBT rights in three post-Soviet states – Russia, Georgia and Latvia. Homosexuality was illegal during most of the lifetime of the Soviet Union. In almost all post-Soviet states people who identify as LGBT face significant challenges with regard to their human rights.

The paper examines the primary sources of law in the Soviet Union and post-Soviet states and the public discourse on human rights law issues. Field research involving interviews carried out with human rights defenders and LGBT rights advocates in the case study states is also discussed. Similar field research will be carried out in Ireland, so that comparisons can be made with a western European state. The paper examines the approach to human rights law taken in each state and shows that while these states have adopted different human rights law systems, these systems all reflect the Soviet legacy in some ways.

**Catherine O'Rourke, Addressing a Web of Gender-based Harms against Women in Transitional Justice**

Drawing on empirical work conducted by the author in three different transitional contexts, the paper proposes a web of gender-based harms against women in transitional justice. The web describes how public harms of political repression and conflict violence exacerbate nominally 'private' harms experienced by women, in particular harms of domestic violence and reduced reproductive autonomy. Unlike the 'continuum' theory of violence against women, which tends to collapse the distinction between public and private harms in transitional justice, the proposed web of gender-based harms provides the basis of a legal and political argument for transitional justice to address a wider range of harms against women, while maintaining a public/private distinction. To this end, the paper draws in particular on more recent human rights innovations around due diligence requirements of states in respect of 'private' violence against women and reproductive rights infringements.

**Aderemi Oyewunmi, Intellectual Property Rights and the Commodification of Culture ([adebobajo21@yahoo.com](mailto:adebobajo21@yahoo.com))**

The increasing tendency towards the commodification of cultural works, particularly by persons other than their traditional custodians has attracted considerable attention in recent times. This is more so given that the trend has been exacerbated by developments in information technology. Attention has focused on the existence and suitability of legal options to address the multi-dimensional challenges arising from these developments, with a view to striking the right balance between the protection of the custodians of cultural works, and the encouragement of innovation and derivative creativity based on these works. Such legal tools must recognise the possibilities of utilising cultural works for social, economic and cultural development of local communities, with a view to alleviating the grinding poverty which confronts those communities. It is noteworthy that the creation, packaging and commercialisation of certain cultural works could constitute important venues of empowerment for the largely economically displaced rural dwellers in many poor countries. On the other hand however, the tacit sanctioning of the commodification of cultural works through intellectual property rights may pose a threat, as it has the potential to transform the cultural relations which drives creativity in local communities, by ignoring the role of historical, emotional, traditional and sometimes religious components in the creation and utilisation of these works.

This paper examines these issues within the framework of intellectual property rights as the body of legal rights which deal with the protection of creativity in its many different forms. It examines the suitability of certain forms of IPRS in addressing the peculiarity of cultural works, given their western orientation and underpinnings, and emphasizes the possibilities of exploring protection under legal regimes that are better suited to accommodate collective ownership of rights and unlimited time frames. The relevance, if any, of traditional mechanisms for balancing in IPRS, such as fair dealing, is also probed. Some contexts that have played out in certain jurisdictions/communities would be used to highlight the significant concerns of the presentation.

**Tanya Palmer, Emily Kakoullis & Emma Oakley, Roundtable on Socio-Legal Studies: Methodology and Discipline (Tanya.Palmer@bristol.ac.uk; Emily.Kakoullis@bristol.ac.uk; Eo7121@bristol.ac.uk)**

The roundtable will raise, explore, and discuss the questions pertaining to the methodologies used in Socio-Legal Studies and the place of Socio-Legal Studies as a discipline. The panel will use their own experiences of designing their doctoral research methodologies as a jumping off point to explore some of the ways these issues have arisen and been tackled.

The roundtable will also build on discussions prompted by the recent SLSA conference 'Exploring the 'Socio' of Socio-Legal Studies' and the 2008 Special Issue of the Journal of Law and Society 'Law's Reality: Case Studies in Empirical Research on Law'. The questions that will be explored concern what 'fits' into the 'Socio-legal': How do you know when your research fits into the 'Socio-legal'? Does Socio-legal Studies have specific methodologies? Is Socio-legal Studies a discipline in itself, or is it simply that the content of Socio-legal Studies refers to law and the social?

The roundtable will begin with a panel of 3-5 research students at various stages of their doctoral studies, who come from a range of disciplinary backgrounds including both law and sociology. They utilise a variety of methodological approaches such as grounded theory, critical applied ethics, and ethnographic interactionist approaches. Each panel member will talk for 5 – 10 minutes introducing their research and highlighting some of the questions it has prompted with regard to methodology and discipline. The session will then be opened up to a group discussion, building on the questions raised in the short opening presentations and allowing all those present to contribute their experiences and questions.

**Christine Parker & Janette Nankivel, Does the punishment fit the crime? The attempt to criminalise cartel activity**

This paper summarises evidence from our qualitative and quantitative investigation of the impact of cartel criminalization on cartel conduct in Australia. First we investigate the nature of the "crime" of cartel conduct from the perspective of business people who have been penalized for cartel activity. We do so using in depth qualitative interviews about their activities and their experience of enforcement. Second, we test the likely impact of criminal sanctions vis a vis criminal sanctions using evidence from business people's responses to a range of hypothetical vignettes in a survey. Our qualitative interview evidence uncovers a powerful range of rationalizations for cartel activity that mean business people do not see their own activities as "criminal" and "punishable". Our survey evidence suggests insufficient knowledge of the law and fear of its criminal enforcement to challenge these rationalizations. These findings are not just of practical policy relevance. They reflect a fundamental instinct among business people that much activity that is currently treated as illegal cartel activity in Australia should be controlled by means of economic "regulation" rather than befitting punishment as a crime. We suggest that this has consequences for the integrity of the whole project of using criminal law for economic regulation.

**Aisling Parkes, The Right of the Child to Participate in Family Law Proceedings: A Comparative Analysis of the Extent to which Article 12 of the CRC has enhanced child protection under Family Law over the past two decades (a.parkes@ucc.ie)**

This paper will examine the nature and scope of Article 12 (the right of the child to be heard/participate) of the UN Convention on the Rights of the Child 1989 (CRC) and in particular, its overall contribution to the protection of children under Family Law since the CRC entered into force in 1990. Children are a vulnerable group in society, in respect of



whom decisions are made on a daily basis in family law proceedings. It is submitted that, in order to ensure that fully informed decisions can be made in relation to children, their views must be taken into consideration. Models of best practice will be explored where the right of the child to participate directly and indirectly in family law proceedings is effectively ensured and facilitated in a systematic manner in accordance with Article 12(2). Indeed, the challenges that the implementation of Article 12 continues to pose to countries all over the world, including Ireland, in the context of such proceedings will be highlighted. In particular, common barriers to child participation in family law proceedings will be identified including the adoption of age limits in areas such as custody and access, adoption as well as medical decision-making. Furthermore, the suitability of the adversarial approach to family law proceedings will be addressed, identifying models of best practice which have adopted alternative approaches in this respect. Finally, taking on board the General Comment on Article 12 which was adopted by the UN Committee on the Rights of the Child in July 2009, this paper will conclude with suggestions for the way forward where children are both seen and heard in family law proceedings which concern them.

### **Samantha Pegg, Legal etymology - The cases of Fanny Adams and Sarah Payne**

As the Child Sex Offender Disclosure Scheme (popularly known as Sarah's Law) rolls out nationwide many commentators will undoubtedly be concerned with the operation and legality of the scheme. Adopting a different focus, this paper instead seeks to consider whether we can learn anything about how young murder victims are received by society from the enduring use of their names. Sarah Payne's murder, while initially one that prompted media outrage and moral panic, has come to be positively associated with greater public access to details of sexual offenders and this case will be positioned against a young Victorian murder victim whose name has had a lasting resonance, that of Fanny Adams, in order to address whether the etymological footprint left by such cases has anything to add to our understanding of how these young female murder victims have been socially and legally received. This paper then considers whether the consequent deviations in the lasting etymology of these murdered children speak to differing social responses to acts of child murder and to child murder victims. In addressing how the term 'sweet Fanny Adams' entered popular parlance it not only seeks to look at the historical locus of the terminology, but also to understand how the name of this young murder victim came to be used as a pejorative slang term and whether young Victorian murder victims were received differently and perhaps (as the etymology of Fanny Adams would suggest) with less reverence than those in the modern period.

### **Georgios Perakis, Aggression, Security and the Harm of Sexual Violence (g.perakis.1@research.gla.ac.uk)**

A study on the criminalization of rape in various jurisdictions proves that national laws are based on a non-consent definition of rape (instead of coercion based). Thus, the common denominator of the criminalization of rape is sexual autonomy.

However morals and religion influence on the formation of the law and affect the characterization of an act as sexual. Rape, does not flow irrespective of sexuality. Prove for this is the fact that rape laws involve protection of women against unwanted (out-marriage) sexuality, but against men, rape laws have regulated the limitation of uncontrollable sexual desire so as to leave homosexuality as private as possible. In addition, they had afforded no protection to male victims of sexual assault.

Sexual violence has been deployed as an instrument of systematic control and international tribunals, recognized it as aggression against sexual autonomy but without acknowledging motives of violence, related to sexuality and harm on sexuality- in the overall context of aggression. In addition, they fail to adjudicate effectively male rape cases. Prosecution is still selective on the gender of the victim because traditionally sexual autonomy means different things for men and women, and sexuality is protected on the occasion that flows out of the victim's hands, that is to say, the protection of female sexuality is at men's hands.

Hence, despite the recognition of rape as *jus cogens*, the existing legal framework insisting on individual accountability is not adequate to such a cultural and social problem. The intent to commit rape must be acknowledged with an understanding of motivations that make sexual violence prevalent to other forms of violence in conflict. Sexual violence can decrease only

by acknowledging attacks against sexuality or intimidation through sexualized violence as a root cause of violence rather than insisting on bodily integrity or female dishonor.

**Amanda Perry-Kessarlis, What does it mean to take a socio-legal approach to law and development? (a.perry-kessarlis@soas.ac.uk)**

This paper seeks to identify the contours of a socio-legal approach to one section of the field of international economic law: the theory and practice of law and development. It proposes that a socio-legal approach is one that draws on the analytical, normative and empirical resources of the social-sciences (sociology, economics, political science, geography, history, anthropology and so on) to explore law's role in human life. In the law and development context, the exploration is twofold. First, we explore law's role as a means (or obstacle, or irrelevance) to achieving general development goals. Here we draw on the social sciences for insights into what those general development goals ought to be; into how any efforts to achieve those goals through, or buttressed by, law might affect, and be affected by, human social behaviour. Second, we explore law's status as a development goal in its own right. Here we draw on the social sciences for insights into what values and interests that law should support, or allow to flourish.

In identifying the contours of the socio-legal approach, the paper highlights an uncomfortable question that is rarely aired in through the rather unreflective interdisciplinarity that characterises law and development. What does law itself bring to the table?

**Andreas Philippopoulos-Mihalopoulos, Critical Autopoiesis**

The recent increase in attempts at reading Niklas Luhmann's autopoietic systems theory from different perspectives demonstrates the capacity of the theory to come into productive dialogue with theoretical strands that at least prima facie would be considered incompatible. My attempt is to offer an autopoietic reading that will push autopoietic limits and bring forth the theory's relevance to contemporary society. Hence, what I have come to call Critical Autopoiesis is the autopoietic practice that is at home with deconstruction, gender studies, geography, radical ethics, postecologism, deleuzian jurisprudence, radical politics, or indeed radical autopoiesis itself –namely, a reading of the theory that reach the limits of self-referentiality and establish a critical space within the theory from which observations about the theory's identity, topology and future can be produced. In my exposition of Critical Autopoiesis I will be touching upon issues such as the connection of law to justice, dedifferentiation and hybrid normativity, global legal centre and periphery, legal rights and identity politics.

**Christine Piper, Plus ça change plus c'est la même chose – or is it? (Christine.Piper@brunel.ac.uk)**

In the decade before the Family Law Act 1996 family law and policy was increasingly focused on mediation, parental responsibility, diversion from solicitors and courts, and the perceived harms to children caused by divorce and lack of contact with the non-resident parent. As a result, academic critique was concerned, inter alia, with the effect of such developments on women abused by their partners and with the nature of the knowledge base being used to predict the present and future welfare of the children involved. In 2010 the Ministry of Justice issued a Consultation Paper on Legal Aid and set up a review of the family justice system in England and Wales. The guiding principles of the latter and the thrust of the former make clear the aim is to ensure as far as possible that separating parents 'take responsibility', use mediation, do not use the courts, and that contact 'rights' for non-resident parents are promoted further. However, research since 1996 has created a more complex picture of the child's best interests in regard to parental separation and contact, and the Re L case in 2000 introduced the principle that the courts would investigate and take account of domestic violence in regard to contact applications. So the context for the resurgence of pressure towards out-of court settlement is very different and the concerns of academics in the 1980s and 1990s are no longer relevant. Or are they? This paper will review developments over the last decade which might suggest that, rather than the situation being just the same - or better, it is actually likely to be more deleterious for children and abused parents.

**Sieglinde E. Pommer, Global Health Law: The H1N1 Challenge  
(sieglinde.pommer@law.ox.ac.uk)**

When a potentially deadly epidemic threatens a population, should the government be able to suspend individuals' rights if it is deemed to be in the public's interest and to what extent? This debate about the immediate responsibility of government to protect the public during times of emergency was refueled recently by the hundreds of A/H1N1 flu cases that emerged across the globe.

The outbreak prompted several countries and states to invoke emergency measures, such as ordering flu testing, banning public gatherings, issuing a sweeping quarantine orders, or closing schools. Others are considering enacting new and often controversial rules on trade restrictions, travel restrictions, and also implementing other recommendations for public health measures for a public health emergency of international concern.

With human-to-human and now even human-to-animal transmission established, the "swine flu" threat has raised the potential need for interventions, such as compulsory isolation, quarantine, and treatment, which infringe on civil and political rights. Human rights concerns may also arise under the right to health, particularly with respect to non-discriminatory access of infected individuals to health care services (e.g. hospitals) and anti-viral drugs (e.g. Tamiflu).

The H1N1 outbreak could also affect the deadlocked negotiations over sharing avian influenza virus samples because it demonstrates how critical virus sharing with WHO is for global influenza surveillance and response. The International Health Regulations (IHR) 2005 and international human rights law recognize the legitimacy of many interventions, provided that they meet specific conditions and are applied in keeping with certain principles. Already clear is the IHR 2005's importance to international disease threats such as the swine flu, and perhaps this crisis will catalyze needed efforts, even in times of global economic crisis, to strengthen compliance with and implementation of the IHR 2005.

Critically evaluating the role of law and legal instruments in handling global health threats of pandemic proportions, this presentation discusses the necessity of conceptualizing a global health law regime in the contexts of international relations and global public policy. Arguing that law and policy should be linked at the global and domestic levels, we offer a careful analysis of the role of law as a tool to coordinate international health cooperation and global health governance and to achieve health equity in an increasingly interconnected global society. Examining the effectiveness and limits of health law to control and contain the transmission of the H1N1 virus, this presentation discusses necessary framework rules rendering effective a "global health law".

**Sieglinde E. Pommer, Global Mental Health: Reevaluating Rights and Standards from a Comparative Legal Perspective (sieglinde.pommer@law.ox.ac.uk)**

Exploring the role of law in enhancing global mental health, this presentation investigates crucial differences between the legal traditions of mental health laws in place in civil and common law jurisdictions. Pointing out common trends and developments as well as highlighting distinct features of particular national laws, we discuss the impact of existing international legal instruments on domestic legislation from a comparative legal perspective and raise awareness of potential difficulties and future needs.

**D Prabhat, Legal Mobilization for Suspect Communities after the Human Rights Act 1998: Same Difference? (devyani.prabhat@nyu.edu)**

The Northern Ireland Conflict created a 'suspect community' of Irish men and women in England (Hillyard 1993). State response to Islamic terrorism since 9/11 has created a similar suspect community of Muslim men and women today (Gearty 2010). Lawyers, both in Northern Ireland and in England, have represented Irish defendants and raised awareness of the rights issues involved during the conflict. Similar developments (with variations) have taken place for Muslims in England post 9/11. Most of the Northern Irish rights work was prior to the incorporation of the European Convention on Human Rights (ECHR) into domestic law of the United Kingdom whereas the post 9/11 work is after such incorporation by the Human Rights Act of 1998. Has the Human Right Act made any difference? Keeping in mind the various variables such as change in political context, increase or decrease in resources such as legal aid or pro bono work, other legal changes, structure of the legal profession,

technical capacity, advances in technology, the growth of the NGO sector, academic research culture, and the culture of rights practice, this paper will analyze whether the Human Rights Act has had any significant impact on rights lawyering for basic freedoms of people at the margins of a liberal democracy. Instead of a quantitative analysis of wins and losses in courts, the paper identifies other indicators for an impact analysis such as magnitude of response from the legal profession, specialization of practice, the status of rights lawyers and their reception by the profession, the publicity generated by the work both in and outside of the juridical field, and the change (or lack of it) in state action following rights work by lawyers. Through qualitative interviews with rights lawyers, some involved in the Northern Irish cases, some in the post 9/11 cases, and some in both, the paper analyzes whether the statute has contributed in a broad sense (through both direct and indirect impacts) to a development of a rights culture in the UK juridical field.

**Rebecca Probert, Carry On Up the Aisle! (Rebecca.Probert@warwick.ac.uk)**

The Carry On films are often regarded as exemplifying bawdy British humour. Yet the majority of the 30-odd films in the series are very conventional in their attitudes.

Marriage was at the centre of the early Carry On films, and depictions of extra-marital sex tended to occur only in historical or exotic settings. From 1968, however, sex is very much on the agenda, if not on the screen, and by Carry On Emmanuelle in 1978 the sexual revolution was complete.

Such changes in the depiction of sexual attitudes and practices reflect the changes that were occurring in society as a whole over this period. Indeed, the films provide an excellent barometer of such change. The low budget for the films, and the fact that they were produced with such speed, meant that reference could be made to contemporary issues without any risk of them becoming dated. It was no coincidence that 1971, the year that the Divorce Reform Act 1969 came into force, saw Sid James as Henry VIII in Carry on Henry working his way through a line-up of queens and demanding easier divorce laws.

This paper offers a light-hearted look at the changes in family life and the law in the 1960s and 1970s through the way in which they were depicted on screen.

**Michel Quilter, Bankruptcy as a literary device in Shakespeare's plays (michael.quilter@mq.edu.au)**

Shakespeare uses the idea of bankruptcy in several of his plays, from comedies to histories. It may be the "poor and broken bankrupt" in *As You Like It*, or the King who has "grown bankrupt" in *King Richard II*. At the end of the 16th century the law of bankruptcy in England was responding to a changing commercial environment. Bankrupts however, were still generally regarded with much suspicion. Shakespeare was a businessman and he understood the effect of indebtedness and of bankruptcy. He uses Antonio's financial downfall in *The Merchant of Venice* to build tension in the play until finally Shylock is ready "to cut the forfeiture from the bankrupt there". As the many works on Shakespeare's connection to the law attest, he certainly had more than a passing interest in the area. Shakespeare wrote during the currency of the Bankruptcy Act of 1570 and the Bankruptcy Act of 1604. The Act of 1570 was the legislation that confined bankruptcy to traders only, a situation that would persist for another 300 years. This paper looks at how Shakespeare uses bankruptcy as a literary device and in this context examines the relationship between the Act of 1570 and the plot of *The Merchant of Venice*.

**Dwijen Rangnekar, The Exclusion of Clubs: GIs and the dilemmas of collective action (dwijenr@gmail.com)**

Geographical indications (GIs) are a recent introduction into the global portfolio of intellectual property rights governed by the TRIPS Agreement. Yet, it has existed in different forms either in nomenclature (e.g. Appellations of Origin, Indications of Source, etc.) or as cultural norms and notions. Marks indicating origin and institutional forms of the same (e.g. guilds) are often recognised as the precursors to trademarks. If one moves outside of supranational and into national jurisdictions than the French system for wines, Appellation d'Origine Contrôlée, easily comes to mind. Interestingly, certain products also witness a sui generis system for protection, e.g. International Olive Oil Agreement (Stresa). Looking at cultural norms and notions of authenticity, some scholars draw attention to the stabilisation of

cultural repertoires in certain localities as establishing such norms and notions. For instance, van der Ploeg's talks of *art de la localité*, suggesting that "every location acquired, maintained and enlarged ... its own cultural repertoire: its norms and criteria that together established the local notion of 'good farming' (van der Ploeg, 1992: p20). My specific interest is in the interface between these two – and other – norms and notions of authenticity. And particularly in what happens to the notions/norms as they traverse from the 'cultural' and into the 'juridical'.

I approach these puzzles through a characterisation of GIs as 'clubs'. This analytical category is based on an understanding of the impacts of cultural norms and juridical rights: both, through different mechanisms and with different consequences, are endowed with requirements for adherence (inclusion) and prohibition (exclusion). To explain, the local notions of 'good farming' require an adherence to those practices to be part of the 'club'. Those not adhering to the rules of 'good farming' are prohibited from using the mark indicating origin. Such inclusion/exclusion exists with varying levels of precision with cultural norms/notions and their juridical reification – GIs (and others of this IP family). After an explication of the analytical notion of 'clubs', the paper uses it to raise a number of research questions concerning GIs: 'How do different actors – and differentially endowed and interested actors – cooperate to form a GI-club?' Members of a GI-club are interdependent: the reputation embedded in the indication is collectively on account of and simultaneously accrues to all club-members in the geographical region. However, despite this interdependence, club members compete with each other: "horizontally" for market shares (e.g. competition between distillers) and "vertically" for share of the rents (e.g. competition between distiller and a retailer). This competition is equally complicated by varying perceptions and cultural notions of authenticity (i.e. 'good farming') and future imaginations of the product (i.e. the future of 'good farming').

The paper ends with a gentle reminder to research on GIs – and other marks indicating conditions of origin, including 'organic', 'fair trade', 'blood-free' diamonds etc. – that using the analytical category of 'clubs' brings into attention two particular issues. First, it reminds us of the microfoundations of power and standard setting; thus, suggesting that the consensus on rules is not necessarily the rules of the consensus. Second, those excluded by clubs' rules are not necessarily 'unauthentic' – whatever might be that elusive element of authenticity.

**Adilah Abd Razak & Mass Hareeza Ali, Consumer Credit Card Agreement and Mandatory Disclosure: How Disclosure Affect Consumer's Decision to take Credit Card (adilah@econ.upm.edu.my)**

The Credit Card Guidelines 2003 contain mandatory disclosure requirements which the credit card issuer in Malaysia must comply with when entering into a credit card agreement with the consumer. The purpose of the disclosure is to facilitate the making of an informed decision. Disclosure rule is useful if the information provided by the issuer assist the consumer in deciding whether to accept or reject the credit card. Based on previous literatures, it is expected that demographic factors; format, language and timing of disclosure; mode of communicating the information; and also the influence from friends and family will affect the consumer's decision to take a credit card. These factors also affect the utility of the disclosed information to the consumer in his or her decision making process. This paper also suggests that with the introduction of the credit terms and conditions as mediator the consumer's decision and ultimately the effectiveness of the disclosure rule can tested. Result shows that the credit terms and conditions have influence on the consumer's decision to take credit card. From the finding it can be concluded that the disclosure was useful for the consumers in their decision making process.

**Gethin Rees, "[W]ell nurse you're not very good because she's actually got a tattoo on her back": Experience, profession and relevance in forensic medical examinations of sexual assault survivors (g.rees@ed.ac.uk)**

The question of whether certain information is relevant to a case of rape is a problem that has been faced by many countries, and has resulted in the production of "Rape Shield" legislation, which prohibits the complainant's sexual history or other bad character evidence from being presented during the trial. However, in their study of Scotland's Rape Shield legislation, Burman et al. (2007) found that the type of information prohibited by the law was

finding its way into the courtroom via medical reports. The relevance of different kinds of medical information collected during the forensic medical examination of sexual assault complainants constitutes a challenge for forensic practitioners in adversarial legal contexts. Drawing on interview material collected from Sexual Assault Nurse Examiners (SANEs) in Ontario and Forensic Nurse Examiners (FNEs) in the United Kingdom, this paper will compare the ways that these two groups of practitioners record medical history and other information that could potentially problematise the complainant's allegation in a future trial. The study found that SANEs follow a strict protocol when determining which information is relevant and go to great lengths to ensure potentially problematic information is not mentioned by the complainant during the taking of a medical history. On the other hand, FNEs, a novel sub-profession in the UK, who are still attempting to establish themselves in the medico-legal context, record potentially compromising information in order to protect themselves and their discipline, leaving the responsibility for the sharing of problematic information to the complainant. This distinction is most prominent in the recording of tattoos and piercings, which is considered absurd in the Ontario context, but vital by FNEs in the UK.

### **Nancy Reichman, Beyond the Reaches of the Criminal Law? The case of low waged women workers**

Low waged women workers constitute a significant proportion of workers in the hospitality and healthcare (?) industries. Not only are the wages and conditions associated with this work difficult, with low pay combined with long working hours and high intensity of demands, but breaches of these conditions by employers (i.e. non payment of wages) common (?). The negative impact of both 'legal' and 'illegal' elements of low waged work on the women concerned can be considerable. Despite this, sanctioning of breaches by employers through criminal law for even the most egregious breach by employers is absent. This paper analyses the challenges for women in these sectors explores the reasons why criminalisation of harmful conduct in this area is not used.

### **Máire Olivia Reidy, From Fragmentation to Centralisation: Reform of the Irish System of Regulating Health Service Providers ([mreidybl@eircom.net](mailto:mreidybl@eircom.net))**

1. "Regulation", in a broad sense, is about maintaining order and ensuring a minimum set of standards in society.
2. Definition of what I mean by "Healthcare Regulation"... i.e. not the more common economic regulation or financial regulation or even professional regulation. "Healthcare Regulation" is not spoken of as often as these other forms of regulation.
3. What bodies in Ireland are responsible for regulating health service providers? How many health regulatory authorities are there in Ireland at present?
4. Discuss FRAGMENTATION. The Evils of Fragmentation in the Regulation of health service providers. What kind of Problems does this lead to?
5. Discuss the aim of Centralisation. What is Centralisation of Healthcare Regulation? What does that entail or involve? What are the benefits of Centralisation? Can it be achieved? How can it be achieved? What are the disadvantages/criticisms of moves towards centralisation of healthcare regulation? How can we achieve centralisation of healthcare regulation here?
6. "Super-regulation" – regulation of regulators – who oversees the regulators to make sure they are enforcing the standards they have set? – how can we guard against an overly "soft" approach on the part of our regulators?

### **Helen Rhoades, Working with separated families in a shared care policy environment – A cautionary tale ([h.rhoades@unimelb.edu.au](mailto:h.rhoades@unimelb.edu.au))**

In recent years an increasing number of jurisdictions have explored the possibility of enacting laws that encourage separated parents to share the care of their children and to use non-adversarial dispute resolution services to resolve family conflict. Australia implemented reforms along these lines in 2006. This paper draws on recent research into the operation and impact of Australia's legislative changes to tease out the policy and service delivery lessons they suggest for jurisdictions, like England, that are considering similar reforms.

### **Stephen Riley, Human Dignity and the Problem of Transcendence**

This paper considers the extent to which human dignity, and its relationship with transcendence, is explicable within Luhmann's systems theory. Human dignity functions variously as a substantive right, a heuristic, a peremptory norm, and a grundnorm. Together, these functions serve to designate the individual - embodied and inviolable - as the ultimate determinant of change within law. Moreover, these functions invoke the transcendent: human dignity as justice, a reified humanity, and the a-temporal conditions of legality. While such appeals are unexceptional within normative legal discourse each depends in the context of human dignity on interplay between the embodied individual and a democratised idea of sovereignty. This interplay eludes analysis in terms of the temporal progress of human self-government, but is explicable in terms of law's privileging certain conceptions of human self-consciousness. In other words, when we afford importance to human dignity we commit ourselves to a view of law not solely as the management of change, but as a negotiation between the transcendent and immanent in human self-perception.

### **Martin E. Risak & Ian McAndrew, Mediation of employment rights cases: The New Zealand experience (martin.risak@univie.ac.at; ian.mcandrew@otago.ac.nz)**

The paper reports on the findings of primary research undertaken in 2010 on how the mediation of employment rights cases is conducted by the New Zealand Department of Labour Mediation Service, a system of institutional mediation that was recognised in the Gibbons Review as one worthy of close attention. The paper draws on in-depth, semi-structured interviews with 21 mediators, 15 observations of the mediation process, and a questionnaire-based survey of the employer and employee parties to mediation and their representatives.

The paper begins with a compact overview of New Zealand labour law and the options for resolving employment disputes. It then provides an insight into a system of mandatory state funded employment mediation that is the first and primary option. Since its establishment in 2000 the Mediation Service has developed an organisationally efficient style of employment mediation, especially in dealing with unfair dismissal and disadvantage claims that represent the majority of the caseload. Characteristics include the presence of often legally qualified representatives, caucusing with shuttle mediation, usually active management of the process and the parties by the mediator, and directive litigation risk assessments provided by the mediator. The paper seeks to draw a picture of the mediation process followed, as well as teasing out its theoretical underpinnings, and to identify variables associated with parties' perceptions of mediation outcomes.

The findings on the New Zealand system of employment mediation provide a valuable benchmark for future comparative research on the use of employment mediation in the member states of the European Union.

### **James Roffee, Discourse on Indigenous and Aboriginal Incest and Sex Offences: Guised for Assimilation? (James.roffee@leicester.ac.uk)**

Discourse analysis of government documents has identified a functional use of incest as a guise for legitimating government action. The work presented here uses the theoretical findings of a recent study to question discourse on aboriginal incest and sexual violence. Australia no longer adopts a policy of cultural assimilation with Aboriginal Peoples however questions can be raised over actions which amount to indirect assimilation. Analysis of discourse may also provide insights into the two-fold reasoning process of child welfare and cultural assimilation; the latter being a long held aim of the dominant culture and the former being a tool to aid such assimilation. It further proposes hypotheses for testing. Identification of such discourses may help highlight the continued inequality in treatment that many indigenous peoples face particularly within the marginal sections of such cultures showing the use of the legal discourses in action.

**James Roffee, Conflating Reasons: Sexual Rhetoric, Discourse Analysis and Setting the Boundaries (jroffee@dmu.ac.uk)**

This paper presents a discourse analysis of *Setting the Boundaries*. *Setting the Boundaries* was a government white paper which formed the backbone of the Labour government's response to growing public disquiet over sexual offences. Most of its recommendations were enacted into law. It claimed to be evidence based, however analysis has shown that rather than using evidence, the writers' used sophisticated linguistic techniques to mask illogical reasoning. The report has been subjected to a form of Critical Discourse Analysis: Rhetorical Political Analysis. This paper will identify the discourse techniques and linguistic construction employed to disguise what is at best, circular reasoning. To enable the public to engage and respond to the report, the reasoning process should remain clear and unbiased. Instead the report conflates discussion of consensual and non-consensual acts surrounding incest and employs the moral rhetoric of childhood acting as a guise for circular discourse dynamics. Use of vulnerability and innocence stifle any true debate on the issue of consensual adult incest. Implications for reliance on the recommendations formed as the result of such reasoning are thus profound.

**Christopher Rogers, Clare Sandford-Couch & Sarah Mercer, Law, literature and art in the trial of Oscar Wilde (sarah.mercer@northumbria.ac.uk)**

The trial of Oscar Wilde provides an unusual perspective on the trial process. The first action contains a cross-examination involving consideration of the aesthetic philosophy of Wilde in an attempt to prove that he was subverting contemporary understandings of gender. It is a fascinating study of how Wilde's literary output was used to undermine his prosecution by demonstrating the immoral nature of works such as *The Picture of Dorian Gray*. It therefore provides a perspective on the trial process incorporating not only the formal mechanisms of the English legal system, but also requiring consideration of literature and art, how they were used in a specific trial and how such representations influenced the outcome. The paper has three main focuses. Firstly it briefly outlines how the trial of Oscar Wilde fits into a module on the trials of dissenters. Secondly it looks at how the process of the trial can be used to engage with questions such as who or what was on trial – was it Oscar Wilde the man, or his writings or his gender dissent? The emphasis here is on Carson's cross examination of Wilde, in particular his use of Wilde's literary works to construct a portrait of Wilde that was likely to be abhorrent to the jury. Finally, the paper argues that in addition to the perspectives offered on the trial of Oscar Wilde from literature, accessing visual images and artworks can be an effective way of engaging with real law and therefore can enhance understanding of both a specific trial and the trial process. The paper considers specific examples of how accessing such non-traditional sources can lead towards a more nuanced appreciation of those social and gender norms from which Oscar Wilde was alleged to have dissented.

**Alex Roy, Reserved and unreserved lawyers' activities (Alex.Roy@legalservicesboard.org.uk)**

Regulation, regulation, regulation – time to change the record?

The current regulation of legal services has grown over hundreds of years as the profession itself has developed and expanded. The rules and regulations were produced both by the profession itself and by governments keen either to confirm existing practice through legislation or simply to respond to political pressure. The Legal Services Act 2007 aimed to refocus regulation on consumer rather than professional interests, ensuring independent regulation and removing unnecessary barriers to competition. Despite this, centuries of legal regulation have left a patchwork of approved persons, reserved activities and authorised regulators criss-crossing across legal activities. The paper explores recent work by the Regulatory Policy Institute on the economic justification for regulation of legal services and considers how the Legal Services Board will use these principles to consider reforming and simplifying the regulation of legal services. The paper concludes that a reassessment of types of regulatory tools available and their deployment is necessary to ensure efficient and effective regulation of legal services.



### **Thomas-Gabriel Rüdiger and Cindy Krebs, Gamecrime and Metacrime Relevant criminal conduct in connection with virtual worlds**

Almost one eighth of the total population of Germany – about 10 million people – visit virtual worlds like Second Life or World of Warcraft on the internet. The users of virtual worlds spend in some cases several hours a day in them and show – depending on the selected world – very complex social interaction and communication behavior. The visited worlds can be further divided into two main forms, Metaverse on the one hand, that try as wide a range of interaction processes to imitate real life without having to specify a specific goal, and online games on the other hand, that allow users all over the world to fulfill predetermined play goals.

Virtual worlds have become a mass cultural phenomenon, but also a highly profitable economic factor. To the extent that the use of virtual worlds becoming an accepted form of social life, while using them, also social deviant behavior established. Partially formed and already own virtual forms of criminal behavior have emerged, which don't exist in the real world. Then there are also mixed forms of deviant acts which can be committed both in the real world and in the virtual world. According to present knowledge, the possible and observed actions can be divided into assets, expression and sexual offenses.

These offenses, which can be described according to the different worlds as Metacrime and Gamecrime – at least according to recent research – are traditional criminal law forms with a high dark field – similar to the infringement of copyright in the Internet. In Germany in 2009 we only registered 84 ads in the bright field. First dark field studies suggest the legitimate conclusion that in Germany about 5 - 7.5 million acts committed in connection with virtual worlds a year. The crimes committed here are distributed primarily to freedom of expression and property crimes. The main attacks are those on the account information of users. For the criminology, these new forms of criminal acts constitute a great challenge but also a great opportunity. A challenge therefore, because we have to ask whether existing approaches to the understanding of crime can be transferred maladjusted to action in connection with virtual worlds. Or whether these need to be adapted or developed from scratch. Just this challenge offers opportunities. Criminologists have the option to develop completely new approaches to the understanding of crime. They can also develop preventive and repressive solutions free of the previous understanding. These they possibly are checked out for their effectiveness in the real world.

### **Ralph Sandland, Sex and Capacity**

The recent decision in *D Borough Council v AB* [2011] EWHC 101, decided in the Court of Protection, is the most recent in a line of cases, beginning with *Re E (an Alleged Patient)*; *Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), in which the courts have been asked to rule on the test of capacity for sexual relations. In this paper I analyse that line of caselaw, interrupted and (perhaps) modified by the coming into force of the Mental Capacity Act 2005 and the comments of Baroness Hale in *R v C* [2009] UKHL 42. I shall argue that the law as it currently stands is somewhat incoherent, and that, which is more problematic, the main thrust of the jurisprudence is more concerned with the problems of management that sexually active persons lacking capacity pose for their carers than with the interests of the individuals concerned.

### **Sarah Sargent, 'Theorising Rights in the New Millennium: Indigenous Children and International Human Rights (Sarah.Sargent@buckingham.ac.uk)**

As with the start of any new period, there is frequently a time of pausing to step back and to consider both established and emerging ways of assessing the status of the international community, and to look at divergent strands of events and instruments to arrive at new understandings. Is it now time for such an assessment of the rights of indigenous children in international law? This paper argues that it is necessary to arrive at new understandings of rights to make the provisions in the UN Declaration on the Rights of Indigenous Peoples and the UN Convention on the Rights of the Child meaningful in a contemporary context. Theorising about rights however will require far more than a simple synthesis of the two instruments, or debating on the nature of individual and collective rights. Through the combined use of transnational law theories and international relations theories, this paper

provides proposals for new understandings of rights for indigenous children. These proposals take on board the role of non-state actors within international law, as well as emerging issues and themes on rights in the broad context of international human rights law, and with a specific focus on indigenous rights and children's rights. This paper argues that there is an incomplete understanding of rights in the new millennium. It proposes new theoretical understandings of rights in such a way that the full context of the UN Convention on the Rights of the Child and the UN Declaration on Indigenous Rights will be accessible for indigenous children.

**Heidi Schoeman, Adapting Teaching and Learning for the New Generation Student by Making Use of Technology (hschoeman@uj.ac.za)**

The changes in higher education in South Africa saw the merger of a number of institutions and brought about a few comprehensive universities. With the ever increasing student numbers and demands for better teaching, learning and assessment have brought about a change in the perspective of lecturers of law, both to law students and non-law students. In higher education institutions, those concerned with teaching and learning have made way to technology assisted learning.

On campus one finds three generations – the “baby boomers”, “generation X” and “generation Y”. All three generations have different priorities and different ways of studying. Traditional teaching does not engage the current generation of students. Our students are technology savvy – they grew up with the internet and social networking facilities, e.g. Facebook.

The University of Johannesburg is currently out rolling a philosophy of “learning to be” whereby the training situation of students largely contributes to the “real life” environment. It is thus argued that powers of teaching and learning in higher education need rather to adapt to new ways of learning naturally, intuitively and instinctively as required by students. Subsequently, this presentation attempts to compare existing taught law courses for non-law students with the use of a learning management system. A qualitative research approach is followed and substantiated by quantitative data. Ultimately, it is proposed the implementation of a community of practice, engaging students of law (formally and informally), upon graduation as collaborative, life-long learners in their own professional and career development.

**Toni Schofield, Advancing a dynamic sociological understanding of prosecution and deterrence in OHS [occupational health & safety]: An Australian case study of employers**

Occupational health and safety (OHS) law and prosecution comprise the major public institutional response to redressing workplace deaths and serious injuries in most comparable English-speaking jurisdictions. Its main purpose is to deter the recurrence of such fatalities and injuries through the application of sanctions and penalties. Yet international research is inconclusive about how deterrence works in relation to OHS and in what ways it may be effective in preventing workplace deaths and serious injuries. Deterrence in the OHS field is informed primarily by criminological discourse and is generally understood in terms of a cause-and-effect relationship between sanctions and outcomes. There are, however, significant limitations with this approach.

In this paper I suggest that an alternative theoretical approach to understanding deterrence in relation to OHS – one that draws on recent sociological thinking about the dynamic organisational processes associated with it – may be more useful. I propose that deterrence in relation to OHS may be better understood as an institutional process that is played out in combinations of state-based, business and trade union organisations involved in the development and implementation of the law and penalties that address serious workplace injuries and deaths.

I then proceed to report on some of the findings from a three year study into OHS prosecution and deterrence in Australia funded by the Australian Research Council. I focus on the process of prosecution and deterrence among employers, analyzing the major social dynamics involved. Based on over 40 semi-structured interviews with small and large employers, both prosecuted and non-prosecuted for serious OHS offences, I explore what prosecution for OHS offences means for employers, how they feel about it, and what actions

they take in relation to it and why. In the light of employers' responses, I propose a new way of understanding deterrence related to law and prosecution in OHS.

**Kirsten Sellars, International courts and the problem of the criminalisation of aggression  
(kirsten.sellars@btinternet.com)**

National leaders responsible for the international 'crime of aggression' may soon be prosecuted before the International Criminal Court, even though the fundamental problems that have dogged previous attempts to criminalise aggressive war remain unresolved.

In 1946, the Nuremberg Tribunal declared 'crimes against peace' – the planning and waging of aggressive wars – to be 'the supreme international crime'. The judges were uneasy about convicting on the basis of this charge, while some of their counterparts at the Tokyo Tribunal questioned its validity and filed dissents. Many legal observers argued that it was an *ex post facto* enactment, selectively applied.

Aside from retroactivity and selectivity, however, the main (and unacknowledged) difficulty arose from the contradictions within the charge itself. First, it reflected the impulse to *protect* sovereignty, by punishing assaults on the existing world order; but also the impulse to *breach* sovereignty, by making individual leaders directly accountable to international law. Second, by proposing punishment after the event, it simultaneously de-legitimised both aggression and pre-emptive attempts to prevent aggression.

The postwar Allies created the *ad hoc* charge of 'crimes against peace' when they were united in purpose and virtually unconstrained in action. Yet despite these optimal conditions, they failed to resolve these aforementioned tensions. Can the International Criminal Court overcome national interests, institutional impediments and deep differences in their attempts to try leaders for crimes of aggression? The portents are far from good.

**Tom Serby, Adjudication of disciplinary hearings in sport and the role of the Court of Arbitration for Sport: lessons from the International Cricket Council's investigation into spot-fixing by Pakistan players (Tom.Serby@anglia.ac.uk)**

The allegations made by the News of the World newspaper on August 28<sup>th</sup> 2010 concerning the bowling of deliberate "no-balls" during a test match at Lord's as part of a deliberate "spot-fixing" scam by three Pakistan cricketers brought to a head a betting scandal that has dogged international cricket for a generation. At the time of writing of this abstract the International Cricket Council has controversially postponed until February the announcement of the result of its hearing held in Doha earlier this month under a panel chaired by Michael Beloff QC into the events at Lord's. This paper will explore (i) the difficulties faced by the Crown Prosecution Service in bringing criminal charges against the three cricketers under the English laws on corruption; (ii) the potential arguments the cricketers may make on any appeal to the Lausanne based Court of Arbitration for Sport with regard to the procedural flaws in the ICC investigation; (iii) the author's recommendations for changes to the ICC's code of conduct for cricketers if the game is to rid itself of the betting scandal. The ICC's recently revised "Anti-Corruption Code for Players and Player Support Personnel" will be examined for its relevance to all three of the above themes. The paper will also recap the police investigations and charges brought by the CPS into a first class cricketer from Essex CC at the start of the 2010 season and the bearing of that case on the subject of this research.

**Lucy Series, Autonomy, incapacity and institutional care**

The late twentieth century saw a series of critical histories and sociological studies of institutional care; perhaps best known among these are Goffman's *Asylums* and Foucault's *Madness and Civilization*. In both these authors' writings Hacking identifies a core concern, rooted deep in the traditions of Western philosophy: institutions represent a threat to our autonomy, which in turn represents a moral and existential threat to who we are. The situation of those in 'total institutions' may sometimes approach what Republican writers call a 'state of domination'. Goffman referred to its effects as 'mortification of the self', and Foucault as 'alienation'. The Mental Capacity Act 2005 and the deprivation of liberty safeguards promised to increase the autonomy of adults who lack mental capacity in care settings. Early case law and policy literature appeared to associate the loss of autonomy in institutional care with deprivation of liberty under Article 5 of the European Convention on Human Rights. It seemed initially as if the deprivation of liberty safeguards might cast a legal

spotlight on institutional care practices that were excessively damaging to personal autonomy. I trace the rise and fall of individual autonomy in the deprivation of liberty case law, and show that increasingly autonomy is constructed in court as irrelevant to deprivation of liberty in the context of mental disability. I will argue that institutions and disability make separable incursions into personal autonomy, that are at risk of being conflated in these judgments. In the light of these considerations, I will discuss some of the advantages and limitations of the Mental Capacity Act for promoting the exercise of autonomy in residential care and limiting 'mortifying' institutional effects.

**Morteza Shahbazinia, Child Protection and Recent Changes in Iran's Legislation With Emphasis on Child Custody and Marriage (shahbazinia@modares.ac.ir)**

Islamic Republic of Iran has acceded to the United Nations Convention on the Rights of the Child and has an obligation to observe its rules and regulations. Under Article 4 of Iran's Constitution All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria, Since there are detailed regulations on family and children law in Islamic Jurisprudence, some of which don't meet today (contemporary or modern) needs and are not compatible with international obligations, the regulations in the area of family and child law has witnessed drastic changes and faced serious challenges since the 1979 revolution.

One of the most important challenges in this regard is the definition of a child and the age of childhood (primarily for criminal responsibility). Another important matter is the problem of child custody in the case of divorce or death of one of the parents and eventually the most important question is child marriage. In this article we intend to examine the said matters in Iran in the light of recent changes in the legislation.

Recently the new bill on family protection has been proposed by the Judiciary to the Government and has been brought in to the Parliament for ratification. This bill also has positive and negative points in the area of family and child law and has been criticized by many jurists and different women revolts. These new evolutions too are going to be examined in this essay.

**Sumaira Shaikh (sumaira.shaikh@gmail.com)**

The Canadian government's use of immigration policy to combat national security threats through front-end tools such as security certificates is not only inefficient but an assault on the very principles upon which our legal system is premised. Central to the Canadian state's success in the pursuit of this immigration policy has been its ability to treat the subjects of this policy as persons without claim to any rights. Accordingly, the author highlights the rationale and climate that called for the development of the current immigration policy that allegedly spearheads the interests of national security in the form of the security certificate procedure. The paper explores the implementation of this policy and argues that not only has this national security policy using immigration law not worked, it has taken a toll on our rule of law and basic principles of fundamental justice. The author demonstrates the failure of this government policy in achieving its objectives and purposes and explores possible alternatives to the current system of counter-terrorism and national security.

**Rabiu Sani Shatsari, The Criminal Prosecution of Human Traffickers in Nigeria (rshatsari@hotmail.com)**

Since 2003, there has been in force in Nigeria a comprehensive anti-trafficking legislation entitled the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003 (The Act) as amended in 2005. Among other things, the Act defines human trafficking, penalizes the offence of human trafficking, and establishes a national counter-trafficking agency. The essential mandate of the National Agency for the Prohibition of Traffic in Persons and Other Related Matters (NAPTIP), the counter-trafficking agency established by the Act, includes: prosecution of human traffickers, prevention of human trafficking, and protection of victims of human trafficking. This paper focuses attention on the prosecution of human traffickers within one of the six national Zones created by NAPTIP- the Kano Zone. The paper will examine the penal provisions of the Act and discuss the prosecution-related programmes and activities of the NAPTIP Kano Zone. The paper will also highlight the successes so far recorded by the Kano Zone, as well as identify the challenges being experienced by it in this

regard. These issues will be treated in the context of both the international and national legislative actions against human trafficking, an organized crime that is increasingly receiving attention due to its adverse consequences on national security and human rights.

### **Andrey Shcherbovich, Local Rules of Internet Communities in the Context of Protection of the Freedom of Expression Online**

Nowadays the Internet is characterized by ample opportunities for self-realization that continuously increases its value in society. Sometimes the Internet replaces traditional media and channels of communication. It is a global trend, bearing in mind condition of the information environment, as well as the level of legal and information culture of Internet users. Negative legacy of the "static Internet" era is relevant for users' concerns towards rules regulating behavior online. Analysis of the current level of development of the Internet and its "user-orientation" suggests that such regulation directly affects the realization of freedom of expression on the Internet.

In our point of view, it is necessary to provide conditions for active participation of online communities in the normative regulation on web-resources. For this purpose it is necessary that those rules should be clearly understood in conjunction with the establishment of a system of enforcement. Also it is important to raise legal and information culture of their users. License Agreements or Terms of Service are documents governing the entire spectrum of relations between the owner, administration and users of the website. They fix the social and legal standards adopted by the subjects of online relationships. These rules serve as socio-normative regulators, represent the will of their participants and have a mandatory force. In addition, they provide the possibility of negative consequences in case of noncompliance. These rules, not coming from any central authority, and could act as a more effective means of regulation, in non-centralized environment of the Internet. Corporate norms, as a rule, regulate social relations that are not covered by laws.

In this report it's necessary to analyze user agreements in order to understand what features of internal rules of network communities affect the exercise of freedom of expression and the right of access to information for individuals.

### **Kirsteen Shields, Why Fairtrade is succeeding where international law has failed (k.i.shields@dundee.ac.uk)**

We seem to have arrived at a situation whereby ethical trade initiatives are delivering the economic and social components of the ILO's labour rights agenda. The Fairtrade Movement does this through incentivising its member organisations with Fairtrade certification and ensuring compliance is made easier by peer-to-peer monitoring. But beyond its demand driven incentive structure there may be other factors behind the movement's success. This paper considers the extent to which Fairtrade's corporate structure contributes to its success and seeks to locate the Fairtrade Movement within the varieties of capitalism discourse. A socio-legal approach is used to align a spectrum of corporate structures against a spectrum of labour standards (whilst acknowledging that there may be many relevant external factors impacting on labour standards), thereby making links between legal structures and this branch of socio-economic rights. The paper demonstrates that the Fairtrade movement shares features with trust-based capitalisms but beyond this there is a striking feature of Fairtrade's regulatory structure that ought to be highlighted: A shift in the status of workers as stakeholders towards workers as co-owners.

This discussion has resonance not only for the Fairtrade movement and other ethical trade movements but also more generally for areas of public international law typically outwith the reach of regulation (and as a result relying to a worrying degree on monitoring as a means of enforcement). Indeed this slow shift towards ownership can be found in other grassroots spheres, such as the forestry movement and the microfinance movement. This bears important implications for the governance of international labour standards more widely as it highlights the incompatibility of a liberal capitalist structure with the delivery and distribution of the potentially welfare enriching aspects of trade. Ultimately what we may discover is that Fairtrade offers not only an alternative way to protect labour rights, but an alternative way to organise labour.

**Damien Short, Indigenous rights in Australia as a socially constructed phenomenon  
(Damien.Short@sas.ac.uk)**

Legal scholars and political theorists dominate academic writing on the issue of indigenous peoples' rights. This article, however, adopts a sociological approach, analysing indigenous rights in Australia as a socially constructed phenomenon, the product of ideals, entrenched colonial structures and the balance of power between political interests. It shows how, during rights institutionalization processes, ably aided by a receptive government and media, commercial lobby groups constructed propaganda campaigns to further their interests to the detriment of indigenous interests. The resultant legislation was an exercise in rights limitation behind a veneer of agrarian reform. The article concludes by highlighting the tension between national rights regimes of this nature and international human rights norms and suggests an approach that could overcome this problem.

**Syahirah Abdul Shukor, Is A Common Bar Examination: the way forward?  
(syahirah@usim.edu.my)**

In recent years, there have been suggestions that a Common Bar Examination to be introduced to standardize the entrance to qualify as an advocate and solicitor in Malaysia. At present, overseas graduates have to sit for the Certificate in the Legal Practice (CLP), whereas local law graduates, they will simply go for chambering provided that the local university that they attend duly recognized and gazetted in the Legal Profession Act 1976. At the centre of the debates and discussions to the call of common bar examination, is the legal education in Malaysia itself. Issues such as whether the current legal education in Malaysia provides potential lawyers or lawmakers are definitely subjective. At the same time, we cannot deny that the current system also produce good lawyers and judges. This paper aims to discuss the scenario of the current legal education, the challenges attached to legal education and suggestions as what might be taken by all entities to improve the current legal education in Malaysia.

**M Sigwadi, Pension Funds and Corporate Governance: Can Pension Funds in South Africa Maximise their Power as Sahreholders to Push for Corporate Governance at Companies in Which they Invest?**

Corporate failures at Enron, Arthur Andersen, WorldCom and others remind us that poor corporate governance can seriously affect the lives of thousands of people – investors, savers, creditors, retirees, employees, suppliers and consumers. South Africa has had its own share of corporate collapses and financial scandals. These corporate failures and the current financial instability have focused attention on the need for good corporate governance and corporate accountability.

In view of these many corporate failures and financial scandals, the question that arises is: What measures can be taken to monitor directors of companies (corporate managers) to ensure that they are accountable to shareholders? It is clear that individual investors (shareholders) fail to effectively function in a collective manner, which undermines the monitoring of directors of companies. But institutional investors are correctly and properly regarded as a power house, which cannot be ignored, if they assert their views in companies they invest in, especially in the absence of the voice of individual investors, who are often too ineffective because they either do not attend annual general meetings, or hold ineffective divergent views.

The aim of this paper is to discuss whether pension funds in South Africa can better utilise (maximise) their power as shareholders to push for governance reforms or pressurise directors and managers to comply with corporate governance in companies they invest in. The paper begins by providing a brief overview of the pension structure in South Africa and the economic importance of pension funds in South Africa's corporate structure. It then considers the challenges faced by pension fund trustees in promoting adequate corporate governance in companies in which they invest their funds. Finally, it suggests few changes and provides a conclusion based on the discussions.

### **Brian Simpson, Social networking, inappropriate conduct and making friends: constructing online identities within teacher and student relationships in the age of Facebook**

The rise of social networking sites has led to youth receiving many cautions from those with power and influence about the perils of posting images and text online that may rebound on them when later seeking employment, for example. In this sense online social networking is often seen as a young person's activity and thus a space that may benefit from adult wisdom.

This construction of the problems associated with social networking ignores the extent to which social networking is now being used by many adults in position of influence to sell their message, business or educational wares. This shift in who uses social networking has thus created new problems in terms of how adults may potentially abuse and misuse the medium. This paper will look at the evolution of the regulation of social networking in the teacher-student context. There are now many guidance documents which seek to control and govern the use of social networking by teachers to ensure that 'appropriate' distance is kept between teachers and students. The dilemma is that such guidance must tread a line between protecting professional boundaries while also allowing educators to exploit the benefits of new forms of communication. The question is whether such regulation contributes to the creation of false identities and perhaps paradoxically leads to an environment where people are risk averse and afraid to learn about new ideas.

### **Brian Simpson, Planning spaces for children's sexuality (brian.simpson@une.edu.au)**

This paper explores the manner in which planning laws that construct and govern sexual spaces within cities operate within a particular conception of children's sexuality. Planning laws (when they do mention children) often assume that children need to be protected from those sexual spaces which tend to be defined as 'adult' spaces. This is interesting because there is a strand within planning literature that advocates for the greater inclusion of children in planning decisions in their own right and with their own voice. However, this literature itself could be criticised for taking a romantic view of children in that the child is not conceptualised as ever antagonistic to dominant views about sexuality. Childhood, according to planning law, is not a space for sexual matters and is either silent on the issue or regards sexuality as something from which children need to be protected. But we know that children do have sexual identities and that children often seek spaces to express their sexuality. The question that therefore needs to be asked is whether planning law can accommodate the creation of spaces within which children can express their sexuality. The paper will utilise some examples of the application of planning law to allocate space for sexual purposes to investigate this issue.

### **Gauri Sinha, Banks and Money Laundering: The Bond that Law Needs to Break (Gauri.Sinha.1@city.ac.uk)**

1. An Introduction to Money Laundering and its Relationship with Banks: Criminals are always on the lookout for banks as soft targets to make their 'dirty' money appear 'clean'.
2. The Global Legal Environment of Money Laundering: At the outset, it is pertinent to give an introduction on the anti-money laundering laws in the United Kingdom with respect to banks.
3. Bank secrecy v Client Confidentiality: The bank is often caught up between the duty of secrecy owed to the customer and laws of money laundering which require disclosure of customer details. Why is law not able to draw the line?
4. Risk Based Approach- The Financial Action Task Force ('FATF'), the international AML standard setting body, recommends a 'risk based approach' to be taken by banks. However, law does not define the precise meaning of 'risk' which leads to complications in categorising customers on the basis of risk posed by them to money laundering.
5. A 'Box-Ticking' exercise? Law requires banks to put in place an effective AML regime, failing which the banks face the possibility of criminal as well as civil liability. This leads to banks having a 'fearful' approach towards law, resulting in too little or too much reporting.
6. Public-Private Partnership- A better partnership between the law enforcers (police, government agencies) and banks is the need of the hour.
7. The Way Forward: A set of suggestions will be put forward to enable the law to effectively tackle the crime of money laundering through the support of banks.

**Daithí Mac Síthigh, Neutral Heart: participation in Ofcom's 2010 net neutrality consultation**

*I have a letter guessingly set down,  
Which came from one that's of a neutral heart,  
And not from one opposed. (King Lear, Act 3, Scene VII)*

The consideration of the question of network neutrality has moved from academic analysis to a range of consultations conducted by public authorities in advance of possible regulatory action. Such consultations have taken place in the United States, in Canada, in the European Union, and most recently under the auspices of Ofcom in the United Kingdom. Many groups have made submissions to these processes, relying on a range of disciplines and approaches in putting forward their arguments. This is not entirely surprising, given the attention paid to net neutrality by scholars in law, economics, communication studies, political science, to name but some. Some divisions between how neutrality is presented (e.g. as a question of the abuse of dominance, or a human rights problem, or a matter of consumer awareness) are suggested, but need to be tested. The purpose of this paper is to assess, through content analysis, the set of responses received by Ofcom, and to investigate the prevalence of different themes, including the relationship between the arguments, the identity of the respondent, and indeed their views on net neutrality. Some comparisons are also made with the processes in other jurisdictions. By taking this approach, the nature of the network neutrality debate will be better understood and the influence of scholarship on the policy process explained.

**Charlotte Skeet, Intersectionality and Orientalism: Claims in European Court of Human Rights (C.H.Skeet@sussex.ac.uk)**

In many areas the Council of Europe has delivered very positive leadership in setting rights standards and adjudicating rights claims in Europe. Yet the court has been reluctant to develop jurisprudence on equality, and where Article 14 – the right to be free from discrimination in relation to Convention rights – has been argued the court has usually declined to consider this aspect of the claim. Moreover the Court has used the rhetoric of women's human rights to deny claims and to marginalize women who are different. This is particularly true in relation to claims by women where the claim involves an identification as Muslim. This paper examines a number of cases which illustrate the failure of jurisprudence from the European Court of Human Rights to adopt an intersectional approach to women's equality. In particular it compares three cases *Opuz v Turkey*, *Sahin v Turkey* and *Gundez v Turkey* to illustrate how the court differs in its construction of Muslim identity, gender identity and the margin of appreciation where the applicant is a Muslim women.

**Leanne Smith, What is family law for? (Smithlj@cardiff.ac.uk)**

In recent years the laws of England and Wales have undergone changes which fundamentally alter how foundational family relationships – partnerships and parenthood – are defined and recognised. In addition, the ways in which people use the family justice system is changing as old and new forms of alternative dispute resolution are promoted. Further change seems inevitable given the remit of the Family Justice Review which is currently underway and proposed significant changes to the legal aid framework. Change on this scale raises important questions and diverging views about the role of family law and the family justice system in modern society and begs the question, what is family law for? In an attempt to focus discussion on this question, this paper will explore and synthesise some of the views expressed by judges, academics, and policy makers. It will combine a synthesis of the areas of overlap and departure in these views with discussion of the direction in which change is moving to present a contemporary overview of the purpose of family law.

**Laureen Snider, Regulation and Resistance: The Technological Arms Race**

This paper examines regulation and resistance, specifically the technological “arms race” that has developed through High Frequency Trading (HFT) and other technologically-assisted forms of “innovation”. It argues that constantly evolving surveillance technologies such as HFT constitute a strategy of resistance that puts state regulators as well as small retail investors at a serious disadvantage. It examines the history and potential of the technologically-enabled resistance that is deployed by deep pocketed, dominant financial players, those able to



purchase the most powerful, fastest computers and the algorithmic gurus who devise the formulae and programmes, giving them an enormously profitable advantage over regulators, who have neither the expertise nor the budgets to compete. In conclusion, it argues that the root of regulatory incapacity lies neither in the technologies themselves nor in regulators' lack of access to them, but in the political, economic and cultural advantages of financial capital and its centrality in a globalized neo-liberal world.

**Hilary A. Sommerlad, Restructuring and the Solicitors' labour market in England and Wales: a new professional precariate? (haks1@leicester.ac.uk)**

From the mid 1980s onwards, the supply side of the solicitors' profession has undergone a dramatic diversification. The first new entrants were predominantly white, middle class women, but the expansion of HE has resulted in a significant increase in the numbers of aspiring and qualified solicitors drawn from Black and Minority Ethnic (BME) and, to a lesser extent, lower socio-economic backgrounds. A number of studies have documented the ways in which this has occurred in the solicitors' profession, revealing how women solicitors have come to represent a transient labour force, which supports the white male partnerships. More recently, two developments have coincided to create a space for an even more disadvantaged group of 'lesser professionals'. On the one hand, changes in the profession have hastened the ongoing process of firm mergers, producing 'factory firms', while both technological and legal developments have resulted in the routinization of many labour processes. On the other hand, the expansion and diversification of the law student population has strengthened the pre-existing hierarchies of HE, stratifying them on race and class lines.

In my discussion of the emergence of this professional 'precariate' I will be seeking to make a link between the meso level changes to the profession and the wider socio economic developments within which these are taking place. In particular I will draw on a range of empirical studies to argue that Wacquant's theorisation of 'advanced marginality' (1999, 112) can be applied to the paralegal workforce which is increasingly a feature of the solicitors' profession.

**Antu Sorainen, Sexual criminal law, EU policy and the politics of the paedophile (antu.sorainen@helsinki.fi)**

I will look at how the EU level criminal policy has started to influence national legislations on child sexual abuse. This development has been marked with lots of tensions between differing philosophies of punishment and crime in different EU countries.

The political field cannot be adequately conceptualised with reference to moralistic and punitive government agendas. Protectionist perspectives have gained excessive influence in all recent EU and EN proposals concerning child sexual abuse. The efforts to harmonise the EU legislation via deployment of harsher penalties, chemical castration and other additional severe control mechanisms for sex offenders are currently effecting national legislations and law-making of all EU member countries. The politicization of children, the tightening legislation around the age of consent and the increase of political populism in its various forms is apt to target certain people. In my paper, I will discuss how prejudice against paedophiles is in danger to add to ignorance against queer population.

I will start by commenting on recent policy-making in the EU, then have a look at current political debates using Finland as my case material, and close by making some critical remarks on whether the concept "penal populism" is relevant when analyzing how the furor around the paedophile is used to target queer people and queer sexualities. I will look at how ideas like decency can be constructed cross-nationally, but can also be expressed differently in national contexts that have similar but divergent philosophical traditions. In Finland, the Hegelian model of the state is facing changes as a result of the EU pressures; possibly more politically 'liberal', not more open-minded or progressive, but based around liberal notions of abstract individualism.

**Tim Spencer-Lane, Adult social care and s 117 (tim.spencer-lane@lawcommission.gsi.gov.uk)**

Adult social care is a confusing patchwork of conflicting statutes enacted over a period of over 60 years. In order to understand whether a person with mental health problems (or their carer) is eligible for services requires a detailed knowledge of the inter-relationship between

the different laws. However, I argue that the legislation does accord “mental disorder” special status by identifying it in various places as a condition that is eligible for certain services. This status is however largely illusory since in practice no such special rights are available.

Between 2008 and 2011 the Law Commission has undertaken a comprehensive review of adult social care law and their final recommendations were published in May 2011. I argue that the recommendations would create a single clear and modern adult social care statute that would sweep away much of the existing complexity. In doing this, the so-called special status accorded to mental disorder in community care law would be removed. I argue that this aspect of the reforms would promote the rights of those with mental health problems, who would in future be treated in law the same as any other potential service user. The main exception would be section 117 of the Mental Health Act 1983, which will continue to offer special benefits to some former mental health patients. The paper considers the justification for a separate after-care duty and whether this would be undermined by the Law Commission’s recommendations to tie section 117 more closely to the existing community care legal framework, and the proposals in the Health and Social Care Bill 2011 to establish section 117 as a gateway duty for health services, rather than a standalone duty. I argue that the reforms will establish greater coherence but may lead to increased questioning of the efficacy of section 117.

**Andreas Stephan, Reconciling Criminal with Administrative Enforcement  
(a.stephan@uea.ac.uk)**

A defining characteristic of cartel criminalisation in the UK is the existence of a criminal offence reserved exclusively for individuals, but enforced alongside civil or administrative sanctions against the firm. A healthy balance between these two procedures has the potential to further both effective deterrence and the perceived legitimacy of cartel enforcement. This marriage of criminal and administrative enforcement roles might also characterise other attempts to criminalise harmful business practices in the future. This paper identifies the main challenges faced by the OFT in reconciling these two roles, in particular: The practical difficulties of undertaking a criminal investigation alongside a civil one, and the strain this potentially exerts on the working culture within the authority.

A lack of prosecutorial experience in dealing with criminal cases, compounded by ‘bad habits’ from administrative enforcement.

The problems posed by evidence gained through the leniency programme, in building both a civil and a criminal case.

The potential relationship between criminal enforcement domestically and administrative enforcement at the EU level.

The paper concludes by considering the UK government’s proposal for a new white collar crime super-agency which would potentially strip the OFT of their criminal enforcement role.

**Ruth Stirton, A Sterile Cause of Action? Project Prevention and the Law of Tort in England and Wales (Ruth.stirton@sheffield.ac.uk)**

Project Prevention is a controversial US-based non-profit making organisation which pays drug addicts \$300 for undergoing sterilisation. In 2010, the organisation attempted to expand its activities to the UK. This paper considers the possible claims in tort which could arise if Project Prevention were to act in the UK. It argues that offering £200 to drug addicts who undergo sterilisation procedures invalidates their consent. This means that the doctors who provide that treatment could be liable in battery. It further argues that Project Prevention, or its officers, are liable in negligence for making these payments. While some protection is offered by tort law, if we are looking to deter organisations such as Project Prevention from working in the UK, then we may need to look elsewhere for something more certain.

**Celine Tan, Navigating new landscapes: The contribution of socio-legal scholarship in mapping the plurality of international economic law and locating power in international economic relations (c.c.tan@bham.ac.uk)**

The evolution of international economic law in the past two decades has been characterised by the growth and diversification of international economic actors, the expansion in the substantive areas governed by international law, and, crucially, the proliferation of multiple

sites of international economic governance. This web of multi-layered international economic governance is, in turn, underpinned by complex dynamics of power which structure the legal and economic relations between the subjects of international economic law and other actors impacted by international legal rules and regulation.

The challenge for international legal scholarship lay not only in mapping the multiple sites of international economic governance but also in unmasking the power dynamics inherent in international economic relations. Locating and analysing power relations underlying international economic law is crucial to understanding the cause and effect of international economic rules and institutions for rulemaking.

Conventional legal scholarship with its doctrinal focus, while useful in providing the foundational basis for analysis, cannot adequately capture the complexity of contemporary international economic law. Socio-legal approaches may be able to overcome these epistemological limitations by supplying: a) the methodologies to study international economic law beyond a focus on rules and institutions; and b) the critical theoretical lens to understand the power dynamics inherent in international legal relations.

The objective of this paper is twofold: firstly, it will seek to identify the contributions of socio-legal approaches to the study of international economic law; and secondly, it will explore how socio-legal scholarship can provide a methodological and theoretical framework to construct an understanding of the pluralistic nature of international economic regulatory regimes and their underlying dynamics of power. In doing so, the paper will also consider the value of juxtaposing an empirical methodology for mapping legal regimes with a critical normative approach for analysing power relations in international economic law.

**Guan H. Tang, A uniform or tailored approach to take? The future of copyright regime (tang.guanhong@shufe.edu.cn; gtang\_ed@hotmail.com)**

Copyright law officially took a uniform approach in 1886, with the adoption of the Berne Convention for the Protection of Literary and Artistic Works. A harmonised worldwide protection has ever since become the ultimate objective for both international and European treaties, and has also raised numerous questions with regard to the applicability of copyright in the digital era. Would taking a tailored approach answer those questions? This paper examines the limitation of the current copyright system, the occurrence of Creative Commons, Open Access, as well as the need and benefit for taking a tailored approach in the world copyright regime.

**Roger Thomas & Rachel Campbell, From the Fayyum to the Fens - land ownership comparisons and contrasts across the sands (roger.thomas@anglia.ac.uk; rachel.campbell@anglia.ac.uk)**

The control of any human activity is based on the concept of ownership of property, particularly land. This paper considers the meaning of ownership in land in Histon in 2011, a village north of Cambridgeshire with a population of roughly four and a half thousand, and Karanis, a town in hellenistic Egypt, which had a population of about three thousand. It contrasts and draws parallels with examples of land ownership in Histon and Karanis, using the extensive documentary evidence from the Fayyum settlement of Karanis. Karanis was a hellenistic town inhabited by Egyptians as well as people of Graeco-Roman descent, and because of the huge numbers of papyri which survived in the town and its environs, a very detailed picture of life in all its aspects has emerged. Ownership of all types of property is frequently mentioned in the papyri. It concludes that what is striking about the approach to land ownership in hellenistic Egypt is the modernity of the law and similarities to English land law. Hellenistic Egypt operated with a legal structure with which we are partly familiar. To understand the concept of ownership of land in both Histon and Karanis, it is necessary to consider not just the physical boundaries of the property, but the requirement to consider the time for which the interest will endure and the rights over the land. In respect of the later, this paper will focus on the use of the easement – a right of way over property – and will highlight similarities and differences between hellenistic and English law.

**Brian Thompson, The Future of Tribunals (wbt@liverpool.ac.uk)**

I plan to develop the theme, if not the metaphor, of tribunals as the Cinderella of the Justice system, marrying the Courts Service but will it be happy ever after? Their joint future seems to

be love in a cold climate, in which the economic downturn is causing an increase in tribunals' caseload, especially social security and employment, but also producing public expenditure cuts in MoJ personnel and in civil legal aid, so that tribunals are going to be expected to give justice to users without representation and possibly advice.

### **Sharon Thompson, Prenuptial agreements and the meaning of 'fairness' since *Radmacher v Granatino* [2010] UKSC 42**

In recent years, there has been much confusion as to whether prenuptial agreements, which are traditionally viewed as contrary to public policy, would be enforced by the court. As such, *Radmacher v Granatino* was eagerly awaited as it provided an opportunity for the Supreme Court Justices to consider this question of enforceability. The majority held that decisive weight should be accorded to prenuptial agreements, 'unless in the circumstances prevailing it would not be fair to hold the parties to their agreement' (para. 75). Whilst this statement reflects a judicial majority in favour of giving decisive weight to prenuptial agreements, it does not definitively determine the position of these agreements in England and Wales. Indeed, it is submitted that the Court has opened an interesting debate as to what constitutes a 'fair' prenuptial agreement, and Lady Hale's dissenting opinion indicates the complexities which lie ahead in resolving this matter. As such, this paper will examine the meaning of 'fairness' in the context of this judgment, and in particular what circumstances the court might view as unfair so that an agreement will be set aside.

The divergence of opinion between the Justices of the Supreme Court in *Radmacher* as to the meaning of fairness will be outlined and it will be argued that as fairness is a variable and unfixed concept, the enforcement of prenuptial agreements remains uncertain.

### **R.A. Tomasic and Folarin Akinbami, Regulating Innovation in Finance: Financial Engineering and its effects on the Resilience of the Financial system**

The global financial crisis threatened to bring down the global financial system and exposed weaknesses in world financial markets. One of the suggested causes of the financial crisis is the misuse of financial innovation. This misuse of financial innovation was, in part, driven by the desire of bankers and financial practitioners to circumvent financial regulations. It was also driven by an inadequate understanding, on the part of bankers, financial practitioners and regulators, of the complex financial innovations that had come to be widely used in the global financial system. This paper takes a holistic look at financial innovation and its overall effect on the financial system. It explains what financial innovation is and looks at the role that financial innovation has played in the financial markets from the development of high-yield bonds (junk bonds) in the 1970s and 1980s by the U.S financier Michael Milken to the more recent proliferation of Collateralised Debt Obligations (CDOs) and Credit Default Swaps (CDS) in the run-up to the financial crisis. The paper examines the benefits associated with financial innovation- this involves a careful look at some examples of financial innovation that have contributed positively to building a more robust and resilient financial system. The paper also examines the problems associated with financial innovation- this involves a detailed examination of some examples of financial innovation that have weakened the financial system. The paper highlights the complexity surrounding some financial innovations and the use of others to circumvent banking and financial regulations. Having identified these problems the paper considers how they can be addressed by regulators, lawyers and financial practitioners.

### **R.A. Tomasic and Folarin Akinbami, Shareholder Activism and Litigation against UK Banks: the Limits of Company Law**

In the wake of the Global Financial Crisis (GFC) banks in the UK and other parts of the world suffered significant financial losses. One of the findings of official inquiries into the GFC and its effects in the UK is that shareholders were remarkably docile during the height of the market euphoria. Shareholders made very little effort to constrain banks from taking more risky business strategies. In addition, shareholders have been slow to bring legal actions against directors of loss-making banks and financial institutions. This is despite the fact that company law provides a wide range of mechanisms for shareholder activism, such as the powers of shareholders to elect and dismiss directors (through the General Meeting) and to bring legal

actions against directors for breach of statutory and fiduciary duties. This suggests that company law is, in practice, something rather different from what it is claimed to be in theory. This paper explores some of the reasons for this divergence and looks at ways of bridging this gap between company law in theory and in practice. This involves a look at some of the obstacles that individual shareholders and institutional investors face with regard to bringing legal actions against managements of loss-making banks and financial institutions. It also involves a look at some of the different options for increasing the level of shareholder activism and litigation in the UK.

**Rodolfo Torregrosa, The Socials Representations of “the justice and peace Law” in the Colombian Press (rolffor48@hotmail.com)**

The Justice and Peace Law, approved by the Colombian Congress aims to regulate the current demobilization of paramilitaries by granting "demobilized" to impose appropriate penalties on them and to guarantee the victims just reparation.

In this sense, any legal framework for the demobilization of members of illegal armed groups, be they paramilitaries, must respect victim's right to truth, justice and reparation, tackle the endemic problem of impunity, ensure that combatants are not reintegrated into the conflict, and include measures to bring to justice all those responsible for supporting the illegal armed groups militarily and financially, including members of the security forces; because in Colombia, remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: equal and effective access to justice.

The main conclusion is that paramilitary structures have remained intact after "demobilization", that human rights violations are still being committed by paramilitaries in areas where they have supposedly demobilized, that many demobilized paramilitaries are being "recycled", mainly as paid military informants, and that collusion between the paramilitaries and sectors of the security forces is continuing.

On other hand, Social Representations are forms of knowledge that allow the subject or the group to appropriate external knowledge in the service of everyday life. Accordingly, the present study aims to identify the social representations on transitional justice and its actors that circulate in the Colombian press.

The selected methodology was framed within the procesual approach, since this approach rests in qualitative postulates and privileges the social thing analysis, the culture and the social interactions.

**Mike Upton, Temporalities of Invention: challenging the ownership of AZT (Mike.Upton@manchester.ac.uk)**

Drawing on ethnographic fieldwork conducted at a U.S. law school, this paper considers the ways in which intellectual property concepts become self-evident through an analysis of the dispute over patent claims on AZT, the first anti-HIV drug. In particular the paper considers the judgment in *Burroughs Wellcome Co. v. Barr Laboratories, Inc.* (40 F.3d 1223 Fed. Cir. 1994) as it was used to “teach” the concept of ownership in a Patent Law class at the Boalt School of Law, University of California Berkeley. This paper combines inter-disciplinary methodologies with anthropological analysis to unpack the related folk categories of authorship, collaboration, inventorship and ownership embedded in U.S. patent law. Drawing on the work of Marilyn Strathern, the paper demonstrates the ways in which the AZT case privileges a certain temporality of invention. This temporality is seen to turn on normative notions of “conception” and “collaboration” that serve to invest the “invention” of AZT into a single and discrete moment/author. The paper offers a genealogy of AZT to show how this has the effect of erasing not only the long slow burn process of pharmaceutical research and development but also critically the potential claims of others who have contributed to that process, including the publicly funded National Institute of Health (NIH). In conclusion, it is argued that this specific notion of invention embedded in U.S. patent law and reproduced at Berkeley has had dramatic consequences for the ownership and in turn global accessibility of drugs to treat HIV/AIDS.

**Valentina Vadi, When Cultures Collide: Foreign Direct Investment, Natural resources and Indigenous Heritage in International Investment Law (v.vadi@maastrichtuniversity.nl)**

The protection of cultural heritage has profound significance for human dignity and the realization of human rights. Although the recognition of indigenous peoples' rights and cultural heritage has gained some momentum at the international law level since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, an international economic culture has emerged that puts emphasis on productivity, economic development and assumes that we can solve the problems of growth with more growth. Existing laws frequently fail to strike a balance between economic development and indigenous rights. Law and policy tend to favour macroeconomic notions of growth regardless of actual or potential infringement of cultural entitlements.

This paper investigates the relationship between indigenous heritage protection and natural resources exploitation focusing on how international investment law and arbitration has dealt with indigenous heritage issues. In recent years, there has been a boom of investment treaties which extensively protect foreign investments from unlawful treatment by the host states and provide foreign investors direct access to an international arbitral tribunal. As investment treaty provisions are inherently vague, it is increasingly difficult to ascertain the legitimate exercise of sovereign state power to protect public goods in the light of these standards. While recent arbitral awards show an increasing awareness of the need to protect indigenous heritage within investment disputes, questions arise as to whether this model of adjudication is procedurally and substantively adequate to deal with indigenous peoples' rights.

This paper will proceed as follows. First, a brief description of international norms protecting indigenous heritage will be provided. Second, the investment law framework shall be sketched out. Third, the potential conflict of norms will be scrutinized through the analysis and critical assessment of relevant case studies. Fourth, the conclusions shall be put forward.

**Valentina Vadi, Cultural diversity disputes and the judicial function in international economic law (v.vadi@maastrichtuniversity.nl)**

In recent years cultural heritage law and international economic law have increasingly intersected. The disparity between the two fields of law has made their interaction particularly uneven. Cultural heritage law has only emerged after WWII in a piece-meal fashion, through a series of international conventions and the formation of customs. Because this branch of law is still in its infancy, it presents embryonic features and lacks a dispute settlement mechanism. By contrast, international economic law constitutes a traditional and well developed area of public international law and presents sophisticated means of dispute settlement.

This paper explores and critically assesses the recent case law adjudicated by WTO panels and investment arbitral tribunals on cultural diversity related disputes. While other studies have analyzed the interplay between international economic law and cultural diversity from an institutional perspective, this paper adopts a socio-legal approach, by focusing on the role that adjudicators have played in mapping the interactions between two different sets of norms. While arbitrators have started to accommodate non-investment values, and in particular cultural values in argumentation patterns, WTO panels and even the WTO Appellate Body have adopted a more cautious approach to the introduction of non-trade values in their argumentative patterns. This paper identifies the socio-legal reasons that explain these different approaches.

This study will proceed as follows. First, I will define the multifaceted concept of cultural diversity and sketch out the relevant UNESCO instruments. Second, I shall analyse the available dispute settlement mechanisms. Third, the conflict areas between international economic law and cultural heritage law will be scrutinized through the analysis of some relevant case studies. Fourth, this contribution critically assesses the role that adjudicators play in adjudicating interdisciplinary disputes. Finally, some conclusions will be drawn.

**Judith van Erp, Administrative sanction publicity: an alternative for the criminalization of business conduct? (vanerp@frg.eur.nl)**

Contrary to developments in the United States, business regulation in the Netherlands is increasingly administrative. Criminal enforcement of business misconduct is virtually absent,

whereas regulatory enforcement authorities are empowered with a growing variety of administrative sanctions and higher fines. They also publish the names of offenders, which aims, among other things, to increase the strength and general deterrent effect of administrative sanctions. "Naming and shaming" of offenders is therefore often presented as an alternative to criminalization of business misconduct.

This paper compares the impact of "naming and shaming" with the assumed impact of criminal sanctions, on the basis of interviews with thirty Dutch financial intermediary firms whose name was published as a result of an administrative offense. It describes the effects of sanction publications in terms of loss of business opportunities, social stigma, and business perceptions of the legitimacy of the enforcement process. It also presents results of a media analysis of negative publicity about offending firms. The results show that the business community experiences published sanctions as equally or more severe than criminal sanctions. Because the administrative enforcement process offers less legal protection and less checks and balances than the criminal process, the sanctioned businesses perceive the publication of their names as very unfair. Finally, the media analysis shows that the impact of publicity is unevenly distributed and disproportional to some offenders. The findings suggest that the strength of administrative sanction publications measures up to that of criminal sanctions. Considering the lack of checks and balances in the enforcement process, however, it would be unwise to consider naming and shaming a fullblown alternative to criminalization of business conduct.

**Honni van Rijswijk & Penny Crofts, Negotiating the Relationship between Law and Violence: The vampire as a figure of ambivalent justice (honni.vanrijswijk@uts.edu.au; penny.crofts@uts.edu.au)**

The vampire has re-emerged in contemporary culture as a figure of ambivalence, sexuality and threat. This paper explores the potential of the vampire as a critical figure of justice, focusing on the literary and filmic representations of John Lindqvist's novel *Let the Right One In*, and the film of the same title, directed by Tomas Alfredson. We argue that the film and novel destabilize a number of binaries upon which the adjudication of justice relies: human/non-human; male/female; moral/immoral; historical/ahistorical; child/adult and victim/perpetrator. Moreover, these texts interrogate key narratives about the adjudication of violence by the law. The story focuses on the relationship between an ancient vampire who appears to be a child, Eli, and Oskar, a 12-year-old boy. Oskar is the victim of school bullies and Eli becomes his avenging saviour. However, it is difficult to interpret the ultimate scene in which the bullies are killed in a single way: has Eli delivered justice on Oskar's behalf, or has Oskar merely joined the unjust and tragic circle of violence in both human and non-human registers?

This paper connects the vampire figure with theories of the law's adjudication of violence, examining the ways in which the destabilization of key binaries offered by the vampire figure affects conceptualisations of justice. We argue that the vampire figure can be used as an effective figure of disruption with respect to critical analyses. For example, the vampire critiques the circularity of the victim/perpetrator model, or the hidden power disguised in historical/ahistorical frameworks. Placing the figure at the centre of theories of justice, then, reveals and unravels the assumptions upon which they are premised. We consider, for example, the implications of using a vampire figure in reading the foundational violence theorized by Walter Benjamin and Jacques Derrida. We use this approach to re-consider a number of questions posed by critical theorists of justice—What is the relationship between justice and violence? Is there an essential human nature that defines the possibilities of justice? What are the aesthetics of justice? What are the terms of evaluation that seem relevant in deciding judgment in any particular instance? And how can we make sense of recent, cultural interest in the vampire figure in relation to these questions?

**Scott Veitch, Binding obligations: Images of the legal bond (veitch@hku.hk)**

The notion of a binding obligation is central to legal ordering. Yet the nature of the 'bind' is itself elusive. It is usually merely alluded to or assumed as the outcome of certain conditions having been met; it is seldom considered on its own terms. Yet practices of binding – of the body and the will – have an ancient lineage and contemporary resilience: for example, the very root of 'obligation' lies in the physical binding of debtors in early Roman Law, while the

notion of binding restraints are central to the practice of constitutional, 'free', government. This paper will contrast three understandings of binding that appear as central in the Western imaginary. The first is captivity; the second sanction; and the third liberation. It will draw on a range of literature to highlight different aspects of the legal bond and in doing so will explore the varied nature of legal obligation in the context of changing social norms and expectations.

**Antoinette Vlieger, The lack of labour protection in the Gulf and game theory (A.r.vlieger@uva.nl)**

In Gulf countries such as Saudi Arabia and the Emirates, little labor protection has developed thus far. Although this could be explained simply by pointing at the relatively late industrialization of the countries concerned, the theory of Dutch Sociologist De Swaan applied to the Gulf, offers a more convincing hypothesis. De Swaan argues, combining game theory and knowledge on the development of collective goods in the West, that in Europe the upper-class developed protection for the underclass because this was in their own interest. The five interests he describes are largely absent in the Gulf and therefore the upper-class there has no incentive to write labor laws or create other forms of protection for the underclass. Furthermore, civil society is largely absent, while according to the Swaan it is crucial for the development of collective goods such as labor protection. The explanation for the differences between Europe and the Gulf, therefore could lie in the combination of oil revenues –creating a rentier state- and a workforce consisting of temporary and disposable migrant workers.

**Antoinette Vlieger, Sharia on domestic workers; legal pluralism and strategic maneuvering in Saudi Arabia and the Emirates (A.r.vlieger@uva.nl)**

Sharia barely influences the conflicts involving domestic workers in the Kingdom of Saudi Arabia and the United Arab Emirates. Analyzed from the perspective of legal pluralism, Sharia constitutes a reservoir of discursive tools that can be used by either party in a conflict. The outcome does not depend on Islam, but on power relations.

Such is the case with the position of domestic workers, but also with the position of women in general; it is both under attack and defended through the use of Islamic discourse. The fact that female witnesses under Sharia only count as half and the fact that non Muslims in certain cases are not allowed to testify at all, has little effect in practice, as the evidentiary rules are followed only if the judges concerned decide to do so. A third factor is the fact that Islam emphasizes that everyone has been given a place in society by God, a place that therefore has to be accepted. Nevertheless Islam also offers rhetoric or discursive resources which directly contradict this discourse. Furthermore there are several aspects of Islam that can be used as normative tools to improve the position of domestic workers. The first is the view of Allah as a panoptic God. Secondly, Muslim interviewees regularly emphasized was the centrality to Islam of justice, basic human rights, dignity and equity. The concept of human rights according to several interviewees is not new, as it has been introduced already by the Prophet Mohammed. Apart from these general principles, there are several Sharia rules specifically on the proper treatment of slaves and workers. If only all Muslims on the Arabian Peninsula would follow these rules, the domestic workers would be doing rather well. Blame for the poor position of domestic workers should thus not be put on Sharia, but rather on power relations.

**Aurora Voiculescu, Text and Context in the Search for New Paradigms of International Economic Normative Frameworks: Socialising Economic Actors under the UN Guiding Principles (A.Voiculescu@westminster.ac.uk)**

The lack of foreign direct investment and the absence of strong economic infrastructure are often at the heart of perennial social conflicts in many parts of the world. It is also often claimed that, in the long run, foreign direct investment and the global market generally, will appease these conflicts through trade and investment, lifting the population out of poverty and progressively raising the standards of living. In the absence of strong transnational regulatory frameworks, transnational economic actors are, however, also often responsible for fuelling rather than appeasing domestic conflicts, pillaging of natural resources and



fuelling domestic conflicts, supporting directly or indirectly armed groups with payments for mineral resources, corruption and bribing of government officials.

Following years of research and reporting on issues of business and human rights, the UN Guiding Principles (recently produced by the UN Special Representative to the Secretary General John Ruggie) is the latest initiative at international level acknowledging the impact of business organisations in the developing countries and the role of various actors – public as well as private, domestic as well as international - in addressing the issues. Taking a socio-legal conceptual approach, this paper looks into the potential of the UN SRSG Guiding Principles to propose and support a new paradigm of the link between business and human rights in the context of transnational market structures. For this purpose, the paper develops on two dimensions. On the one hand, the article undertakes an institutional comparative path, looking at the normative and regulatory potential of the proposed Guiding Principles, by using as comparator key instruments such as the Voluntary Principles on Security and Human Rights, the Kimberley Process Certification Scheme and the now replaced UN Norms for Transnational Corporations. Looking at the evolution of these initiatives and of the UN Norms debate over the past decade, the article addresses the points of contact and the points of tension that might be of relevance for the desired development of the proposed Guiding Principles as an instrument of global governance.

The second dimension of the article builds on the institutional comparative exercise undertaken in the first part. This is a normative and conceptual dimension that looks to the deeper theoretical underpinnings of the 'business and human rights' points of tension, underpinnings that can impact upon the realisation of the business and human rights agenda as encapsulated in the proposed UN Guiding Principles. In this sense, the article addresses the hypothesis that the business and human rights nexus requires a rethinking of the working paradigms from the point of view of the socialisation of the economic actors and from the point of view of the input the national and international agencies have in this process of socialisation.

The conceptual part of the paper builds on Karl Polanyi's work on 'history in the gear of social change' and Joseph Stiglitz' work on self-regulating markets, transnational risk regulation and human rights. The paper advances the hypothesis that the process of socialisation of economic actors – as an essential element of global governance - can only be understood in the context of global economic and social interdependencies. From this conceptual platform, the article looks critically into the processes through which potentially beneficial economic processes can and should be embedded in social relations for a chance of protection and enhancement of human rights, and critically evaluates the role of the state and international institutions in this process of socialisation. Drawing upon this conceptual analysis, the article concludes by identifying some of the (unintended) potential consequences of the proposed Guiding Principles for the human rights protection

### **Barbara von Tigerstrom, Regulating medical products and medical practice in emerging technologies ([barbara.vontigerstrom@usask.ca](mailto:barbara.vontigerstrom@usask.ca))**

In the regulation of health care, a distinction has traditionally been drawn between medical products and medical practice. Separate regulatory regimes seek to ensure the safety, efficacy, and quality of medical products such as drugs and medical devices, on one hand, and the qualifications and conduct of professionals in medical practice, on the other. However, this distinction is more difficult to draw, and perhaps to defend, in the case of some important new technologies. For example, record keeping, diagnosis, and selection of treatments are part of the domain of medical practice, to be supervised by professional standards of competence and legal duties of care. Computer software is increasingly used to assist with these functions, however, and this software is regulated in some jurisdictions as a medical device, although its safety and efficacy may be as much determined by its use as by the product itself (if these can even be separated). In the emerging field of cell and tissue therapy, parts of the patient's own body can become the basis for a medical "product" to be used in treatment. The regulatory paradigm that has been applied to these therapies is based on traditional pharmaceutical products, although the processes involved in "manufacturing" these therapies bear more resemblance to medical procedures than the manufacture of conventional pharmaceuticals. Where these two domains of medical product and medical practice regulation meet, how should we define the boundaries

between them? What questions do novel technologies raise for the regulatory schemes governing products and practice, and for the relationship between them? These questions will be examined using examples drawn from current law and policy in Europe and North America.

### **Asma Vranaki, Is code law in the copyright network of YouTube? – An empirical analysis of the relationship between law and technology in YouTube**

This paper presents the findings of one of the case study, namely the YouTube case study, conducted as part of the doctorate. In my doctoral thesis, I examine the role of law, as a manifestation of power, in protecting copyright and privacy interests in Online Social Networking Sites ('OSNS'). The doctoral thesis takes issue with the cyber-regulatory literature which argues that there are four modalities of regulation in cyberspace (i.e. law, code, market, and norms) and that the 'code is law' in cyberspace (Lessig, Post & Johnson, Murray). In my doctoral thesis, I argue that a deeper understanding of the relationship between law and technology as well as the power effects generated from this relationship can be achieved by applying a socio-legal-technological approach. To this end, I have developed a conceptual lens of power which brings together Foucauldian and ANT notions of power to analyse the role of law and technology as manifestations of power.

In this paper, I will present the findings of the YouTube case study (qualitative data was collected through virtual ethnographic methods and documentary analysis) which empirically investigates the relationship between law and technology in YouTube's copyright network. In order to achieve this aim, I will have to explain how the copyright network of YouTube is constructed. I will analyse to what extent the Actor-Network Theory ('ANT') notion of translation and ANT/Foucauldian ideas about materiality can be used to shed light on the construction of the copyright network of YouTube as a socio-legal-technological network. I will also trace the sources of resistance in the copyright network of YouTube which threatens the successful mobilisation of the network. The argument which will be presented at this stage is that the construction of the copyright network of YouTube is a precarious, contingent, and local process which depends on the stable and durable associations of various *actants* such as users, commercial right holder, and technologies (e.g. Content ID) which assist in the protection of copyright interests. I will then analyse the relationship between formal copyright law and copyright technologies (e.g. YouTube Player, Content ID Tool, Regional Blocking Tool, AudioSwap) in YouTube and the power effects of this relationship (e.g. co-constructive).

### **Umme Wara, A Multi-disciplinary Approach in Legal Education: Prospects and Effects (waramishu@gmail.co)**

The emergence and universal recognition of the multi-disciplinary approach has been an imperative incentive in order to unite both the academics and practitioners under the Legal Education System of today's world. Since the rapid growing intricacy and interrelationship of global economy, corporate governance and socio-political metamorphosis with legal issues, it is the recent challenge to make fundamental changes in the curriculum and teaching methodologies of the law schools which the traditional legal education does not provide. While developing curriculum it should be mindful that the students will not only obtain the substantive understanding for dealing their clients but will also have the potentiality to resolve the legal disputes where a perceptible idea on subject matters outside the legal arena. Because of the numerous international treaties and conventions, the complex global trade regulations in the domestic and international perspectives, law is now having a significant role in becoming a part of the solutions instead of the problems. Thus, if the Law schools initiate a multi-disciplinary approach, Law students will be able to understand and protect the welfare of various stakeholders. My paper will examine the importance of initiating a multi-disciplinary approach in modern Legal Education and the positive consequences of it which is recognition of the fast developing necessity for such an approach to deal with the multi-disciplinary challenges of the transforming world.

### **Bruce Wardhaugh, A Normative Approach to the Criminalization of Cartel Activity (m.b.wardhaugh@newcastle.ac.uk)**

Although cartel behaviour is almost universally (and rightly) condemned, it is not clear why cartel participants deserve the full wrath of the criminal law and its associated punishment.

To fill this void, I develop a normative (or principled) justification for the criminalization of conduct characteristic of “hard core” cartels.

The paper opens with a brief consideration of the rhetoric commonly used to denounce cartel activity, e.g. that it “steals from” or “robs” consumers. To put the discussion in context, I briefly present first a precise definition of “hard core” cartel behaviour, and second a microeconomic analysis to identify the damages associated with this activity. The damages identified are: welfare losses in the form of appropriation (from consumer to producer) of consumer surplus, the creation of deadweight loss to the economy, the creation of productive inefficiency (hindering innovation of both products and processes), and the creation of so-called X-inefficiency.

As not all activities which cause damage ought to be criminalized, I develop a theory as to why certain harms in a liberal society can be criminalized. It is based on J.S. Mill’s harm to others principle (as refined by Feinberg) and on a choice of social institutions using Rawls’ “veil of ignorance.” The theory is centred on the value of individual choice in securing one’s own well-being, with the market as an indispensable instrument for this. But as applied to the damage associated with cartel conduct, this theory shows that none of the earlier mentioned problems associated with this activity provide sufficient justification for criminalization. However, as the harm from hard core cartel activity strikes at an important institution which permits an individual’s ability to secure their own well-being in a liberal society, criminalization of hard core cartel behaviour can be normatively justified on this basis.

#### **Julian Webb, Moral Economy of Professional Regulation (Julian.Webb@warwick.ac.uk)**

This paper charts the re-emergence of an interdisciplinary discourse of moral economy concerned with “the study of how economic activities of all kinds are influenced and structured by moral dispositions and norms, and how in turn these norms may be compromised, overridden or reinforced by economic pressures” (Sayer, 2004: 2).

Conventional accounts of the so-called “new economy” have stressed the autonomy of the economic sphere, and a downgrading or disregard of moral issues in economic life. A moral economy perspective sets out to question that received wisdom.

The paper proposes that, in the context of legal work, the moral economy has both ‘formal’ and ‘informal’ dimensions. The reform of legal services regulation after the Legal Services Act 2007 marks the emergence of a new ‘formal’ moral economic discourse, which seeks to reframe ethics and regulation, arguably, within a more risk and market-orientated outlook. The proposed move to outcomes based regulation also transfers greater ethical responsibility to the level of the firm, since it is an approach that requires embedding by management “into a firm’s values, culture and the way it conducts business” (Black et al, 2007:192). This, it is argued, brings to the fore questions about the ‘informal’ moral economy of legal work: to what extent does legal work fit the model of the new economy? Is there evidence from existing legal professions research, matching that in other market sectors, to suggest the emergence of “morally diverse business models with complex orientations to market rationality” (Banks, 2006: 461)? In sum, does a moral economy perspective open up the possibility of a new agenda for researching the legal profession?

#### **Tom Webb, Complexity and Autopoietic Theory – What Relation? A Public Law Perspective**

This paper contends that autopoiesis and complexity bear many familial resemblances, and as such one might be well-used to inform ideas in the other. These familial resemblances stem from connected origins in the natural sciences, their status as systems theories, and the overlap in technical terminology (even though the meanings of such terminology will vary). Of course, a familial resemblance does not mean that complexity and autopoiesis are the same, there are a number of ideological and structural differences between the two systems theories, and these will be drawn out in the discussion.

This paper, having made clear the general differences (ideologically and structurally) between autopoiesis and complexity seeks to outline the similarities and differences between complexity and autopoiesis through a discussion of Teubner’s understanding of societal constitutionalism juxtaposed against key concepts of complexity.

**Chalen Westaby, Changing expectations: The performance of emotional labour by immigration solicitors in their exchanges with UKBA Case Owners (C.Westaby@shu.ac.uk)**

Immigration solicitors, as the legal representative of asylum applicants, are required to interact with United Kingdom Border Agency (UKBA) Case Owners in their everyday work in the pursuit of a successful outcome for their client. These legal representatives are expected to manage their own emotions as well as those of the Case Owner during such exchanges, which requires them to produce emotional labour.

Between November 2006 and June 2007 the Early Advice Pilot (Solihull Pilot) was set up to test a new approach jointly proposed by the UKBA and the Legal Services Commission (LSC) to improve the quality of asylum decisions. These changes require more interaction between legal representatives and UKBA Case Owners before, during and after the asylum interview, but prior to the asylum decision being taken. Following on from its successful implementation, the Early Legal Advice Project (ELAP) is now being tested in the Midlands and East of England (MEE) region. This small empirical study focuses on the impact ELAP has on the form and extent of emotional labour produced by immigration solicitors, and the potential consequences of that performance.

The paper begins with a brief overview of emotional labour, a consideration of relevant theoretical considerations, and a discussion of the research methods undertaken. The findings, resulting from the analysis of interviews, reveal that legal representatives not involved in ELAP emphasised the adversarial character of the emotional labour produced. Some participants recounted emotional displays which situated them as the 'zealous advocate', while other referred to more subtle displays characterised as 'strategic friendliness'. Interviews with legal representatives participating in the ELAP scheme will be conducted and contrasts drawn. The paper will conclude with a discussion of the findings and future work to be undertaken.

**Sally Wheeler, Responsibility for the world to come (s.wheeler@qub.ac.uk)**

My interest is in Transnational Corporations (TNCs) and the role that individual and corporate responsibility couched in terms of an ethic of responsibility can play in dealing with issues of corporate social responsibility, human rights and other claims against the world of corporate commerce. Having previously worked on virtue ethics and corporate community responsibility, this paper looks at the ethical position offered by that reluctant Heideggerian, Hans Jonas. Jonas offers an ethic of responsibility grounded in notions of humanity (beingness) and the terror of technology towards future generations. Influenced by the horror of both nihilism and the search for morality in a post holocaust world, Jonas presents a secular vision of "the Good, of what man ought to be". (Jonas 1985, *Industrial Society and an Ethics for the Future.*)

**Clare Williams, Beyond the New Economic Sociology: the role of embedded networks in post-neoliberal economic culture (ku46026@kingston.ac.uk)**

The power of Credit Rating Agencies (CRAs) over the fortunes of economic actors was brought into sharp question by the recent financial crisis. The natural response of governments firstly to apportion blame and secondly to regulate brought the role of CRAs in the financial sector into focus.

As "gatekeepers" of the markets, the reputational capital of CRAs is built on trust, notions of which have suffered setbacks in the wake of the crisis. In a classical economic view of the world, homo economicus maximizes his utility without recourse to deceit, fraud or malfeasance. In referring more closely to reality and acknowledging the existence of such practices, economic sociology not only sees financial markets as tangential representations of social interaction, but would seek to offer two explanations as to why greater levels of malfeasance are not seen. The undersocialized account would refer to institutional barriers to such while the oversocialized account would point to the internalization of social norms such as trust. Embedded economic networks, by contrast, stresses the role of concrete personal relations or networks that regulate action. Yet in an increasingly globalized, anonymized, atomized market, how useful is the embedded network analysis in providing an answer to the regulatory reforms that governments around the world have declared aphoristically necessary?

Using regulatory reform of the CRA market as an example, the paper argues that a new form of 'depersonalized' network that combines both under- and over-socialized accounts of economic interaction and which embraces government intervention as a necessary corollary to the effect of free market policies on community cohesion, and consequently on embedded networks, must be recognized.

**David V Williams, Contemporary socio-legal issues and New Zealand's colonial history (dv.williams@auckland.ac.nz)**

Since 1985 the Waitangi Tribunal has exercised a jurisdiction to inquire into historical claims brought by indigenous Maori against the New Zealand Crown. The tribunal is a permanent commission of inquiry that reports to the executive branch of government through the Minister of Maori Affairs. A large proportion of the tribunal's work over the last twenty five years has concerned inquiries into historical events between 1840 and 1992, but focused most heavily on the 19th century, that are alleged to have been in breach of the land and other guarantees contained in the Treaty of Waitangi signed between Maori and the Crown in 1840.

Owing to the tribunal's retrospective jurisdiction, a great deal of the history written in the tribunal's reports is counterfactual. If the Crown had not acted in such and such a way, then the Maori claimant community would not have suffered the devastating economic, cultural and social losses that did in fact occur. Contemporary socio-legal issues have always dominated the tribunal's approach to history, and its report writing is necessarily 'presentist'. Treaty of Waitangi jurisprudence on the 'principles of the Treaty of Waitangi' has been invented since 1975 by judges in the ordinary courts as well as in tribunal reports. This jurisprudence has then been applied retrospectively to the history of the colony in a manner designed to ensure that Maori claimants may succeed in negotiating a (modest) political settlement with the government's Office of Treaty Settlements. That Maori have, it is said, a 'right of redress' is one of the 'principles of the Treaty of Waitangi'. The paper will include critical comment on the government's control over the nature and content of this 'right of redress'.

**Stephen Wilks, The Criminal Cartel Offence and proposals for reform of UK competition enforcement (s.r.m.wilks@exeter.ac.uk)**

The Coalition Government has announced that it plans to merge of the Office of Fair Trading and the Competition Commission. The OFT is likely to lose most of its consumer protection powers. Consultation on the proposals is expected in February and government is considering various options for organising and resourcing the operation of the key competition powers. The organisational choices are crucial for the fair and effective enforcement of UK and European competition law.

Reform will provide an opportunity to revise the substantive law. Mandatory merger notification is being discussed as well as adaptation of the appeals process. The competition powers of the utility regulators are also under consideration. At present there is no mention of any changes to the criminal cartel offence so this paper will outline the options for reform and will explore two aspects of the enforcement of the Offence. First, in the light of experience since the Enterprise Act, are there aspects of the offence as currently legislated that could usefully be adapted within the reform of policy? Second, how will the cartel offence fit within the possible redesign of policy tools and processes within a new, strengthened and more specialist competition authority?

**Siobhán Wills, Categorisation of Conflicts (Siobhan.Wills@ucc.ie)**

It is generally agreed that when the United States and its coalition allies entered the wars in Afghanistan in 2001, and Iraq in 2003, their operations in those countries were initially subject to the laws of international armed conflict. However the ICRC has determined that the conflict in Afghanistan became non-international with the establishment of the United States' backed government of Hamid Karzai on 19 June 2002 and that the conflict in Iraq became non-international with the establishment of the Iraqi Interim Government on 28 June 2004. The practical consequence of the requalification of the legal characterization of the conflicts downwards to non-international is a marked loss of protection for persons previously protected by the Geneva Conventions. There are a number of important protections

provided by the Geneva Conventions for which there is no parallel under common Article 3, Protocol II or customary international humanitarian law. The extent to which international human rights law provides comparable protections is debatable.

Hitherto the primary focus of Security Council resolutions authorizing military intervention seems to have been the needs of the intervening powers (whose agents will often have been involved in the drafting of the resolution) and the feared reactions of other affected States, especially those with influence or with close connections to those with influence. The needs of civilians are often only addressed ad hoc, and after the fact. Provision could and should be made for a more consistent approach to protection of vulnerable persons. The Security Council could adopt a general resolution insisting that any UN endorsement of States' participation in an armed conflict must be contingent on an undertaking by the contributing States that they will respect and uphold the provisions of the Fourth Geneva Convention even where the conflict is formally regarded as having become non-international.

### **Debra Wilson, Cartel Criminalisation: A New Zealand Perspective ([debra.wilson@canterbury.ac.nz](mailto:debra.wilson@canterbury.ac.nz))**

In late 2010 the New Zealand Government announced its intention to amend the Commerce Act 1986 to add criminal liability to the existing civil penalties for engaging in cartel conduct. The proposed amendment appears to be motivated by two factors. The first is the desire to harmonise New Zealand laws with those of Australia and with international standards. The second is to alter public perceptions of acceptable business conduct. The New Zealand public appears not to presently regard engaging in cartel conduct as being morally culpable and/or deserving of punishment, and it is thought that the imposition of criminal sanctions might alter this perception.

This paper will describe the background to the proposed cartel amendment, and will consider the validity of the justifications for its introduction. It will suggest that New Zealand's haste to enact legislation is unwarranted, and that it may be more beneficial to business regulation in New Zealand to delay the amendment in order to observe the experience and effectiveness of criminal cartel laws in the UK and Australia. In the interim, the public perception can be addressed through public education and through the courts increasing the level of civil penalties imposed from current levels to amounts closer to the maximum permitted under the Act.

### **Simone Wong, Home-sharing and constructive trusts: the relational dilemma of time and context**

In this paper, I examine the judicial constructions of the temporal experiences of cohabitants who share a property as a home and in determining how beneficial ownership is to be determined in the light of those experiences. In recent cases, judges have sought to provide a more holistic approach to ascertaining home-sharers' intentions regarding the beneficial ownership of the shared home. This is done through increasingly drawing attention to the significance of 'context' in determining how the equitable principles are to be applied. For instance, Baroness Hale in the more recent House of Lords case of *Stack v Dowden* emphasises that "context is everything". This is in part to militate against the rigours of Lord Bridge's judgment in *Lloyds Bank v Rosset*. An emphasis on context means that we are being called upon to assess and evaluate various aspects of the litigants' relationship, specifically their conduct, in order to search for and determine their 'common intention' regarding beneficial ownership. This exercise thus engages us in a temporal assessment and evaluation of a couple's relationship at different phases of the parties' relationship both with regards to acquisition as well as occupation of the property with the view to ascertaining their actual or inferred (and possibly even imputed) intention. By using *Jones v Kernott* as a case study, I seek to argue that, post *Stack*, judges have offered clarification to some, though not all, of the troubling aspects of that case. But in doing so, they have reverted to a conservative orthodoxy which makes it much harder for home-sharers in future to rebut the presumptions of beneficial ownership despite reference to context.

### **Rae Wood, S Anleu & K Mack, Time and Gender Inequality in the Judiciary**

Time, access to time and time management have been identified as sources of inequality in many occupations including the legal profession. Time cuts across work, family and leisure

domains. The structuring of time, the time intensity of tasks and the allocation of time to activities are especially significant for professional occupations, which may not have clearly delineated time parameters. High levels of autonomy, which characterize professional occupations, may mean that incumbents have more control over the timing and location of some work tasks. Nonetheless, the requirement of flexibility -- the obligation to complete tasks or provide services when needed rather than working only within defined set hours -- often means that distinctions between work and non-work time blur or disappear. This can lead to reduced autonomy and the inability to control the parameters of work time.

This paper addresses the significance of time, the relationship between work time and non-work time and different types of time in the context of the judiciary as a profession. It examines the ways in which women and men might experience themselves as either time sovereigns or as time subjects, stemming from the way in which work is organized in this elite occupation. Data from a 2007 nation-wide mail survey the Australian judiciary shows that perceptions about work hours and compatibility with family responsibilities were factors that attracted women and men to the judiciary. However, traditional gendered expectations and obligations persist in judges' and magistrates' domestic lives which suggests that time, and particular kinds of time, are experienced differently by these women and men. Despite being in an extremely well-paid and institutionally powerful, elite, independent professional occupation, women are still subject to the time bind in a way that their male colleagues are not.

**Anan Shawqi Younes, Trade-marks and Domain names: 'Use in Course of Trade' in the dilution-basis of trade-marks protection (asy3@le.ac.uk)**

One of the crucial requirements of protecting the economic value of trade-marks, in particular on dilution-basis, is that the trade-mark needs to be used by the infringer in the course of trade. This requirement was introduced in most trade-marks laws in order to consider the Free Speech principles in the context of trade-marks infringement. In the interrelationship between trade-marks and domain names, the use of trade-mark is a controversial issue, especially with the differences between jurisdictions regarding the meaning and importance of this requirement in the scope of trade-marks protection. This paper tries to prove how the limitation of trade-marks protection within commercial use in commerce obstacles the dilution-basis to be properly and fairly applied if that mark infringed by a domain name. Domain names are not always used in course of trade whereas, this research reveals that using a trade-mark as a domain name or by a domain name might cause a form of trade-marks infringement, regardless of the nature of that domain name and even, whether the latter is used or merely registered. The paper indicates how this issue is a loophole in the existing trade-marks laws and therefore, needs to be reviewed so as to consider new technologies, namely the nature of new device challenging trade-marks; such as, domain names. The paper tries to prove that the justice in the scope of trade-mark protection does not come from narrowing that scope: it could be via introducing technical and fair solutions that take into account the rights of all parties in the conflict. The paper concludes that 'Use in course of trade' needs to be considered in the solutions rather than to keep it as a requirement of trade-mark infringement.

**Aldo Zammit Borda, Decision-making Patterns at the First Trial of International Criminal Courts: A Case-Study of the ICC (Prosecutor v Lubanga) (zammitba@tcd.ie)**

The first trial of the ICTY (Tadic) and ICTR (Akayesu) led to a conviction of the accused. This paper seeks to understand this empirical observation by applying new institutionalist perspectives to decision-making processes of international criminal courts and tribunals ("courts"). This approach draws on Clayton and Gillman's (ed.) (1999) "Supreme Court Decision-Making." It argues that the first trial of such courts is affected by a learning curve and should be differentiated from other trials because of, inter alia, the novelty of proceedings, the absence of previous jurisprudence and the need to develop *modi operandi* often from scratch. It then discusses decision-making patterns at the first trial with reference to logics of action and posits that, at the first trial, the logic of consequentiality is dominant, as the court would still not have determined its legitimate bounds of appropriateness, a phenomenon it terms the "first trial syndrome." It concludes by applying this theory to the first trial of the ICC.