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# Access to Justice in Context

NB: all sessions will be held in Barbara Strang B29

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## Wednesday 5th April (13:30-15:00)

Pablo Fuenzalida, 'Access to justice and controlling the production of lawyers: legal aid between two logics'

This paper asks why Chile's distinctive legal aid scheme has stood the test of time from 1981 until present. The particularity of this scheme is its dual role, namely providing legal aid to low-income people (the access to justice dimension) together with providing law school graduates with a mandatory apprenticeship period as an admission to practice requirement (the legal professional dimension). In brief, legal aid through legal training. The scheme was introduced in 1929 as a central feature of the Chilean Bar Association. From 1981 it has been managed by the Legal Assistance Corporations, institutions created by the military dictatorship led by General Pinochet (1973–1990). The subsequent democratic governments from 1990 until present have not reformed this scheme, although they have totally or partially excluded law students from criminal, employment and family legal aid as well as from alternative dispute resolution mechanisms.

Traditional sociological literature explaining legal aid's development focuses on the motivations of the individual actors involved whereas others are more centred on structural factors and how they affect its occurrence. This paper opts instead to frame this question as a case study on legal and institutional change and continuity. Using as a basis Bruce Carruthers and Terence Halliday's recursivity of legal change framework, complemented by institutionalism and policy literature, it draws on qualitative methods to collect and analyse data from key actors involved in the enactment and implementation of the rules governing this scheme.

My thesis, in nutshell, is that the recursive cycle of legal change -from law on the books to law in action and from law on action to law on the books-, while interrupted from the legislative point of view, may still effect gradual and isomorphic forms of change closer to those attempted legislatively. Yet, because Legal Assistance Corporations must fulfil with two different tasks, the latter preliminary thesis needs to be tinged to take into account these two dimensions. Thus, a positive hypothesis would state that institutional change can be affected by potential reforms of law, which reflects the access to justice dimension; whereas its negative version would consider the opposite, that institutional change is not affected by potential reforms of law, which reflects the legal professionalism dimension.

Preliminary findings reflect a setting of prolonged legislative reform attempts continuing with, modifying or suppressing the mandatory training stage. Nonetheless, while these reform announcements have failed from a legislative point of view -except for criminal legal aid where a new institution, the Criminal Public Defender, was introduced by law- the lurking shadow of legal change has steered changes in both dimensions, first, towards professional and specialised legal service provision, and recently to increase the training role of these institutions with respect to law graduates.

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Lucy Welsh (Sussex), 'A case study on the effects of changes to legal aid in criminal cases'

This paper explores the effects of changes to legally aided representation on criminal cases in magistrates' courts according to data collected in an area of South East England. Data was collected using empirical research methods; namely courtroom observation followed by interviews with Crown prosecutors and defence lawyers. I consider the political factors that motivated changes to legal aid and suggest how these issues affect the relationships between defendants, lawyers and the magistrates' courts. The factors which appear to have had the greatest influence are the regime of payment by way of fixed fee and the reintroduction of means tested eligibility for publicly funded defence representation. I argue that my research indicates a potential relationship between solicitors' risk taking behaviour in obtaining funding and the reintroduction of means testing; remuneration rates affect the service that defendants receive and that the reintroduction of means testing decreased efficiency in summary criminal courts. Ultimately I argue that the present system of legal aid funding is excessively bureaucratic and adds a layer of uncertainty to the proceedings which detrimentally affects the lawyer/client relationship.

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Jo Wilding (Brighton), 'The Business of Asylum Justice'

People seeking asylum in the UK face a hostile and cynical procedure. High quality legal representation may be crucial to their chances of obtaining refugee status. Yet legal aid cuts and other changes appear to have reduced access to high quality representation. Need, demand and supply are little understood in the context of publicly funded asylum legal services. Likewise there is limited understanding of how good quality representatives balance quality with financial viability. This paper presents a case study of one small not-for-profit organisation providing legal aid asylum representation. It concludes that quality and financial viability are maintained through careful recruitment of practitioners, significant cross-subsidy by another area of practice and charitable funding, and internal subsidy in the form of practitioners carrying out unpaid work. Demand far exceeds capacity so the organisation has chosen to prioritise the most vulnerable clients' cases. These require the most work and take the longest to complete (and be paid for) but also offer the possibility of a higher rate of pay. This case study suggests that "demand" needs to be considered in two parts: Potential-Client demand (the number of people seeking the organisation's services) and In-Case demand (the demand for services on a case which has been opened). It provides a valuable illustration of the filtering process from need to supply, via the two stages of demand. Policy on legal aid has been heavily influenced by theories of supplier-induced demand and rational economic actors. This research suggests that those theories are flawed in relation to asylum legal aid.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

James Gallen (Dublin City), 'Investigating an Abusive Past in Consolidated Democracies: Truth Commissions, Commissions of Inquiry and Historical Abuse'

In Ireland, four commissions of inquiry have examined child sexual abuse and the response of church and state authorities, with further investigations into State involvement in the Magdalene Laundries recently concluded through Inter-Departmental Committee investigation. In addition, at the time of writing, a Commission of Inquiry has been established into the practices of Mother and Baby Homes. This paper will evaluate the nature, structure, practices and findings of these commissions by comparison to international law and best practices regarding truth and reconciliation commissions. In particular, the paper will assess whether commissions designed to investigate historical abuse in consolidated democracies should serve the purposes as truth commissions in transitional and post-conflict societies. It will evaluate whether the Irish commissions have pursued a victim-survivor centred practice; the extent to which these commissions have clarified the causes of and responsibility for historical abuse and justifications offered for not offering public hearings, including the chance for victim-survivors to confront perpetrators. The paper will conclude by examining the overlapping relationship between the Canadian Truth and Reconciliation Commission with transitional justice and redressing historical abuse in consolidated democracies.

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Kate Gleeson (Macquarie), 'The road to redress for institutional child abuse in Ireland and Australia'

Legal and political outcomes for survivors of institutional child sexual abuse (CSA) vary greatly between Ireland and Australia. The scandal of institutional CSA has been investigated in numerous Australian state and federal government inquiries since the 1997 Stolen Children Report (HREOC 1997). These culminated in the Royal Commission into Institutional Responses to Child Sexual Abuse, begun in 2013 and scheduled to run until late 2017. Despite 20 years of recognition of CSA in government-funded institutions, it was late 2016 before the Australian government announced plans for a redress scheme. Failures in civil justice (lawsuits) also characterise the Australian experience (Gleeson 2016). In contrast, the Irish Republic instigated the national Commission to Inquire into Child Abuse (CICA) in 1999. Although CICA conducted extensive investigations for a decade, by 2002 the Irish government had implemented a national redress scheme for survivors of child abuse in residential institutions run almost entirely by Catholic orders on behalf of the state (Arnold 2009). An estimated €1.5 billion has been paid, and the Christian and Marist Brothers have also been sued for abuse in non-residential schools (Gleeson 2016). Although the Irish scheme is not without criticism, the international differences in political and legal responses are stark, and warrant investigation.

This paper forms part of a comprehensive project examining these differences. It understands the sexual abuse of children in institutions to be the product of the institutionalisation of children as a form of biopower (Foucault in Carrington 2011), which may be described as the power of regulatory regimes that is concerned with refining populations for purposes of nation-building in colonial and post-colonial contexts. With this in mind, the project aims to provide a genealogical account of the different legal and political outcomes for survivors of institutional CSA in Ireland and Australia, by analysing the different laws and institutions

involved in nation-building that were implicated in child abuse in each country from the mid-19th century. By emphasising racialised sexual and religious discourses informing the institutionalisation of children, the project aims to contribute new perspectives to growing bodies of work rethinking nation-building in Ireland (MacLaughlin 2001) and Australia (Butcher 2008), and to provide a new transnational historical model for analysis of law and politics in both countries.

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Sinéad Ring (Kent), 'Law as an Archive of Historical Child Sexual Abuse'

This paper explores Mawani (2012)'s notion of law as an archive in the context of historical child sexual abuse in Ireland. It examines the ways in which law produces a body of knowledge (the archive) about historical child sexual abuse in Ireland. It critiques the silences contained in the archive, and explores how many of these are of law's making. It asks what demands can society make of law in the creation and preservation of a national memory around historical child sexual abuse.

Reference: Mawani R (2012) *Law's Archive Annual Review of Law and the Social Sciences* 8:337–65

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Zihan Niu (Singapore Management University), Gijs Van Dijk (Maastricht), 'The Impact of Culture on Chinese Judges' Decision Making in Contractual Damages Cases'

This research examines the impact of Chinese cultural values on the application of law on contractual damages. Following an experimental design, 43 in-depth interviews were conducted with Chinese judges in 13 cities and provinces across China. The findings show how Chinese national cultural values influence Chinese judges' decision making when determining contractual damages. The data reveal two patterns. First, the judges took the cultural values into account when determining the amount of damages. Second, the consideration of cultural value factors reduced the judges' consideration of legal factors. The local cultural values did not change the Chinese judges' understanding of law. Instead, the judges compromised the legal requirements and cultural desires by using the discretion offered to them or by recommending mediation. Additionally, the interview results indicate that the consideration of cultural values is not only the result of judges' personal preferences, but also of judges seeking social approval. The motivation of Chinese judges to obtain social approval may be enhanced by the assessment criteria and the institutional constraints of Chinese courts.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Zanele Nyoni (UCLaN), 'DIY Justice: Litigants in person and the effect of non-representation'

Since the cuts to legal aid were imposed on 1 April 2013, the grave injustice that has resulted from a lack of legal representation has continued to dominate headlines. The removal of legal aid for advice and representation in private family law disputes, save where domestic violence is present, has not only led to an increase in the number of litigants in person ("LIP"), but has prevented access to justice for many LIP in England and Wales.

The focus of this article is to highlight that while a small minority of LIP are capable of representing themselves, there remain significant issues of access to justice and navigating the justice system without the assistance previously provided by legal services. This article will explore the obstacles faced in relation to preparing for court proceedings and understanding procedural matters. In addition, it considers the impact of LIP on the judiciary and argues that the defects lie within the nature of the court system which is adversarial in nature and unsuitable for self-represented litigants. In considering the aforementioned, the article discusses key issues that must be addressed in order to facilitate access to justice, namely the availability of accessible information and resources to assist LIP to represent themselves; alternative methods of providing free or low-cost legal services and modifying the court system from an adversarial one to a more supportive inquisitorial one.

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Tatiana Tkacukova (Birmingham City), 'Barriers in Access to Justice for Litigants in Person: Communicative, Conceptual, Cognitive and Procedural challenges'

After cuts into legal aid in England and Wales, the numbers of litigants in person (LIPs) have been growing and it is not unusual for both parties to act in person. The paper presents a rationale for communicative, conceptual, cognitive and procedural challenges experienced by litigants in person in civil court proceedings. The paper also explores oscillation between written and spoken legal genres and narrative development strategies which litigants in person have to use throughout different stages (from the early stages of starting proceedings, filling in court forms and providing documentation, through the negotiation process to interaction in court). While legal professionals express themselves in paradigmatic legal mode influenced by legal acts and legislation, litigants in person tend to express themselves in narrative mode similar to everyday storytelling. The objective is to investigate obstacles litigants in person experience during the process originally designed by legal professionals for legal professionals. The paper evaluates different options for empowering lay people involved in legal proceedings and argues for the need to provide more specific support for different stages of civil court proceedings.

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Kate Leader (LSE), 'Fifteen Stories: Litigants in Person in the Civil Justice System'

In April 2013 the Legal Aid Sentencing and Punishment of Offenders Act [LASPO] came into force. This bill effectively cut off access to legal aid for the overwhelming majority of litigants

in non-criminal cases. In the wake of the passage of this bill, the litigant in person [LiP] has come to the fore as a pressing issue for both the legal profession as well as the wider public. For the legal profession, this is primarily because it is expected that the deep cuts to civil legal aid will lead to a significant rise in litigants in person. They are therefore wrestling with how to include LiPs more fully in a legal system that is not 'designed with self-represented litigants in mind'. For the public, the LiP has also become a touchstone for wider questions about court reform and access to justice in the so-called "age of austerity".

Yet whilst the term 'access to justice' is used a great deal in literature, exactly what it means is often glossed over. This paper critically considers access to justice through the lens of the LiP. I do this by drawing on my doctoral research which consists of extended oral history interviews with LiPs. The purpose of this particular approach is to use data analysis to assess larger philosophical questions, including: are legal representation and access to justice mutually dependent? Can LiPs have equal access to justice to that of represented parties? If the legal system does require reform to facilitate fairer access for a future with more LiPs, what will this entail? What can LiPs tell us about what our future courts might look like? My paper will draw on LiP stories to both shine a light on these overlooked but important players in legal proceedings as well as to reflect on larger questions about the accessibility of law today.

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Robert Lee (Birmingham), Tatiana Tkacukova (Birmingham City), 'Access to Legal Information and Advice: A Case Study of Litigants in Person in the Civil Justice Centre'

After the cuts into legal aid in England and Wales, the numbers of litigants in person (LiPs) have been on the increase. The paper presents the results of an empirical socio-legal research project conducted in the Birmingham Civil Justice Centre in cooperation with Birmingham Law School and the School of English, Birmingham City University (April – July 2016). The quantitative part of the project included questionnaires eliciting bio-demographic details, information about the case, reasons for being unrepresented, information seeking behaviour, access to online information, and court experience from the 197 LiPs surveyed. The qualitative part explored the same issues in more depth via telephone interviews with 28 LiPs.

The results of the project reveal several tendencies and strategies employed by lay people: LiPs try to combine different sources of information and advice to lower the costs; LiPs find charities such as CAB and PSU very helpful; LiPs with previous experience of being represented find it easier to act in person; LiPs find it more helpful to draw on family and friends with previous experience of court proceedings than search online; LiPs prefer receiving advice in person or over the phone (even if it is for a short amount of time) to searching for information online; LiPs do not search online or do not tend to find much useful information online; the overall experience of LiPs with court proceedings tends to be positive; LiPs are generally happy with judges but often find that communication with the legal representative for the opposing party can be problematic.

The paper explores the above tendencies in light of the existing research on access to justice as well as the 'digital by default' approach to government administration.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Nataie Ohana (Exeter), 'The gaps and tensions between the experience of trauma and its legal representation'

In September 2016 I started my three year research project, funded by the British Academy, on the understanding, representation and construction of trauma in legal proceedings.

The research method of the project consists of working with small groups of people who gave testimony in legal proceedings on a trauma they experienced. The groups will be formed according to different types of trauma: shell shock, sexual abuse, domestic violence and trauma experienced in home countries that led to seeking asylum.

Each group will undergo a workshop that will be delivered in collaboration with therapists and in which art would be integrated as one of the mediums for expression and communication.

In my paper I would like to focus on the elements of the research method and to reflect and consider its ability to generate understandings on the meanings and consequences of translating a traumatic experience for legal purposes.

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Ashley Rogers (Stirling), 'Legal Consciousness and Access to Justice in Bolivia'

Law 348 to guarantee women a life free from violence was established in Bolivia in 2013, following from the increased recognition of women's rights as outlined in the New Constitution (2009). Whilst this law was hailed as a step forward for women in the elimination of violence, offering access to justice and legal remedies, it could be considered to have become another form of regulation for women and an important site of conflict in the construction of legal consciousness.

Funded through the ESRC Socio-Legal stream, this research involved twelve months of ethnographic fieldwork in the high altitude de facto capital of La Paz. Participant observation and life stories were gathered in a women's centre in order to explore women's lived experiences of violence and the construction of legal consciousness in the wake of Law 348, as well as to uncover the relationship between law and the legal subject. Given that institutions and organisations are important in such constructions, semi-structured interviews were also conducted with criminal justice actors and non-governmental agencies. Encounters and interactions with legal spaces and institutions reveal the difficulty of accessing justice and of the conflicts and tensions that women face between the law on paper, and the law in practice

This paper explores some of the key findings from this research, in particular highlighting that whilst the development of law can create important spaces for women in relation to recognition and empowerment, it can also work to disempower them and in turn delegitimise the law. Access to law is only possible if women adopt the label of victim and fit a specific 'victim' model. This is reinforced through limited access to justice and the discourses this promotes. Presenting then, are the conflicting relationships that Bolivian women have with the law, with society, and often, with themselves.

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Aleister Adamson and Robyn Kerrison (Nottingham), ‘Duterte’s “war on drugs” in the Philippines – can international refugee law hold out some hope for protection for those targeted by police and death squads?’

Since coming into power on 30 July 2016, the Philippines’ President Rodrigo Duterte has pursued a state-sanctioned regime of violence against all those seen as being linked to the illegal drug trade – from “drug lords” through to recreational drug users. At the time of writing, the death toll had reached 3,600 and continued to climb. Police and unofficial vigilante groups faced no significant pressure to exercise restraint, and Philippines President Rodrigo Duterte’s comments dehumanising the victims, denouncing international human rights obligations and vowing that his “war” will continue have been broadcast around the world.

After briefly documenting the scale and impact of Duterte’s campaign against those associated with the drug trade, this paper will examine whether people attempting to flee the country to escape the violence would be entitled to international protection under the 1951 Refugee Convention as a “particular social group”.

While we take as authoritative the UNHCR’s interpretation of membership of a particular social group, and use this in our analysis, we will also present a comparison of how this standard differs from that employed to date in various national and regional contexts, the latter being the definitions that will ultimately determine whether people find protection in practice.

In doing this, we will identify whether, within the broader grouping of people affected by the anti-drug violence in the Philippines, there are sub-groups whose claims might most usefully be pursued via differing arguments (dealers, as opposed to consumers of drugs, for example). At first glance it might be thought that the characteristics forming the basis of the persecution of these groups are neither immutable nor central to an individual’s fundamental identity for the purposes of the Convention. However, the reality facing anyone associated with drug use in the Philippines currently is such that we contend that, in some cases at least, perceptions will follow individuals regardless of the reality of their status, while in others, accessing the support needed to bring about a change of status would either be impossible or potentially draw dangerous attention to an individual before s/he had been able to achieve the necessary change.

Having established which categories of people could qualify for recognition as refugees, we examine, also, the potential impact across sub-groups of the Refugee Convention’s exclusion clauses, again making a comparison of the interpretations used by key actors (e.g. UNHCR, the US, EU).

Finally, in light of the specific nature of the persecution these groups face in the Philippines (including denial of their right to leave the country in order to seek asylum) we consider whether International Criminal Law – and the threat of being held accountable for crimes against humanity – would potentially offer a more tangible form of protection.



# Administrative Justice

NB: all sessions will be held in Herschel Training Room 1

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## Thursday 6th April (11:00-12:30)

Stephen Daly (King's College London), 'Holding HMRC to account through the tribunals'

HMRC is one of the most powerful bodies in government whose extensive powers have the capacity to considerably restrict the liberty of taxpayers. It is essential accordingly that taxpayers are appraised with open access to judicial review to ensure that HMRC's actions fall properly within the confines prescribed by Parliament. The need for such a route is compounded by the fact that HMRC is a non-ministerial body and hence the ordinary avenues for accountability are eschewed.

Taxpayers however are restricted by the need for judicial review proceedings to take place in the Administrative Court (with the exceptional possibility that these may occur in the Upper Tribunal). This is particularly burdensome where there is a separate dispute between the taxpayer and HMRC already set to be heard by the First-tier Tribunal. In such a case, there is an unnecessary duplication of proceedings: one judicial review dealing with a public law issue, one substantive appeal dealing with an underlying tax dispute, the resolution of either of which will render the other redundant. In such a case, why should the expertly constituted First-tier Tribunal not have capacity to resolve both disputes? Is there any justification behind this restriction?

This paper seeks to demonstrate that, just like the Emperor, the underlying justification is without clothes. It is proposed that taxpayers should be allowed to bring public law issues before the First-tier Tribunal where there is additionally a substantive dispute. The merit of such a proposal lies in its placing of the relevant disputes before the body best placed to adjudicate upon them. More significantly, it can help ensure HMRC are held to account in relation to the extraordinary new powers it has acquired since 2014. HMRC can now issue Accelerated Payment Notices ('APNs') which in specified circumstances can be used to require taxpayers to pay the 'disputed tax' (the amount subject to a substantive assessment) within 90 days. 56 judicial review applications have been launched in relation to these particularly powerful instruments. Importantly for the purposes of this paper, these judicial review applications relate to cases where there is additionally a substantive dispute to be heard by the First-tier Tribunal. If the First-tier Tribunal could hear the public law issues additionally, there can be greater assurance that there has been no abuse of power and that no unnecessary hardship is caused by a premature claim for tax not properly owed.

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Michael Adler (Edinburgh), 'An AJ Take on ODR'

In a very low-key, very thin document entitled *Transforming our Justice System*, published in September 2016, the Government announced an enormously ambitious modernisation programme for courts and tribunals built around the digitising court and tribunal procedures. The document makes it clear that all cases should be started on-line and that some cases will be handled completely on-line. It envisages a massive shift away from challenging decisions in person to challenging decisions on-line although it does say that people who are not comfortable with this will be supported.

The document is unclear about whether existing procedures will be digitised or new procedures developed. Either way, the introduction of on-line dispute resolution (ODR) will have important implications for administrative justice (AJ) seen as the justice inherent in the making and challenging of administrative decisions.

In this paper, I intend, first, to outline the Government's proposals; second; to assess the thinking that lies behind them and concerns they have provoked, third, to look at the issues they raise from an administrative justice perspective; and, fourth, to suggest how these could be addressed.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Marc Hertogh (Groningen), 'Out-of-Court Financial Dispute Resolution in Germany and The Netherlands: Revisiting Blankenburg on Legal Culture'

This paper aims to compare out-of-court financial dispute resolution in Germany and the Netherlands. Alternative dispute resolution (ADR), an informal method to resolve complaints that consumers have about (financial) products and services, is offered as a pathway to seek redress within the national justice system. The paper will focus on the Insurance Ombudsman (Versicherungsbund) in Germany and the Financial Services Complaints Tribunal (Kifid) in the Netherlands. Using empirical data and building on the socio-legal literature on legal culture and legal consciousness, we seek to explain why German users are generally (very) positive while Dutch users are generally (very) negative about these ADR bodies. The paper will revisit Blankenburg's (1994) classic comparative study of legal culture in Germany and the Netherlands. According to Blankenburg, the civil litigation rates in both countries depended less on what people want from law ('demand side') than on the availability of other institutional possibilities for dealing with their disputes and claims ('supply side'). Similar to Blankenburg, we will argue that the way in which users evaluate their national (financial) ADR bodies is influenced by their country's 'legal infrastructure'. However, we will also argue that the legal consciousness of ADR-users plays an important intermediate role in shaping their opinions and expectations about out-of-court financial dispute resolution. The paper will conclude that, contrary to Blankenburg's position, legal 'folk mentalities' are not only relevant for studying legal culture within a given society, but are also important for our understanding of (financial) ADR bodies in comparative socio-legal research.

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Sally Richards (Keele), 'The Foundations of Responsive Legality'

This paper identifies responsive legality as a new ideal type of administrative justice. When employing the logic of this type, officials believe a decision is a good one if it blends rule of law compliance with a caring concern for substantive justice. In responsive legality, officials work to protect applicant welfare through rule of law conformity. They are driven by an overall sense of responsiveness, a dual orientation towards substantive fairness and procedural consistency, and cognitive processes requiring the application of personal experience to verify factual truths.

This discernment of responsive legality builds on over thirty-five years of socio-legal administrative justice literature, which devises models explaining the normative logics underpinning public decision making. Responsive legality accounts for recent changes in public administration, accommodating much evidence that exponential changes over the twenty-first century have brought with them new 'interactive' forms of organisation; forms that (new or not) need to be accounted for in updating these models if we are to take them as analytically encompassing of the normative rationales motivating administrative action.

Several changes to contemporary public administration are analytically reflected in the new responsive legality type. These include that there is a high degree of conflict, excitement and unanticipated change in contemporary organisations; that responsiveness and organic

emotionality increasingly drive workplace norms; and that there is a high level of personal involvement of career-level civil servants in administrative decision making.

This paper considers this literature and a modest empirical study of public officials in the Refugee Review Tribunal of Australia to illustrate the component features of the responsive legality type. Whilst it laments that the practical and policy ramifications of this finding are not yet known, the paper emphasises the descriptively new and normatively valuable realisation of responsive legality in dialogue with the pioneering socio-legal models.

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Eliza Varney (Keele) and Mike Varney (Hull), 'Enhancing the Participation of Disabled People's User-Led Organisations (DPULOs) in Public Consultations'

Disabled people are in the best position to identify the barriers they face in society and the solutions to address these barriers. The United Kingdom is legally bound under the UN Convention on the Rights of Persons with Disabilities (CRPD) to 'closely consult with and actively involve' disabled people, 'through their representative organizations', in 'decision-making processes concerning issues relating to' disabled people (Article 4(3) CRPD). Measures to enhance the contribution of Disabled People's User-Led Organisations (DPULOs) in public consultations could play an important role in meeting these objectives. Yet, the consultations that informed the Consumer Rights Act 2015 received no responses from DPULOs. This paper seeks to identify the main factors affecting the participation of DPULOs in public consultations and assess the effectiveness of the current legal and policy framework on public consultations to facilitate such participation. The research, funded by the SLS Research Activities Fund 2015, relies on socio-legal critical analysis of the legal and policy framework on public consultations and qualitative interviews with representatives from a sample of DPULOs (registered charities, led and controlled by disabled people: minimum 75 per cent of board members) and the Law Commission. These interviews enabled us to gain a better understanding of the barriers affecting the participation of DPULOs in public consultations and recommend measures that could enhance such participation.

## Thursday 6<sup>th</sup> April (16:15-17:45)

John McGarry (Edge Hill), 'The Attorney General, Contempt of Court and Political Bias'

Politicians appear increasingly willing to comment on active legal cases – in traditional or new media – in ways which may interfere with the administration of justice.

For example, during the 2016 manslaughter trial of an NHS Trust and anaesthetist for the death of Frances Cappuccini, Jeremy Hunt, the Health Secretary, tweeted Ms Cappuccini's picture and wrote 'Tragic case from which huge lessons must be learned'. The trial judge ordered Hunt to remove the tweet saying 'in a very serious case, it could be regarded as a contempt of court'.

Similarly, before the conclusion of Andy Coulson's trial for conspiracy to cause misconduct in public office, David Cameron made a televised apology for employing him, saying that Coulson had given 'false assurances'. The judge 'expressed his dismay' at the statement, and noted that 'politicians from across the political spectrum' had commented about Coulson during the trial.

Cameron was previously criticised for saying he was a 'massive fan' of Nigella Lawson during the fraud trial of two of Lawson's assistants. The trial judge instructed the jury to ignore Cameron's comments calling them 'regrettable'.

When published, such comments may create 'a substantial risk that the course of justice in ... proceedings ... will be seriously impeded or prejudiced', a contempt under the Contempt of Court Act 1981. Proceedings for such a contempt 'shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it'.

In this paper, I review the Attorney General's role in cases where a contempt may be committed by a political colleague or opponent. I consider the rationale underlying the AG's role in contempt cases, the legitimacy of his/her role in political cases, whether a charge of political bias would be inevitable and possible alternatives.

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Jaclyn Paterson (Northumbria), 'The Administrative Efficiency of the UK Supreme Court; an empirical examination of the transitional period from the Appellate Committee of the House of Lords to the UK Supreme Court.'

The Supreme Court occupies a unique constitutional position in the United Kingdom, acting as a hub between sub-national, national and international judicial and governmental bodies. The court needs to be able to regularly and effectively communicate with other institutions; otherwise it will not be in a position to operate efficiently. In practical terms, this means the active management of its caseload and ensuring that the judges produce comprehensive and accessible judgments, to ease lower court interpretation, minimise error and assist in the overall administration of justice. This paper presents original empirical research conducted for the presenter's doctorate that examines the efficiency of the UK top court in the transitional period from the Appellate Committee of the House of Lords to the UK Supreme Court, namely 2007-2011. The empirical data reviewed covers certain efficiency measures of

the court, such as average hearing length, average length of time before delivering judgment and average judgment length as between the two courts. The paper also reviews the judgment style adopted by each court, including the volume of single judgments, numbers of concurring and dissenting opinions, panel sizes and voting splits. The paper aims to highlight the significant differences found in the judgment style and administrative efficiency of the Supreme Court as compared to the House of Lords and to use these findings to make suggestions as to how the court may improve its administrative efficiency going forward and ultimately the administration of justice.

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Richard Kirkham (Sheffield), 'Procedural fairness in fitness to practise hearings: Sanctioning social workers'

When a professional is subject to disciplinary or fitness to practise proceedings that might place restrictions on, or even bar, him/her practising, it is commonly assumed that a quasi-judicial tribunal is required to provide the requisite procedural fairness to oversee the process. This paper questions that dominant paradigm, first through re-examining the robustness of standard administrative law accounts of procedural fairness, in part through the work of Tom Tyler (eg 'Why People Obey the Law' (2006)), and the second through an empirical study of the Health and Care Profession Council (HCPC).

The HCPC operates a disciplinary process for a range of professions, but this paper focuses on just one, social workers. This paper interrogates the claim that the adversarial solution adequately provides for procedural fairness in all circumstances and uses the results of two recent empirical studies into the work of the HCPC's Conduct and Competence Committee ('the CCC') to highlight the risks and shortcomings of the adversarial model for those subject to disciplinary proceedings. These findings are supported by a content analysis of the judicial appeals process that oversees the work of the CCC.

The conclusion drawn from the combined research is that, at least in relation to social workers, the fitness to practise proceedings in current operation may formally meet standards of procedural fairness but in operation fall short. These shortcomings risk undermining wider policy efforts to create trust amongst the social work community and to learn from instances of malpractice. Building on this finding, the paper goes on to map out one possible alternative model by which a more balanced disciplinary process could be put in place. The paper calls for the current pre-hearing stage to be replaced by an inquisitorial ombuds-like model capable of reducing the numbers of cases going to full hearing. In the context of social work, the paper argues that a more nuanced disciplinary process would be better equipped to offer practitioners the opportunity to receive due process and would be in a stronger position to focus on institutional learning.



# Apologies, Abuses and Dealing with the Past

NB: this session will be held in the Lindisfarne Room

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## Friday 7th April (12:00-13:30)

Anna Bryson and Kieran McEvoy (Queen's University Belfast), 'Apologies, Abuses and Dealing with the Past in Ireland'

Drawn from extensive archival research and ongoing fieldwork on the island of Ireland, this paper explores the meaning of 'victim-centeredness' in transitional justice by examining the apologies and statements of acknowledgement issued to date by those responsible for harms and human rights abuses in the conflict in Ireland (Republicans, Loyalists and the British state).

Such statements are a central element of ongoing efforts to deal with the past in the jurisdiction. In 2014 the Stormont House Agreement included provision for the establishment of a range of intersecting mechanisms to deal with the past and legislation to establish these will be introduced in Westminster in 2017. The British and Irish governments committed to making 'statements of acknowledgment' regarding their respective roles in the conflict and an expectation that other parties (e.g. the IRA, loyalist paramilitaries) would do the same.

Drawn from extensive archival research and ongoing fieldwork with victims' organisations, ex-prisoner and ex-combatant groups and other key stakeholders, this paper explores a number of themes associated with the apology process. These include: the language used; timing; choreography and performance; understanding of audience; reception and perception of legitimacy; leadership within an apologising institution; and follow-through. The paper is framed within the relevant literature from criminology, restorative justice, anthropology and transitional justice concerning 'victim-centred' approaches to harm and wrong-doing. It concludes by proposing a schema for effective victim-centred apologies and statements of acknowledgement in dealing with past conflict related abuses.

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Jenny Johnstone (Newcastle), 'Considering Restorative Approaches for Cases of Historical Institutional Abuse'

Potential for RJ in dealing with cases of Historical Institutional Abuse – case study of use with cases of Historical Institutional Abuse

The use of restorative approaches in serious cases has proved controversial, especially in cases of sexual abuse and assault and especially in cases involving children. This paper specifically addresses the difficult and complex area of historical abuse. The paper draws upon work undertaken as part of a wider study commissioned by the Scottish Government exploring the potential for restorative approaches in cases of historical institutional abuse. The paper considers whether restorative approaches involving representatives from the institutions can play an active and effective role in these restorative processes where the perpetrator is no longer alive or accepting responsibility.

# Art, Culture and Heritage

NB: all sessions will be held in Herschel Training Room 2

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## Thursday 6th April (11:00-12:30)

Mirosław Sadowski (Wrocław), 'UNESCO's Conventions, Heritage Protection, and Collective Memory in the 21st Century City'

In the wake of globalisation, technological advances, and social changes, the interest in the times past and its carriers often fades away. The 21st century, so enlightened in many aspects, has seen the destruction of a large number of cultural heritage objects, either on purpose, or due to negligence. One of the modern battlefields of cultural heritage protection is the modern city, which, when faced with a dilemma whether to redevelop, gentrify, and grow, or to preserve and protect, often chooses to do the former. The purpose of this article is to examine how the two UNESCO's conventions (Convention concerning the Protection of the World Cultural and Natural Heritage, and Convention for the Safeguarding of the Intangible Cultural Heritage) shape urban cultural heritage protection law in the 21st century, and to investigate the place of collective memory in a modern city. In the first part of the paper the author introduces said conventions, analyses them, and tries to establish how they may influence the cultural heritage protection legal framework in a present-day metropolis. The second part of the article is devoted to the intersections between the city and collective memory. M. M. Sadowski first ventures to define collective memory, then asks what is the place of collective memory in a globalised, 21st century city, and ultimately shows how collective memories may become a part of intangible cultural heritage, and how collective memory of certain events can influence cultural heritage protection. In the third, last part of the paper, the author ponders whether there is a need for a new international convention, one specifically protecting urban cultural heritage, to be proposed by UNESCO, while giving various examples from around the world (inter alia former Yugoslavia, France, Poland, Hong Kong, Macau), when law has failed to protect urban cultural objects.

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Hayley Roberts (Bangor), 'Time to Ratify the UNESCO Convention 2001? Challenges and Solutions for the United Kingdom'

The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 provides a much-needed international legal framework for the management and preservation of underwater cultural heritage (UCH) by promoting inter-State cooperation and prohibiting commercial exploitation of artefacts. Upon adoption of the treaty the UK Government stated it had a number of concerns with the text, namely that the treaty contained an over-inclusive definition of UCH, certain provisions eroded the long-upheld sovereign immunity principle for State vessels and that it threatened a 'creeping' coastal State jurisdiction beyond that which was conferred by the United Nations Convention on the Law of the Sea 1982.

Nonetheless, recently the UK Government made a commitment to review its position on the UNESCO Convention over the coming years, following the drafting of legislation to ratify the 1954 Hague Convention. In light of this commitment, it is timely to review these challenges and examine whether they could be overcome to ensure the UK's ratification of this important convention. This paper will provide an overview of these problems, examining the interpretation of relevant provisions and the development of State practice in that regard, particularly the practice of other initially reluctant State parties such as France and the

Netherlands. It seeks to provide a discussion on the importance of UK ratification of this convention in the next few years.

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Hano Ernst and Kristijan Poljanec (Zagreb), 'Revisiting Private Law Responses to Cultural Property Trafficking: How EU Counterterrorist Measures Measure Up'

Recent large-scale looting of archaeological and other cultural sites in Iraq and Syria has once again reinvigorated the question of global protection of cultural property. In this paper, we critically assess the current EU scheme for the protection of cultural property against trafficking, as well as on-going proposals for novel EU import licensing measures. The current scheme is underpinned by the proposition that national legislators are responsible actors in designing their legal systems both in terms of defining and distinguishing between art, cultural property, and cultural heritage, as well as designing private law rules and public law restrictions to further the protection of cultural property. Due to diverging legal traditions, positioning in the international art market, and cultural protection policies, this is not always the case. Further to that, import bans—well-known mechanisms against cultural property trafficking—have historically had limited success, due to both the existence of established smuggling routes, as well as practical difficulties in accurate identification of such cultural property particularly having in mind the changed international landscape that has now become not just a matter of culture—but one of security—considering that cultural property trafficking has taken center stage in terrorist financing operations. Finally, we discuss the role that the EU should take in the global protection of cultural property. Having in mind the ethical, as well as the legal responsibility for the preservation of cultural property items once they have entered the illicit market, we argue that many measures remain perfunctory turning a blind eye to the heart of the problem located in national property rules. By excluding itself from the issue, such policy shift the burden of dealing with cultural atrocities to others which may well be far less equipped to handle them. We conclude that the EU should, particularly in its fight against terrorism, revisit private law responses to cultural property trafficking as primary suppressive measures, instead of the current half-hearted scheme.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Sarah Sargent (Buckingham), 'Nomads, Heritage, National-Identity and the Difficulty of Multi-National Nominations for Intangible Cultural Heritage: Comparative Case Study on Chovqan and Kok-buro'

The Operational Directives for the Convention on Safeguarding Intangible Cultural Heritage contemplate the possibility of multi-national nominations for heritage elements. On its face, this is a useful option for states in dealing with heritage elements that may occur in more than one state or across state borders. This belies, however, the difficulties that can arise between states. Conflict, rather than cooperation, may be the reality, given the central role that heritage can play in national identity. Rivalries and conflicts between states may arise over what form of the heritage should be nominated, what name should be given to it, and what other states may lay claim to the heritage. Heritage elements may also represent deeper and long-running conflicts over state borders and territory, conflicts that may be or have the potential to become dangerous and violent, with loss of life. Thus, the conflicts over multi-national nominations for heritage elements may be the type of the iceberg for sustained disputes between states, and may mirror on-going and unresolved geopolitical conflicts. One of the unintended consequences of the state centred nomination process is the highly political nature of heritage and heritage nomination.

The implications of this for ICH nomination and inscription have not been fully explored nor has a workable solution been proposed. This paper considers these issues in a comparative case study of two heritage elements with nomadic origins: Chovqan and Kok-boru, which also have in common being games played on horseback. Chovqan was approved for inscription in 2013 on the list of intangible heritage in need of safeguarding, while Kok-boru was not approved in 2015 and a new application is now under consideration for a decision in 2017.

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Shea Esterling (Canterbury, New Zealand), 'The Prosecutor v. Ahmad Al Faqi Al Mahdi: Advancing the Protection of Cultural Heritage under International Criminal Law?'

In August 2016, Ahmad Al Faqi Al Mahdi was sentenced to 9 years imprisonment by the International Criminal Court [ICC] for the war crime of intentionally directing attacks against religious and historic buildings in Timbuktu, Mali in contravention of Article 8(2)(e)(iv) of the Rome Statute.

Al Mahdi was a member of Ansar Dine, a militant Islamist group that sought to impose Sharia law throughout Mali. In conjunction with Al Qaeda, Ansar Dine gained control of Timbuktu from April 2012 until January 2013. Appointed head of the Hisbah or the morality police, Al Mahdi participated in and oversaw the destruction of a series of historic and religious monuments in Timbuktu including the historic Sidi Yahia Mosque and nine mausoleums of Sufi Muslims saints, all of which but one were designated World Heritage sites by the United Nations Educational, Scientific and Cultural Organization [UNESCO].

With sentencing complete, the ICC is currently in the reparations phase of the proceedings with final submissions due in February 2017. Pleading guilty, Al Mahdi is the first case before the ICC to focus solely on the destruction of cultural heritage as a war crime. Seizing on this ground-breaking subject matter and its novel guilty plea, this paper will explore the Al Mahdi

judgment in detail analyzing both its procedural and substantive components regarding their potential to advance the protection of cultural heritage under the framework of International Criminal Law.

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Janet Ulph (Leicester), 'A New Museum Act?'

This paper will discuss some of the challenges currently facing museums and discuss the need for new legislation to enable them to manage their collections more effectively and in a manner which upholds public trust.

Many museums have objects in their collections where legal title is uncertain ("orphans") or where the owner is unknown (deposited objects) or where the owner cannot be found (uncollected loans). Should there be new legislation to enable museums to obtain legal title to these objects which they may have had in their collections for decades?

A new Museum Act would be an opportunity to consider other questions. For example, should local authority museum collections be held on charitable trusts to hinder councillors from selling the most valuable objects in the collections? And should the provisions of the Holocaust (Return of Cultural Property) Act 2009 be extended beyond the "sunset" date in 2019?

## Thursday 6<sup>th</sup> April (16:15-17:45)

Carolyn Shelbourn (Sheffield), 'Graffiti – a heritage resource to be preserved?'

Graffiti is generally seen primarily as anti-social, and legally is often characterised as a form of criminal damage. The response of many local authorities to graffiti is that it is something to be removed as soon as resources permit this to be done, and local authorities have also been given powers to require the removal of graffiti. On the other hand, some forms of graffiti have come to be regarded as 'street art' and some has great commercial value. The work of graffiti artists has even been used in the posters of American presidential campaigns. It is increasingly being recognised that even apparently mundane 'scribblings', which at the time of their production might have been seen as mere vandalism, may be a potentially valuable source of information for social and political historians. This paper will consider how graffiti is increasingly coming to be regarded as a heritage resource, and how this change in attitude is being reflected in law and practice. It will look at how the protection and recording of graffiti is now considered important and is being undertaken by both amateur and professional groups. The paper will also consider whether some modern graffiti might be worth preserving as the 'heritage' of the future.

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Sophie Vigneron (Kent), 'Soft Law: towards global compliance'

Soft Law is usually defined as rules of conduct that, in principle, have no legally binding force but that nevertheless may have practical and legal effects. Abbott synthesised the distinction between soft law and law in the concept of 'legalization' that focuses on three elements: obligation to the rule, precision of the rule and delegation in the execution of the rule; the intensity of each of these three elements is variable and can produce several combinations of soft law that become politically, socially and morally binding.

The concept of 'legalisation' can be applied to the regulation of the art trade in order to identify the impact of soft law (codes of conduct stating a due diligence requirement, provenance, international recommendations) on the different actors of the art trade. This approach shows that a distinction can be drawn between museums and art dealers/auction houses, whereas the former comply with international recommendations and improved standards of diligence, the latter less so. However, a new era of politically, socially and morally binding soft law instruments is emerging with the development of internal worldwide compliance services within Sotheby's and Christie's, hence transcending due diligence into a global concern. Indeed, formally non-binding due diligence standard and provenance research gradually become politically, socially and morally binding because they create the expectation that auction houses will comply with the rules that they enacted.

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Valentina Vadi (Lancaster), 'Is international cultural law a democratic system?'

Is international cultural law a democratic system? In recent years democratization processes have characterised several areas of international cultural law. The proposed paper aims to

identify these participatory trends, and assess whether, and if so, to what extent they contribute to the perceived legitimacy and effectiveness of international cultural law.

The paper also highlights the potential clash between bottom up, that is participatory approaches and top down or expert driven ones and makes the case for an appropriate balance between the two.

The paper concludes stressing that non-state actors have increasingly participated into and contributed to decision-making and compliance processes thus contributing to the development of international cultural law. Their participation to global cultural governance has highlighted some strengths, but also some weaknesses of the existing regime governing cultural heritage. Finally, the paper considers some possible ways to facilitate the dialogue between the local and global levels of cultural governance.



# Banking and Finance

NB: all sessions will be held in Barbara Strang G33

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## Wednesday 5th April (13:30-15:00)

Ilias Kapsis (Bradford), 'The consequences of reforms of financial regulation for the financial services industry and beyond'

The financial crisis, which started in 2007 and whose impact is still being felt today, resulted in major reforms of financial regulation at both national and international levels. These reforms included the establishment of new regulatory and supervisory bodies supported by extended control powers and new regulatory rules targeting a wide range of financial sector activities placing particular emphasis on risky financial products and services. The creation of new bodies with extended powers were deemed necessary to fill existing gaps in regulation such as the control of systemic risks or to enhance regional or international cooperation (e.g. see the purpose of the creation of the three new European Banking Authorities in EU and the Financial Stability Board in G20). In addition, banks were ordered to take steps to protect savers from the risks associated with the risky activities of investment banking, to keep more capital for a rainy day and to be more prudent in their lending. Finally, new rules for senior managers and new ethical codes for bankers were introduced in an effort to address individual misconduct and to deal with the perceived culture of greed and corruption in the industry.

As a result of these reforms a whole new landscape for financial services has emerged. In this new landscape there are more public controls of financial institutions than before and more layers of regulation restricting the overall freedom of banks to act in the markets.

The expectation is that through these reforms the financial sector will become more resilient and future crises will be prevented, whilst at the same time the public antipathy for banks and bankers caused by their central role in crisis, will be reduced.

The motivation for writing this paper was the recent emergence of evidence from the market and other sources including the regulators themselves that the new architecture of financial regulation, which was created through a lot of hard work by governments and relevant international bodies may not be capable of fully addressing a number of significant risks associated with the financial sector. In addition it seems that the expanded regulation and the consequent restriction of banking activities may have impacted heavily on economic growth in western economies, which appear to be underperforming comparing to the pre-crisis levels.

Mark Carney, the Governor of Bank of England and Chairman of Financial Stability Board, the international bank regulator, in his letter of August 30, 2016 to G20 members referred to financial sector misconduct as an emerging vulnerability for the global financial system. He warned that "...the incidence of financial sector misconduct has risen to a level that has the potential to create systemic risks by undermining trust in both financial institutions and markets".

Further the World Economic Forum in its 2015 report on the future of financial services refers to the explosive rise recently of new financial companies with links to the technological sector, which entered the financial markets with innovative products targeting consumers facing difficulties or exclusion from access to credit caused by regulatory barriers imposed on traditional lenders.

These new companies offer financial cover to these excluded consumers but their activities may create systemic risks for the financial system in the same way that innovative derivative products created risks which finally led to a major systemic crisis during 2007-2009.

The renewed appearance of financial innovators and their ability to satisfy existing demand for credit, which is excluded by traditional lenders, may also indicate that the new regulatory regime restricts the freedom of financial institutions beyond what is necessary and in a way, which hinders global economic growth.

Additional evidence supporting the latter hypothesis seem to be arising from market reports showing that one of the reasons for the hectic economic growth experienced by most western countries after the crisis was the restricted access to credit caused in part by regulatory restrictions. This has led to social demands for more access to credit as a way to support economic growth. The new US administration favours this view and has promised to reduce financial regulation pushing back some of the recent reforms.

The emerging situation seems to justify some early scepticism about both the effectiveness of the new regulatory landscape and the medium and longer term viability of its current form.

The paper explores these issues and makes the point that whilst broad reforms of financial regulation and reinforcement of the powers of regulators were absolutely essential to deal with the massive failure of the previous relaxed regulatory regime, the scope of these reforms may have gone beyond the required level and therefore, some rethinking of the scope of financial regulation may be needed in certain areas.

The paper has three sections:

Section 1 will present an outline of the key reforms in financial regulation at national and international level by focusing on key institutions and rules, which were created as part of the reforms.

Section 2 will present available evidence of the effectiveness of the new regime focusing in particular on emerging challenges in key areas, which include both the financial industry and the broader society and economy.

Section 3 will discuss the findings of section 2 and will make recommendations for the best way forward for financial regulation in the identified areas.

Sources:

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3. World Bank, ‘Global Economic Prospects’, Report, June 2016, available at <http://pubdocs.worldbank.org/en/842861463605615468/Global-Economic-Prospects-June-2016-Divergences-and-risks.pdf> [last accessed December 30, 2016].

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TT Arvind (Newcastle), ‘The financial revolution and the emergence of modern debt’

The purpose of this paper is to discuss the history of debt in the late 17th and early 18th centuries – a period of radical change in finance which has come to be called the ‘Financial Revolution’. It argues that the Financial Revolution marked a decisive shift in the legal understanding of debt, away from the traditional relational understanding which saw debt as a socially-embedded relationship between debtor and creditor, and towards a more commodified understanding which treated debt into a commodity capable of being traded on a market, with an existence independent of the social relationship between the original debtor and creditor.

This shift had a twofold effect. Firstly, it moved the legal system away from an understanding where debt was seen as an expression of individual need, to which society had a religious and moral obligation to respond, to one which saw the taking on of debt as no different from the acquisition of any other commodity and, hence, as the product of a free choice rather than as a manifestation of a need. Secondly, it resulted in debt increasingly assuming legal forms that are far more complex, and capable of far more manipulation, than other means by which purchasing power may be acquired.

The 2008 financial crisis instantiates the complexity of the debt-based structures that the commodified understanding of debt facilitates, and the role of this complexity in causing crisis. This paper argues that whilst derelationalisation was not without its logic, the propensity towards instability is inherent in the commodified character of debt. Debt is a fictitious commodity, not a true one, and the key lesson which the history of the construction of this legal fiction offers is that a regulatory system which ceases to remember its fictional character will promote instability.

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Andrew Baker (Liverpool John Moores), ‘A Capital idea or just more work?’

Since the global financial crises emerged in 2007 the response from policy makers has been to bring forward a plethora of laws and regulations, some of which are still winding their way through the legislative process. One of the key global measures is based on the amount of capital that a bank will need to keep to ensure that it is able to absorb losses from its activities.

This is not a new measure and efforts of the Bank For International Settlements and its Basel Committee for Banking Supervision have mandated the level of regulatory capital required to ensure the resilience of the banking system have been in force since 1988. By 2019 the third iteration of the so called Basel accords will be operational, however, it is arguable that a system that failed even after being updated simply means that using capital as a regulatory measure is redundant and needs very little focus. In the context of overall regulatory reform this paper will try to assess the utility of capital being one of those reforms and what value regulatory capital adds to the overall picture.

## Wednesday 5th April (15:30-17:00)

Iain Frame (Kent), "'Affording assistance to the mercantile world" and the Bank Charter Act of 1844'

In this presentation, I focus on how the constraints placed on the Bank of England by the Bank Charter Act of 1844 worked, in theory at least, to discipline the rest of the banking sector.

Prior to 1844, the ratio between Bank of England notes and gold reserves had been left to the discretion of the Bank of England's directors. The Act of 1844 removed that discretion by putting in place a rule stipulating that all Bank of England notes had to be backed by their equivalent in gold, with the exception of a £14 million fiduciary issue. Now that the Bank of England's note issue was fixed in quantity, it had far less scope to, as the PM Robert Peel put it, "afford assistance to the mercantile world". Yet the Bank of England did provide such assistance in the decades that followed, and was able to do so in the midst of commercial crises because the Act of 1844 was suspended by the government (with the subsequent backing of parliament) on three occasions between 1844 and 1866. Suspension removed temporarily the note issue restriction, allowing the Bank of England to create as many notes as it pleased. In this presentation, I use these suspensions and the assistance afforded to the commercial world by the Bank of England as an opportunity to reflect upon both the theory behind the adoption of the rule limiting the creation of Bank of England notes, and the ways that this rule was challenged in practice.

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Reem Radhi (Durham), 'Restorative Justice for Corporate Criminal Liability and Sentencing'

Corporate criminal legislation has failed, in practice, to achieve its main goals of deterrence, rehabilitation, incapacitation, restoration, and retribution. Legislation needs to correspond to changing economic circumstances and consider that corporate wrongdoings, in comparison to individual wrongdoings, are more likely to lead to long-term impacts on various stakeholders, including victims, the offenders themselves, the community, and the environment.

Restorative justice is "a process whereby all the parties with the stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future." The article argues for incorporating restorative justice principles into corporate criminal legislation. Restorative justice responds to crime in a multi-dimensional manner and in accordance with the specific circumstances of the crime; it uniquely looks at crime primarily as a conflict between individuals that impacts various interests (victims, communities, offenders), and secondarily as a violation against the state.

The article serves as a starting point for thinking about how a restorative justice based model could be constructed to deal with certain types of corporate crime. Focusing on corporate environmental crimes, the paper explains the core principles of restorative justice in comparison to prevalent justice theories, defines the prevalent stakeholders in corporate environmental crimes and how a restorative justice system could help reconcile their competing interests, and proposes a wide array of necessary regulatory and structural reforms to laws regulating corporate environmental crimes in the UK and USA.

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Ilias Kapsis (Bradford), 'Can Banks be Socially Responsible Actors?'

Banks and bankers had never been particularly popular in society. Bankers had been routinely accused of being consumed by greed and corruption and banks had been associated with unfair practices against their customers and exploitation of vulnerable members of the society (Visser, 2010). The public antipathy towards bankers grew with the rise during the last 4 decades of "financialisation", a term associated with the increasing significance of financial markets and services in economy and society (Deutschmann, 2010) and reached a very high level with the financial crisis of 2007-2009, which resulted in the Great Recession in the global economy, whose impact is still being felt in many countries in the form of sluggish economic growth, higher levels of unemployment and rising inequality.

Bankers continued to appear frequently on news headlines even after the financial crisis. The LIBOR and exchange rate scandals which involved big City banks, the PPI mis-selling practices, the individual cases of bank involvement in money laundering only added to a picture of a sector in continuing crisis.

The phenomenon is not limited to UK. The recent case of Deutsche Bank, which was involved in a series of risky and in some cases illegal activities costing it billions, the emerging risk of further bailouts of Italian banks and similar phenomena of greed and corruption in the US only add to the public perception that the culture of greed and corruption is so deeply entrenched in the financial sector that it is very difficult if not impossible to eliminate.

Some commentators branded bankers "criminals" and the banks "criminal financial institutions" (Bosworth-Davies, 2015), which would have to be dealt with accordingly. Bank regulators have also acknowledged (see e.g. Mark Carney's letter to G20 commenting that the risk of misconduct in the financial industry remains high) that there are still serious problems in the sector despite reforms which extended the scope of regulation and supervision of banks. The bailing out of failing financial institutions using taxpayer's money, which had been viewed by policymakers as the best way to avert a complete economic meltdown during the financial crisis, was met with bitter opposition by a big part of the society, which saw in the bailouts efforts to whitewash and save the bankers.

Banks have tried to limit the damage to their public profile by compensating customers (although in most cases the banks acted under pressure by law and court orders), emphasising more their economically and socially beneficial activities, (see. e.g. the British Bankers' Association report "The Benefits of Banking 2016") and by highlighting the steps they have taken to eliminate corruption and greed in the sector. To offer additional protection and reassurance to the public, governments introduced legislation to increase protection of depositors and borrowers from unfair bank practices, to establish minimum standards of conduct for bankers and to subject banking activities to more public scrutiny and control (Edmonds 2016).

These steps though do not seem to have fully addressed the public concerns about banks, which remain high. It is clear that there is a need for major rethinking and a new approach to the relationship between banks and society especially as the crisis heavily challenged fundamental assumptions on which the current relationship is based (Louche et al. 2011; Mullineux, A., 2011). It is also clear that society can no more tolerate socially irresponsible behaviour by bankers. Political developments in western world in 2015 and 2016 with the rise

of anti-establishment parties show that the maintenance of the status quo becomes increasingly difficult.

The purpose of the paper is to explore the relationship between banks and society with the purpose of identifying ways to make banks more socially responsible. To achieve that the paper builds its analysis around 3 themes:

Identification and assessment of the main public expectations of banks. The focus here is mainly on access to finance, responsible lending and investment practices and banks' support of economic growth and socially beneficial projects with emphasis on environment and sustainability. Public expectations are to a great extent reasonable but media, politicians and part of science, especially in periods of crisis may be fuelling unrealistic public demands from banks.

Identification and assessments of the reasons which explain why banks have so far failed to meet the public expectations. The focus here is on the existing culture in the industry with the prevalence of greed and corruption, the lack of accountability and responsible leadership and the disregard of key social needs. There appears to be also a mismatch between public expectations of banks and what banks are prepared (or are able) to offer. The focus is also on whether the phenomena appearing in the banking sector are idiosyncratic or they reflect broader trends appearing in other industries and the wider society as well.

Exploration of the existence of realistic ways to bridge the gap currently existing between society and banks. The focus here is on an evaluation of the current efforts to bridge the gap and on making proposals for further improvements. The emphasis is given on proposals which are realistic and which can therefore be implemented effectively by the banks. Particular focus is on whether the efforts to make banks more socially responsible will have to be driven by the state or by the banks acting voluntarily. The crisis indicated a public preference for government-driven efforts due to the lack of confidence in the banks but the paper argues that if banks wish to regain part of the lost public trust they also have to act independently and beyond the public requirements. The difficulties associated with the required cultural change in the banking sector are also considered.

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# Children's Rights

NB: all sessions will be held in the Lindisfarne Room

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## Thursday 6th April (09:00-10:30)

Jan Ewing and Anne Barlow (Exeter), 'The Voice of the Child in Online Dispute Resolution Processes: Risks and Opportunities'

The ESRC 'Mapping Paths to Family Justice' project reported that whilst out-of-court family dispute resolution processes are child-focused they are rarely child-inclusive leading to the marginalisation of children's voices in such processes. As the provision of information, divorce, mediation and support services online become more prevalent, this paper will explore the risk that children's voices will become further marginalised. Drawing on an ESRC Impact Acceleration Award study 'Creating Paths to Family Justice' which included reports from members of the Family Justice Young People's Board on their experiences of the family justice system, this paper will further consider the potential for young people to participate more fully in the decision-making process following their parents' separation and for their information and support needs to be better met by the provision of information and support online rather than offline. Following an overview of the existing online information and support available to young people, the paper will conclude with some reflections on how online information and support could be reconfigured to better meet the needs of young people in a digital age.

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Aisling Parkes and Fiona Donson (University College Cork), 'Developing a Child Rights based approach to Children affected by Parental Imprisonment: Thoughts from Ireland'

A growing body of research has identified that parental imprisonment can produce multiple negative effects on dependent children. While the criminal justice system can respond to this post-imprisonment through positive interventions to minimise this harm, this paper will focus instead on the potential impact of recognising and respecting children's rights in the context of parental imprisonment more generally. The paper will reflect on how the recognition of children's rights can result in a shift in understanding as to the duties state bodies have in relation to this group of children. Focusing on Ireland, we will consider the practical context of children's rights which has now been formally recognised within the Irish Constitution. In this way we will reflect on how the Irish Constitution might protect both the best interests of children as well as their voices under Article 42A.

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Alison Struthers (Warwick), 'Voice and Participation in English Primary Schools: Who's listening?'

Pupil voice and active participation form two central elements of international Human Rights Education provisions. Both, for example, are key components of the UN Convention on the Rights of the Child (1989), with Article 12 guaranteeing children a voice in matters that affect them and decreeing that their views must be given due consideration and be acted upon if appropriate to do so.

This paper draws upon empirical research conducted with teachers in primary schools across England to gauge the nature and extent of these processes at classroom and school level and

to understand better the reasons for apparent deficiencies in their practice. The underlying research comprises quantitative data from a scoping survey (completed by 378 teachers across the country) and detailed qualitative data from subsequent interviews with 44 of these teachers from 18 English counties.

The paper argues that whilst there are examples of good practice regarding both concepts, they are nevertheless often tokenistic or constrained within tightly controlled and adult-imposed boundaries. The underlying reasons for these constraints – including concerns about loss of control in the classroom, reservations about the value and efficacy of school councils, and suggestion that learners of primary school age need to be reined in with regard to voice and participation rather than encouraged to speak out – are explored by drawing upon data from in-depth interviews with teachers. Suggestion is made that in order to break down the boundaries that currently restrict voice and participation in the formal school setting, teachers need to become comfortable with, and confident about, the idea of rights respecting learning environments. This, however, will only happen through the better provision of Human Rights Education within their own teacher training.

## Thursday 6th April (11:00-12:30)

Clare Dywers (Queen's University Belfast), 'Young People's Experiences of Paramilitary Violence: Interpreting 'Community Punishment' through the Lens of Children's Rights'

Northern Ireland's transition from conflict has been heralded as a model of international success. However, nearly 20 years after the signing of the peace agreement 'paramilitary-style policing', including attacks and intimidation remain a reality within many communities. Young people are disproportionately the targets of such 'arbitrary justice' and the continuous attacks on and use of children and young people by 'paramilitaries' make international news. Detailed understanding of these issues and experiences from young peoples' perspectives is, however, lacking. Through an analysis of in-depth interviews with young people this paper reports on a study which examined 'paramilitary style' threats and attacks through the lens of child protection and children's rights. It looks specifically at young people's experiences, the processes through which they become subject to paramilitary 'justice' and their negotiation of risk. The paper also critically examines the State's responsibility to uphold its human rights obligations and links with wider theoretical debates on young people, criminalisation and social exclusion.

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Louise Forde (University College Cork), 'The Convention on the Rights of the Child as a Theoretical Framework and Benchmark in Research on Children in Conflict with the Law: A Critical Approach'

Internationally, the Convention on the Rights of the Child is the focal point around which children's rights advocacy and research are based. However, using the Convention as a theoretical framework and as a benchmark to assess States' progress is not unproblematic. These issues have been raised by a number of scholars, who call for a critical approach to the Convention to be assumed in children's rights research.

This paper aims to explore the usefulness of these international standards as a theoretical framework and a benchmark in research on children's rights in youth justice. The context of this discussion is doctoral research which aims to examine how the rights of young people in conflict with the law are impacted by the type of juvenile justice system in operation in a jurisdiction. The ideological foundations which underpin youth justice systems vary from jurisdiction to jurisdiction. Each type of system has potential implications for the rights of young offenders.

The international instruments do not advocate one type of juvenile justice system over the other, but this does not answer the question of how children's rights are best vindicated within particular systems. The drafting of the Convention on the Rights of the Child, including the articles relating to children in conflict with the law, was a complex process, which ultimately led to the adoption of heavily-negotiated standards. This paper takes a critical approach to the Convention, and considers their usefulness as a theoretical framework for children's rights research. It considers the potential pitfalls, as well as the benefits, of using the international standards adopted by the United Nations and the Council of Europe in children's rights research. The paper aims to highlight key challenges and possibilities in using the international standards as a tool for advancing the rights of children in conflict with the law.

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Nduku Njoku (National Open University of Nigeria), 'Evaluating the Right of Nigerian Children during Insurgency'

The idea that children ought to enjoy fundamental human rights as adults is accepted as given under international human rights law. Equally, children, as a result of their vulnerable status are entitled to special interest or needs which require special protection under human rights law. Nevertheless, during periods of insurgency the rights of children are subjected to severe violations and no conscious effort is made to secure and protect the rights that address the distinctive need of children. This work examines the state of rights of children in Nigeria's North East; an area which has been subjected to insurgency by extremist and terrorist organization. The writer concludes that conscious effort was made to isolate and protect the rights of children living in that part of Nigeria which has led to severe violations of different rights of children.

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Daniella Bendo (Carleton University), 'The Role of Canada's Child and Youth Advocates: A Social Constructionist Approach'

In the absence of a federal Children's Commissioner in Canada, the mandates of the provincial and territorial Child and Youth Advocates have evolved primarily to protect and promote children's rights. Although research exists on the rights of marginalized youth, relatively little attention has been paid to the growing role of the Canadian Council of Child and Youth Advocates. As a consequence, the aim of this research was to address a knowledge gap by investigating the Canadian Council of Child and Youth Advocates and examine their understanding and articulation of child and youth advocacy in Canada. The study further aimed to uncover the opportunities and barriers associated with their day-to-day work. A critical ethnography was employed involving five former and current members of the Council (including members from the Prairies, central Canada and eastern Canada). In line with the intent of the study, a discourse analysis was also undertaken to explore relevant child and youth advocacy policy documents, media pieces, and legislation. The results of this study indicate that child and youth advocacy is best understood as a complex phenomenon, and as such, various opportunities assist the Council members' work. On the other hand, certain barriers also hinder the work, which ultimately affects the many groups of vulnerable children and youth with whom the Offices engage. The findings of this study demonstrate the need to appoint a Canadian Children's Commissioner to liaise with the Council in an attempt to improve the current state of child and youth advocacy in this country and help ensure that no children fall through the cracks of Canadian society.

## Thursday 6th April (14:00-15:30)

Helen Stalford (Liverpool) and Kathryn Hollingsworth (Newcastle), 'Children's Rights Judgments'

This paper will present the findings of an AHRC-funded project that sought to rewrite existing judgments from a children's rights perspective. The project, which is co-led by Prof Kathryn Hollingsworth (Newcastle) involves approximately 60 children's rights academics and legal practitioners from across the world who have selected a number of judgments from a range of jurisdictions, including the international and European courts. The judgments are accompanied by a short commentary and the project is inspired by Feminist Judgments and other judgment re-writing projects that have emerged in recent years. This session will provide a brief overview of the approach to rewriting children's rights judgments and what it means to adopt a children's rights based approach to judgment writing. It will then present some of the contributions to the project by way of illustration.

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Aoife Daly (Liverpool), 'Letting Off Steam – Rewriting the Castle “Kettling” Case'

This paper outlines the process of rewriting the 2012 case of *R (On the Application of Castle) v Commissioner of Police for the Metropolis* as part of the Children's Judgment Project. The case concerns three teenage claimants who in 2010 took part in a public demonstration in London against education cuts. Along with other demonstrators they were “kettled” – detained by police in an outdoor area – for six to eight hours in near-freezing conditions (for the most part without food, water or toilets), ostensibly because of violent and unruly behaviour of some of the protestors. They were detained in spite of showing identification that they were aged 14 and 16 years. Under the Children Act 2004 the police have a duty to safeguard and promote the welfare of children. The teenagers sought a declaration that the defendants, the Metropolitan Police, breached this duty by failing to have a clear plan in place to release children. When the High Court heard this case in 2012, it held that the duty to children did indeed extend to such events, but that the intention to have regard for 'vulnerable' people in the plans for the day was sufficient to meet that duty. This rewritten judgment relies on the UN Convention on the Rights of the Child to point to a broader concept of 'welfare' as moving beyond protection of safety to include the promotion of children's political rights. Children are a group who require special consideration, yet were simply categorised with the generally 'vulnerable' at this protest, with the police on the ground left to determine whether in fact an under-18 is a vulnerable child. Many police decided that this was not the case. Under-18s are indeed to be considered inherently vulnerable, and without a clear acknowledgement of this in police training, incidents like this are likely to continue and children will be fearful of engaging in political events. If the implementation of the duty is not effective for many children, as it was not for the claimants, then the duty is not being met. This rewritten judgment seeks to focus the Castle case into a reworked consideration of children's rights dimensions.

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Sue Farran (Northumbria), 'Children's Rights Judgment Project: The case of John Hudson'

Children have not always had rights and indeed historically and still today there are children with few rights and little time for childhood. For this project Rhona Smith and I selected an eighteenth century case concerning a nine-year old child indicted for burglary, breaking, entering and theft. He was sentenced to transportation following conviction of the felony but not the burglary. Today his story is used in Australian schools as part of the history of early settlement. While the case is reflective of attitudes towards children's lives/rights at the time it is not an unusual or notorious case, but commonplace. At the same time there are the first early signs that judicial practice was becoming aware of the vulnerabilities of children in the criminal justice system, reflecting the start of a broader social and political shift towards seeing children as people distinct from adults. To re-write this case we had to step beyond the law and the exercise was very much a law and society one. Moreover, we thought that the case – concerning as it does penal transportation, has contemporary resonance with the issue of deportation from a child's rights' perspective, something which one former penal colony (Australia) is currently under attack from across a range of international law and human rights commentators.

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Raymond Arthur (Northumbria), 'Children's Rights Judgments Project: R v JTB [2009] UKHL 20'

R v JTB concerned a 12 year old boy who was convicted of offences of causing or inciting a child aged under 13 to engage in sexual activity contrary to section 13(1) of the Sexual Offences Act 2003. The appellant admitted the activity but said that he had not thought that what he was doing was wrong, as such the appellant sought to advance the defence of *doli incapax*. The trial judge, the Court of Appeal and the House of Lords ruled that this defence was not open to him as it had been abolished by section 34 Crime and Disorder Act 1998. Lord Phillips in the leading House of Lords judgment stated that section 34 represented Parliament's intention to abolish both the presumption and the defence, even though the section simply says that the presumption is abolished. The consequence of this judgment is that the law in England and Wales assumes all children are sufficiently mature at 10 years of age to accept criminal responsibility for their behaviour. All of the judgments in this case were delivered without any discussion of the need to recognise that children may have not yet fully developed the capacity to be mentally culpable for their behaviour or the relevance of children's rights in this regard.

In this paper I will present my re-written dissenting judgment, which argues that R v JTB raises profound questions about childhood, sexuality and the scope of courts' powers to convict children aged under 14 years who do not understand the wrongfulness of the criminal acts they have been charged with. This dissenting judgment adopts a child's right approach which contains a clear foregrounding of the child defendant's experiences and an invitation to empathise with the child's developmental immaturity, inherent vulnerability and his cognitive limitations. The child's experience of vulnerability and powerlessness is embedded throughout and frames the judgment. The re-written judgment concludes that Parliament must have legislated in conformity with children's rights as enshrined in the UNCRC, common law principles, principles of justice and fundamental (substantive and procedural) rights. Accordingly, if a decision is made to prosecute a child for a criminal offence, the prosecutor and the court ought to be alive to the possibility that the child might not, for one reason or another, understand the criminal nature of their behaviour.

## Thursday 6th April (16:15-17:45)

Seamus Byrne (Liverpool), 'Child-led Research in Practice'

Despite the wealth of research in the area of children's rights, one feature thereof which has remained comparably underdeveloped has been child-led research. In its implicit recognition of the unique and authentic contribution which children and young people bring to research endeavours, child-led research possess the capacity to yield results which would otherwise be extremely difficult to obtain.

In examining the growing establishment of child-led research as a viable model of investigation, this paper will analyse the ethical and methodological challenges which accompany it as a research method. In this regard, the paper will confront seep-seated assumptions pertaining to capacity, vulnerability and autonomy which invariably attach to child-led research as a method of investigation. Specifically, the author will outline some of the challenges which accompanied his use of child-led research to investigate the phenomena of school exclusions in England.

The second part of the paper will be given by children and young people who have been recruited by the author to carry out child-led research. In their articulation of their roles as child-researcher's and the responsibilities which they assumed, the children and young people will convey the practical aspects of child-led research.

Ultimately, this paper will highlight, in practical and real terms, not only the manifold benefits which child-led research brings but also its durability as an enduring model of research.

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Dawn Watkins (Leicester), 'Adventures with Lex: Researching Law in Children's Lives through "gamification"'

Adventures with Lex is a digital game that was used as a research tool to explore how far, if at all, children perceive themselves to be empowered by law in their everyday lives. The game was designed and developed in the course of an 18 month research project 'Law in Children's Lives' ([www.le.ac.uk/licl](http://www.le.ac.uk/licl)) that was funded by the Economic and Social Research Council under its transformative grant scheme from 2014-2016. The game was used successfully to gather quantitative and qualitative data from over 600 children aged 8-11 years.

This paper will begin by providing an overview of this methodological innovation; focussing on three main areas: design and development; data gathering and data analysis. It will then go on to discuss the latest findings from the research; drawing especially from recent further analyses of the data carried out in collaboration with Prof Pascoe Pleasence and Dr Nigel Balmer; facilitated by the use of MLwiN multilevel modelling software (Rasbash et al., 2015) and funded by The Legal Education Foundation.

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Rachel Heah (Liverpool), 'Exploring the Use of Synchronous Online Focus Groups as a Method for Researching with Children'

One of the key features of the 'new sociology of childhood' (James and Prout, 1997) is the positioning of children as competent social actors who actively respond and contribute to the construction of the social world around them. Therefore, they are 'knowing subjects' who are able to contribute to research in a relevant and meaningful way. In researching with children however, there is a need for research methods to take into account children's experiences, competencies, and interests, and the (potentially different) ways in which they communicate (Punch, 2002; Alderson, 1995). Adults doing research with children may also need to confront 'generational issues' (Mayall, 2000).

The internet is now an important part of children's lives: children aged 8-11 in the UK spend an average of 11.1 hours per week online, and children aged 12-15 spend an average of 18.9 hours per week online (Ofcom, 2015). Children use the internet for a variety of purposes: schoolwork, gaming, information, entertainment, and social networking. In fact, children are comfortable engaging with the internet and find it easier to be themselves online (Livingstone et al, 2011; Livingstone et al, 2014). Hence, online methods are a good way of encouraging and facilitating children's participation in research.

This presentation will therefore explore the use of a web-conferencing software, Adobe Connect, for conducting synchronous, online focus groups with children. In the first part, I will briefly outline the various innovative functions of the software, and explain how I propose to use this method in my own empirical work with secondary school students in England. In the second part, I will discuss some of the strengths and limitations of the method, with a specific emphasis on ethical considerations such as access to participants, informed consent, power relationships between researcher and participant, confidentiality and disclosure.

## Friday 7th April (10:00-11:30)

Milka Sormunen (Helsinki), 'A comparison of child welfare and asylum jurisprudence of the European Court of Human Rights: what role for best interests?'

In child welfare, there is a strong assumption that unless otherwise shown, it is in the child's best interests to live with her parents. Only in exceptional circumstances can the State intervene and take the child into care. In asylum law, the setting is different: right of the State to control its borders may limit right to family life and therefore justify an outcome that is not in a child's best interests.

Even though the concept of the best interests of the child is not included in the European Convention on Human Rights, the concept is often referred to in the case law of the European Court of Human Rights. The UN Convention on the Rights of the Child changed the concept: best interests have to be considered in all actions concerning children, and human rights and best interests are intertwined. The content of best interests has to be determined on a case-by-case basis. No clear guidelines exist for solving situations where best interests conflict with another interest or right.

The paper compares the European Court of Human Rights' use of the best interests concept in case law related to child welfare and asylum law. The paper discusses weight and content the Court gives to best interests in these two case groups and pays attention to the Court's balancing of rights and interests. Both in child welfare and asylum cases, best interests are balanced against another interest or right. Because of the Court's role as a monitoring body considering individual, concrete complaints, the Court's case law is an important source for defining a consistent approach to balancing best interests. Case law analysed in the paper has been obtained through systematic searches of HUDOC database.

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Samantha Arnold (Trinity College Dublin), 'A Children's Rights Approach to the Interpretation of the Refugee Convention'

Children make up half of the world's refugees. It would be logical to assume that children would be a visible group within refugee law and refugee discourse, in particular in relation to their qualification as refugees. This has not been the case. In fact, children are largely invisible in historical and contemporary refugee law. Moreover, there has been very limited interaction between the burgeoning children's rights framework, in particular the Convention on the Rights of the Child (CRC) and the 1951 Convention relating to the Status of Refugees (Refugee Convention).

The CRC has inspired research and guidance on the topic of child refugees. The CRC has even trickled into case law. Despite these developments, the CRC has had relatively little impact to date on the qualification of child refugees. Developments in refugee law prior to and after the adoption of the CRC indicate that more work is needed to bridge the gap between the two areas of law.

This paper explores the possibility of a children's rights approach to the interpretation of the Refugee Convention and within that what such an approach might look like. In order to construct a children's rights approach, the conceptualisations of children outside the legal

discipline, within international children's rights law and then within refugee law and refugee discourse are analysed. This paper analyses to what extent the Refugee Convention is capable of dealing with claims from children based on the existing conceptualisation of children which are underscored by two competing ideologies – the child as a vulnerable object in law to be protected and the child as subject with rights and the capacity to exercise their agency.

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Ruksar Sattar (Leicester), 'Putting the Welfare of the Child at the Heart of the Reconciliation of Work and Family Life Principle: A Role for Grandparents?'

Parents in market economies worldwide have long been confronted by the demands of participating in paid work and providing care for their dependant family members. Over the last few years, the United Kingdom's legal framework has significantly changed to address the evolving social reality and the European Union has played a pivotal role in this through the introduction of the 'reconciliation of work and family life' principle under which a dynamic set of policies and legal measures have been developed focusing on the tension inherent in juggling between work and family responsibilities. Whilst recognising the valuable contributions of the existing reconciliation policies and legal measures towards the promotion of a family-friendly workplace, my research demonstrates that very little attention has been paid to the role of children within the reconciliation discourse. Despite children being the very reason for the existence of the reconciliation principle, my research reveals that nowhere within the reconciliation policies and legal measures has the well-being of children, either as autonomous and deserving members of the society in their own right or because their lives are implicated by the measures being adopted, been explicitly acknowledged as a vital consideration. The aim of my research is to consider how to address the disregard for the welfare of children within the reconciliation discourse. It is distinctively proposed that one of the possible ways to do so is through the regulation of the role of grandparents who are no longer only providing full-time care to their grandchildren following a crisis or family breakdown but, nowadays, they are also directly facilitating reconciliation by providing informal and flexible care to their grandchildren.

# Civil Procedure and Alternatives to Litigation

NB: all sessions will be held in Herschel Training Room 1

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## Friday 7th April (10:00-11:30)

Brian Barry (Dublin Institute of Technology), 'Appointing judges properly: a comparative analysis of criteria and processes for selecting judges'

This paper will comparatively analyse selection criteria and processes used to appoint judges across a wide range of jurisdictions. The aim of the paper is to consider what is best international practice in this area, particularly in light of impending legislative reform due in Ireland on how judges are appointed there.

The Irish Government has recently published the Scheme for a new Judicial Appointments Commission Bill 2016 to change how judges are appointed in Ireland. The Scheme acknowledges two perceived weaknesses in the current Irish judicial appointments system. First, "current selection criteria do not compare favourably with other jurisdictions which deploy transparent merit-based criteria." Secondly, "there is a need to fundamentally review the selection process and to develop comprehensive, best practice and appropriate selection procedures."

In this context, this paper will explore what criteria and processes are used in other common law and European law jurisdictions to appoint judges. The aim of this paper is to provoke debate on what criteria and processes best ensure that the highest quality candidates are appointed to judicial posts.

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John Bates (Northumbria), 'ODR, Fixed Costs and Personal Injury Claims Process reform: A Perfect Storm for Access to Justice?'

In January 2017 there were three significant developments presenting real challenges for access to justice for those injured as a result of negligence.

First, the Lord Chief Justice and the Master of the Rolls issued a joint statement endorsing the Final Report of Lord Justice Briggs' Civil Courts Structure Review, which they described as ensuring 'that the overall system for civil justice is improved for its users in a coherent as well as comprehensive manner.' Chapter 6 of the Report recommended the introduction of an Online Court, eventually to be made compulsory for cases within its jurisdiction, and with a fixed recoverable costs model.

On the same day, the Ministry of Justice closed its consultation on 'Reforming the Soft Tissue ('Whiplash') Claims Process' which included controversial proposals to remove the right of injured people to claim damages for some types of pain, suffering and loss of amenity, the introduction of a fixed tariff for damages for other injuries and an increase in the scope of the small claims track. The Government's stated aim was to implement the reforms as soon as possible.

Finally, Lord Justice Jackson commenced his review of fixed recoverable costs as an extension of his previous Review of Civil Litigation Costs, commissioned by the Lord Chief Justice and the Master of the Rolls. In an earlier speech, Lord Justice Jackson had proposed an extension of fixed recoverable costs to claims with a value of up to £250,000.

How will this concatenation of reforms impact on access to justice in personal injury and clinical negligence claims, where individuals face well-resourced tortfeasors, in what has been described as a 'paradigm instance of litigation in which the parties are in an asymmetric relationship'?

This paper aims to explore some of these topical issues.

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Dominic De Saulles (Cardiff), 'The Nature of Sanctions in Civil Procedure'

I would propose to present a paper on a general theory of sanctions in civil procedure. In particular to what CPR sanctions are and how they fit into the broader classification debate. There are aspects of sanctions which go beyond mere regulation not least because they effectively override the individual's article 6 right to a fair trial and involve a public denunciation of a party for default (at least in a civil context) as well as exposing the defaulting party to a financial extraction based upon their behaviour. I expect to argue that CPR sanctions are a hybrid which are to be treated distinctly from the current regulatory, penal, civil penalty categories. The particular classificatory status of CPR sanctions stems from the social and constitutional role of the court in society.

## Friday 7th April (12:00-13:30)

Tatiana Kylesova (Kyiv-Mohyla Academy, Law School, Ukraine), 'Defining Mediation in Law and Practice'

Although mediation is becoming more recognizable dispute resolution mechanism worldwide debates about its definition are still on-going. On the one hand, mediation practice develops towards greater inclusivity of multiple styles and models of mediation. On the other hand, the pressing need for legal regulation conditions a single simplified definition of mediation to be fixed in the national and international mediation laws. These diverse tensions have resulted in a contradiction between the 'law in books' and the 'law in action' with regards to the core elements of mediation. Therefore, this paper is aimed at answering the following questions: "What elements of mediation, as derived from practice, are not incorporated into statutory definitions of mediation and what are the root causes of this gap?" The paper is based on the findings of a comparative empirical study of statutory mediation definitions from 24 jurisdictions; definitions that derived from 32 interviews with the top international mediators at the 2016 ICC International Mediation Competition in Paris, and 34 interviews with Ukrainian mediators representing developing mediation context. This paper demonstrates that statutory definitions of mediation failed to incorporate some core characteristics of mediation that were developed in mediation training and practice worldwide and suggests that this failure results from competition between various models of mediation practice such as facilitative, evaluative and transformative models; competition between various interest groups including mediators, lawyers, judges and consumers; and objective technicalities of legislative drafting. The concluding remarks emphasize the need of mediation practitioners, researchers and policy-makers to recognize this gap and the confusing message that it sends to the consumers of mediation services; as well as the need for mediation community to develop strategies to remedy this gap through the self-regulatory measures and popularization campaigns.

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Aonghus Cheevers (University College Dublin), 'The Role of Procedural Justice Ideas in Client Evaluations of Mediation, The Family Mediation Service in Ireland'

Since its formation in 1986, the Family Mediation Service (FMS) has provided mediation for divorcing or separating couples throughout Ireland. Originally based in a single Dublin office, the FMS has grown so that it now provides mediation in 17 offices throughout Ireland. In addition, the service provides mediation in 5 court locations to couples seeking to resolve guardianship, maintenance, and visitation issues. This paper analyses a series of FMS client evaluations completed between 2006 and 2015. In particular, the analysis focuses on the role of procedural justice ideas such as voice and control in client evaluations of mediation. Beginning in the 1970's researchers in the United States and other jurisdictions began to examine how clients evaluated legal processes. Much of these early research efforts focused on adjudicative processes. In later years, and with the growth of alternatives such as mediation within court proceedings, attention has turned to the place of such procedural justice ideas within client evaluations of alternative processes such as conciliation and mediation. This paper adds to this growing body of research, by studying the place of procedural justice ideas within client evaluations collected by the FMS. The analysis points to

a service providing clients with an effective and much-appreciated process. In particular, it shows a service in which clients are afforded dignity and respect, an opportunity to voice their understanding of the dispute and a place where they are provided the support they need during a stressful and taxing time.

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Valentina Dimitriou (Leicester), 'Arbitrators Gone Wild? – The impact of arbitrator appointment mechanisms on the substantive development of the law'

Investment treaty arbitration has been at the centre of a so-called 'backlash' from academia and civil society for the past few years. Disputes involving ever more sensitive areas of sovereign discretion such as regulation on carbon emissions and renewable energy regulations leave arbitrators pushed into reviewing the role of the executive, the legislative and at times the role of national courts. Despite efforts by the European Union to radically reform the investment treaty arbitration through the TTIP negotiations, newly concluded international investment agreements remain faithful to the existing international investment arbitration mechanism.

International investment arbitration is responsible for enforcing international standards and upholding the rule of law, a building bloc of the sustainable development goals introduced for the first time in the UN 2030 Agenda on Sustainable Development. It is a primary reason for developing countries entering international investment agreements. With the number of newly filed investor-State disputes rising and dispute subject matters including areas of sustainable development, human rights and labour law under first generation treaties, arbitrators more influential than ever on the development of new international investment law and new concepts.

Existing empirical literature focuses on the outcome of awards and the composition of arbitral panels. It recognises the importance of arbitrator selection to the arbitral process. However limited research has been carried out on how such a procedural step influences the substantive development of the law especially in where there is a need to interpret new concepts under a vague, first generation BIT. The paper argues that the international investment arbitration mechanism is a valuable dispute resolution mechanism, however its implementation undermines new substantive areas of law such as sustainable development. The aim of this paper is to evaluate the existing arbitrator appointment system and its impact on the arbitral proceedings and the development of substantive law.

# Conflict Related Destruction of Cultural Property

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## Thursday 6th April (16:15-17:45)

Luke Moffett (Queen's University Belfast), 'The double-edged sword of reparations for cultural property'

Premeptive protection of cultural property during armed conflict is considered the primary way to preserve and avoid destruction. Reparations have often been seen to be as inappropriate to restore historical property that is irreplaceable, with prosecution and punishment more preferred. Moreover, reparations for destruction of cultural property has often been carried out as reprisals against aggressor states that has further stymied support for such measures. This paper explores the history and current position of reparations in international law for destruction of cultural property. It then pivots the discussion to examine the increasing recognition of remedying the community that suffers from the destruction of cultural property. In particular the Al Mahdi case at the International Criminal Court is discussed involving the destruction of the masoleums in Timbuktu. This paper argues that it is time to rethink the international law position on reparations for cultural property where increasingly cultural property is intentionally targeted by armed groups to harm communities and groups that requires remedying not only the physical, but moral harm suffered.

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Rachel Killean (Queen's University Belfast), 'The Role of Cultural Heritage in Genocide and Resistance'

This paper explores the experiences of the Cham minority during the Khmer Rouge. The Cham are a predominantly Islamic minority group who were targeted for genocide by the Khmer Rouge, a communist regime who held power in Cambodia from 1975-1979. In particular, this paper exposes the role the destruction of the Cham's cultural heritage played in that genocide. The Khmer Rouge desecrated and destroyed mosques, burned religious texts and forced the Cham to abandon their religious and cultural practices. This has been acknowledged by the Extraordinary Chambers in the Courts of Cambodia, the hybrid court established to prosecute the crimes perpetrated during the regime.

This paper also explores the ways in which the Cham protected and maintained their cultural heritage as a method of resisting the regime and protecting their cultural and religious heritage. This paper will explore the methods utilised by the group, and explore how their understandings and relationship with their cultural heritage was impacted by their experiences under the regime.

Finally, this paper considers how any reparations granted by the ECCC can respond to the destruction of the Cham's cultural heritage, while being sensitive to the ways in which this heritage has developed within the community since the atrocities took place.

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Robin Hickey (Queen's University Belfast), 'Property and the restoration of cultural heritage'

This paper considers the role of property law and property institutions in responding to the destruction of cultural property. An emerging literature explores methodologies for cataloguing cultural property, and calculating the 'heritage value' of destroyed sites. Such

identification measures depend for their realisation on robust legal institutions to facilitate the implementation of restoration projects and provide the means for lost heritage to be reclaimed. Here traditional ownership theory intersects with governance-based approaches, as we seek property paradigms and frameworks that can contribute meaningfully to the empowerment of victim communities by safeguarding sites of cultural heritage. The construction of such frameworks present a number of potential, overlapping difficulties and challenges for ownership regimes. There is a danger of privileging certain voices, and preferring the perspectives of transitional justice entrepreneurs over affected communities. Within those communities, there may be differences of view on the design and impact of a given restoration project (eg it may be considered more important to restore original property, rather than to evolve something new), and the influence of governments and other elites (international donors/NGOs etc) in restoration may impact these decisions and the resulting narratives in complex ways. This paper explores these themes, using preliminary findings from the AHRC PaCCS project 'Restoring Cultural Property and Communities after Conflict', including an assessment of the impact of land registration regimes in responding to the destruction of cultural property.



# Courtroom Ethnography – Doing Justice in Everyday Praxis

NB: all sessions will be held in Herschel Training Room 4

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## Thursday 6th April (11:00-12:30)

Lisa Flower (Lund), 'Looking Like a Loyal Lawyer in the Swedish Courtroom: Revealing the subtle strategies used by defense lawyers to interactionally defend a client'

Traditionally, the law has been considered as devoid of emotions, however we now view the courtroom as an emotional scene. Defence lawyers in Sweden must loyally defend their clients, yet how defence lawyer do loyalty in the courtroom has received surprisingly little sociological attention. By focusing on how a legal defence is achieved using interactions and emotions, that is, how defence lawyers defend their clients using body language, facial and vocal expressions and props it is possible to show how loyalty, and, in extension, justice, is actually performed in the courtroom. By studying this in a context where the scope for expressive gestures is limited, it is possible to gain a greater understanding into the prevailing emotional regime of the courtroom and the ways in which legal representation is performed. This paper draws on ethnographic fieldnotes from courtrooms in Sweden and interviews with defense lawyers to explore how loyalty is performed by using emotiona management and impression managemens strategies in the courtroom. Each of these strategies reproduces and reinforces the emotional regime of the courtroom: the emotion norms of what is permitted or prohibited, norms which are also explored in this paper. The findings show how defense lawyers not only represent their clients juridically but also interactionally and develops Goffmanian concepts along with emotion sociological theory.

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Amy Kirby (Surrey), 'The role of the researcher in court-based ethnography: negotiating the 'them and us' divide'

Those conducting research in the criminal courts have often favoured an ethnographic approach to the collection and presentation of data (see Rock, 1993; Fielding, 2006; Jacobson, Hunter and Kirby, 2015). A common theme highlighted across such studies is that of the marginalised status of both witnesses and defendants within the court process. Several studies have sought to document the stark 'them and us' – or 'outsider vs. insider' – divide between court users' (victims, witnesses and defendants) and professionals (judges, barristers and court staff) within the court arena (Rock, 1993; Jacobson et al., 2015). However, as yet, little consideration has been given to the role of the researcher in negotiating this divide when conducting court-based ethnography. This paper aims to examine this by reflecting upon the research process of a doctoral study that is currently being conducted within the court setting. The present study involves an examination of lay participation in the criminal courts. Data collection is currently being undertaken at four courts in England and involves observations of court proceedings and semi-structured interviews with court users and other lay participants. Issues that this paper will consider include: the layered process of access negotiation and the impact of ethical and spatial considerations on data collection.

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Kate Leader (LSE), 'The Premium on Live Presence in the Courtroom: or, why does a defendant have to be there, and does it matter if she isn't?'

This paper seeks to raise questions about attitudes towards defendants and the nature of defendant participation in Magistrates' courts by using courtroom ethnography as an interrogative tool. I begin by exploring the premium placed on a defendant's live presence in a courtroom, and the surrounding methodological questions of how to approach assessing this phenomenon. Since my initial PhD research into the role of performance in the adversarial criminal trial, *Trials, Truth-telling and the Performing Body* (2009), my work has been concerned with the nexus between law and performance and in these paper I use these tools, namely those derived from performance studies, sociology and anthropology, as well as that of criminal law and evidence, to consider the concept of 'confrontation'. How do we invest in and express beliefs connected to the immanent power of live confrontation, and what challenges can such beliefs pose for reform?

I then turn to think specifically about defendants in Magistrates courts. The vast majority of criminal cases in England and Wales start and finish in the Magistrates' courts, and yet comparatively little research has been undertaken into defendant experiences comparative to Crown Courts. This is particularly striking in the wake of incentivisation of guilty pleas, diminished access to legal representation and, most importantly, the increased use of remote testimony for plea and bail hearings. In a courtroom that increasingly draws on mediatised technology that simulates or reproduces 'presence', what is at stake in live bodies gathering together? And what effect can a shift towards increased mediatisation have on the participatory experience of the defendant in a Magistrates Court? I conclude by considering how interrogation into the role of liveness, presence and confrontation can be a means of assessing our changing attitudes towards defendants in the criminal justice system in England and Wales.

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Jess Mant (Leeds), 'Access to justice in the post-LASPO family courtroom'

In this paper, I use an interdisciplinary ethnographic approach to explore the ways in which litigants in person ('LiPs') experience family court hearings and processes in the current legal, political, and social context. As a result of large-scale reforms implemented by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, the majority of state-funded legal representation has been withdrawn for private family cases. As a result, most of these court hearings now involve at least one self-representing litigant, and LiPs on both sides are by no means uncommon. This paper argues that the effective withdrawal of lawyers results in the post-LASPO family courtroom as a new domain in which LiPs are spatially, temporally and politically oriented by new relations with people and objects acting within this space. In drawing on interview experiences from the ongoing empirical stage of my PhD research, I will explore these processes from the perspective of the unrepresented litigant, and highlight potential implications of the new ways of adjudicating family justice in the absence of legal aid. This paper argues that a major consequence of this shift is a fragmentation and redefinition of 'justice' and its accessibility in the private family law context, wherein access to different forms of adjudication is now demarcated by the absence of legal representatives in the courtroom. It will be suggested that if equality of access to the family courtroom and family justice is to be maintained despite these legal aid cuts, then it is essential to consider ways that the process can be re-organised and adapted so that the family justice system (and

legal system more broadly) can sufficiently engage and respond to the varied needs of its users; rising to the challenge of ensuring access to justice for all.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Agnieszka Kubal (Oxford), 'Paper cases or trouble cases? Immigrants before domestic courts in Russia'

Much of the academic literature, analytical reports, mass media and even common wisdom suggest that the justice system in Russia is rather unreliable – at best, ineffective and, at worst, corrupt (Freeland 2000, Pastukhov 2002, Solomon 2005, Transparency International 2007). Scholars and practitioners alike list the different dysfunctionalities of the Russian justice system – it does not provide equal access to justice, it does not treat fairly its litigants, the law enforcement is fortuitous, the 'telephone law' still prevails in different court settings (Ledeneva 2008, Hendley 2009, Sakwa 2009).

But perhaps the full picture is more complicated? The aim of this paper is to provide a first-hand empirical, ethnographically informed study of a particular context of the justice system in Russia – the immigration law cases before district and regional courts – to paint a more complex picture of how law works in practice in Russia and how it is experienced by Central Asian migrants within and beyond the courtroom setting. Upon presenting the results of the courts' ethnography, the paper focuses on highlighting the specific features of the immigration law cases before Russian courts: very high volume and sentencing rates, quick processing times, strict adherence to formal legality in how the cases are adjudicated: on the basis of formal protocols from the immigration raids, printouts from the Federal Migration Service (state immigration enforcement authority –AK.) databases, and signed affidavits of the respondents.

Whilst these cases are largely adjudicated according to the 'paper trial' model (exclusive reliance on the formal written evidence), my article suggests that from a human rights' perspective these cases resemble more 'trouble cases', where 'a particular decision may rest upon a legally impeccable rationale; at the same time, it may be rendered nugatory or self-defeating by contingencies imposed by other aspects of social reality' (Blumberg 1967): 15). The sole reliance on the formal written evidence and arguably 'simple and just' way in which these cases are adjudicated are challenged when we move from the formal legality to what is usually at stake in these cases. The harsh and often disproportionate repercussions (deportations) result in disruption of livelihoods for many individual migrants, who have established lives, families in Russia and often, due to no fault of their own, fell through the cracks of the complex and ever changing immigration laws.

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Joaquin A. Lopez (Université de Reims Champagne Ardenne), 'The judiciary post-sentential communication of the french sentencing judge, "le juge de l'application des peines (JAP)": a case study'

The daily judicial communication is composed of norms and obligations which constrain the judge in his daily practice. These institutional considerations come before the natural institutional order of ordinary conversation. It is indeed around a "conversation" that the object of justice unfolds. These two logics (that one of the justice and that of the ordinary conversation) have to find themselves for the effectiveness of justice. But do these two logics really meet? How is this meeting really taking place? Our research work is part of a doctoral thesis which tries to account the existing constraints occurring in the court. We are aware of the modal and multi-modal way in which the production of justice takes place. We are particularly sensitive to the implications for the execution of the sentences that these interactions produce. We propose to account for a sequence of interaction between the judge and the condemned in order to perceive what our research work aims at and by what methodological prism we operate. From the presentation of this example, we will be able to expose more explicitly the exact object of our research, addressing the theories of legitimacy of justice and therapeutic jurisprudence which are particularly relevant to our work.

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Ignacio Riquelme (Bristol), 'Actor-Network Theory and the problem of interdisciplinary language for court ethnography'

This paper discusses Actor-Network Theory's (ANT) materiality-inflected methodology, and the contributions this can bring for an interdisciplinary dialogue in court ethnography. To do so, it situates ANT within the longstanding discussion between structuralist and agential socio-legal court research and debates some of ANT's theoretical propositions. In this way, the paper seeks to debate a working framework to guide ethnographic observation in court and develop a solid base for an interdisciplinary reading on court practices and methods.

The paper is divided into three parts. In the first part, I follow the conceptual tension between the structural and agential understanding of court work. I will briefly explore how this ontological divide underpins important methodological differentiations and the way in which this hinders an interdisciplinary dialogue on the way courts operate. In the second part, I will discuss ANT's turn to materiality and its symmetry principle. I will analyze the way in which this school of empirical research has responded to the dualism of structure and agency, and

the potential that this focus brings for an integrating language in socio-legal ethnography. I argue that ANT's radical empiricism has shown an interesting path from where to channel the needs for interdisciplinary accounts of court practices. Finally, I delve into two puzzling issues around ANT's approach to court work. Namely; the role of 'Law' as an overarching concept from where to interpret court practices; and, the role of human intention in the analysis of observational data.

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Jenni Ward (Middlesex), 'Transforming summary justice: lower criminal court sentencing'

Sweeping changes have been introduced into the lower criminal courts in efforts to modernise the system and speed up case processing. These concentrate on delivering prompt justice within a modern, efficient and technologically advanced system. But the various transformations are fundamentally changing the way justice is delivered. This paper reports from recent book research analysing changes to lower court justice including the ongoing promotion of 'speedy justice', incentivised early guilty pleas, the introduction of 'virtual courts' whereby defendants appear over live links from police stations and prisons, and the increased reliance on 'sentencing guidelines' in allocating court penalties. Sentencing guidelines have been devised to reduce sentencing disparity across offence types. Yet in efforts to achieve 'equal justice' judicial discretion is hampered and 'individual justice' is impacted in serious ways. Courtroom observations carried out as a part of the research revealed the way defendants are subject to structured grid guided sentencing decisions which strips out personal mitigation and sees defendants exposed to the same assessments regardless of whether transgressions are caused through mental illness, drug and alcohol problems, psycho-social immaturity, poverty and social marginalisation. My analysis draws on conceptualisations of social justice and its connection to law administration, and asks whether adversity and disadvantage can be used as defence and personal mitigation for some low-level criminal wrong doing. There is a place in our understandings of the lower criminal courts and the nature of the work carried out within them, to acknowledge the impact of sentencing policy. There is an urgent need for a more rational, humane penal response at the sentencing stage of the criminal justice process. As such, greater recognition of the power the courts hold in contributing to social justice and indeed injustice is paramount, and revisions that reflect societal care and responsibility are needed.



# Criminal Law and Criminal Justice

NB: all sessions will be held in Barbara Strang 1.48

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Debra Wilson (Canterbury, New Zealand), 'Forensic Brain Wave Analysis ("Brain FingerPrinting") In The Courts: Judicial Consideration and The Likelihood of Future Use'

In 1978 Terry Harrington was convicted of first degree murder and sentenced to life without the possibility of parole. After serving 23 years he appealed, and evidence was introduced of a 'brain fingerprinting' test which concluded that Harrington had no knowledge of critical details of the crime which would have been known to him had he been present during its commission. The Iowa District Court found this evidence to be admissible, although ultimately denied the petition for rehearing. On appeal, a new trial was ordered in 2003, but the state elected not to re-try the case. This was the first time brain fingerprinting had been discussed in a court, although it had been directly responsible for a guilty plea in relation to three murders in 1999. Since Harrington, defendants in several cases (most recently in 2013) have requested its use to verify the claimed knowledge (or lack thereof) of themselves or other witnesses in relation to a crime.

Brain Fingerprinting also received substantial consideration by the Indian Supreme Court in 2010, and the Court's recommendation that guidelines for use be developed suggests a degree of acceptability of the science involved. While it has not been considered by the Indian courts since, its use has been reported in at least nine criminal investigations between September 2015 and June 2016, suggesting further judicial consideration is imminent.

This paper will discuss the science behind brain fingerprinting before considering both the past and potential future uses of brain fingerprinting in criminal investigations and prosecutions. It will focus on two prominent decisions and consider some of the potential legal issues arising from it. It will suggest that while this technology can be an important tool in solving and prosecuting crime, the legal issues require careful consideration before its use is accepted and becomes more widespread.

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Hannah Wishart (Manchester), 'Taking Legal Assumptions about the Responsibility of Adolescents Seriously'

The idea adolescents should be treated less responsible for committing the same crime as adult offenders remains a constant feature of legal scholarship. But, today, there are now greater concerns amongst legal theorists about the approach taken by the English criminal justice system to juvenile offending. For these kinds of reasons: (1) there has been little discussion in Parliament about the Age of Criminal Responsibility Bill (2013), (2) there is an deficient legal assumption that supposes adolescents have the capacity to be held responsible for engaging in wrongdoing from 10 years of age and, (3) there is extensive neuroscientific literature on the slow maturation of the adolescent brain and the low degrees of mental competency in juveniles compared to adults.

Now, central to responsibility practice is the idea that an individual is only responsible and blameworthy for his actions if he possesses the relevant capacities. And if an individual does not possess these relevant capacities he cannot be held legally responsible. For the basic moral intuition stands, as Hart argues, it is only fair to hold individuals accountable for their actions when they had the capacity and opportunity to refrain from committing wrongdoing. As a consequence, many commentators believe that most adolescents do not deserve the kind of blame attached to responsibility attribution, for they are considered too young and immature to be held responsible. On the other hand, there is something about adolescents that marks them capable from 10 years of age to satisfy the requirements of English criminal law. What that something is and how it inspires a concept of law to condemn the immature to moral and legal criticism is something that this paper seeks to address.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Geoff Pearson (Manchester), 'The Role of Police Body-Worn Cameras in the Criminal Process – Some challenges for the rules of Criminal Evidence'

Body-Worn Cameras (BWCs, also known as Body-Worn Video/BWV) are now a standard piece of equipment for front-line police officers across the UK. The advantages of their use are most frequently stated in terms of improving police interaction with the public, reducing complaints and increasing accountability. They can also play an important role in gathering and recording evidence, both real and testimonial, and their value to a criminal trial has been noted by both the Court of Appeal (*R v Painter* 2016) and the Leveson Review of Efficiency in Criminal Proceedings (2015). BWCs can provide a vast array of evidence in visual and audible form, often at the moment of crime detection. However the BWC challenges the primacy of examination and cross-examination of testimonial evidence in court, which, although now curtailed by statute, remains the default position in the English criminal justice system.

This paper considers the intersection of the rules of criminal evidence and police practice, procedure, and policy. It is based on a three-year ethnographic study of two police forces during the process of BWC roll-out to frontline officers. BWC use was one area investigated by the project team, in particular the questions of when officers chose to activate BWCs and what evidence or testimony they chose to capture by this method. The study established that there were many reasons for a police officer's decision not to activate their BWC, even when this went against force policy. As a result, the tribunal of fact should not automatically infer from an absence of BWC footage that other contemporaneous evidence adduced in court is less credible.

The paper also identifies two areas of probable future contention: (1) The operation of the rule against narrative and in particular the exceptions under s.137 CJA 2003, requests for which are likely to become more regular when BWC-wearing officers are present at crime scenes. (2) The adduction of previous inconsistent statements, in particular confessions captured by BWC prior to a caution, and whether this further waters down a suspect's protections under Code C PACE 1984.

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Colin Moore and Gerry Rubin (Kent), 'Police Reform and Modernisation in the Inter-War Years'

The policing of England and Wales in the 1920s and 1930s was carried on amidst a reasonably well-documented background of general criticism, in terms of both prevention and investigation of crime and exposure of controversial practices deployed by the police, highlighted in a series of high profile police scandals or causes celebres that ultimately led to the Royal Commission on Police Powers in 1929. General press and public criticisms of the police included a reluctance to adopt new technology and scientific techniques, militarism, rigid adherence to old-style beat policing, esprit de corps concerns and corruption. It is well known that controversial police practices included use of agents provocateurs, entrapment, 'third degree' techniques of interrogation, as well as allegations of false imprisonment and wrongful arrest. While high profile scandals are cited, including the Savidge/Chiozza Money case, Sergeant Goddard (with Horace Josling), Inspector Syme and Kate Meyrick and the 43 Club, particular attention is given how the Metropolitan Police dealt with the lesser known

cases of Helene Adele, Major Sheppard and Cope Morgan. This paper examines internal police reactions to the barrage of criticism, their response as articulated through police orders, and criminal case law on the delimitation of police powers in relation to searches, cautions, arrests and questioning of suspects. The main focus here is to highlight the day-to-day addressing of practical issues of improving policing practice as aided by training, education and forensic development. This analysis uses wider literature on both police culture generally, and more specifically on police corruption, as a loose theoretical framework, but ultimately argues that organisational improvements in policing resulted not from theoretical blueprints but from practical experience, a very British way of policing which starts at the 'bottom up'.

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Roxanna Dehaghani (Leicester) and Dan Newman (Cardiff), “‘We’re vulnerable too’”: an (alternative) analysis of vulnerability within criminal legal aid and police custody’

This paper considers criminal justice through the lens of vulnerability theory, drawing attention to unexplored or underexplored vulnerabilities in the criminal justice system. We address three layers of vulnerability. The first identifies those who have more traditionally, although not unproblematically, attracted the label ‘vulnerable’; suspects in the criminal process. The second examines the vulnerability of those who, as humans, can be appreciated as vulnerable, but, within their roles in the criminal process, are not typically considered vulnerable –custody officers and defence lawyers. The third, least considered, explores the vulnerability of institutions –the police service and criminal legal aid system. Institutional failure to provide resources, and thus bolster the resilience of suspects and practitioners, can serve to further exacerbate vulnerability. Using empirical data, we explore how vulnerability manifests within the crucial early stages of the criminal process. In doing so, we provide a more holistic and critical account of vulnerability within the criminal justice system.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Charlotte Bishop (Exeter), 'The need for a Trauma-Informed approach to ensure Safe and Effective participation in the criminal justice process for Domestic Violence Complainant-Witnesses'

This paper will outline suggestions for reforms to the pre-trial procedures and special measures provisions used in criminal proceedings where the witness is also a victim of domestic violence. It will be shown that this area of the law is in urgent need of reform to ensure that recent legal developments in this area result in increased protection for victims by increasing the likelihood that perpetrators will be prosecuted and convicted. Although obstacles to the successful prosecution of domestic violence are complex, it is clear that the reluctance of victim's to report and/or be a witness in criminal proceedings play a significant part (see Robinson 2006).

The recommendations are based upon the, insufficiently recognised, link between ongoing abuse and trauma, and use psychological research into the impact of trauma on the brain to expose the evidential and other difficulties encountered when victims of domestic violence testify in court. The ways in which trauma impacts upon the brain, particularly on memory and recall processes, means that a coherent and consistent account of the traumatic experience often cannot be given by the victim. In addition, the process of giving evidence itself may trigger a flashback, panic attack or episode of dissociation which may be seized upon by the defence during cross-examination and portrayed as 'suspicious' in order to undermine witness credibility. If the impact of trauma on the brain is not understood, the credibility, reliability and veracity of the witness's account may be doubted by those involved in the decision-making process.

A series of amendments and measures will be suggested, all of which take a trauma-informed approach to providing the necessary assistance for effective participation in the criminal justice process, without victim safety and psychological integrity being compromised. If developed and adopted, the reforms would thus help overcome two factors which contribute to the high attrition rate in domestic violence cases; victim retraction (by reducing some of the stress associated with participating in the criminal justice process) and lack of witness credibility (by providing information about trauma for all those involved in the process; police, crown prosecutors, magistrates, judges and jury members).

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Natalie Wortley and Nicola Wake (Northumbria), 'Myth-busting Social Framework Evidence: Anglo-Australian Comparisons'

Research has shown that public misconceptions often affect jurors' views about the credibility of complainants in sexual offence cases. To target "rape myths" in England and Wales, the Judicial College provides examples of directions that a judge may give to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct.

Prejudicial attitudes also exist in the context of domestic abuse, but these "myths" have not been addressed in a similar way. This presents difficulties for victims of domestic abuse who

use violence against their abusers and seek to plead either self-defence or, in the case of fatal violence, the concessionary defence of loss of control.

In the Australian State of Victoria, social framework evidence may be admitted to support self-defence where it is relevant to an element of the defence. This paper will compare the jury direction approach to “rape myths” in England and Wales with the Victorian approach to combatting prejudicial misconceptions in the context of domestic abuse. It will consider whether the introduction of social framework evidence in England and Wales could help to prevent unwarranted assumptions and improve the reliability of juror evaluation of the credibility of victims of sexual violence and domestic abuse.

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Solvig Leugerud (Oslo), ‘The Constitution of Legal Evidence in rape cases in Norwegian Courts: Tensions between Legal and Medical Discourses of Sexual Violence’

In my PhD project I am exploring how legal and medical discourses produce knowledge of sexual violence within the legal field.

I will present an analysis of how medical knowledge or discourses are utilized by the court in the consideration of evidence. I will use the concept of legal hybridity by Valverde (2003; 2015) and the conflation of the concepts of suffering and trauma by McGarry and Walklate (2015) and consider how these concepts work together.

According to Valverde (2003) legal knowledge formation constitutes a hybrid of scientific, legal and common sense based knowledges. When scientific knowledge is utilized in legal proceedings in which scientific logics do not dominate, for instance as part of evidentiary material in a legal case, it has to be translated into a legal fact. With reference to Bakhtin she elaborates on how legal discourse validates its own discourse by recourse to another discourse, for instance a medical discourse, rather than to nature itself or to “the facts” (Valverde, 2015).

McGarry and Walklate (2015) argue that the development of the diagnosis of post traumatic stress disorder (PTSD), as well as an increased emphasis on trauma and healing within the Criminal Justice system because of the development of Therapeutic Jurisprudence and the emphasis on repairing harm as part of Restorative Justice initiatives, in part have resulted in a slippage in terminology between victimization and trauma, in which suffering is conflated with trauma.

In my presentation I will discuss how these concepts work together by asking when does a recourse to medical discourse become a problematic conflation of suffering and trauma, rather than simply an expression of legal hybridity?

My presentation will be based on an analysis of the constitution of legal evidence in rape cases made by district and appeals courts in Norway during the year of 2016.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Sabrina Gilani (Sussex), 'Must we Begin Thinking about a Posthumanist Criminal Law?'

The internet has become an increasingly important vehicle through which the modern citizen engages in a number of economic, educational, interpersonal, and recreational activities. In recent years, this growth in our online presence has triggered revolutionary shifts within the law. Legal practitioners and the Courts in many societies across the globe have confronted demands for greater legal protection and redress for activities that have taken place in virtual communities and through online networks. Many legal systems have responded by enacting legislation which has had the specific aim of reducing the economic and financial burdens of transacting business online. More interestingly, criminal law theorists and practitioners have also been asked to modify existing legislation and rethink existing crimes to respond to cases of online stalking, internet-based harassment, and the digital communication of offensive and obscene materials. The law has been, in many cases, adapted so as to respond to the rapidly-advancing terrain of digital communication and interaction.

Despite these developments, however, criminal law theorists have shown a general unease with accepting the parity of 'virtual' versus 'real' crimes – either because virtual crimes are not seen as harmful as real crimes, or because virtual crimes do not consist of the traditional common law elements we associate with real crimes: the actus reus, the mens rea, surrounding circumstances and a prohibited harm or result (Lastowka and Hunter 2004; Brenner 2001).

In this paper I question the view that virtual crimes are something less than real crimes and thus their governance and regulation should be left to extra-legal forces. The need to begin thinking about reforming our criminal law has become necessary. As Balkin notes, "precisely because virtual worlds are fast becoming important parts of people's lives, and because they are likely to be used for more and more purposes in the future, legal regulation of virtual worlds is inevitable" (2004). However, this paper explores the issue of virtual crime regulation from a slightly different, theoretical perspective. Rather than arguing that an increase in virtual-world communication makes legal regulation inevitable, I instead make a case for the development of a virtual-crime-sensitive criminal law by unpacking the ways in which human subjectivity is being exercised within the digital age. I undertake a posthumanist critique of the criminal law, particularly as it relates to the traditional corporeal offences murder and sexual assault, and theorise reasons why developing a posthumanist criminal law may become a necessity for societies living in the digital age.

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Joanna Gilmore (York), "'That is not facilitating peaceful protest. That is dismantling the protest.': Anti-fracking protesters' experiences of dialogue policing and mass arrest'

The death of Ian Tomlinson at the G20 protests in April 2009 triggered a haemorrhaging of public confidence in public order policing. Although later praised by MPs as a "remarkably successful operation", these events forced into the public spotlight what protesters had long described as a shift towards an increasingly authoritarian style of protest policing in Britain. The G20 protests were swiftly followed by a plethora of official inquiries and reports tasked with investigating the legitimacy of existing public order policing methods. The most

significant was a two-part report published by Her Majesty's Inspectorate of Constabulary (HMIC). The report maintains that whilst the "starting point" of any public order operation should be to "facilitate" peaceful protest, the role of the police is to act as "arbiter", balancing the rights of protesters against the competing rights of the "wider community". The HMIC report provides a template for a new "human rights compliant framework" for public order policing, based on dialogue, communication and an overriding commitment to "facilitating" peaceful protest.

The official response reflects what has been identified in a number of recent academic studies as a move towards "negotiated management" protest policing, which favours "cooperation and communication between police and protestors" in order to "reduce the likelihood of violence". In entrenching negotiated management principles into public order policing policy, the HMIC recommendations have been heralded as "some of the most progressive developments in policing in over a decade".

This paper offers a critique of the growing academic consensus on public order policing in the wake of the HMIC report. Drawing on an ethnographic study of the policing of anti-fracking protest, it is argued that in contrast to the presumed consensual approach underpinning the official response and reflected in much of the academic literature, the relationship between the police and protest groups is based upon grossly unequal power. Whilst those who engage in protest activity are subject to increasing criminalisation, the police in public order situations act with relative legal impunity. The disparity has intensified in recent years with a significant expansion of state control over public protest. This has included a proliferation of public order offences, an expansion of common law policing powers, the use of private law remedies as a proxy for criminalisation and an expansion of the state's intelligence and security apparatus to monitor political movements. The paper concludes by arguing for a radical reorientation in public order policing research from the 'velvet glove' to the 'iron fist'.

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Kevin Brown (Queen's University Belfast), 'The Hyper-Regulation of Public Space through Public Spaces Protection Orders'

This paper explores how Public Spaces Protection Orders (PSPOs) are being used to enforce majoritarian sensibilities at the expense of due process and civil liberties. PSPOs were introduced to England and Wales in October 2014. These orders grant considerable discretion to local authorities to use the threat of criminal sanction to regulate activities in public spaces that they regard as being detrimental to the quality of life of residents. Initially, local authorities were slow to make use of PSPOs, but now many are now in place with their use steadily increasing. This paper provides critique of how these orders are used to target minority and vulnerable groups, whilst curtailing fundamental freedoms.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Mwenda Kailemia (Keele), “‘The war on what?’:The pre-law problematic in the policing of Africa's wildlife crimes’

The problem of wildlife poaching and trafficking is a mainstream issue today, with discourse focusing on the extent of the loss of animal populations and the shared space-of-opportunity between poaching and other forms of transnational crimes (from terrorism, smuggling and money laundering). What has received little scrutiny is the evolution of anti-poaching into a 'war-on' (along the lines of 'war on terror'; 'war on drugs' etc.) with a connected (international) architecture of drones, military contractors, trainers and surveillance teams. Against this there is anecdotal linkage of anti-poaching and counter-terrorism in the priorities of governments with very poor human-rights records. Deploying the logics of pre-crime/pre-law policing, we shall aim to demonstrate the human rights implications of a 'war-on' anti-poaching in Kenya (and East Africa, generally), and specifically how it secures 'outputs' as opposed to 'outcomes' for wildlife protection.

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Christos Boukalas (Cardiff), ‘Reversing the Rule of Law without Breaking it: UK Counterterrorism Law as “Authoritarian Legality”’

This paper undertakes the, surprisingly rare, task to present UK counterterrorism legislation as a whole and, on this basis, makes comprehensive theoretical sense of it.

UK counterterrorism legislation comprises 8 dedicated parliamentary Acts and a host of provisions scattered across Acts addressing crime, criminal justice, immigration, finance, and intelligence. Given its sheer volume and disparity, an exhaustive presentation of UK counterterrorism law would be impossible within the confines of a brief paper. Instead, to provide a comprehensive overview of it, this paper identifies the main trends of counterterrorism law, exemplifies each by a couple of specific provisions, and analyses them from the point of view of criminal law. Namely, it discusses the temporal expansion that counterterrorism introduces to criminal law; the open-ended character of its offences; the bypassing of criminal law through parallel, hybrid and administrative, procedures; and the re-orientation of criminal law towards pre-emption that constitutes the overarching trend that counterterrorism installs in criminal law.

The paper assesses the implications of this pre-emptive turn for the rule of law. It does so by distinguishing between three articulated but analytically distinct elements that comprise the law: legal content, the logic that motivates the law, and the institutional framework within which the law is produced and implemented. Here, counterterrorism law represents a paradox: while both its content and logic run contrary to the rule of law, its institutionality is fully inscribed in the confines of the latter. To account for this contradictory positioning of counterterrorism vis-a-vis the rule of law, the paper concludes that the latter signifies the advent of ‘authoritarian legality’: a reconfiguration of the rule of law that turns its juridico-political principles on their head without breaching it.

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Ffion Llewelyn (Aberystwyth), 'Householders and Self-defence: was permitting disproportionality a step too far?'

Self-defence is well-established as a complete defence to crimes of violence. For the defence to be successful, the law of England and Wales requires evidence that the defensive force used was reasonable in the circumstances. The reasonable force test enforces a minimal standard of reasonableness, and has traditionally required two components: a necessity to act, and a proportionate response to the threat.

For many years there has been a growing concern and public perception that the reasonable force standard is unfair, that it criminalises the defender (the true victim of crime), and fails to punish the aggressor. Cases involving intruders in the home, known as householder cases, were identified as special circumstances meriting enhanced legal protection. This culminated in a new legislative provision in section 43 of the Crime and Courts Act 2013, which amended the definition of reasonable force under section 76 of the Criminal Justice and Immigration Act 2008. According to the new provision, force need no longer be proportionate in the context of householder cases. Thus, disproportionate force may be allowed, providing it is not grossly disproportionate.

This paper will examine the background of this legislative amendment and consider the practical implications of allowing disproportionate force. It will be submitted that the change creates confusion and inconsistency within the law by applying two separate tests based upon the location in which an attack occurs. The paper will question whether such a distinction between attacks occurring in public and private places is justified, and whether the change of legislation was in fact necessary.



# Critical Perspectives on Security and Migration

NB: all sessions will be held in Herschel Training Room 1

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Maarten Bolhuis (Vrije Universiteit Amsterdam), 'Identifying jihadists among asylum seekers'

The attention for jihadism in relation to the increase of the number of migrants applying for asylum in Europe since the end of 2014 represents a clear example of the securitisation of migration. Increasingly, not only at but also within the borders, stakeholders involved in the asylum process such as immigration and reception agencies, are expected to identify people who may pose a security risk. The expectations from these stakeholders are high.

Whereas initially, national security agencies and other experts in Europe expressed themselves cautiously about the risk that jihadists would be among migrants entering Europe, the tone changed after the attacks in Paris in November 2015. Currently, at least three "risks" are circulating: 1) the risk of jihadists traveling with "migratory flows" into Europe (and applying for asylum); 2) the risk of forced recruitment by jihadi among asylum seekers and 3) the risk that applicants simply radicalise during their stay in reception centres. The paper is based on a study commissioned by the Dutch Ministry of Security and Justice, into the question what the stakeholders in the asylum process do to address these risks and how they share information they collect with law enforcement and security and intelligence agencies. The data collection consisted inter alia of interviews with policy officers and first line professionals within the most important organisations involved in the asylum process.

One of the main findings of the study is that, while the stakeholders have started to pay more and more attention to the possible presence of people supposedly posing a security risk, jihadists in particular, different stakeholders have different perspectives on how to identify them. The paper identifies a knowledge gap with respect to the effectiveness of the methods used, and concludes that it can be questioned whether the high expectations from these stakeholders in relation to identifying people posing a security threat can be met. Moreover, little is known about possible negative consequences of the methods used. More research into these issues is needed therefore.

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Rachel Wilson (Rachel Wilson, PLLC) and Sergei Ryazantsev (Institute for Socio-Political Research), 'Three models and three failures: how "strengthening" borders results in decreased security in the United States, Russia, and Europe'

Modern governments stubbornly insist on viewing migration as a threat to national security and undocumented migrants as criminals who violate the law. Governments increasingly attempt to strengthen borders as bulwarks against unlawful migration using both physical barriers to entry and administrative measures such as entry bands and black lists.

We compared three models of border security: Russian, European, and American. The Russian model for combating unlawful migration only uses administrative barriers, such as entry-bans in otherwise free-entry zones, also known as "blacklisting" migrants that have previously violated immigration laws. The European model until recently also relied solely on these administrative measures, but some European countries are now also adding physical barriers to combat irregular migration. The American model is perhaps the harshest, combining sophisticated physical barriers, such as the construction of triple fences along the California-

Mexico and Texas-Mexico borders, with harsh administrative measures, such as the permanent entry ban.

However, despite the significant administrative and financial costs that the United States, Russia, and Europe have expended, not one model has been effective in reducing unlawful migration. Physically closing off migration routes in one area (Texas, California, the Balkans) has simply shifted migrant flows to different locations (for example, current migration into the United States is now through the Arizona desert and in Europe it is through the Mediterranean Sea). This has led to a significant death toll in both regions, coupled with human trafficking and smuggling. Russia, through the introduction of its entry bans, has seen an uptick in falsified documents and increased exploitation of undocumented labor.

In this paper, we argue that any attempts to frame the control of migration in a security framework are doomed to fail and will instead only increase insecurity in any given region, as shown in the United States, Russia, and Europe.

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Maartje van der Woude (Leiden), 'Monitoring 'rapefugees' and 'terrorists' within Fortified Europe: Analysing the militarization of border policing and the dehumanization of immigrants in the Netherlands, Germany and Belgium'

Over the past couple of years, especially since the start of what has come to know as the European refugee "crisis", several scholars, journalists and activists have warned for the rise of a 'border security-industrial complex' and the process of border militarisation as a concerning side-effect of Europe's quest to keep bogus and dangerous refugees out (Bigo 2016; Holmes & Castaneda 2016). Both refer to the deployment of military troops, rather than civilian border patrols, along borders (Heyman & Campbell 2012). However, a broader understanding of militarisation would also include the pervasive influence of military strategies, culture, technologies, hardware and combat veterans that are now policing the border. Although the military and police are both agents of sovereign authority, historically their designated locations, methods and equipment differed substantially. This makes their growing interconnectedness in the current age of migration, and the resulting blurring of distinctions between security and policing on the one hand, and militarisation and war making on the other (Bigo 2014; Neocleous 2014), highly concerning. The latter might be especially true from the perspective of immigrants who experience the militarisation first hand. This paper aims to investigate the militarisation of the borders of three EU member States, Belgium, Germany and the Netherlands, by mapping the involvement of (para)military organisations in border control over time and place and by identifying a range of militarisation practices. To what extent is there an increase and an intensification of this militarisation and what can be said about the traditional divide between external military and internal policing logics in all three countries? The outcomes will furthermore be interpreted in the light of the dehumanisation of migrant others and discussions on state sovereignty. In doing so, the paper intends to contribute to the conceptualisation and theorisation of European border militarisation as distinct from the largely US oriented body of literature on the militarisation of policing.

The paper will be based on qualitative analysis of literature, government documentation, (social) media and images.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Polychronis Kapalidis (Plymouth), 'The Securitization of the Refugee Crisis: A Foreign Policy Tool in the Context of Greece-Turkey-EU Relations'

The ongoing refugee crisis has developed into a cross-border security issue. Drawing from current scholarly and political debates, my argument is that understanding the issue solely from a humanitarian perspective, although essential, is not sufficient anymore. Hence, further research is needed to, initially, identify its implications on the receiving states' national security and then try to examine how this is intertwined with the states' foreign policy (FP).

The proposed paper explores how Greece and Turkey structure and promote their FP objectives in relation to this crisis. This research questions whether (and to what extent) Greece's and Turkey's response to the refugee crisis has been exploited to achieve gains in their FP. It engages with the challenges and opportunities posed by the crisis in both states' FP in the context of the ongoing contention in their bilateral relations, along with their relations with the EU.

The qualitative research analysis is structured around stakeholder consultation and desk-based research. It utilises the effects of the Syrian refugee crisis on these two states as a case-study, in order to look into the influence of the crisis on their foreign policies and conduct comparative analysis as to the level of success this effort has had to their bilateral relations and their relations with the EU. The empirical focus is on the ways Greece's and Turkey's governments have tackled the crisis; a phenomenon occurring within the economic crisis in the former and the EU accession talks of the later.

This research sheds light into a largely understudied topic, brings about a more insightful understanding of the security challenges the refugee crisis poses to Greece and Turkey as well as contributes to a deeper understanding of the wider dynamics of these implications in their foreign policies on bilateral and international level.

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Julija Sardelic (Liverpool), 'Transit Countries and the 2015/16 Refugee Crisis: Between European Solidarity and National Security'

The International Organization for Migration (IOM) labelled the 2015/16 Refugee Crisis as the largest one in Europe after the Second World War. In the summer of 2015 different factors contributed to a significant divergence of path that the asylum seekers were taking to reach EU, which led to the creation of the Western Balkan Route. One of these factors was the decision of Germany to apply the discretionary clause stated in the Article 17 of the Dublin III Regulation (604/2013/EU). According to this article it decided to examine the asylum application of those third-country nationals whose first point of entry in the EU was not Germany. However, Dublin III Regulation does not de jure define the role of other EU and (non-EU) countries, when one of them applies the discretionary clauses of Article 17. Yet this de facto created an ad hoc cooperation in transit migration between the countries located along the Western Balkan route, which often happened without the application of EU Law. For a certain time period (October 2015-March 2016), post-Yugoslav countries along the Western Balkan route took it upon themselves to create a sort of 'safe passage' for the asylum

seekers to get to what was considered as the most welcoming destination at the time: Germany. The creation of such a passage included quick changes in national legislations as well as transport for asylum seekers provided by the states themselves. On the basis of these events, this paper reconsiders the meaning of transit migration and its implication by using a socio-legal approach to analysis. The paper particularly focuses on how different post-Yugoslav states (The Republic of Macedonia, Serbia, Croatia and Montenegro) applied EU and national legislation in order to 'manage' the Western Balkan route and the passage of more than ten thousands of people on a daily basis. The paper discusses the post-Yugoslav national legislation, which was not created ex nihilo, but particularly appropriated to previous refugee crises these countries faced during the post-Yugoslav wars. It argues that this legislation was a foundation also in the approach towards the 2015/16 refugee crisis. The paper aims to show that with the Western Balkan Route the understanding of transit migration as well as transit countries (as for example offered by Franck Düvell) was to certain extent transformed since also the certain EU Member states and candidate countries became transit countries. It also raises questions whether transit migration should be defined in more details on an EU level and what rights should asylum seekers have in transit. I conclude that the understanding of the transit country was not defined by law, but it was navigated between how different countries understood either national security or European solidarity.

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Daria Davitti (Nottingham), 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"'

This paper examines the current European migration 'crisis' by challenging, from a theoretical and philosophical perspective, the way in which the European Union (EU) has used the increased number of deaths in the Mediterranean as a renewed opportunity to frame recent migration flows as an emergency which, by definition, can only be addressed through the adoption of exceptional measures. The paper engages with the work of Giorgio Agamben on state of exception and (Foucault's) biopolitics to illustrate, first, the need to rethink the way in which borders are defined and used (e.g. externalised) within the context of the European migration 'crisis'. Second, Agamben's work is useful to understand the way in which sovereign states operate, including when it comes to the increased privatisation of migration control. A re-conceptualisation of what moves the externalisation of migration and the rise of private non-state actors in the migration context is crucial to fully understand the legal implications of these phenomena and to interrogate the role of international law within them.

The underlying argument of this paper is that the policies recently adopted by the EU cannot but fail to solve the migration issue they are supposed to address, in that they represent a continuation and, indeed, acceleration of the same policies of externalisation and privatisation of migration control which have characterised EU migration policies for over a decade. The European migration 'crisis', therefore, rather than being caused by sudden events or unforeseen circumstances, is the result of a concerted effort by the EU and its member states to identify, deter and prevent the movement of refugees and migrants towards EU borders. Agamben's work on biopolitics and state of exception is apposite in examining the language of emergency and humanitarianism adopted by the EU in developing and implementing the European Agenda on Migration.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Devyani Prabhat (Bristol), 'Re-evaluating Human Security for Unaccompanied Child Migrants in UK'

This paper is a response to the call for papers in the Critical Perspectives on Security and Migration stream. It seeks to go beyond the migration and security nexus to extend an understanding of human insecurity with wide-ranging concepts such as dignity and capabilities. While national security and its effects on basic freedoms provides an analytical framework into human security it is generally state centric and state focussed in its approach. In the context of torture and indefinite detention in the Guantanamo Bay detention camp, Giorgio Agamben's work on 'bare life' and dignity of human beings provide an alternate entry point into human security. Connecting Agamben's work with Nussbaum's capabilities theory, it is possible to think concretely of a range of human security issues.

This paper attempts to combine Agamben's 'bare life' with Nussbaum's capabilities approach to examine specifically what human security issues arise with respect to unaccompanied asylum seeking minors who are recently arrived in the UK. Neglect, abuse, and trauma are grave concerns, but there are also aspirations and capacities of young people to be considered. The paper asks whether the primary legal statutes, the Children Act 1989 and the Children (Leaving Care) Act 2000 in England and Wales, as well as asylum application and immigration laws, adequately consider the needs of dignity as well as capabilities of children. Immigration concerns could overwhelm approaches to children's security unless there are inbuilt safeguards such as intensive best interests analysis. Finally, it suggests there is scope for harmonising national (section 55 of the Borders Citizenship and Immigration Act 2009) , EU wide (Dublin system), and global standards (UN Convention on the Rights of the Child), to better incorporate approaches to dignity and capabilities in a comprehensive and consistent manner.

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Sanna Mustasaari (Helsinki), "'It is normal for expulsion to interfere with established family life"? The tacit undersides of 'wellbeing' in the legal regulation of families'

The paper focuses on the nexus of law and wellbeing in the regulation of transnational families from the perspective of security and border control. Drawing on previous research on how the regulation of families has in different historical periods been and remains interlinked with nation-building (e.g. van Walsum 2008, Cott 2000), the paper examines, in particular, wellbeing as the main justification of legal interventions into families and suggests that lifting wellbeing as a key normative goal in the legal regulation of families has become one of the key discursive techniques in securitization and framing migrant families as security threats.

The paper draws on analysis of selected cases from the European Court of Human Rights (Nunez v Norway, appl. 55597/09, 28 June 2011; Butt v Norway, appl. 47017/09, 4 December 2012; Berisha v Switzerland, appl. 948/12, 30 July 2013; and Jeunesse v The Netherlands, appl.12738/10, 3 October 2014). Three interlinked undersides or inherent tensions are identified in the ways in which wellbeing is promoted in law that feed into framing migrants as security threats or as morally unworthy and non-deserving subjects. Firstly, law that seeks to promote the wellbeing of families tends to construct a particularly hegemonic relation of belonging between the state and the individual. If this link is severed or unrecognised, it

becomes difficult for the individual to claim protection for her or his private or family life. Secondly, the inherent antagonism between welfarism and rights constructs the equality and autonomy of individuals in majority terms. Thirdly, policies aimed at enhancing the wellbeing of individuals may promote ‘normalized’ ways of life, thus making the distinction between those who deserve and those who do not seem natural and legitimate.

The paper is a draft chapter in an edited volume on the wellbeing of transnational Muslim families (Routledge, 2018).

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Cristiano D’Orsi (Johannesburg), ‘South Africa and Sweden: mutual lessons to learn in the treatment of asylum-seekers and refugees to better securitize the two countries?’

By the end of 2015, in South Africa (population: 51,770,560, 2011 census) we counted 1,096,063 asylum-seekers and 121,645 refugees, this country representing the country in the world with the highest number of asylum-seekers.

In the same period, in Sweden (population: 9,658,301, 2013 census) we counted 157,046 asylum-seekers and 169,520 refugees.

South Africa and Sweden are party of both the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Protocol (1967 New York Protocol): South African since 1996 (both instruments) and Sweden since 1954 (Convention) and 1967 (Protocol).

In addition, both countries are party of regional instruments aiming at the protection of forced displaced persons, for instance, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problem in Africa for South Africa, while Sweden adheres to the main acts adopted in the framework of the European Union.

Prior to November 24, 2015, there were three types of asylum statuses in Sweden: refugee, persons deemed in need of subsidiary protection, and persons in need of other protection. However, on that date, the Swedish Government announced that Sweden would have aligned its asylum policy with that of the rest of the European Union by limiting the number of grounds for asylum to include only refugees and persons in need of subsidiary protection.

Finally, both countries have adopted a domestic law, regulating asylum.

Thus, my presentation will deal with the situation of the protection of asylum-seekers and refugees in South Africa, making a parallel on what it is happening in Sweden to assess whether there is any lesson that both countries can borrow from each other in term of better securitizing themselves.

For instance, given the rising popularity of anti-immigrant political parties throughout Sweden (such as the right-wing Party Sweden Democrats), it is not unlikely that, also in Sweden, we will witness an increase of discrimination against foreigners regardless of their legal status, as it is regularly happens in South Africa. Not by chance, for the ongoing situation in Sweden, has been employed (by both governmental officials and medias) the expression “mass-influx”, referred to the flow of asylum-seekers and refugees in the country. This expression, with the same, not positive, meaning, is a well-known expression also in South Africa.

Not unexpectedly, at the beginning of 2016, the Swedish Government opted to introduce border controls at the Öresund Bridge connecting Sweden with Denmark, to control how many people enter the country. Soon thereafter, the government decided to tighten the country's asylum program by limiting its residence permits to three years and making it more difficult for families to reunite, at the same time making it easier to deport people faster.

As a provisional solution, the Swedish government also adapted its country's asylum law to that of the minimum standards of the EU, the reason of this choice being to have more people apply for asylum in other EU Member States.

In June 2016, several laws passed in Sweden's Parliament. Prior to this, in February 2016, the country's Minister of the Interior announced that between 50 and 60 percent of all asylum-seekers arriving in the country in 2015 would be deported, adding that, in doing so, he expressed the will to cooperate more with other countries, like Germany. That it is similar to what South Africa is doing with Namibia and Botswana, two other countries in Southern Africa that are more "receiver" than "creator" of potential refugees.

Sweden, like South Africa, finds now itself caught between humanitarian tradition, on the one hand, and limited capacities as well as an ambivalent atmosphere among the local population, on the other. Security, for both countries, is becoming an increasing issue, linked to the hospitality and treatment of forced migrants.

Legal refugee status cannot ensure that migrants and refugees are economically and physically secure if they are surrounded by widespread xenophobia and institutional marginalization. Providing incentives for local communities who embrace refugees and migrants perhaps could help crush tensions and secure a greater political following. In this case, the parallel between what is happening in South Africa and in Sweden is evident and it will be interesting to analyze how the two countries are acting facing the same internal unrest.

South Africa's experience offers an example of what happens when states ignore the complex realities of migration by mixing progressive refugee policy with exclusionary immigration practices. Approaching the current influx of forced migrants into both South Africa and Sweden exclusively through the lens of a "refugee crisis" could have the potential to unleash similar unplanned consequences.

In effect, once forced migrants enter the country, they will live and work among its citizens. In this sense, Sweden can be criticized because, for long time, its welfare system made refugees too much self-confident to depend upon the host state without having any real incentives in trying to be self-reliant.

Thus, policies would need to go beyond granting legal status to providing financial and political incentives for local leaders to embrace non-nationals and their economic contributions.

Probably, destination countries, such as South Africa and Sweden should focus their efforts on designing long-term strategies to address the lived realities of mixed migration rather than grasping for short-term solutions. Such an approach, probably, will reduce the risk, for both countries, to become the more and more unsecure.

# Is Equality and Human Rights Law Capable of Tackling 21<sup>st</sup> Century Crises?

NB: all sessions will be held in Percy Building G05

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

David Barrett (Nottingham Trent), 'Economic Inequality, Socio-Economic Rights and a State's Maximum Available Resources'

High levels of economic inequality are of great concern in the twenty-first century. It was traditionally thought that high levels of economic inequality were problematic to the extent that they contributed to poverty. However, a range of researchers have shown that high levels of economic inequality are undesirable in and of themselves. For example, Wilkinson and Pickett illustrate that countries with high levels of economic inequality have a range of social problems including lower levels of trust, higher levels of mental illness and drug use, reduced health and life expectancy, higher teenage birth rates, increased violence and lower levels of educational success. The UK has particularly high levels of economic inequality with Piketty finding that the US was the only developed country with higher levels of economic inequality, with the top 1% of wage earners in the UK receiving 15% of income from salaries and the top 10% of capital holders holding 70% of capital.

Legal scholars are increasingly turning their attention to economic inequality and arguing that legally enforceable socio-economic rights are a means of reducing high levels of economic inequality (e.g. Alston). However, it is not clear that legally enforceable socio-economic rights (such as those in the International Covenant of Economic, Social and Cultural Rights) necessarily do reduce economic inequality. Thus while the realisation of many of the rights in the ICESCR (e.g. the right to housing) will require some redistribution via taxation, this does not have to come from the very richest individuals, many of whom utilise a variety of tax avoidance schemes to avoid contributing their share. Meaning a state that has perfectly realised socio-economic rights could still possess high levels of economic inequality (Moyn).

Consequently, this paper seeks to explore different interpretations of Article 2(1) of the ICESCR (which requires states to take steps 'to the maximum of its available resources') to establish whether it is possible to require states to realise socio-economic rights in a way that would reduce economic inequality, and if so, what this would entail and how it could be measured.

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Karla Perez Portilla (West of Scotland Regional Equality Council), 'The Leveson Inquiry. Report and recommendations in relation to complaints of discrimination made by group representatives.'

Discrimination is a group-based issue and therefore, the legal subject of Anti-discrimination Law (ADL) is not an individual. Any act of discrimination has implications for entire categories of people and in fact it is performed because of the status subordination of such a group category. The legal issues that groups as legal subjects entail are constant challenges for equality rights generally but they also exist in other less explored specific contexts such as in the media, where complaints about demeaning stereotypical representation; biased reporting; and 'lack of diversity', have come from group representatives. The Leveson Inquiry which opened in 2011 in order to investigate the role of the press and police in the wake of the phone-hacking scandal of the now defunct News of the World tabloid, identified a series of issues related to groups as claimants, to the remedies that should follow their complaints, and to the need for power for the press regulator to intervene in cases of allegedly

discriminatory reporting, and in so doing reflect the spirit of equalities legislation [Leveson LJ (2012), An Inquiry into the culture, practices and ethics of the press. Executive summary and summary of recommendations, The Stationary Office, paras. 11, 15 and 38.]. Whilst the Inquiry and its Report only refer to the press, the issues identified and the recommendations that followed need to be further researched and can inform and benefit other forms of media.

This paper, then, analyses the recommendations made as a result of the Leveson Inquiry and links them to the 'equality obligations' of media regulators derived from the Equality Act 2010.

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Ian Turner (University of Central Lancashire), 'Islamism and the terror threat to the UK: does human rights law require the British police to be routinely armed for reasons of security?'

The Human Rights Act 1998 in the UK gives further effect to specific Articles of the European Convention on Human Rights (ECHR), such as the right to life (Article 2) and freedom from torture (Article 3), into United Kingdom law. A typical feature of these unqualified rights is that they oblige states to take 'positive' measures to prevent their violations by third parties. In June 2010, for example, Derrick Bird shot and killed 12 people, as well as injuring a further 11, in and around Whitehaven, Cumbria. After the shooting of Bird's first three victims, the local police had opportunities to stop him but, as the police in Briatin are not routinely armed, they were unable to prevent him escaping. Bird killed a further nine people. This paper explores whether it can be argued that human rights law, and the positive obligation under Article 2 in particular, oblige the UK authorities to routinely arm the police in mainland Britain in, say, the pursuit of human security and public protection? If so, is this a reasonable measure to discharge this positive duty? Such a question is even more telling with the severe terror threat to the UK and its European allies from Islamist groups such as Islamic State in Iraq and the Levant (ISIL).

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Elena Gualco (Bedfordshire), 'The EU and the protection of equality: coping with new realities and facing old shortcomings'

Within the EU, and via its Court of Justice, the principle of equality has been strengthened under different perspectives. First, by affirming that equality shall apply disregarding the absence of a comparable situation (C-149/10, Zoi Chatzi,). Second, by arguing that the list of discriminatory grounds provided by EU law does not restrict the applicability of equality (C-354/13, Kaltoft). Third, by clarifying that individuals can rely on the principle of equality foreseen by the EU also within disputes against other individuals (C-144/04, Mangold, C-555/07, Küçükdeveci, C-441/14, Dansk Industri). These achievements seem to confirm that – within the EU – the protection of equality is constantly ensured and enhanced to tackle the 21st Century challenges.

Nevertheless, this scenario presents at least two shortcomings. First, the virtuous approach of the CJEU indirectly exacerbates the gap between the fields where EU law applies from the areas where it does not. Since at present the EU secondary instruments protecting equality are mainly related to employment and occupation, there are areas of law where the protection of equality is not duly pursued (e.g. the protection against age discrimination with regard to migrant children). Second, the improvement of equality at EU level is linked to its jurisdictional protection. Notwithstanding the commitment of the EU to provide individuals with this right (also foreseen by art. 13 ECHR), its accomplishment is usually frustrated by the economic burden that the access justice entails. Therefore, under the umbrella of EU law, the protection of equality lacks of uniformity both under a substantive and a procedural point of view.

Moving from the remark that a “selective protection of equality” jeopardizes the meaning of equality itself, the proposed paper will assess whether, by way of the enhancement of its “bill of rights” (i.e. the EU Charter of Fundamental Rights) the EU could possibly achieve the goal of ensuring not only an adequate, but also a uniform protection of equality.

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Claire Lougarre (Southampton), 'Is there really a right to sexual and reproductive health in human rights law? Perspectives from the Council of Europe'

Following calls from feminist scholars and women's rights organisations in the 1960s and 1970s, international human rights law became increasingly interested in protecting individuals' sexual and reproductive health. The achievements obtained by the United Nations (UN) regarding women's rights in the 1990s even led those years to be called 'the UN Decade for Women'. During major international conferences held in 1993 and 1994, states declared that women's human rights should be mainstreamed in UN activities; and that the recognition of their reproductive rights and health were essential in that respect. A second wind was then given to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), initially adopted in 1979. Since then, numerous instruments, policies and cases across the globe have enabled awareness and norms to be refined at both the international and regional levels of human rights protection. Therefore, issues such as abortion,

contraception, medically-assisted procreation, sexual orientation and gender identity have become subjects of debates amongst human rights lawyers and not solely philosophers.

However, a trend recently emerged, giving to the topics of sexuality and reproduction an even greater importance in human rights law: that to recognise a stand-alone right to sexual and reproductive health (under an already existing human right to health). In March 2016, the UN Committee on Economic, Social and Cultural Rights, mandated to monitor the implementation of the International Covenant on Economic, Social and Cultural Rights, recognised an independent 'right to sexual and reproductive health' in its General Comment No. 22, as part of the universally recognised right to health. This statement was following a resolution adopted 12 years before by the Parliamentary Assembly of the Council of Europe, in which a right to sexual and reproductive health had already been associated to the human right to health.

Such statements call for the following question to be asked: can a stand-alone right to sexual and reproductive health be protected in practice, through supranational adjudication? More particularly, can human rights bodies give life to this right through their monitoring procedures (and, thus, promote more efficiently women's rights)? The Council of Europe offers particular insights, given the considerable case law developed by the European Court of Human Rights on sexual and reproductive matters, or that of the European Committee of Social Rights with regard to the right to health. Therefore, this article will question the existence of a right to sexual and reproductive health in human rights law, by using perspectives from the Council of Europe.

For this purpose, section 1 of this paper will outline that the compartmentalisation operated by human rights treaties between civil and political rights on one hand, and economic, social and cultural rights on the other, impedes the potential recognition of a right to sexual and reproductive health. More specifically, it will assert that the adjudication of sexual and reproductive matters under rights conceptualised and monitored differently (e.g. right to privacy or right to health) compromises the recognition of a stand-alone right to sexual and reproductive health. Sections 2 and 3, however, will verify whether such a gap can be bridged in practice, through the monitoring procedures of CoE human rights bodies. Section 2 will study the case law of the European Court of Human Rights, a body traditionally mandated to monitor civil and political rights, on human sexuality and reproduction. It will discuss in particular the Court's ability to engage with health considerations and thus, that to give life to an independent right to sexual and reproductive health. Section 3 will then explore the jurisprudence of the European Committee of Social Rights, a body traditionally mandated to monitor economic, social and cultural rights, when sexual and reproductive matters are at stake. It will especially challenge the Committee's capacity to engage with civil and political autonomy considerations and, therefore, to protect a stand-alone right to sexual and reproductive health. Finally, Section 4 of this paper will argue that without any principled understanding of what the right to sexual and reproductive health implies, this right cannot be adequately adjudicated and monitored in the Council of Europe, and more generally, in international human rights law.

In 2014 the European Court of Human Rights (ECtHR) upheld the French Constitutional Court's decision that a ban on the Islamic face veil, could still be justified by reference to, amongst other legitimate aims, the legitimate aim of living together. While many celebrated that the Court no longer accepts the legitimate aim of gender equality as one of the reasons for limiting the right to wear the Islamic veil, others were disappointed that the judgment runs counter to the ECtHR's equality jurisprudence.

This paper considers the representation of veiled women, their right to manifest their religious belief and inclusion in policy in the ECtHR. It will examine the language, content and legal concepts integrated in the face veil cases. Furthermore, it will also draw on the quantitative and qualitative research that has been conducted by researchers across Europe who have evidenced that women are disproportionately affected by such bans and documents the experiences and motives of the women affected.

Drawing from intersectional theory, which argues that identity politics often replicate the exclusion of other groups; this paper will use intersectionality to identify shared assumptions and understandings of 'gender' which may continue to reassert traditional perceptions of women and religion. It concludes that the bans are based on outsider experiences and views and proposes a more inclusive framework for the right to manifest a religious belief using two cases currently pending before the ECtHR: *Belkacemi* and *Oussar v Belgium* and *Dakir v Belgium*.

## Thursday 6<sup>th</sup> April (09:00-10:30)

James Beresford (Leeds), 'Remembering Equality: Enactments of remembering and forgetting in the assembling of the Equality Act 2010'

This paper explores questions of equality and human rights law capability to tackle 21st century crisis through examining the Equality Act 2010's becoming through enactments of remembering. Memory studies has grown exponentially in recent years, its core theoretical principle being that memory is not an automatic reflection on an event but a narrative enacted and re-enacted upon each telling. It is not an arbitrary, automatic process but something with social effects and embedded within power relations. While memory studies has looked to various different facets of the social, this paper expands this focus to the yet researched area of policy and legislation. The Equality Act combined previous anti-discrimination legislation into a single piece of law in the name of simplification and making the practice of anti-discrimination law less complex. Drawing upon qualitative interviews with policy practitioners involved in its construction, the paper will critically interrogate the way in which the apparent need for simplification emerged through how previous legislation is remembered. How are particular laws remembered as being inadequate (needing simplification) and how does this stimulate a conceptual necessity for simplification?

This line of inquiry answers key questions of the stream around equality legislations ability to provide inclusion through looking to how simplification of the previous legal formwork has been shown to erase particular details. As a result of simplification, public authorities, rather than having to pay due regard to disability, gender and race as they were complied to do under the previous legal frameworks, were permitted to take action in a limited set of priority areas as they may lack the resources to address every area where action to address discrimination is necessary. How particular legislation is remembered will therefore be linked to how different safeguarding are avoided in the name of 'cutting red tape'.

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Anne Smith (Transitional Justice Institute), 'Tackling 21st challenges: Brexit, Repeal of the Human Rights Act and the re-emergence of the Northern Ireland Bill of Rights'

Brexit and the UK's government's plan to repeal the Human Rights Act and to withdraw from the European Convention on Human Rights are some of the biggest challenges facing 21st century society. At a time when there is so much uncertainty about the protection and safeguarding of rights with a real risk of lesser rights for fewer people in the UK, this paper posits that equality and human rights law in the form of a Bill of Rights can address the uncertainties arising from these challenges. Drawing upon the experience of Northern Ireland, this paper argues that despite the complexities arising from these potentially far-reaching developments, more than ever is the need for the re-emergence of a discussion on how best to take forward the outstanding issue of a Northern Ireland Bill of Rights. Using empirical data from a previous and a current research project, this paper provides an alternative to progress this issue as a means of tackling these 21st century crises.

Alice Taylor (Australian National University), 'Equality Law and the Judiciary in the 21st Century'

The related concepts of equality and discrimination are notoriously difficult to define. Both concepts necessarily require moral judgements to be made about the similarities and differences between people and circumstances. Legislation prohibiting discrimination on the grounds of specific characteristics therefore requires judges to engage in moral reasoning, to determine whether or not a particular treatment of an individual constitutes discrimination and warrants legal sanction. Quite understandably, judges are reticent to engage in such moral reasoning. This paper will argue that the extent to which judges can and do engage in such moral reasoning is dependant on the judicial culture that surrounds them. That judicial culture is informed by constitutional, historical, political and personal factors. The question of whether cultural factors inform judicial decision-making has been considered and answered in the affirmative since the mid-20th century. This paper seeks to examine how this culture influences judging by allowing for or limiting different forms of judicial reasoning to develop. This paper will consider this question by conducting a comparison of the case law from the Supreme Court of the United Kingdom and the High Court of Australia on questions of equality and anti-discrimination law. This paper will highlight that the jurisprudence that has developed in the respective jurisdictions may not be dependant on legislative wording, but from a judicial culture from which distinctive styles of legal reasoning arise. It will question whether, given the continued problematic relationship between law and morality, law in its traditional sense is the best tool to confront problems of equality and discrimination in the 21st century.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Gulara Guliyeva (Birmingham), 'The Impact of European Court of Human Rights' jurisprudence concerning property rights on the rights of IDPs in Ukraine'

In February 2014, Russian Federation began a military operation to annex Ukraine's Autonomous Republic of Crimea. Following a swift occupation, on 18 March 2014, President Putin signed a bill declaring reunification of Russia with the Crimean peninsula. Subsequently, in April 2014, Russian militants and pro-Russian separatist groups occupied government buildings in Donbas and Luhansk, and proclaimed themselves to be independent of Ukraine. The war that ensued on Ukraine's eastern borderlands led to the death of at least 9,300 people, with over 21,500 injured. Around 1,7 million people from Crimea and eastern Ukraine fled their homes and registered as internally displaced people (IDPs) in other parts of Ukraine. Not only these people lost their property, but also they experienced a number of difficulties associated with the receipt of pensions and social allowances. Currently, there are over 3,500 individual applications from Ukraine pending before the European Court of Human Rights (ECtHR).

This paper focuses on property rights as interpreted by the European Court of Human Rights, and their potential impact on the rights of IDPs in Ukraine. It is noteworthy that the term 'property' has autonomous interpretation under the ECHR, which includes not only movable objects and real estate, but also welfare entitlements. Part 1 of the paper analyses the case law of the ECtHR in relation to the loss of property of IDPs who had to flee their homes, and Part 2 deals with the jurisprudence on pensions and other welfare entitlements. Part 3 assesses how the ECtHR's case law is likely to impact the right of Ukrainian IDPs to enjoy their property.

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Ben Hudson (Bristol), 'Realising IDP Return: Challenges in Law and Implementation'

Today we are experiencing the greatest crisis of internal displacement the world has ever known. As of the end of 2015, a total of 40.8 million persons were recorded as internally displaced due to conflict and violence alone, the highest end of year figure ever recorded. Add to this the 19.2 million new disaster-induced displacements in 2015, and the total global IDP figure now far exceeds that of refugees. For those millions of IDPs who find themselves in protracted situations, displacement has become a defining feature of their lives and any foreseeable prospect of return seemingly elusive.

Despite numerous high-level proclamations of an IDP 'right to return', this paper will argue that current international human rights frameworks inadequately protect IDPs' right to return to their homes or places of habitual residence. The 1998 UN Guiding Principles on Internal Displacement, although designed to address the failings of existing law to protect the human rights of the internally displaced, fails itself as a "soft law" instrument to unequivocally assert such a right. This omission has profoundly detrimental consequences for the protection of IDPs' freedom of movement and the securing of durable solutions. It also leaves IDPs without effective recourse to a 'right to return' that can be used to challenge their displacement, and sustains an increasingly unjustifiable gulf in protection between those subject to involuntary movement who have crossed an internationally-recognised border and those who have not.

The present crisis demands that an explicit, comprehensive, legal right to return is realised in international law. However, to do so demands critically engaging and resolving a series of fundamental legal, conceptual and practical challenges, all of which, this paper will show, not only question current approaches to securing IDP return but also test the very foundations that underpin our understanding of internal displacement.

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Julia Bradshaw (Liverpool John Moores), 'Finding the Humanity in Human Rights Law: we need to talk about Statelessness'

In the late 1940s and early 1950s modern Human Rights law emerged from a collective desire to avoid a Third World War: its effect was to elevate the status of the individual so that it that penetrated the international global conscience - with that recognition came the need for a robust set of enforceable rights. As a result universal and regional human rights instruments were developed, proclaiming the significance of human life and declaring certain rights to be inviolable, while others could only be restricted in limited circumstances. Following that initial profound pronouncement, a second issue of considerable gravity, Statelessness, became the focus of international attention, both in terms of academic commentary and the implementation of legal instruments designed to prevent that status from arising. Again, action has been taken with that goal in mind at a universal and regional level, with the European Convention on Nationality of 1997 indicating that this continues to be a persistent problem.

Nonetheless, in more than 70 years of trying, the problem of statelessness has not been eradicated. In fact, the types of statelessness that can be experienced have multiplied; no longer restricted to a purely legal notion (*de jure* statelessness), it can also be experienced in a social context (*de facto* statelessness) - both have a crippling effect on the individual, in social, political and economic dimensions. The end result of statelessness, of whichever kind, is that the special quality of humanity is either diminished or refuted entirely.

Europe is again experiencing a refugee crisis, and the changing shades of emotional and political response to human beings' suffering will be investigated in this paper, documenting the difficulties that the stateless experience in both asserting their humanity and accessing human rights protections that should, surely, have been designed to assist them in such circumstances. This paper will also consider the work of Hannah Arendt on statelessness, in addition to considering the fitness for purpose of human rights legislation, both regionally and internationally, in combatting a status that is never voluntarily acquired. It will consider the means by which stateless groups and individuals can attempt to receive recognition as legal entities, with reference to specific case studies. When recognising that the first requirement to be satisfied when seeking to enforce human rights is the recognition of one's status as a human, this paper will attempt to answer the question 'where is the humanity in human rights law'?

## Thursday 6<sup>th</sup> April (14:00-15:30)

Richard Poole (Newcastle), 'Expressive Identity as a Feminist Ethic: A New Model of Legitimacy Through Vulnerability Theory'

This paper argues that a feminist critique of human rights law drawing from theories of precarity\* and vulnerability\* provides an ethics of resistance to the model of politico-legal legitimacy which privileges a harmful gendered dynamic of productivity and participation, contributing to crises in ethics of social inclusion.

Building a model of social interaction from the dynamics of signalling behaviours,\* we find that politico-legal legitimacy depends upon a gendered conception of 'instrumental identity.' Linking gender conformity with 'in-group' behaviours, 'instrumental identity' privileges identity performance which contributes to an economic-growth model of the perception of human value.

A feminist ethics of 'expressive identity' challenges politico-legal legitimacy founded on the economic value of humans, and locates human value in the free expression of self. Vulnerability theory can be used to advocate re-focusing human rights law and policies of work and welfare towards prioritising caring in the private sphere.\* Distancing perceptions of human value from economic productivity creates conceptual space for a new model of legitimacy based in an ethics of equality and encouraging political participation through the free expression of identity.

\*Judith Butler, *Frames of War: When Is Life Grievable?*, (London: Verso. 2010)

\*Martha A. Fineman, "The Vulnerable Subject and the Responsive State" in *Emory Law Journal*, Vol. 60 No. 2 (2010-2011); Jonathan Herring, *Caring and the Law*, (London: Hart Publishing.2013)

\*Eric A. Posner, "Symbols, Signals, and Social Norms in Politics and the Law" in *The Journal of Legal Studies*, Vol. XXVII (June 1998); Brian Druzin, "Law, Selfishness, and Signals: An Expansion of Posner's Signalling Theory of Social Norms" in *Canadian Journal of Law and Jurisprudence*, Vol. XXIV No. 1 (January 2011)

\*Susan Bisom-Rapp and Malcolm Sargeant, *Lifetime Disadvantage, Discrimination and the Gendered Workforce*, (Cambridge: Cambridge University Press. 2016)

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Felicity Belton (Glasgow), 'Forced marriage: a more effective approach within international human rights law'

Current measures in both international and domestic law do not successfully address the human rights issues involved in forced marriage. In international law, forced marriage is frequently not expressly stated within provisions, allowing avoidance of obligations. When it is expressly addressed, forced marriage provisions concentrate solely on criminalisation. This has proved difficult to prosecute domestically. Existing provisions are gender-specific and do not address male victims. Recognition of the intersectionality of victims is similarly limited to

obvious stereotypes. All victims and potential victims of forced marriage are insufficiently provided for as there is no cohesive support process outlined.

Amendment of the definition of 'trafficking' to include forced marriage, in the Palermo Protocol, and Council of Europe Convention on Action against Trafficking in Human Beings, generates possible solutions. Compliance would be increased through the Special Rapporteur and GRETA processes. Securing domestic convictions would be simplified because 'exploitation involved' would replace 'consent' as the material element. Preparatory events, like transportation, would also become illegal. Forced marriage victims and potential victims would benefit from the existing and comprehensive support available under both instruments. Finally, males and females would be able to claim protection from forced marriage, as both instruments are gender neutral.

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Christel Querton (Newcastle), 'The Role of the European Court of Human Rights in the protection of women fleeing gender-based violence in their home country'

More than one million persons crossed the Mediterranean Sea in 2015 into the European Union ('EU') leading many to describe the situation as the worst refugee crisis in Europe since the Second World War. The role of International Human Rights Law in ensuring the protection of asylum seekers from return to countries where they would face prohibited treatment is consequently of particular interest. In 2015, approximately 27.7% of persons claiming asylum in the EU were women and girls and reports suggest most flee war, armed conflict, persecution and sexual or gender-based violence. In the context of increasing reliance by asylum seekers and refugees on the European Court of Human Rights ('the Court') as a protection mechanism against return to ill-treatment, torture and persecution, examination of the Court's approach is essential.

Adopting a gender analysis based on feminist legal theory, this paper will explore the case law of the Court relating to gender-based violence and discrimination against women. Using a comparative approach, the paper will analyse how principles and concepts developed in 'domestic' cases are applied in 'expulsion' cases, in order to query the impact of the Court as a mechanism for the effective protection of women seeking refuge in Europe.

This paper will consider the extent to which International Human Rights Law as interpreted by the Court responds to the international protection needs of those at risk of gender-based violence. It will compare how the principles regarding the prohibition of gender-based violence and discrimination against women developed by the Court in 'domestic' cases are applied to 'expulsion' cases where the breach of Article 3 ECHR is feared as a result of treatment in the receiving country. Protection against gender-based violence from a 'male network' and the Court's reliance on this concept in 'expulsion' cases will be explored in particular.

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Vikki Turbine (Glasgow), 'Can "Pussy grab back?": comparing women's engagements with the project of women's human rights in the UK and Russia'

Pussy Riot's 'Make America Great Again' - released ahead of the US Presidential election in November 2016 - starkly highlighted how women's human rights are contingent and contested in both post-Soviet authoritarian spaces and advanced democracies alike. This paper takes up this comparative perspective to analyse what is happening to the project of women's human rights and local articulations of women's rights when universal human rights and earlier commitments to gender equality are under attack – globally and locally. The paper compares and contrasts findings from 2 projects: observations from a workshop conducted with young women living in Scotland in November 2016 - exploring views of women's human rights in Russia and the UK - and qualitative interviews with women living in Russia conducted over the past decade asking about the meaning of women's human rights in their daily lives. Building on understandings of women's human rights as existing via processes of vernacularisation (Engle Merry), the paper acknowledges that how, when and why women engage with women's human rights will differ. However, it turns attention to whether the current global 'crisis' of human rights and attack on women's rights offers a moment for translation across clearly distinct political, social and economic contexts with differing scales of rights violations. The paper suggests there are resonances when we look at women's everyday experiences of gendered harassment and violence – but questions whether this is this enough for 'Pussy to grab back'.

# Exploring Legal Borderlands

NB: all sessions will be held in Herschel Training Room 2

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Mark Haskew (Oxford), 'Caught up with Libor: complicating ideas of law in global finance'

In the wake of the financial crisis, findings of deliberate misconduct affecting the setting of Libor, a daily interest rate used in the pricing of financial products from mortgage loans to complex derivatives, triggered a fresh crisis of confidence in global finance. The conduct of the rate-setting process, which relies on rates submitted by individual banks to calculate an average output, was found to have been routinely influenced by bias and self-interest. In retrospect, a deficit is revealed between the real (the actual rate) and the ideal (what an influence-free rate ought to look like) which demands to be accounted for, whether by way of morality, culture, governance, integrity – or indeed law. Understandings of Libor in legal judgments, rule-making procedures, enforcement actions and prosecutions engage the premise of a normative deficit by constituting finance as a distinct social domain liable to produce its own norms. At the same time law is constituted as a system of rules with a stable normative substrate that makes it uniquely capable of mediating between domains. On closer inspection, however, the function and capacities of 'law' here show striking resemblances to those attributed to Libor, summarised in the concept of the 'benchmark'. This paper attends to this convergence and suggests that the notion of the benchmark complicates the post-crisis account by highlighting the latter's normative underpinnings. On one hand it points to a law-like complex in global finance whose continued functioning and stability is the overriding concern of the post-crisis discourse. On the other hand the benchmark cannot easily be reduced to either rules or norms, and invokes a disparate set of techniques of quantification, regimes of value, expert knowledges, and power relations.

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Naomi Creutzfeldt (Westminster) and Petra Mahy (SOAS), 'Informality and the Media in Consumer Protection in Indonesia and Turkey'

This paper reports on the initial results of a study aimed at discovering the extent to which the media (both traditional and new) has played a role in the informal mediation and resolution of consumer complaints in emerging economies. Using a comparative approach focused on Indonesia and Turkey, we outline the formal legal and institutional mechanisms available to consumers in these countries, and then present empirical evidence of consumers' use of newspaper letters to the editor and Twitter to complain. In both countries, we find substantial use of the media (and its reputational sanctioning effects) by consumers to resolve disputes publicly. This appears to be a reaction to inadequacies in the formal legal processes, but also often gives consumers quick and self-managed resolution of their claims. We reflect on the implications of this research for planning the development of consumer protection systems in emerging economies, as well as its potential for advancing theoretical understanding of the 'borderlands' between formal and informal dispute resolution.

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Eleanor Pritchard (Queen Mary University of London), 'The use of comparisons in a Legal Borderland: nation-building through comparative thinking about law by Albanians in Kosovo'

Since the late nineteenth century, ideas about law, both Albanian and 'other', have played significant parts in the development of a sense of 'Albanian-ness' and remain central to the ongoing construction of the nation. In this paper, I develop my earlier analysis of comparative thinking around the Kanun of Leke Dekagjin, an early twentieth century legal code rooted in northern Albanian customary practices, to explore comparative thinking around the Pajtimi i Gjaqeve (Movement for the Conciliation of Blood Feuds), a late twentieth century dispute conciliation movement. I look at this from two perspectives: comparative thinking in the work of the Movement, and comparative thinking by contemporary writers about the Movement. Through these perspectives, we gain a more nuanced understanding of the socio-legal context of the Pajtimi i Gjaqeve and its contemporary commemoration than is reflected in the existing literature. We can also glimpse the complex position it occupies in relation to ideas of nation.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Jane Rooney (Bristol) and Alan Greene (Durham), 'Counter-Terrorism in New Legal Borderlands: Prosecuting Terrorist Offences beyond the State'

This paper explores the extent to which the 'global' nature of terrorism, transcending across states and forging new legal borderlands, poses both challenges— and opportunities— for governments.

The UK's definition of terrorism in section 1 of the Terrorism Act 2000 makes no distinction between 'terrorist' and 'freedom fighter'. This is so, notwithstanding that the British Government clearly makes such a distinction regarding the armed groups it militarily, financially, and politically supports in armed conflicts. This problem is further compounded in light of the estimated 30,000 overseas fighters in Syria who are engaged in armed conflict with, and against, various other armed groupings and government forces.

Out of 350 'jihadists' that are reported to have returned to the UK having engaged in terrorist activities in Iraq and Syria only 35 cases involving 54 defendants have been prosecuted under the Terrorism Act 2000. In addition, British citizens fighting for other armed groups may, under the section 1 definition of terrorism, be liable for prosecution too if their actions were directed against the government of the state in which they were fighting. In deciding whether to prosecute, the Crown Prosecution Service asks whether there is sufficient evidence and whether it is in the public interest. When evidence suggests that the UK security or intelligence agencies supported the alleged terrorist activity, prosecution is discontinued. Consequently, although the UK makes no legal distinction between terrorist and freedom fighter, politically it does. Moreover, the increasing so-called 'global' nature of terrorism, creating these new legal borderlands, is making these distinctions more evident than ever.

By mapping the political and legal inconsistencies evident in the UK definition of terrorism, this paper will then apply these concerns to legal attempts, both domestic and international, to police these new legal borderlands created by terrorism. Arguments such as favouring the extra-territorial applicability of counter-terrorist legislation, the prosecution of terrorist offences under universal jurisdiction in international law, and the quest for a definition of terrorism in international law will be questioned. Ultimately, this paper takes a sceptical position towards the concept of terrorism, imagining whether and how the reality of prosecuting 'terrorist offences' could be defended or articulated without 'terrorism'.

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Olga Pleshkova (Birmingham), 'Shadow play: The Changing Concept of Human Rights in the Russian Political and Academic Discourse'

Despite systemic human rights abuse, the language of rights had permeated the Soviet public discourse. Social and economic rights, including the right to housing, health and employment rights were hailed as the major achievements of the socialist system, granted and protected by the state.

Russian accession to the European Convention on Human Rights in 1998 resulted in increased emphasis on civil and political rights. The number of individual applications to the European Court rose dramatically leading to gradually emerging public confidence in the European Court

of Human Rights. However, this initial enthusiasm for human rights proved to be short-lived. In 2015, the Russian parliament passed the law allowing the Russian Constitutional Court to overrule the judgments of the European Court to protect the 'national interests of the country'.

At the same time, in contemporary Russian political and academic discourse human rights are increasingly being re-conceptualized as non-legal norms falling into the grey area between legal requirements and moral claims.

Using the data obtained from interviews and focus groups in the course of longitudinal study spanning seven years from 2007 to 2014, and a discourse analysis of national policy documents and leading Russian academic texts, the paper charts the transformation of the idea of human rights in the public imagination and in the official rhetoric. It considers how the human rights debate is watered down and re-appropriated by the state through instrumental use of historic references, over-reliance on the language of morality and re-framing human rights as predominately social and economic rights.

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Liz Roddis (BPP), 'Exploring Legal Borderlands: Empirical and Interdisciplinary Approaches'

The use of drones is rapidly increasing and the law is struggling to keep up.

The private ownership of drones is growing very quickly, and technological advances mean that we are at the threshold of the wider commercial exploitation of drones. Drones will increasingly become a feature of our landscape.

As well as exciting commercial and technological opportunities, the private and commercial use and abuse of drones raises multiple challenges across several legal borders, including public safety, privacy, nuisance, and trespass, and European, UK and local government regulation. Increasingly elderly case law is being stretched to cover technology not imagined at the time the law was decided.

What are the limits of private ownership of drones and how can these be enforced to ensure that an individual's rights are not infringed? Should drones in private ownership be treated like cars, and registered and insured? Do the current regulations ensure the safety and privacy of adjoining owners?

The Department of Transport's consultation (Unlocking the UK's High Tech Economy: Consultation on the Safe Use of Drones in the UK) makes it clear that the government is looking at ways to ensure that the right conditions for the emergence and growth of drone technology.

This paper will examine the current law relating to drones, and the grey areas that now exist between established case law and current regulation, particularly the law relating to privacy, trespass and nuisance. The paper will also examine the government's proposals for further regulation of drones, and whether this will go far enough to address the challenges faced by competing commercial and private interests.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Paige Isaacson (University College London), 'Aid, Anarchy and Aspirations: conceptualizing an alternative Calais government'

The migrant camp in the French port city of Calais, known ubiquitously as “the Jungle,” was a complex, liminal space between France, a Schengen signatory country and the UK, a non-signatory country. Responding to the existence of the camp was a myriad of individuals and organizations such as the anarchist group No Borders and various humanitarian organizations and NGOs such as Help Refugees, L’auberge des Migrants, the Refugee Rights Data Project and MapFugees. The guiding ontological imaginations of actors in the Jungle were often radically different and, accordingly, manifested in operationalizations of territoriality where, following Sack’s (1983) definition, one actor attempts to control another by exerting control over a geographical area. In accordance with Agnew’s (2005) conceptualization of sovereignty regimes, I argue that the synthesis of governmental projects mobilized by humanitarian organizations and NGOs and diffuse practices of territoriality came to constitute an alternative “government” in Calais which served to control the movement of bodies in space both physically and, at times, metaphorically. Though the Calais “Jungle” has been dismantled in its entirety since this paper was completed, the conclusions drawn may still be highly relevant to other liminal migrant spaces and may be useful to migration scholars, activists, NGOs and policymakers.

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Anna Pratt (York), 'Shiprider, Jurisdiction and the Re-Crafting of Canada-US Maritime Border Control in Akwesasne Mohawk Territory'

Jurisdiction is a thorny preoccupation for Canadian and American law enforcement particularly in the maritime environment. This paper examines the recently formalized Canada-U.S. Shiprider program, a cross-border maritime enforcement program that effectively removes the international maritime boundary as a barrier to law enforcement so that a Shiprider vessel can now pursue and interdict vessels with ‘seamless continuity’ across the international maritime border. This radical reconfiguration of jurisdiction disconnects it from sovereign territory and redeploys it as a portable resource that travels through space and time with the 'ship-rider,' governing borders as fluid as the waters being navigated. This is particularly significant in light of Shiprider's operations in unceded Coast Salish and Akwesasne Mohawk territories where bi-national border enforcement strategies, shaped by the crime-security nexus, transect indigenous border nations. Drawing from a variety of documentary legal and governmental sources, interviews with Canadian and American maritime enforcement officials and with local community members, this paper examines Shiprider’s operations and effects as a new step in the ‘jurisdictional tango’ that is performed in the complicated land and marinescapes of Akwesasne Mohawk Territory where local communities continue to contest the divisions imposed by settler boundaries.

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Simon Lavis (The Open University), 'Interrogating the Borderland between Law and Non-Law in the Third Reich'

Borderlands, legal and otherwise, are central to the academic construction of Nazi Germany and the Holocaust. The temporal border-points at 1933, 1939 and 1945; the phenomenological border between the ordinary lives of the state and individuals within it and the mass atrocity of the Holocaust; and the border between law and non-law. It has often and long been claimed that the Third Reich did not have a legal system to speak of; that our concept of law has virtually nothing in common with the Nazi approach to government, authority and repression. More recent and nuanced versions of this position - such as that presented by Kristin Rundle - still maintain that the Holocaust was a largely or entirely non-lawful enterprise, notwithstanding the acknowledged presence of law as a tool for persecution in the earlier years of the regime. This claim may be viewed as unsatisfactory empirically and theoretically, as is demonstrated in the work of David Fraser, because of the evident uses of law in the extermination of the Jews and others, and the denial it entails of any complicity between law since 1945 and 'Nazi law'. It also guards against us considering how, when and where law becomes non-law, and how the legal works with the extra-legal in a legal system, particularly a genocidal one.

So where did the border between law and non-law lie in the Third Reich, and what can the Nazi experience tell us about this legal borderland more generally? This paper will analyse particular examples of 'Nazi laws' - laws from Nazi Germany - and other Nazi actions and instruments to consider empirically how law and non-law related to and intersected with one another in the Third Reich, and the implications of this for law's enduring potential for complicity in the implementation of state ideology.



# Family Law and Policy

NB: all sessions will be held in Barbara Strang B32

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Adrienne Barnett (Exeter), 'Reimagining Family Law and Justice for a Digital Age'

This paper will explore the changing family law and justice practices in an increasingly digital age and consider what is being gained and lost where online information is replacing offline services.

Drawing on a pilot project looking at 'Delegalization and DIY Family Justice' and an ESRC Impact Acceleration Award study Creating Paths to Family Justice working with policy makers and practitioners, it will consider how far online divorce, mediation and other avenues of support are becoming integral to family dispute resolution and assess their impact on the values associated with family law, the need for legal expertise and the delivery of justice in a traditionally discretionary area of law.

Finally, it will reflect on how family law and justice might be reimagined to use digital opportunities creatively in the resolution of private family law issues.

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Rachel Treloar (Simon Fraser University), 'High-Conflict Divorce Involving Children: Parents Meaning Making and Agency'

Despite a proliferation of research, policies, and interventions aimed at mitigating inter-parental conflict after separation, approximately 10 percent of divorcing parents contend with ongoing legal disputes. This paper draws on the author's recently completed doctoral study which explored how mothers and fathers who have experienced a high-conflict divorce process make meaning of and navigate the experience as well as how positive change can occur. This interdisciplinary and qualitative study employed in-depth interviews with 25 parents residing in British Columbia, Canada. The first part of the paper provides a brief overview of the study findings, one of which is that positive personal change occurs over time when supported with personal, social, and material resources that address a parent's particular needs and challenges. The second part of the paper critically explores this theme of positive change over time. Drawing on relational autonomy and Fricker's epistemic injustice, this paper argues that the dominant discourses upon which parents draw to make sense of the high-conflict divorce process and their personal experiences are socially constructed and embedded in broader power relations, especially in gender relations and encounters with experts, and further promulgated through neoliberal conceptions of autonomy and choice. This often results in parents not feeling heard, their concerns going unaddressed, and a lack of access to needed services. Nevertheless, individuals change, make sense of, and respond to their circumstances across the life course, thereby exercising agency. The paper concludes that policies and practices that provide the supports and resources identified by parents as helpful would promote agency, autonomy, and resilience in the face of difficult circumstances, facilitating personal transformation and family flourishing.

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Tina Haux and Ruth Cain (Kent), 'Post-separation contact patterns'

There is a lack of current (quantitative) research about post-separation contact and parenting in the UK. The relatively high number of contact breakdown, usually quoted as two out of five children having lost contact with their father two years after separation (see Poole et al. 2013), is of concern to policy-makers, law professionals, lobbying organisations and parents involved. The concern is partly based on the assumption that contact breakdown is irretrievable.

Existing research has established the main factors associated with contact breakdown such as re-partnering and new children coming into either household. However, none of the UK based studies have examined contact patterns more closely over time. Research for the US by (Cheadle et al. 2010) suggest that there are three distinct contact patterns after separation: a steady state, gradual decline and higher and consistent engagement. In this paper, we are aiming to replicate that analysis for the UK by carrying out sequence analysis to identify different patterns for contact post separation as well as its drivers. Existing analysis of data from Millennium Cohort Study (Haux and Platt 2015) suggests that contact breakdown is temporary for a sub-group of fathers. Therefore, the aim of this paper is to analyse contact patterns over time and their drivers with particular reference to the drivers for permanent loss of contact. Building on Haux and Platt (2015) the analysis is based on the Millennium Cohort Study, a nationally representative cohort study of 14,000 families with a child born in 2000. The findings of the paper have the potential to inform policy and service provision for separated families in this emotionally charged field.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Ellen Gordon-Bouvier (Canterbury Christ Church), 'Cohabitation and the vulnerable carer: building resilience'

I make two claims in my paper. Firstly, individuals who care for dependents in the context of an unmarried relationship become 'relationally vulnerable', meaning that they are at risk of economic hardship on relationship breakdown. Relational vulnerability occurs as a result of a legal system and a society which is based on an ideal of autonomy and self-sufficiency and which structures intimate relationships in an unequal manner. Caring is confined to the 'private sphere' and is something thought to be beyond legal regulation. The judiciary has struggled to fit unpaid care into the property law framework and inconsistency has ensued. Certain forms of care have been deemed to be 'natural' and incapable of generating a proprietary interest (e.g. care performed by wives or mothers). In other cases, the court has attempted to depict caregiving as a bargain in order to justify financial recompense (e.g. in proprietary estoppel cases).

My second claim is that the state (through the law) has an obligation to address relational vulnerability and to equip vulnerable individuals with resilience. Drawing on Jennifer Nedelsky's theory of relationality, I argue that this should be done through fostering relationships based on equality and autonomy (understood in a relational sense). In the cohabitation context, this means that parties should have equal opportunities to acquire property rights in the home. Currently, the law upholds relationships of property that are based on economic contributions. Other forms of connections to the space of the home are ignored. 'Property' is presented as fixed and incapable of reconfiguration, preventing reform in this area. I suggest that this is in fact a fallacy that simply seeks to uphold the liberal ideal of economic self-sufficiency. Reform can only be achieved when this is realised and a more equal approach is taken.

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Alan Brown (Abertay), 'Images of "Family" within the Law: The Continuing Significance of the Traditional Nuclear Family'

This paper draws on recently completed doctoral research and considers whether there is an identifiable image or model of 'family' which underpins the diversity of legal regulation of families and family life.

In 1992 Susan Boyd argued that the 'normal family' of law, 'is heterosexual, nuclear, generally white and middle class, and usually involves a dependent role for the women who has more responsibility for home and childcare than the man, and who preferably remains outside the workforce.' In the 25 years since then there have been further demographic changes in UK society, corresponding shifts in cultural and familial practices, as well as substantial family law reform (e.g. Adoption Act 2002, Civil Partnership Act 2004, Human Fertilisation and Embryology Act 2008, Marriage (Same Sex) Couples Act 2014), which has seemingly reflected a more 'progressive' understanding of 'family'.

This paper explores the extent to which the underlying image(s) of 'family' within the law has changed, suggesting that while competing images of 'family' are now evident within legal

understanding (e.g. understandings centred upon 'care' and models based on individual autonomy and intention) the traditional, 'nuclear' family continues to represent the idealised image of 'family' within legal understanding. Moreover, this paper suggests that the continuing significance of this traditional model of 'family' sits uneasily against the diversity and complexity of family forms, structures and practices in contemporary UK society, with problematic consequences for families, family law and family law reform.

As such, this paper concludes by considering the possibilities offered by reconceptualising the legal understanding of 'family' around alternative and potentially 'radical' models of 'family'.

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Daniel Monk (Birkbeck), 'Ultra-Orthodox Judaism/Transgender: who's the "deviant" parent and what would Helen Reece think?'

In *J v B (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4 Mr Justice Peter Jackson was faced with a dilemma: whether to allow contact between a trans woman/father and her five children who lived with their mother in an ultra-orthodox Jewish community. Describing the case as a 'collision of two unconnecting worlds' the judge - 'with real regret, knowing the pain that it must cause' - refused the application for direct contact.

The case, which attracted considerable media attention, raises difficult questions that highlight key tensions within contemporary society and that go to the heart of long-standing legal and political debates.

In this paper I will attempt to unravel some of the conflicts underlying the case and the responses to it in the media. In using the concept of the 'deviant' parent, I draw on the late Helen Reece's last and posthumously published article 'Was there, is there and should there be a presumption against deviant parents?' (2017) *Child and Family Law Quarterly* (Issue 1, in press).

## Thursday 6<sup>th</sup> April (09:00-10:30)

Cynthia Bowman (Cornell), 'Is LAT (Living Apart Together) a New Family Form of Which the Law Should Take Account?'

My paper concerns committed couples who maintain separate residences, or LATs. While there are many studies of this living arrangement in the UK and Europe, it has hardly been studied at all in the United States. I therefore borrowed the questions on this subject from the British Social Attitudes Survey and submitted them to the Cornell University Survey Research Institute for inclusion in the 2016 Empire State Survey as well as the National Survey, and will be presenting the results of the latter for the first time. I supplemented this research with qualitative interviews of LAT couples in Ithaca, NY and New York City. My ultimate question was whether the law should take account of LATs, giving them any sort of legal recognition or not. My research showed that U.S. courts already do in fact make decisions about LATs, in connection with cases about cohabitation contracts (so-called "palimony" suits) and cases about termination of alimony when an ex-spouse cohabits. I began with a presumption that LATs deserve no legal recognition at all because they are almost universally economically independent of one another. However, after reviewing literature proposing standards for whether and when to recognize various types of adult affiliations, I concluded that LATs should be given a limited number of rights, such as to hospital visitation, family leave, and other privileges of marriage that pertain not to economic interdependence but to facilitating the couple's ability to care for one another.

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Sue Westwood (Keele), 'Friends as Family - Friendship Carers and Succession Law (England and Wales): A Critical Care Perspective'

This paper considers the current lack of recognition of friendship carers in succession law in England and Wales, what this has to say about the norms and normativities which underpin the construction of families in inheritance law, and about the enduring question of the place of care, especially informal care, in law and society. Friends are under-recognised in many areas of UK law, including inheritance, intestacy and other succession laws (e.g. tenancy rights), as well as a range of health and social care laws, policy and provision. Yet for many older people, particularly lesbian, gay, bisexual, trans\* and queer (LGBT\*Q) older people, friends may be the primary providers of informal care and support in later life. In many cases such friends may be considered 'family'. With increasing diversification of kinship in postmodern 'families' law is often playing a game of catch-up and at times no longer accurately reflects this diversification. Despite the increasing significance of friendship, much of family law is still centred on biological & nuclear family (i.e. conjugal couple and children) forms. The place of care in law and society has also been the subject of long-standing critique, particularly among feminist care ethicists. With the increasing privatisation and commodification of care there is ever-greater reliance by the state upon informal carers. While the under-funding of care by the state has been the focus of considerable debate in relation to public law, there has been, very little consideration given in terms of private law. Brian Sloan has argued for the recognition of informal carers in succession law. I extend his analysis to consider the place of friendship carers in succession law. I propose that increased recognition could, in turn, contribute to a destabilisation of law's privileging of the

biological/filial family and the conjugal couple, as well as its traditional marginalisation of informal care.

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Kathy Grffiths (Cardiff), 'Comparing form and function-based approaches to family relationship recognition'

This paper is the result of a theoretical comparative study of form and function-based systems of family relationship recognition in England and Wales and Australia.

Martha Fineman noted in 2004 (*The Autonomy Myth*) that relationships between caretakers and dependents should displace marriage at the centre of family law, and Jonathan Herring later made similar comments that caring relationships should displace sexual relationships as family law's focus (see for example *Caring and the Law*, 2013). While no such reforms have been forthcoming in England and Wales, various attempts to recognise caring relationships alongside marriage and marriage-like relationships have been made in Australia. For example, the Tasmanian legislature passed the Relationships Act in 2003 which allows for the registration of 'caring relationships', and for the legal recognition of informal 'caring relationships'. This paper will explore some of the differences and similarities between form and function-based approaches to recognising caring relationships through law and, drawing on the Australian experience, discuss the potential of both form and function to embrace different types of family relationship.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Emma Hitchings (Bristol) and Joanna Miles (Cambridge), 'Settlement priorities and settlement geography in a discretionary regime: the operation of discretion in relation to financial settlements on divorce'

This paper will draw on findings from stage 2 of a research project commenced in 2012/13 (see Hitchings, Miles and Woodward, 2013 – Assembling the jigsaw puzzle: understanding financial settlement on divorce), which collected data from c 400 court files with a financial order following divorce and 32 interviews with solicitors and mediators handling such cases. These data were supplemented by judicial focus group discussions conducted in 2016, in order to provide further and more recent data addressing the substantive outcomes that are being achieved under the law.

Recent policy discussion and activity in this arena (notably by the Law Commission and Family Justice Council) have been focused on concerns about the relative lack of transparency in the law (in particular for unrepresented individuals) and about apparent geographical inconsistency in its application. Using in particular the practitioner interviews and judicial focus groups, this paper will reflect on how our discretionary law of financial remedies currently operates. It will explore the role of discretion for both practitioners advising on and judges deciding needs-based cases, considering the relative impact of legal principles and non-legal factors in negotiation and settlement of these cases, and attempting to unpack the knotty geographical question. This material will provide a practical context in which to address one of the old chestnuts of family law literature: rules versus discretion. The paper will reflect on how if at all English financial remedies law might benefit from a repositioning along that spectrum.

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Katrine Fredwall (Oslo), 'And they lived happily ever after? Division of assets between cohabitants with common children'

Modern couples often prefer cohabitation instead of marriage – in particular in the beginning of their relationship. In Norway about one quarter of the couples are cohabitants, while about one third of these cohabitants had common children according to my 2016 (Norwegian) web-survey.

The break up-rates among cohabitants are high, and my question was how cohabitants shared their assets when they decided to split up.

According to my findings the legal knowledge among cohabitants is scattered, nearly no one gets legal advice and next to no one takes the question of sharing to the courts.

About half the cohabitants based their division primarily on ownership, while one quarter divided all the outcomes of their life together – no matter who had actually paid for it. This division-practice may include that approximately  $\frac{3}{4}$  of the cohabitants with common children come in a vulnerable position due to break up.

In relationship with children the need for protection partly follows from the mothers (frequent) economic loss following from pregnancy, childbirth and unpaid workloads

following from upbringing of children and partly from the need to secure that both parents – as far as possible – have the necessary economic resources to do good parenting after break up.

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Lucy-Ann Buckley (NUI Galway), 'Financial provision on marital breakdown in Ireland: increasing predictability or continuing subjectivity?'

Critics of discretionary systems for financial provision on marital breakdown commonly highlight problems with consistency and certainty. In this view, the potential for individualised justice comes at a heavy price, since subjective decision-making may lead to difficulties in advising clients, and to increased costs and litigation. Such charges are particularly strong in Ireland, due to the prevalence of unwritten judicial decisions on family law matters, the historic impact of the *in camera* rule, and the under-reporting of family law cases generally. However, studies have also suggested that even highly flexible discretionary systems may develop normative principles over time, which may lead to a good level of consistency, at least in “everyday” cases (Hitchings, 2009).

This paper evaluates the development of normative assumptions and guiding principles in the Irish context following the introduction of divorce legislation in 1996. It does so from the perspective of Irish family law practitioners, drawing on a wide range of interviews with Irish family law practitioners, including solicitors and barristers in private practice, and Legal Aid solicitors. Most of the interviews were conducted in the early years after the introduction of divorce (2001-2003), with follow-up interviews after two decades of experience of the divorce legislation in practice (2014-2017). The paper analyses practitioners’ views on their ability to advise clients on family property issues on marital breakdown, the factors affecting their ability to do so, and the degree to which practitioner confidence levels have increased over time. It also evaluates practitioner perspectives on the guiding principles applied by courts when making financial orders in marital breakdown cases. The paper also explores issues of judicial consistency and the “localization” of justice, and the consequences of this for the development of guiding norms and the ability of practitioners to advise clients on probable outcomes.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Maebh Harding (Warwick), 'Marriage Formalities in Ireland: The weight of religion in state regulation'

The manner in which people are permitted or encouraged to marry, for example through particular religious ceremonies, can promote certain social and religious values over others. In this context, getting married becomes a signifier of conformity to a particular identity and social grouping.

Although the law regulating marriage formation was extensively reformed in Ireland in the 21st century, and there is now more scope for non-religious marriages, an established religious typology of marriage is still an unquestioned part of the new regulatory approach. The weight of religious practice as the primary normative order pervades the new system of marriage registration introduced by the Civil Registration Act 2004.

This paper draws on empirical evidence about the use of the new system to offer an academic critique of the suitability of the new system for an increasingly diverse modern Ireland. The paper raises wider questions about the role of legal regulation and its interaction with religious and family norms. Should law itself provide a universal prevailing normative structure or should it instead ensure that existing different normative structures (whether religious or otherwise) are equally treated? How should the law leave space for the evolution of new normative orders?

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Deirdre McGowan (Dublin Institute of Technology), 'Re-framing the mediation debate in Irish all-issues-divorce disputes: from mediation v litigation to mediation & litigation'

The Irish government has announced its intention, in a forthcoming Mediation Bill, to require family law litigants to attend mediation information sessions. This proposal reflects a political expectation that information meetings will increase uptake of mediation and endorses the broader assumption that mediation can offer an alternative to litigation in the Irish family justice system. This paper reviews similar attempts in England and Wales to encourage family disputants to mediate, identifying weaknesses in the mandatory information strategy. It also reviews the legal framework governing all-issues divorce and dissolution in Ireland, pointing to the limited potential for mediation to direct couples away from litigation. It concludes by arguing that a re-framing of the mediation debate is necessary. Although mediation can provide a valuable support to dispute resolution in all-issues-divorce disputes, it cannot act as an alternative within the existing constitutional and legislative framework. Conceptualisation of mediation as an alternative to litigation has led to a policy focus on increasing mediation uptake across the family justice system, rather than consideration of how it can support the resolution of specific dispute categories within that system.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Mavis Maclean (Oxford), 'Pro bono services in family courts post LASPO: defining legal advice and information'

Following the abrupt limitation of public funding for private family law matters post LASPO we have seen the impact on numbers of cases, and the increase in self representation and its attendant difficulties have been well documented by Trinder and colleagues. But little is known about pro bono activity, and in particular the development of duty lawyer schemes in family courts encouraged by the judiciary. As part of a larger study of legal information, advice and support we have therefore carried out a small study of these schemes, with the support of the President. We contacted all DFJs in England and Wales to ask about their experience of such schemes. Interviews and observations have been conducted in 6 courts to date. Rather than finding freestanding pro bono services we saw instead complex networks of help being provided by the bar, solicitors, law students and lay volunteers, offering activities ranging from end to end casework with representation to help with form filling. Duty lawyer schemes seemed to be effective when working with the more easily available help of students and volunteers. But anxieties were present about who was doing what, and whether they were going beyond their regulated competencies. We therefore raise the question of how maximum help can be offered with minimum concern about quality assurance in the present context of widespread unmet legal need in family justice.

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Emma Hitchings (Bristol) and Leanne Smith (Cardiff), 'The work of paid McKenzie Friends in private family cases'

This paper will present the findings of a recently completed qualitative study of the work of fee-charging McKenzie Friends in family cases. The study comprises in-depth interviews with 20 McKenzie Friends and 20 clients of McKenzie Friends, as well as observations of a number of family court hearings involving paid McKenzie Friends and linked interviews with those involved in the hearings. Drawing on the findings, the paper will reflect on the strengths and weaknesses of arguments for a new regulatory framework governing the work of paid McKenzie Friends in this particular area of law.

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Rob George (UCL), 'Autism and the Family Courts'

Access to justice is a key issue for many sectors of society, but can be particularly problematic for those with communication difficulties. One such population particularly at risk are those with autism: a development condition characterised by deficits in social communication and interaction, and the presence of rigid, repetitive behaviours (DSM-5, APA 2013). Autistic people comprise around 1% of the population, yet there is minimal knowledge about their treatment by the court system or how their condition may affect their access to justice (Cashin & Newman, 2008). This is concerning, as many aspects of autism (inability to decode non-verbal cues, understand non-literal language and subtext) render individuals with the condition vulnerable to being taken advantage of in negotiation or dispute settings. In

addition, a departure from daily routine, and lack of control of the situation can cause autistic individuals a great deal of distress.

While a number of service providers offer autism-specific guidance on navigating the criminal justice system, there is currently a lack of evidence to inform the creation of these support materials, and little about the broader justice system beyond the criminal setting. To address this, we aim to systematically identify areas of difficulty - for both those with autism and legal professionals.

We use the family court as a case study for the justice system more broadly, since family court disputes are both more emotionally fraught than many other areas of the law, and also (since the reduction in the scope of legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012) more prone to litigants being in court without legal representation.

This paper reports the findings from a survey of legal professionals (N=196) and follow-up qualitative interviews with 10 individuals who self-identified as having particular experience of cases involving autistic litigants. This paper reports work which is on-going, where our data analysis is taking place in the coming weeks, and there is no written paper yet.

## Friday 7<sup>th</sup> April (10:00-11:30)

Lucy Yeatman (Liverpool), 'Litigants in Person in the Family Courts: are they really the problem?'

Since the removal of legal aid from most family law cases in 2013, there has been a growing chorus that the family courts are not coping under the strain of litigants in person. Speaking in December 2016 the Lord Chief Justice said of litigants in person "The problem is we have now far too many." A common thread running through the debate is that if only these people were legally represented our problem would be solved. Litigants in person take up too much time, they bring too many bits of paper, they don't focus on the issues, they send too many emails to judges, they can't negotiate, they slow down the justice process.

This paper will explore the narrative that it is the litigants themselves that are the problem. Litigants in private law cases had already been characterised as the problem before legal aid was removed. LASPO was supposed to reduce the number of parents coming to court yet the number of private law Children Act cases are rising and the numbers taking up mediation are falling. Many of the solutions being offered are aimed at containing and controlling the litigants in person or diverting them away from court, whether it is regulation of McKenzie friends, allowing law graduates rights of audience, increasing uptake of mediation (again), or increasing access to legal aid in certain circumstances.

This paper will seek to present an alternative narrative in which litigants are characterised not as the problem, but as people who are alienated and disempowered by an inflexible and paternalistic justice system. Instead of searching for new ways to find professionals to speak for parents in court, I propose searching for new ways of listening to parents and empowering them to actively participate in the justice process.

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Tatiana Tkacukova (Birmingham City), 'Online Resources for Litigants-in-Person'

After cuts into legal aid in England and Wales, litigants in person (LIPs) were left with very limited options for affordable sources of face-to-face legal advice. In an attempt to enable lay people in presenting their cases more effectively, government bodies, courts and legal professionals have produced a range of digital resources (Trinder et al. 2014). Yet LIPs do not seem to be making use of the online information available to them; this is partly due to some LIPs not being computer-literate or simply not having access to internet (Trinder et al. 2014) and partly due to the fact that existing online information for LIPs is claimed to be too generic or presented in a complex way (Tkacukova 2016).

The paper draws on the results of an empirical socio-legal research project conducted in the Birmingham Civil Justice Centre in cooperation with Birmingham Law School and the School of English, Birmingham City University (April – July 2016). The quantitative part of the project incorporated the survey of 197 LIPs. The author then compiled a small specialised corpus based on handbooks and the contents of web pages aimed at litigants in person. Since the most frequent court matter LIPs reported on was contact with children, the corpus focuses on online resources for child arrangement cases. Digital sources mentioned by litigants in person in the survey formed one sub-corpus, i.e. the sub-corpus based on sources lay people use in practice. The second sub-corpus was compiled using resources recommended by the Ministry

of Justice or authored by official bodies in England and Wales. The paper presents the results of the comparative study between the two sub-corpora and explores the differences in the type of information presented and the way it is presented in.

The author argues that what is important for LIPs is the inclusion of reliable legal and procedural information, the overall presentation of information, its direct applicability to their case, clarity of expression as well as availability of clear samples illustrating genre and discourse expectations. The paper then further discussing potential ways of exploring access to justice in light of 'digital by default' as a government administration strategy.

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Tkacukova, T. (2016). Communication in Family Court: Financial Order Proceedings from the Perspective of Litigants in Person. *Journal of Social Welfare and Family Law*, 38(4), 430-449.

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#### Anne Barlow (Exeter), 'Reimagining Family Law and Justice for a Digital Age'

This paper will explore the changing family law and justice practices in an increasingly digital age and consider what is being gained and lost where online information is replacing offline services.

Drawing on a pilot project looking at 'Delegalization and DIY Family Justice' and an ESRC Impact Acceleration Award study Creating Paths to Family Justice working with policy makers and practitioners, it will consider how far online divorce, mediation and other avenues of support are becoming integral to family dispute resolution and assess their impact on the values associated with family law, the need for legal expertise and the delivery of justice in a traditionally discretionary area of law.

Finally, it will reflect on how family law and justice might be reimagined to use digital opportunities creatively in the resolution of private family law issues.



# Gender, Sexuality and Law

NB: all sessions will be held in Percy G09

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Gwen Jordan (University of Illinois Springfield), 'Transnational Coalitions of Women Lawyers of Colour During the Mid-Twentieth Century'

This paper explores the transnational activism of women lawyers of colour to advance the rights of women nationally and around the world during the mid-twentieth century. British women began practicing law as barristers and solicitors in the 1920s after the enactment of the Sex Disqualification Removal Act (SDRA). Women of colour from the British colonies were allowed to study law in Britain, but were expected to return to their home countries to practice. Many of these women used their legal expertise to advance women's rights and some worked transnationally to advance the rights of women of color in the decades before and after World War II. This paper specifically focuses on coalitions built by Edith Sampson, a black woman lawyer from the United States, who became an international activist in the 1940s.

Sampson began to travel internationally in 1949. As a delegate of the US National Council of Negro Women, she joined a tour, unofficially sponsored by the US State Department, which was organized to spread support for democracy in newly decolonized countries in Asia and the Middle East. The following year, she was appointed as a delegate to the United Nations (UN). She worked with Eleanor Roosevelt on the UN Commission on Human Rights and as a member of the Commission for UNESCO. Throughout the 1950s, Sampson traveled to Great Britain, Europe, the Middle East, and Central and South America. In the 1960s, she served on the U.S. Commission to NATO. Sampson used all of these opportunities to meet with women of colour around the world and worked to unite them in a collective voice that they used to influence domestic and foreign policy in a manner that advanced their rights and dignity.

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Megan Ross (Toronto), 'The Secret Ambition of Sex Trafficking Laws: Fascism and Sex Trafficking in Interwar Europe'

This paper tells the shocking history of sex trafficking regulation by newly formed fascist governments before World War II. Never before told, this history is based entirely on archival documents. Using Poland, Italy and Germany as case studies, this article examines how newly formed fascist governments in Europe used the sex trafficking laws and discourse in their own domestic campaigns against immorality and vice. Interestingly, we see marked increased in sex trafficking campaigns under newly formed fascist governments. Poland and Germany provide shocking examples of how campaigns against immorality were being carried out by these governments with the enthusiastic support from the international anti-trafficking community.

Turning to railway station work during the interwar period, this paper explains how it became extremely useful for fascist governments carrying out campaigns against immorality. These missionaries would carry out active surveillance of railway stations, providing a unique quasi-official volunteer boarder police. Interestingly, the year after Mussolini signed the Lateran Accords he becomes personally very active in promoting this station work.

Turning to theory to help explain this complicated relationship between fascist policy and the sex trafficking movement, I argue that sex trafficking idiom has a secret ambition. Because sex trafficking is such a morally charged issue, it becomes a politically popular site to criminalize “immorality” more generally. It is a politically convenient omnibus guise. Accordingly, this paper concludes that in times of great social stress when people are becoming convulsed over issues of sexuality, it is vital to keep close watch on how sex trafficking laws and discourse are being (mis)used.

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Biljana Kotevska (Queen’s University Belfast), ‘Intersectionality in Yugoslav times: Initial findings from a gender and legal history quest on proto-intersectionality in the former Yugoslavia’

The paper presents the initial findings from a gender and legal history endeavor to excavate the understanding of equality in the Socialist Federative Republic of Yugoslavia. More specifically, it presents the outcome from an investigation into the existence of proto-intersectionality elements in written documents deriving from Yugoslavia and pertaining to gender equality and the area of working relations. The findings presented herein are built on data collected from archives and local libraries in Croatia, Macedonia and Slovenia during the fieldwork which the author conducted in the period August 2016-January 2017. They are structured in two clusters. The first cluster of data consists of the works of Yugoslav feminists. The second cluster is data from the work of the legislative governments in three of the constitutive republics - Croatia, Macedonia and Slovenia. The focus is on official documents (laws and strategic documents) and on transcripts from parliament sessions and sessions of parliamentary working bodies. It also includes very early findings on the federal Yugoslav level. By including an analysis of the works of Yugoslav feminists which held high state or party positions, the paper links the two clusters of data, demonstrating the flow between the two and its importance. It also acknowledges the agency of women during socialism as individual subjects and as subjects in interaction with or acting on behalf of the state. The paper links these findings to on-going discussions on feminism during Yugoslav times. Although initial, the findings can serve as food for thought to the wider investigation of the genealogy of intersectionality and remains relevant regardless of whether one supports or opposes what Nina Lykke calls “broader understanding of intersectional thinking”, since it shows the relevance of intersectionality as a theory and a method for researching gender and legal history on the example of the former Yugoslavia.

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Nick Piska (Kent), ‘Icons of Equity’

Equity has long been associated with the feminine - in its iconology, its literary imagination (such as Antigone, Portia, and Esther Summerson), and in Chancery's paternalism towards women. But while the gendered nature of justice (particularly through the figure of Justitia) and jurisprudence more generally has been examined, an historical and theoretical explanation of the gendered nature of the jurisprudence of equity has had little attention. The primary aim of this paper is to provide an historical account of the gendering of the jurisprudence of equity. It will begin by relating some of the common associations of equity,

the 'feminine' and the protection of women. It will then trace the historical emergence and transformations of these associations.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Rob Clucas (Hull), 'Sexual Orientation Change Efforts, Conservative Christianity, and Autonomy Claims'

Despite increasing legal and professional regulation, the practice of sexual orientation change efforts (SOCE), otherwise known as conversion therapy or 'gay cure' therapy, continues to receive energetic support and promotion from socially conservative (religious) organisations. This paper discusses the main findings from my recent research project, in which I investigated the ways in which two organisations, NARTH (US) and Core Issues Trust (UK), resist legal and professional regulation of the SOCE which they advocate. The most convincing of the claims made is that to provide SOCE is to respect client's autonomy rights to diminish unwanted sexual attraction, and to live in accordance with the moral principles that they value. I show that this claim fails to take into account the contextual influence of internal and external stigma on a client's desires. I also demonstrate that neither NARTH nor Core Issues Trust are consistent in their regard for client autonomy. I suggest that the most plausible reason for these organisations' emphasis on autonomy and other secular tropes, such as scientific proof and progressive language, is that they provide a smokescreen for conservative Christian values. These organisations are shown to make instrumental use of rights and diversity language to further their anti-diversity goals.

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Alexander Maine (Northumbria), 'Same-Sex Marriage and the Homonormative Identity: Empirical Reflections'

This academic presentation will discuss my doctoral research which investigates the emergence and effect of the 'homonormative' and 'homoradical' socio-legal identities in the United Kingdom. These identities will be constructed and scrutinised in the wake of the Marriage (Same-Sex Couples) Act 2013, with attention paid to the legal implications of the Act upon the perceptions and experiences of the LGBTQ community

This presentation will discuss the theoretical foundations of my study, the legal standpoint of same-sex marriage, and the empirical methodological aspects of the research. As a socio-legal study focussing on the lived experiences and legal perspectives of self-identified LGBTQ individuals, this study will shed light on the effects of the UK's same-sex marriage legislation and the implications this has for gender, sexuality, and power studies. My study is distinctive in its analysis of both the homonormative (Duggan, 2002), and the homoradical, particularly in the advent of same-sex marriage, while also discussing the implications of Rubin's sexual hierarchy (1984) and the ways in which law divides the 'good gay' and the 'bad queer', primarily on notions of sexual practice. The study will then allow for a developed, modern interpretation of Rubin's charmed circle and the ways in which a changing legal landscape allows for social acceptance of queer sexualities.

The construction of the two socio-legal homonormative and homoradical identities forms the key aspect of my research. This will be evidence through the examination of visual data and interview data of 30 in-depth interviews. This interview data will be analysed using queer theory to assess the impact of same-sex marriage, using grounded theory. This data presentation and analysis will amount to a large proportion of the paper, with time spent

discussing the important narratives emerging regarding same-sex relationship recognition and the operation of law with regards to sexuality.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Ronagh McQuigg (Queen's University Belfast), 'The Need for a UN Treaty on Violence against Women'

Violence against women occurs in every state worldwide and constitutes one of the most prevalent human rights abuses at the global level. However, none of the UN treaties refer specifically to violence against women. This fact is all the more surprising given that since 1979 a 'women's convention', the UN Convention on the Elimination of All Forms of Discrimination against Women (also known as CEDAW), has been in existence. The paper will begin by discussing why any express reference to violence against women was excluded from CEDAW. It will then proceed to examine how the monitoring body of CEDAW, the UN Committee on the Elimination of Discrimination against Women (also known as the CEDAW Committee) has nevertheless sought to include the issue of violence against women within its remit by interpreting various provisions of the Convention in such a manner as to encompass this issue. Other UN bodies have also addressed the subject of violence against women, with perhaps the most notable development being the creation of the office of UN Special Rapporteur on Violence against Women, its Causes and Consequences. However, even though a multitude of statements have been issued by the CEDAW Committee and by other UN bodies, these all fall within the category of 'soft law' which is non-binding on states.

The key focus of this paper is therefore on the question of whether it is now time for a specific treaty on violence against women to be adopted at the UN level. This issue has been brought particularly to the fore in recent times due to comments made by Rashida Manjoo, who held the office of UN Special Rapporteur on Violence against Women from 2009 until 2015. In a number of statements made both during and after her tenure as Special Rapporteur, Manjoo has vociferously expressed her strong belief that a UN treaty on violence against women is essential to addressing this issue effectively. In addition, the current UN Special Rapporteur on Violence against Women, Dubravka Šimonović, recently called for submissions on the question of whether there is a need for a treaty on violence against women. This paper will examine the theoretical and practical arguments surrounding the adoption of such an instrument. It will be argued that although violence against women is now clearly on the agenda of UN bodies such as CEDAW Committee, it is unjustifiable from the perspective of principle that there are still no legally binding provisions at the international level on this issue. This situation is also problematic from a practical perspective, in that it creates difficulties in terms of holding states accountable as regards their responses to violence against women. However, the development of a UN treaty on this issue would by no means be an easy process, and the paper will discuss a number of difficulties which would undoubtedly have to be addressed during the development of such an instrument. Nevertheless, it will be argued that, despite these challenges, it is now time for the development and adoption of a UN treaty on violence against women.

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Jaspreet Sandhar (Bristol), 'Girls in Armed Conflict: applying feminist legal theory to the lived realities of girl soldiers to explore the challenges with providing their legal protection during and post-conflict'

Approximately 35-40% of all child soldiers are girls. Discourse on gender and armed conflict posits war as a masculine endeavour in which girls figure solely as victims. International law

reinforces these stereotypes in that both the protections and rehabilitation processes of children recruited into conflict pay most attention to boys' requirements. Protections for girls derive predominantly from 'gender-neutral' and universal children's-rights instruments, most notably the Convention on the Rights of the Child. The law, according to feminist legal theory, is socially constructed and masculine, and so further ostracises females. The masculine standards imposed are not sensitive to the lived realities of girls and an essentialist view dominates which dismisses the intersectionality of girl soldiers and their subjective experiences.

This paper will draw attention to the social construction of gender in armed conflict and how this has manifested in international law, exploring the work of notable authors such as Hilary Charlesworth and Christine Chinkin. Using a feminist legal theory approach, this paper will analyse the legal instruments deployed during and after the Sri Lankan and Sierra Leonean conflicts for girl soldiers, and explore the protection (or lack of) provided by international law.

### Research questions

To what extent can feminist legal theory explain the shortcomings of international human rights law in providing sufficient protection for girl child soldiers during and post-conflict?

1. How do the social construction of girlhood and gender, and the existing legal framework, apply to armed conflict?
2. How does this discourse explain – or fail to explain – the role of girls during the Sri Lankan and Sierra Leonean conflicts?
3. What does feminist legal theory say about the legal protections offered to girls during and post conflict?
4. What new narratives can be offered which would be inclusive of girl's voices and lead to their sufficient protection during and post armed conflict?

## Thursday 6<sup>th</sup> April (11:00-12:30)

Stephen Whittle (Manchester Metropolitan University), 'Crossing Borders: Researching LGBT Families and the Failure of Free Movement'

This paper addresses the migratory needs of LGBTQ families.

The right of workers (as economic capital) and family members, to freedom of movement within the European Union originated within mid-20th Century heteronormative understandings of the nuclear family.

Some European states as members of both the European Union and the Council of Europe have led international legal debates and actions on the rights of LGBTQ individuals to be free from criminalisation and discrimination, and the moral campaigns to win over hearts and minds to allow LGBTQ people the right to form state recognised relationships. Most of these states have extended the principle of equality to include legislation allowing LGBTQ people not just the right to marry, but also the right to form 'legal families' that include both dependent children and older parents

In an increasingly fractured post-modern Europe, change has faltered, and we see a consistent failure to extend rights legislation to create coherent, LGBTQ inclusive legal definitions of the 'Couple' and the 'Family'. A wide range of the problems present because of the incoherent European jigsaw of rights (or lack of rights) for LGBTQ families. Border crossings can challenge the status of a child as 'family' because of the poor legal framework for European adoption and fostering. Inconsistent rights to name and passport changes, and gender recognition schemes for trans adults and gender variant children who have altered their social gender presentation make a drama quickly become a crisis for a trans family at an immigration checkpoint.

LGBTQ Migrant workers and their family members experience an illogicality of law whenever they attempt to benefit from freedom of movement rights to cross EU borders. Most end up not trying. For LGBTQI refugees and their families, the legal impediments are often insurmountable, particularly when combined with structural and institutional failures to believe that LGBTQ people could exist within societies with non-European cultural values.

There is a paucity of base data on the migration experience of LGBTQ families, even the data to say LGBTQ families end up avoiding migration. Without this, research funders say the numbers affected are too low as to justify funding of further research to discover the extent of need. Academics find themselves driving around the

Consequently, we see a continuation of LGBTQ families avoiding even the risks of holidaying abroad, never mind migration. The Judiciary don't get to develop case law, meaning a lack of the evidence essential to allow supportive parliamentarians to get legislative time to address the issues

This paper considers how Academics can get off the 'research funding failure roundabout' and resolve these issues for real, LGBTQ families.

Michael Ashworth (Bristol), 'The Techne of Visibility: Local LGBTI NGO Resistance to the Government of Sexual Minorities in Uganda'

This paper is concerned with refocusing the theme of visibility in Foucauldian literatures. It calls for a reconceptualisation of visibility from a mechanism through which disciplinary power is exercised, to a technical means of exercising resistance. In so doing, this paper makes reference to resistances on the part of local lesbian, gay, bisexual, transgender and intersex (LGBTI) non-governmental organisations (NGOs) to the government of sexual minorities in Uganda.

This paper is divided into two halves. First, this paper explores the theme of visibility in relation to the spread of normalising power. It does so through the concept of panopticism, popularised by Foucault in *Discipline and Punish*, and the lesser known concept of synopticism, coined by Mathiesen (1997). Panopticism concerns the few watching the many, for example, through Closed Circuit Television (CCTV), whereas synopticism is a parallel development, in which the many watch the few through mass media technologies, such as the newspapers or television set. Both perspectives have analytical purchase in Uganda; the gaze of neighbours and co-workers and the threat of the glare of the journalistic flashbulb have disciplining effects on the behaviours of individual queers in Uganda.

Second – and without impugning the validity of these approaches – this paper moves beyond such perspectives. It instead explores the technical means by which LGBTI NGOs in Uganda purposefully render themselves visible as a strategic means of exercising resistance to the government of sexual minorities. In other words, this paper analyses the techne of visibility as resistance. It examines four techniques through which NGOs constructed and maintained visibility in Uganda - the press conference, the educational pamphlet, the public celebration and the op-ed. It suggests that by making themselves visible through these techniques, NGOs are able to 'educate' the public about homosexuality, thereby serving a direct challenge to the government of sexual minorities.

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Francisca Anene (Buckingham), 'A Tale of Two Eras: Gender Activism in Nigeria'

Gender inequality in Nigeria is traceable to pre-independence systems of exclusion which generally restricted women to the private sphere. In the indigenous communities of Southern Nigeria, such exclusionary systems were contrary to established customary roles which, though also unequal, recognised women's right to be represented in governance and decision making. To protect their rights and resist the oppressive pre-independence policies which affected women disproportionately, Nigerian women effectively confronted the leadership through organised agitation, planned and executed through informal networks which crystallised into various women's interest groups seeking the post-independence empowerment of Nigerian women.

This paper draws a comparison between gender activism against corruption and gender inequality during the Nigerian colonial (pre-independence) and the post-colonial (post-independence) era. The paper highlights an apparent irony: though women appeared more marginalised and disadvantaged during the pre-independence era, they were more successful in their engagement. Juxtaposed against the post-independence era of 'acceptance and

inclusion' of women in politics and governance, effective gender activism appears to be at a decline in Nigeria today. Drawing from specific case examples, the paper shall explore possible reasons for this disparity and suggest avenues for more effective engagement.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Jess Smith (Kent), 'Registering Births: Transgender Identity and the Performativity of Parenthood'

The birth certificate has been a site of political struggle for both trans activists and critical transgender studies. This documentation is significant because it functions as the state's mechanism for assigning sex at birth and ensuring that it is permanently recorded. The Gender Recognition Act 2004 (GRA 2004) created a system for individuals to apply to the state for a Gender Recognition Certificate (GRC). Whilst this legislation is deeply problematic, it does at least provide for a gender being legally documented other than the sex designated at birth. As a result of this fundamental development in the regulation of gender, research has shifted away from the birth certificate and towards the GRA 2004/GRC.

This paper will argue that interest in the birth certificate can be revitalised by placing it at the centre of a discussion on the relationship between legal parenthood and gender identity. Drawing on Butler's theory of performativity, it will be argued that the birth certificate acts in the social world to give life to the medico-legal discourse and gender normative rhetoric it enshrines. The focus on legal parenthood will not only extend the discussion on the significance of this discourse but will also prompt a new understanding of the performative nature of the birth certificate. The paper will conclude by offering some suggestions of the direction that future research might take and by placing the contribution of this research in the broader context of critical transgender studies.

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Peter Dunne (Trinity College Dublin), 'Too Young to be Trans? The Legal Recognition of Trans Youth'

In 1972, Sweden became the first jurisdiction to legally recognise preferred gender. Under Law 1972:119, individuals were prohibited from applying for gender recognition until they had reached the age of majority. Swedish policy makers justified 'youth exclusion' by reference to the perceived immaturity of minors and the inability of young persons to express a stable gender identity.

Around the world, a majority of jurisdictions continue to absolutely exclude trans children from legal gender recognition. While the UK's Gender Recognition Act 2004 introduced landmark reforms by omitting surgery and sterilisation requirements, individuals must still reach the age of 18 years before they can apply for a Gender Recognition Certificate.

The failure to legally acknowledge trans youth gives rise to significant social, cultural and legal obstacles. Evidence from both the United States, and the Council of Europe, suggests that people, who are unable to access gender-appropriate identity documents, run a continual risk of public 'outing', where a previously undisclosed trans history may be unwillingly disclosed to friends or strangers. This in turn can expose children to higher levels of bullying, administrative discrimination and, in extreme cases, the threat of transphobic violence.

Exclusionary policies are also inconsistent with evolving standards of medical best practice, which increasingly show that trans children can articulate a consistent gender identity at a young age and that early intervention appreciably improves trans mental health outcomes.

This paper proposes a legal framework for recognising the preferred gender of trans youth. Adopting a child-centred and highly inter-disciplinary approach, and drawing upon established principles (particularly the best interest of the child), the paper illustrates how exclusionary policies are incompatible with modern human rights standards and fail to properly promote trans welfare. Citing a growing number of child-inclusive recognition regimes (e.g. Sweden, Argentina, etc.), the paper ultimately argues that youth recognition is the safest, most desirable strategy for affirming trans children.

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Chris Dietz (Leeds), 'Recognising gendered embodiment'

Debates around the reform of the UK Gender Recognition Act 2004 increasingly concern the costs and benefits of implementing 'the 'self-declaration model' of legal gender recognition, which allows a legal subject to make a personal declaration of their gender status and have this granted legal effect. This paper presents findings from an in-depth fieldwork visit to interrogate how self-declaration is working in Denmark; the first European state to have adopted self-declaration, in June 2014. It suggests that while trans people in Denmark are now responsible for determining their legal gender status, they have also been individualised in other ways – which in some cases has left them without the necessary supports to guarantee access to the intended benefits of gender recognition.

Feminist legal scholarship has an established history of challenging law's tendency to bifurcate between a subject's mind and body, prioritising one or the other in the process of governance (Naffine and Owens 1997). In recent years, this challenge has often been formulated around a conception of legal embodiment (Fletcher, Fox and McCandless 2008; Fletcher 2009; Fox and Murphy 2013), which seeks to close the gap between mind and body by considering how subjectivity, sociality, materiality, and symbolism are produced and experienced in relation to one another. By reading the Danish reforms alongside such scholarship, this paper suggests that the Danish implementation of self-declaration fails to address the complexities of embodiment, reproducing mind/body dualism in statutory legislation. With the list of states that have adopted self-declaration also including Argentina, Malta, Colombia, the Republic of Ireland, and Norway, this intervention offers scholars, activists, and policymakers critical insight into how self-declaration may not address the needs of trans people and others who do not identify with their assigned legal gender status.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Mitchell Travis (Leeds) and Fae Garland (Manchester), 'Contested Jurisdictions, Intersex Embodiment and State Responsiveness'

Over the last 20 years, there has been an increase in legal recognition of intersex embodiment. Whilst there have been a number of qualitative studies examining the experiences of intersex embodied persons in relation to medicine, this paper offers findings from the first study to examine the practical impact that law has had on the lives and experiences of intersex embodied people. This paper considers contemporary legal responses to intersex embodiment and the critique of these reforms from semi-structured interviews with the intersex community itself. As a result, this paper seeks to place the voices of the intersex community at the heart of recommendations for legislative reform. At present, the majority of western states do not recognise intersex at all and continue to rely on a medical account that traditionally uses surgical intervention to force intersex bodies into the sex binary, rendering individuals invisible at the institutional and discursive levels. In contrast, some legal systems such as Germany and Australia have introduced provisions that focus on status and identity using, for example, third gender markers on official documents and anti-discrimination law in an attempt to level the social playing field. Comparatively, other states, such as Malta, have adopted a more holistic approach to legal reform that concentrates on protecting the bodily integrity of intersex children by prohibiting unnecessary surgeries, thus recognising the legitimacy of the corporeal experiences of these individuals. In this paper we consider the ways in which legal recognition of intersex embodiment are challenging the jurisdiction of medical authority. In doing so, this article brings together Marianne Valverde's conceptualisations of jurisdiction and Martha Fineman's vulnerability theory. Utilising these two frameworks, we reveal how state responsiveness is avoided through the establishment of jurisdictional boundaries. Focussing on vulnerability theory allows for a contextualisation of participant concerns and prompts reconsideration of the public/private divide currently being played out in relation to medical and legal jurisdictions. In particular, participants raised concerns around third gender markers and anti-discrimination law and praised bodily integrity and other more holistic measures. Enacting these changes would involve a radical upheaval of jurisdiction, the public/private divide, state competence and medical power/knowledge but are central to the requirements of the intersex embodied persons who were interviewed. By considering the material experiences of intersex embodied people new political possibilities can be imagined which necessitate a redistribution of jurisdictional competence and state responsibility.

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Frances Hamilton (Northumbria), 'Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights in a Brexit Era'

Currently there is no right to same-sex marriage before the European Court of Human Rights ('ECtHR'). The ECtHR has left this within the discretion of the Member States of the Council of Europe to determine. The main reason for this is the lack of consensus determined by the ECtHR to exist between Member States, leading to a wide Margin of Appreciation ('MoA'). Consensus is an important legitimising tool for the ECtHR in a Brexit era. Yet, the consensus standard as applied by the ECtHR lacks certainty and predictability. ECtHR legal analysis plays

an important role in determining certain aspects of the MoA; namely the importance of the right at stake and the importance of Member State's defence. This article proposes that should there be a wide MoA due to a lack of consensus, the ECtHR should only move forwards once a majority of Member States' legislatures agree ('the Majority Approach').

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Chris Ashford (Northumbria), 'The UK Poppers "Ban" and the Psychoactive Substances Act 2016: New Legal Frontiers in the Homonormative Imagination'

In 2016, the UK Government passed the Psychoactive Substances Act, designed to address a growing moral panic surrounding the use of so-called 'legal highs.' In attempting to ban controversial drugs such as Spice, the Government found themselves in the midst of a debate about defining 'psychoactive substances' and determining the parameters of the new law. These 'legal high' drugs contain one or more chemicals that provide similar effects to illegal drugs.

Whilst drugs such as coffee were quickly and expressly excluded from the ambit of the law, 'poppers' - a popular drug amongst many gay men and queers - remained within the scope of the law, prompting, for the first time in over a decade, a national campaign and Parliamentary debates about contemporary gay men's sex lives.

At a time when the focus of debate around queer sex lives has been on so-called 'chemsex', the time given to debating the use of poppers in 2016 seems all the more quaint (McCall, Adams, Mason and Willis, 2005). Yet, poppers have a long history within queer culture, and have similarly been a source of debate and controversy, particularly in the 1980s amidst the policy response to HIV/AIDS (Altman, 1986: 33; Coxon, 1996: 101; Lauritsen and Wilson, 1986; Young, 1994)

At a time when UK law has been framed within homonormative discourse (Ashford 2011, this moment might be considered a re-imagining of the legal consciousness in which - for a brief moment - the law explores queer lives beyond the normative (see more generally: Duggan 2003; Harding 2011) .

This paper seeks to explore this moment in recent legal history and what it might mean for the ways that queer lives are and might be seen and understood.

## Friday 7<sup>th</sup> April (10:00-11:30)

Laura Bliss (Edge Hill), 'The Law, Social Media and the Victimisation of Women'

Anyone can become a victim of abuse online, but it is apparent that certain behaviours are gender specific. For instance, women are more likely to have comments aimed at them threatening rape and other forms of sexual violence.

This is particularly the case for women in the public eye. For example, Gina Miller (the claimant in *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768) has found herself at the centre of a campaign of online abuse. Abusive comments of sexual violence have been aimed at her. Comments like these are increasingly being used when it comes to the trolling of women online.

The law of the United Kingdom has started to respond to online abuse. Legislation has been adapted to cover online behaviour. Despite this, the law's response to serious online abuse directed at women has often seemed inadequate. For instance, Caroline Criado-Perez was subjected to extreme threats of sexual violence in 2014 via social media; several individuals were prosecuted for sending what was deemed "grossly offensive" comments. Yet, the conduct of Peter Nunn, in sending abusive messages to Ms Criado-Perez, and to the Labour MP Stella Creasey, might be thought to be more serious than the crime for which he was convicted – sending indecent, obscene or menacing messages – for which he received a six week custodial sentence. Rather, it might be thought that his actions amounted to harassment or stalking. If so, this suggests that the potential of the law to protect women from online abuse is not being used to the full.

This paper will propose that women are subjected to a unique form of abuse online, where threats of sexual violence are used to intimidate women. The paper will critically evaluate the law's response and make suggestions for how women may be better protected online.

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Marian Duggan (Kent), 'Two-Tier Systems: Examining Representational and Procedural Discrepancies in Clare's Law'

For the past three years across England, Wales and Scotland, police forces have been operationalising the Domestic Violence Disclosure Scheme, also known as 'Clare's Law'. This scheme allows members of the public to request information from the police about a person's history if this relates to domestic violence. Drawing on empirical research (undertaken with the financial assistance of the SLSA), this paper presents indicative findings from a pilot study into the policy in one geographical policing district. The paper outlines several discrepancies in promotion, engagement, procedure, resourcing and safeguarding measures linked to applicant identity and interaction with the scheme. The analysis situates these issues in a wider framework of increasing austerity measures and their resultant impact on recognising, responding to and reducing violence towards women.

Bruno Obialo Igwe (Maynooth), 'The Impact of Domestic Violence Legal Regulation and Enforcement among Nigerian Immigrants in Ireland'

Since the recognition of domestic violence (DV) as a global issue that ravages many households and its consequent hardship on the victims, some jurisdictions have criminalised the act while some have not prescribed appropriate sanctions against it.

The research comparatively assesses the impact of the law on domestic violence and its enforcement in two jurisdictions, Nigeria and Ireland. By using a qualitative phenomenological paradigm, within a socio-legal lens, the study appraises how the DV regulation and enforcement in Ireland impact on the Nigerian immigrants' perception and attitude regarding the malaise compared to the processes in Nigeria. Also, it explores the role of the law in creating the awareness of domestic violence among Nigerian immigrants, and queries if both jurisdictions are protecting human rights adequately within their different frameworks.

This paper discusses the preliminary findings of the study, which indicates an increased awareness of DV by the participants as well as a shift in perception and attitude towards it. Furthermore, it shows the participants feel more positive regarding the protection of their human rights in Ireland than in Nigeria, especially the female participants.

## Friday 7<sup>th</sup> April (12:00-13:30)

Aravinda Kosaraju (Kent), 'Problematization of prosecutions within contemporary discourses on child sexual exploitation in England'

This paper undertakes a critical discourse analysis of contemporary discourses on child sexual exploitation (CSE) in England informed by Foucauldian feminist theoretical framework. It emanates from on-going work on PhD thesis titled: Attrition in cases involving crimes of child sexual exploitation in England. It interrogates the problematization of prosecutions within discourses on CSE through critically analysing policy, legal texts relevant to CSE and data generated through interviews, focus group discussions with practitioners working to tackle CSE in England. It notes that in CSE discourses the prosecution of cases involving crimes of CSE is thought of as a problem too difficult to achieve and explores how this way of thinking about prosecutions did become possible and what responses are suggested as appropriate and why? Set out in three parts this paper explores in Part 1 the value and significance of prosecutions for practitioners and for sexually exploited children. Part 2 maps the challenges to prosecuting CSE cases and explores what those challenges relate to? It underscores how discourses on CSE talk about prosecutions and elicits the criteria that establish the lack of prosecutions as obvious or taken for granted. Part 3 looks at the suggested responses within legal, policy and practitioner discourses that the problematization of CSE prosecutions calls for. It argues that prosecution is accorded less priority within CSE discourses and notes the emphasis on safeguarding of children and disruption of perpetrators through civil orders as the alternative to problems associated with the prosecution process. It scrutinises the rationalities i.e. prosecution is not in the best interests of children; prosecutions are challenging in cases where children do not acknowledge abuse and perceive themselves as victims; disruption is a far more effective intervention, that are deployed with CSE discourses in de-prioritising prosecutions.

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Harriet Samuels (Westminster), 'Tum Ti Tum Ti Tum Tum: The Archers, the radio, violence against women and changing the world at teatime'

This paper reflects on the means by which women's human rights norms can be transmitted through social movements from the margins to the mainstream. Feminism has shown itself to have the capacity to name as legal wrongs behaviours such as sexual harassment that have previously been accepted as the norm (MacKinnon 1979). Human rights activists have also been able to use international law structures to develop norms and principles that have been conveyed from the global to the local. Social movements on the ground have used and adapted international norms to press for changes to law and the means by which it is administered and applied (Benhabib 2011). This has been done through political and legal processes but has also been achieved through the use of storytelling and the arts. An example of this interweaving between law and the arts is demonstrated by a storyline based on the new domestic violence offence of coercive control in *The Archers*.

*The Archers* is a soap opera broadcast on BBC Radio 4. It is one of the longest running soap operas in the United Kingdom, and was first broadcast in the 1950s. It has had over five million listeners in peak listening times. It takes place in a rural setting in real time in the fictional

village of Ambridge in the Midlands. In 2013 *The Archers* introduced a new character to the village Rob Titchner who marries Helen Archer, a member of the Archer family. Over a period of two years listeners are chilled as they hear Rob psychologically abuse and isolate Helen. The storyline has led to record listening figures, and a national conversation on domestic violence in the press and on social media. A Justgiving site set up in response to the drama has raised over £100,000 for victims of domestic violence and there has been an increase in the number of calls to domestic violence hotlines.

There has been a long campaign, by feminists, to include psychological harm in the definition of domestic violence. This has taken place through international and regional human rights forums and has led to an expanded definition being adopted in human rights laws and declarations. In the United Kingdom the offence of coercive control was included in section 76 of the Serious Crime Act 2015 after a campaign by a coalition of women's groups. Women's Aid has also collaborated with the producers of *The Archers* to ensure the accuracy of the portrayal of domestic violence and coercive control.

The *Archers* storyline on coercive control illustrates the 'jurisgenerative' nature of women's human rights (Benhabib 2011). It can be seen as an example of the power of social movements to use human rights to obtain progressive aims. Human rights can name wrongs and Parliaments can pass laws but the synergy between the arts and law has the capacity to shift public consciousness.

Benhabib S, *Dignity in adversity: human rights in troubled times* (Polity 2011)

MacKinnon C, *Sexual harassment of working women*, (Yale University Press 1979).

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Silvana Tapia Tapia (Kent), 'Criminalising violence against women: feminism, penalty and rights-based discourses in post-neoliberal Ecuador'

Contemporary penalty has been linked to the decline of the welfare state and the rise of neoliberal discourses emphasising individual responsibility and sidelining social redistribution. A sector of feminist scholarship has analysed the role of "governance feminism" in expanding carcerality by advocating for harsher penal laws on violence against women (VAW), particularly in trafficking, prostitution, and wartime rape (Bernstein, 2007; 2012; Halley, 2008; 2006). "Carceral feminism" is said to stem from a structuralist understanding of gendered violence as sexual domination which overshadows concerns with social inequality.

However, Ecuador and other Latin American countries have undergone processes of political and legal reform which are regarded as averse to neoliberalism (Grugel, 2012; Ospina, 2009; Radcliffe, 2012). Ecuador's 2008 Constitution has been portrayed as post-neoliberal and decolonial. This has not impeded penalty from thriving; instead, some analyses show that incarceration is on the rise (Sozzo, 2015). Likewise, the Penal Code of 2014 created new criminal offences, including some forms of VAW whose criminalisation was supported by many feminists. These paradoxes demand further examination of the conditions that allow penalty to thrive in allegedly post-neoliberal scenarios, and ask how feminist campaigns relate to penalty in non-Anglo-American contexts. "Governance feminism" is not always

useful to analyse sites where actors are only able to make legal achievements on certain topics and using a certain language.

Based on fieldwork carried out in Ecuador, this paper argues that penalisation has come to be conflated with the protection of women's rights, and that such association, which is constant amongst feminist networks, is not interrogated but rather reaffirmed through Ecuador's post-neoliberal turn. This shows the complexity of rights-based discourses as fields of intelligibility through which emancipatory campaigns are channelled, often acquiring a penal orientation even outside neoliberal agendas and in the absence of deliberately carceral projects.



# Graphic Justice

NB: all sessions will be held in Herschel Training Room 4

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## Wednesday 5th April (13:30-15:00)

Brian Simpson (University of New England), 'Is Captain Scarlet really Donald Trump?'

Captain Scarlet is hardly a modern super-hero. The character harks back to the 1960s and the Cold War (though he was somewhat resurrected in the early 2000s). But what does he tell us about the modern world and systems of justice? What are the continuities and discontinuities in this Gerry Anderson creation in terms of current world problems? Does he speak at all to the 'modern' world and its current challenges of hyper-nationalism and suspicion of the other? In particular, has this super-hero found a new home in the apparently indestructible Donald Trump? Will justice prevail?

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Fionnuala Doran (Teesside), 'Combining Law & Poetry: The Potential of Comics to Interpret Division in Ireland'

In this paper I address the representation of the 1916 Irish Rising and the subsequent partition of Ireland and sectarian conflict through comics. I will refer to my own graphic novel, *The Trial of Roger Casement*, and the depiction of the protagonist's journey from a respected, knighted human-rights advocate at the outbreak of war in 1914 to his execution for treason in 1916, at the height of British patriotic fervour. His mission—to seek political and military assistance for the Irish independence movement from Germany, the primary rival to Britain for European dominance—was thrown into chaos by the outbreak of hostilities.

The paper examines the challenges and opportunities of using the graphic novel form to depict Irish conflict and civil-war in the 20th Century, the interpretation and legal basis of which has been constantly disputed and reinterpreted on both sides of the border.

The combination of word and image and disregard for taxonomical distinctions within the comic-book provides the ability to blur the lines between objective and subjective truths, and offers a multiplicity of meanings and interpretations to the reader. This multiplicity of meanings can mitigate against clarity, particularly legal clarity. The graphic novel may provide a way for creators to engage with the issues inherent in such a small island's division into two very different states without becoming overwhelmed by the weight of history, offering the potential to deal with socio-political themes in a way that can combine history and law with poetry.

I will also look at the approach of other creators to conflict in Ireland in a new breed of graphic novels. This will include Sean Charleton's 'James Conolly: The Irish Rebel', Garth Ennis and John McCrea's *Troubled Souls and For a Few Troubles More*.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Rosie Taylor-Harding (Leeds), 'Stitched up: Kill la Kill and regulation by clothing'

Trigger studio's polarising 2014 production Kill la Kill centres on a dictatorial school in which the rigidly hierarchical nature of the institution is (usually violently) reinforced by the type of uniform each student wears. It argues that there is a difference between wearing clothes and being worn by clothing. Drawing on this idea and themes of the body, power and authority, this paper proposes that there is danger in clothing becoming the sole object of legal focus at the expense of the body beneath.

In Kill la Kill we are shown a society where clothing is regulation, dictating a person's status, power and placement within that society. Clothing is used as means of control and, when considering Watt's work on the normative basis of dress and law in society, we see this value reflected starkly on to our own societies, giving rise to critical consideration of our concepts of (legal) dress, decency and obscenity and its influence on meaningful legal action and process. It asks how and why this continues to be an established convention and how, considering Kill la Kill's somewhat controversial depictions of legal actors, these norms can be unpacked and challenged. Furthermore, Kill la Kill provides opportunities to explore other intersections of law and clothing and why and how clothing (or the removal of it) manifests as an extension of law's regulation directly on to our bodies. The paper explores instances in which it is clothing alone which enables, or more worryingly, inhibits our ability to access education, liberty and justice (such as Estelle v Williams (1976, appearing for trial in prison uniform) and the burkini ban in France) due to the emphasis placed on clothing by law, and demonstrates how we all risk our bodies and personhood being diminished through being worn by our clothing.

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Francis Sheridan King (Westminster), 'Visually engaging in property paradigms and problems'

Property law is riddled at times with contradictory concepts and perplexing paradigms, yet in other moments it follows a beautifully linear logic. The academic practitioner therefore faces a dilemma: How to provide a framework for the exploration of these incongruities, while ensuring the students can engage with the human element of property law, and understand the relationship to societal and environmental impact?

This paper proposes that, far from a whimsical way to engage students in a 'fun' way, using cartoons as part of a varied visual pedagogic practice can encourage an engagement with the 'real' aspects of real property in a safe forum. This teaching approach creates a more liberating framework in contrast to the drier textual format of the standard problem question, while encouraging scrutiny of theoretical, practical and ethical considerations. It also provides a 'safe' way for students to pull apart some of the more emotive issues in creative and original ways.

The paper provides a number of working examples from academic practice but also looks at how this approach has been received by students. Finally the paper examines how students appear to develop sufficient 'visual literacy' to use the cartoon format as a framework for presenting their own assessed work.

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Emma Patchett (Kate Hamburger Kolleg), 'Law as frame vs Law as spectacle?'

This paper aims to build on the work looking at the relationship between law and the visual by focusing on film a textured topography of juxtapositions, the language of which can be read as a performative refraction of the discursive contortions of the law. This critical research will focus on colliding legal orders in macro and micro spaces, and what this does to the shaping of the European spatial imaginary, using a radical new reading of the way in which the specificities of the film medium can be seen to refract, reflect, shape and frame the law. Examining the way in which spatial imaginaries in jurisprudence are framed through cinematic spaces acknowledges the radical interdisciplinarity of the visual to both act as a framing mechanism of the law and simultaneously, or in contradiction, demonstrate the ways in which the law exists as spectacle. In this instance, the critical act of reading law's refraction through the visual, by focusing on the specific properties of film allows us to take account of the ruptures in the symbolism of the law and challenges us to define its mechanical presence as a means of shaping space.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Liam Sunner (Maynooth), “‘No capes’ How intellectual property laws have been shaping comic books since 1938’

Over the last 75 plus years of existence, Superman, Batman, Captain America, and many others have faced many scares and challenges. None were more a threat to their existence than intellectual property laws, and most significantly, the timeframe afforded to protecting the affixed copyright. In the early 2030’s the men of steel will be facing many dark nights, as the copyright afforded to American superhero comic book characters begin to expire and the characters begin to enter into the public domain. It is likely that the publishers of these various characters will follow the precedent Disney set once Mickey Mouse enters the public domain, as the House of Mouse has often been at the forefront of intellectual property law development. This paper seeks to analyse how the publishers have reacted to intellectual property law developments both in and outside the comic books.

The first part of this paper delves into the relevant elements of intellectual property, discussing the difference between trademarks and copyright and how this applies to comic books. The second part will follow on from this basis, looking at the development of who holds the intellectual property rights, the legal division between work for hire and creator owned content, and the case law which highlights this division. The third part of this paper looks at the application of intellectual property law, notably how far the concepts can be extended or if there are exceptions for public use. The fourth and final part will examine these intellectual property laws in the digital environment, if they can adapt, and what this means for the future of the genre.

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Angus Nurse (Middlesex), ‘Freedom to Express, Inform and Offend: Perspectives on Comics and Censorship’

This paper examines direct censorship of graphic justice via analysis of the banning of comics, primarily in the US. Books are frequently banned for containing 'adult content', for reasons of language, for depictions of sex/nudity or because they are not considered to be 'age appropriate'. According to the Comic Book Legal Defense Fund (CBLDF) comics are uniquely banned because reliance on static images within the medium allows a single page or panel which is part of a larger work/narrative to provide the impetus for challenge or objection; different to challenges to movies or pure prose fiction. Movies can be cut; allowing the 'offending' images and language to be removed and revised work to be distributed. Comics once published are static/permanent and may be subject to challenge on grounds of how the juxtaposition of text and images is interpreted or socially constructed as 'offensive'.

Through content analysis of material on US library bans and obscenity charges laid against comics, this paper explores the social construction of comics as 'low value' and 'offensive' speech. Its analysis of challenges to the public availability of comics explores the manner and context in which comics are subject to regulation as 'obscene' material on various grounds such as: profanity/offensive language; sex or nudity; violence and horror, drugs and alcohol; politically/socially/racially offensive material and material deemed to be offensive to religious beliefs.

The paper questions whether the viewpoint of a vocal minority which at times can dictate what a library's patrons (and their children) can read has created a new, albeit limited, form of public regulation of comics?

# Indigenous Rights

NB: all sessions will be held in the Lindisfarne Room

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### **Wednesday 5<sup>th</sup> April (13:30-15:00)**

Kate Wilkinson Cross (De Montfort University), 'Observations from the Negotiating Floor: Indigenous Rights at the 13th Conference of the Parties to the Biodiversity Convention'

This paper presents my initial observations and explores how different actors argued for the inclusion and reaffirmation of indigenous rights during the Conference of the Parties of the Convention on Biological Diversity (1992). In December 2016, Indigenous Peoples and Local Community (IPLCs) representatives, States, and other actors participated in the joint Conference of the Parties and Meeting of the Parties (COP/MOP) to the Biodiversity Convention, Cartagena Protocol (2000) and Nagoya Protocol on Access and Benefit Sharing (2010). There, Parties adopted many COP/MOP decisions that directly and indirectly concerned IPLCs rights in the context of the biodiversity regime.

Informed by feminist theory, this paper examines the language used by IPLC and state actors and the extent to which they approached indigenous rights as the intersection of values, culture and place, or as objective and measurable goals for States to enforce and uphold. Feminists and other critical theorists recognise that language can reveal the implicit cultural and social values, beliefs and assumptions reflected within international law. They recognise that there are normative consequences to the symbols inherent in language and communication, which are 'embedded within culture and nature together.'

Therefore, the choice of language by different actors involved in the negotiations, and the way that these actors relate values and goals to IPLC rights are worth examining. They may reveal the extent to which State actors actively engaged with the intersections between rights, culture and the environment during the 13th COP/MOP, or whether these two actors still speak in different tongues.

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Chukwuemeka Ndukwe-Nnawuchi (Buckingham), 'Compensating for Indigenous Knowledge in Order to Ensure Equitable Access to Traditional Medicine'

In the past 20 years, there has been an increase in the appeal and widespread use of traditional medicines throughout the world. This development is as a result of the arguments that favour the use of traditional medicines, notably: that they are readily accessible to the majority of the world's poorest parts, such as Asia and Africa who do not have regular access to essential medicines; that they are more affordable compared to conventional medicines; that traditional medicines are compatible with patients' belief systems about the causation of sicknesses; and that they are less paternalistic than conventional medicines.

The development of these traditional medicines can be traced back to the customs, beliefs and knowledge systems of the indigenous peoples. In fact, traditional medicines are produced with the use of plants and animal materials, particularly in adherence to their traditional usages by the indigenous peoples. For this reason, a widespread use of traditional medicines beyond the communities of the indigenous peoples raises intellectual property rights concerns. More so, traditional knowledge of the use of plants and animal resources to treat diseases has served as leads in biotechnological research and development of drugs. In such

a situation, there is a good case of injustice against the indigenous peoples in so far as they are not compensated for the utilization of their knowledge and resources.

Therefore, while it is important to encourage the use of traditional medicines to promote universal health coverage, especially in developing and least-developed countries (LDCs), there is also the need to protect the rights of the indigenous peoples to authorize access to their knowledge and resources based on the principle of prior informed consent, and to share in the benefits derived from such access. Fortunately, the Convention on Biological Diversity and its Nagoya Protocol encourage the protection of the rights of the indigenous peoples to regulate access, and partake in sharing benefits derived from the utilization of their knowledge and resources. An almost natural concern, however, is whether these international instruments adequately cater for these rights.

### Wednesday 5<sup>th</sup> April (15:30-17:00)

Sylvanus Barnabas (Northumbria), 'Definition of Indigenous Peoples in International Law and Abuja Peoples of Nigeria: Lessons from International Child Rights Law'

The main purpose of this paper is to highlight the problem of defining indigenous peoples (IPs) in international law. The other objective is to challenge the West-centric description of IPs in existing international instruments which presents them as victims. This combination of doctrinal enquiry and case study research reviews relevant international instruments. The debates about the definition of IPs in the existing body of literature are critically examined. Through the theoretical lens of post-colonialism, the conception of IPs under international law will be deconstructed. The case study of Abuja peoples of Nigeria will be used to demonstrate the need for a more expansive definition of IPs under international law. There is no universally agreed definition of IPs as the international community has not agreed to any. However, a critical examination of international instruments presents a picture of those regarded as IPs. The main contribution of this paper to knowledge lies in making analogical analysis between the old ways in which children were defined and presented as future beings or citizens in waiting, thereby creating a binary between children and adults in contrast to the present UN Convention on the Rights of the Child, which essentially departs from this approach by presenting children as independent bearers of rights like their adult counter-parts. The argument will be advanced that international law on IPs' rights can glean from the evolution of international child rights law.

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Chiu Yin Leung (Chinese University of Hong Kong), 'Negotiating the Fragmented Governance in the Border Landscape of Hong Kong: Indigenous Rights, Rural Livelihood, and Post-colonial Justice'

This paper investigates the complex interplays among indigenous identity, socio-political organization and state apparatus in the border landscape of post-colonial Hong Kong. This former British colony had designated a transient mode of governance in its New Territories and particularly the northernmost borderland in 1951-2012. With restricted access and development to most people except local and indigenous villagers, the place has been inherited with distinctive village-based culture, historic monuments and agrarian practices until recently.

The author argues that the fragmented governance of its rural population, land, housing and economy has however left the memory landscape and its long-deprived borderers vulnerable against state development projects especially after the sovereignty transfer.

The juxtaposition of indigenous history and colonial dispossession had induced a discriminated system in identity registration and land leasing, which assume to favour the recognized village lineages against subsequent settlers. Since the late colonial period, moreover, the institutionalization of such traditional rights and village affairs has consolidated the monopoly of male descendants and certain village leaders over the others through legal claims and political arbitration.

In the latest development imperatives, empirical evidence illustrates an apparent bias towards the colonial representation of powers in grading historical monuments and drafting development plans to re-incorporate the borderland under state control. Squatter and farm tenants are often deprived of property rights, statutory participation and livelihood option in the planning process. Frequent post-hazard resettlement and land acquisition had also undermined the indigenous identity among some recognized villages, which are then exposed as the sites of displacement by the new border-crossing infrastructure. The enactment of heritage preservation is furthermore disturbed by lineage-based customary law, technocratic bureaucracy and multi-scalar political mobilization. As many traces of colonial misfortune and tyranny have been whitewashed without proper management, it is argued that postcolonial justice is yet reconciled in this fragmented border landscape.

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Emma Nyhan (European University Institute), 'Indigeneity's Vernacular and the Bedouin in Israel'

The Bedouin's turn to indigeneity since the new millennium must be viewed in light of the escalation in the Israeli/Bedouin land dispute and as a response to plans to transfer the Bedouin to authorized areas. This intervention makes no attempt to answer if the Bedouin are indigenous under the criteria set down in international law. Rather the focus is on the process of becoming indigenous in the Israeli/Bedouin context. While scholars debate the question of their indigeneity, few have attempted to unravel the sound and shape that indigeneity makes among the Bedouin. Simply put, this paper attempts to understand the Bedouin's interpretation and meaning of indigenous peoples. By pursuing a law and society agenda, the paper strives to understand if and how the Bedouin self-identify as an indigenous peoples in international law. To get us closer to indigeneity in the Bedouin vernacular, the paper centers on the Bedouin village of al-Araqib, deemed an illegal cluster in Israeli domestic law and called an unrecognized village by civil society. Al-Araqib has propelled itself into the global spotlight of indigeneity. The first part of the paper examines the key tenets of the global concept and category of indigenous peoples. The second part puts the Bedouin and the indigenous rights framework into conversation by exploring their indigenization through academic and civil society activism. The third part attempts to what the sounds and shapes of indigeneity among the Bedouin in al-Araqib, which, in my judgement, amounts to localized transnational knowledge in Merry's model on the vernacularization of human rights. Such study sheds light on whether Bedouinness and indigeneness are, or are becoming, synonymous; Bedouin being a contextualized articulation of the latter. As such, this indigenous/Bedouin dyad has implications not just for the Bedouin in Israel but also throws up conundrums for indigeneity in the region.



# Information Technology Law and Cyberspace

NB: all sessions will be held in Percy G05

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## Thursday 6th April (16:15-17:45)

Marion Oswald (Winchester) and Jamie Grace (Sheffield Hallam), 'Achieving accountability, transparency and legality in the use of algorithmic risk assessment policing models'

Building on the authors' freedom of information-based study into algorithmic analysis of police intelligence (Oswald & Grace, 2016, *Journal of Information Rights, Policy & Practice*), this paper considers the legal framework(s) governing the use of algorithmic risk assessment and profiling tools within UK policing. As is common across the public sector, the police service is under pressure to do more with less, target resources more efficiently and take steps to identify threats proactively under schemes such as 'Clare's Law' and 'Sarah's Law'. Algorithmic tools promise to improve a force's decision-making and prediction abilities by making better use of data (including intelligence), both from inside and outside the force.

This paper uses Durham Constabulary's 'Checkpoint' programme as a case-study, and examines the available literature regarding the statistical model used by the Checkpoint forecasting tool (random forest modelling). It comments upon the potential benefits of such tools, and analyses legal issues stemming from their implementation, in particular regarding data acquisition, transparency and the exercise of discretion. For instance, to what extent should the police be required to show how an algorithm's 'mind is working' (Doody [1993] UKHL 8)?

The paper proposes a 'checklist' of some of the key legal concerns that should be considered in relation to the use of algorithmic risk assessment tools by the police. Ultimately however, the paper concludes that primary legislation may be necessary so that the operation of these tools in each particular context is given a clear legal underpinning. In relation to the surveillance powers of the intelligence services, Sir David Omand remarked during the debates leading to the Investigatory Powers Act, that 'The shock of discovering what was happening, for very good reason—to defend the public and our security—was all the greater.' The police and the Home Office should take steps now to avoid such a 'shock' in relation to the police's increasing use of algorithmic risk assessment tools.

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Asma Vranaki (Anglia Ruskin), 'Data Protection Laws, Privacy Commissioners and Cloud Computing: Of Collaborative Regulation, Non-Governmental Pressures and Scarce Resources'

The race is on for businesses and consumers to join the cloud. From increased efficiency to low operational costs to scalability, reasons abound for why we are adopting cloud solutions. However, industry research has highlighted that regulatory and legal issues, such as data protection issues, can prevent the widespread adoption of cloud-based systems. In recent times, many US-based cloud companies ("Cloud Providers") have been investigated by European data protection authorities ("Cloud Investigations") to determine their compliance with data protection laws.

The increase in Cloud Investigations raises interesting questions about regulating personal data processing through this regulatory tool. Current data protection literature adopts a state-centric approach to data protection laws. From this viewpoint, data protection laws are viewed as static regulatory tools that are deployed in only one direction (for example, from

the EU DPA to the Cloud Provider) to achieve the aims of the state through its legislative draftspersons and enforcers. Data protection laws often seem to have a privileged role in regulating “personal data” in such writings because they are approached as the sole or principal objects of analysis.

In this article, I analyze selected empirical findings from my recent empirical project on Cloud Investigations. The project drew on three main qualitative data collection methods, namely, documentary analysis, observation, and interviews of seven DPAs, four multinational Cloud Providers, and the representatives of two European institutions. In this article, I apply a decentralized perspective on Cloud Investigations which I have developed in a previous article to argue three points.

Firstly, groups, such as the Article 29 Working Party’s Technology-Sub Group, emerge as important regulatory spaces in many Cloud Investigations which involve two or more EU DPAs. I analyse how such groups are important regulatory spaces that enable trans-jurisdictional co-operation, as provided in the data protections laws, to take place in practice through information exchange, decision-making and inclusion of plural data protection concerns. Secondly, the outcomes of some Cloud Investigations, in the sense of evaluating the legal compliance of Cloud Providers, can often be impacted by internal pressures faced by EU DPAs. Internal pressures refer to the financial pressures faced by EU DPAs which restrict their staff numbers and other forms of expenditure including travel costs. This perennial problem is well-known. My empirical analysis sheds light on previously unknown matters, such as how limited financial resources can impact on Cloud Investigations and the strategies some EU DPAs deploy in order to overcome this issue. Finally, my data analysis shows how the external pressures which EU DPAs can often face from stakeholders, such as the media, non-governmental organisations and advocacy groups, during high profile investigations can impact on the outcomes of Cloud Investigations.

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Feja Lesniewska (Centre for Commercial Law Studies), ‘Data protection for decentralised energy providers within an emerging smart grid renewable energy market: Lessons from the European Union (EU)’

The EU 2030 Framework for Climate and Energy aim is to establish an Energy Union that is competitive, secure and sustainable, as well as an energy system that meets the EU long-terms 2050 greenhouse gas reductions target. A new energy ecosystem, one that increasingly harnesses renewable energies via decentralised providers, such as prosumers and energy cooperatives is evolving in EU member states. Information communication technologies (ICT), especially new digital applications for smart grids, play a central role in enabling new renewable energy providers to monitor and process data generated across distributed infrastructure and create opportunities to meet the various EU energy policy goals including efficiency, security and sustainability.

Smart grids use ICT both to support effective operation of the network but also to manage and process the exponential rise in available data. Decentralised renewable energy providers, both households and cooperatives, are new generators of data but also depend on it to be successful energy retailers, aggregators and consumers. They have an interest in the digital

energy economy but also in protecting data subject's rights. Meeting these twin goals is fraught with risks.

This paper considers whether the new 2016 EU General Data Protection Regulation (GDPR) can provide decentralised energy providers with the security they need as both producers and consumers. The GDPR aims to balance protecting the data subject while removing barriers to the movement of personally identifiable information. Employing a comparative method the paper draws on smart grid pilot projects in Europe to critically analyse the GDPR potential to support the new decentralised renewable energy providers' dual goals of privacy and smart grid market access. The paper concludes by identifying ways for Europe's new renewable energy providers can most effectively employ data protection regulations to aid the emergence of a low-carbon energy system.

## Friday 7th April (10:00-11:30)

Lisa Collingwood (Kingston), 'Autonomous trucks: an affront to masculinity?'

Autonomous (or self-driving) vehicle technology has become a commercial reality in a number of cars being driven on public roads around the globe. However, this technology is not only confined to cars. It is equally applicable to trucks and there is speculation that it will be autonomous trucks that will hit the roads first because they operate in "a less complicated traffic environment" and are therefore ideal starting points for the coming automated vehicle market. Indeed, in May 2016, authorities granted a license to Daimler to test its self-driving trucks on public roads in the US State of Nevada. These use a series of different technologies, including video cameras and radar, which, when applied in an incremental way, allow drivers to take breaks, although there must always be a qualified driver at the wheel. It is clear to see the benefits of self-driving trucks to trucking companies, who could use them to transport goods across much longer distances and without all of the scheduled breaks than is presently possible with human truck drivers. But what about the impact on the drivers themselves? Traditionally, truck drivers have been men. Does the introduction of self-driving truck technology represent an attack on the masculinist truck driving culture as portrayed in TV shows such as 'Ice Road Truckers' or 'Outback Truckers' and in advertising, such as the 'Yorkie' (mansize) chocolate bar adverts of old?). Given that self-driving trucks could be available for purchase from the middle of the coming decade (around 2025), the socio-legal and cultural aspects of self-driving truck technology and its impact on masculinity will be evaluated in tandem in this presentation.

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Clowance Wheeler-Ozanne (Strathclyde), 'The role of the individual in contemporary surveillance society'

2016 was a milestone in surveillance law history with unprecedented surveillance powers being granted to governments across Europe. Although the true impact of these laws remains to be seen, it is feared that they usher in a new era of mass surveillance. The laws come despite condemning judgments from the CJEU and ECtHR over member states' use of unregulated, unnecessary, and disproportionate surveillance practices. The need to fortify 'national security' in the 'ongoing war on terror' has been used as a major justification behind the extension of surveillance powers by governments; providing a formidable panacea to rejuvenated privacy concerns in the post-Snowden landscape. Although the justification of 'national security' is rightly challenged across legal and surveillance literature, doing so appears to have diverted academic attention away from meaningful exploration into other drivers behind the upward trajectory of state surveillance over the past decade. In light of this gap, this paper investigates the role of the expository individual whose revelatory and voyeuristic behaviours on social networking sites ('SNS') arguably enhance and enable the vertical and non-vertical axes of surveillance within modern society. Of particular interest, is the self-surveillance evident on SNS with users avowing an identity that has been pedantically pruned to ensure adequate reflection of the norms of other users – other watchers. This self-scrutiny is referred to here as 'autobiographical surveillance' and is used to highlight the role of the individual as an active, as opposed to merely passive, actor in contemporary surveillance society. Through the development of this concept it is argued that a broader legal

definition of surveillance must be adopted in order to ensure that the latitudinal, as opposed to just longitudinal, dimensions of the contemporary surveillance landscape are recognised; failing which, the future of privacy risks further jeopardy.

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Fateme Sarkheil (Allameh Tabataba'i University), 'International association social media platforms'

Online medias are the most relevant channel that endangers peace in the recent days.

It is important for social media platforms to make policies and regulate the extremist and terrorist contents. Self-regulation and platform policies do not ensure peace and individual rights. Because of the financial interests of social medias they do not prefer to be recognized as platforms that may reveal the suspicious identities. Therefore self-regulation and social media policies will not reserve accurately the global peace. Notably due to the worldwide users of social media, their policies and regulations should be compatible with international standards. As a result international association of social media platforms should be established that imposes international policies and code of conducts to serve the world peace. What the law can advise is to recognize these standards as international law. To enforce these new standards in national levels civil society may be useful by establishing national branches of social media platform associations that educate communities via social media platforms to respect the standard. Also national review bodies like ombudsman can be established by the international association to supervise on violation of standards by individuals or platforms based on national laws and legal procedures and refer the crucial violations to the competent national courts. It also has to solve the less crucial conflicts on itself.

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Brian Simpson (University of New England), 'Is Children's Digital Citizenship a Digital Straitjacket?'

There has been some recent discussion in Australia and the UK about the need to better prepare children as 'digital citizens'. Much of this narrative speaks of children's rights, children's resilience and children being empowered - but empowered to do what? This paper casts a critical eye over some of this discussion and questions whether it places too much emphasis on what is 'appropriate' and 'inappropriate' in digital spaces and casts discussions of children's rights far too much around those notions. In the result it asks whether digital citizenship is just another term for 'well informed digital consumer' consistent with the general demise of real citizenship, and in effect preparing children for an adult world dominated by powerful technology corporations.

## Friday 7th April (12:00-13:30)

Aurora Voiculescu (Westminster), 'Human Rights and Artificial Intelligence between "Excitement and Disruption": Technology and Law at the Crossroads'

This paper proposes a multi-layered mapping out of the challenges that technology and law bring to each other in particular in relation to the concept of artificial intelligence. These reflections stem from some of the tentative normative initiatives in the field and in particular from the EPSRC Principles of Robotics, initiatives that reflect social concerns regarding the extent to which robots can affect our lives. This paper highlights the fact that, while such initiatives may address to some extent the present technological challenges, they appear to be less immediately suited for future technological and conceptual dares. Moreover, the normative platform that these initiatives create, translate with difficulty in as much as legal protections and legal responsibilities are concerned. This paper will therefore bring under scrutiny two rather different discourses, the legal and the technological one, mapping out the points of contact and tension, in particular with respect to human rights issues. The first part of the paper is dedicated to the search of the definition of what a robot is, drawing primarily upon the field of robotics and AI technology. Such a definition should offer the basic conceptual platform on which a normative endeavour, aiming to regulate robots in society, should be based on. Advancing the idea that initiatives such as the EPSRC Principles offer no clear yet flexible insight into such a (meta-)definition, which would allow one to take into account the parameters of informed technological imagination and of envisaged social transformation, the second half of the paper highlights a number of regulatory points of tension. Such tensions, it is argued, stem largely from the absence of an appropriate conceptual platform, influencing negatively the extent to which such normative initiatives can be effective in guiding social, ethical, legal and ultimately scientific conduct.

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Allison Holmes (Kent), 'Digital Interventionism: Can AI supplant the State in Human Rights Protection?'

Traditional roles assigned to the state, as distinct from private actors, have been fundamentally altered as a result of technological developments. Popular web platforms such as Google, Facebook, and Twitter are now the dominant mediums through which social interactions occur, news is gathered, and education is facilitated. These private companies have developed technologies which allow for expansive opportunities for freedom of expression and speech, enabling these rights across traditional spatial bounds. However, the development and saturation of these technologies has similarly led to an increase in anti-social behaviour and harmful patterns of harassment and trolling. In seeking to deal with these issues, web platforms are developing artificial intelligence technologies which can automate detection of this behaviour and take a proactive role in preventing it.

This digital interventionism allows private companies to interfere with individuals' rights, acting as arbiters of what conduct is appropriate. Whilst the idea of stopping harassment and trolling online is laudable, it presents a myriad of legal issues which cannot be adequately dealt with due to the nature of the organizations. The prevention of harm and the protection of fundamental rights is under the purview of the state; the actions of private companies in adjudicating these issues have blurred the traditional boundaries between state

accountability and private actions. Allowing private actors to classify these violations and ensure these rights does not afford the same protection; there is a lack of accountability for the moderation, no redress mechanism, and a lack of transparency in the decision-making. This paper examines the issues presented by artificial intelligence mechanisms mediating users' fundamental rights, positing a new legal regime is necessary to ensure that the mechanisms designed to protect individuals online do not turn into instrumentalities of rights intrusions themselves.

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Sara Solmone (University of East London), 'The implications of the access-based jurisdictional principle on the fulfilment of human rights online'

The rise and development of the Internet has posed numerous challenges to the human rights protection regime. One of the major challenges is related to the definition of the concept of State jurisdiction in cyberspace. Indeed, there is currently a high level of uncertainty as to the meaning of State jurisdiction online, according to both general international law and human rights law. Due to this uncertainty, it appears particularly difficult to establish which State is entitled to apply its own laws to prosecute unlawful acts when these are committed online, rather than in a clearly identifiable physical environment. Furthermore, because of this uncertainty, multiple and conflicting national laws are currently simultaneously being applied by States in order to regulate content published online. This study analyses the access-based jurisdictional principle. This principle identifies a particular approach that has so far been adopted by various national courts to establish jurisdiction over content published online. According to this approach, national courts establish jurisdiction over content uploaded and hosted in foreign countries on the grounds that that content can be accessed from within the territory of the State exercising jurisdiction. This study argues that the exercise of State jurisdiction over content published online based on the sole accessibility of that content from within the State's territory has negative implications on the fulfilment of human rights in cyberspace, especially in regard to the exercise of freedom of expression online. To achieve this objective, the key critiques that have been raised to the access-based approach will be identified and discussed. Furthermore, attention will also be paid to how the European Court of Human Rights (ECtHR) has so far dealt with issues related to the exercise of State jurisdiction online in its jurisprudence. By conducting this analysis, this study aims to shed light on the limitations of the guidance provided by ECtHR on both the exercise of cyberspace jurisdiction and the compliance of the access-based approach with the European Convention on Human Rights.

# Information

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

David Mangan (City) and Marion Oswald (Winchester), “‘Tag a Mate’ meme trend on social media – exposing the weakness of defamation and privacy laws?’

In December 2016, an image of Lizzie Velasquez, a motivational speaker from the US who suffers from a rare medical condition, was featured in a ‘tag a mate’ meme, together with the words “Michael said he would meet me behind this tree for a bit of fun. He’s running late, would someone please tag him and tell him I’m still waiting?” Commenting on the meme, Ms Velasquez wrote, "At the time you might find it hilarious but the human in the photo is probably feeling the opposite."

A number of Facebook pages are responsible for creating and circulating sexually-suggestive and body-shaming memes, encouraging social media users to tag a friend with the name mentioned in the meme. Those responsible for the pages claim they are doing nothing wrong – the images are in the public domain and anyone who wanted their photo removed could ‘simply get in touch.’ (<http://www.bbc.co.uk/news/uk-38340095>) So the person portrayed is faced with an uphill struggle – attempting to police the circulation of their image by negotiation with the perpetrator or persuading Facebook that the image violates its community guidelines. In addition, a sexually-explicit or offensive message may affect the reputation of those tagged, especially if visible to their network.

This paper considers whether defamation and privacy laws are equipped to tackle the undoubted harm and distress caused by the circulation of offensive memes. The images are often identifiable but does the individual portrayed have a reasonable expectation of privacy in such image? This may be difficult to demonstrate if the image is one that has been made available, by the individual or others, on the Internet. User-generated content is increasingly the cause of defamation actions (‘Teen fined for YouTube karaoke video’ <http://www.reuters.com/article/us-finland-youtube-idUSL2478621120070824>; *McAlpine v Bercow* [2013] EWHC 1342 (QB)). In *Bryce v Barber* [Unreported July 26, 2010 (HC)], damages were awarded to the claimant when indecent images of children were posted on his Facebook page with the words “Ray, you like kids and you are gay so I bet you love this picture, Ha, ha.” Would, however, the requirement of serious harm in the Defamation Act 2013 put paid to the possibility of defamation claims for offensive memes, bearing in mind the courts’ tendency to attach a low level of importance to social media comments? Due to the uncertainties of the existing framework, it is time, this paper argues, to consider alternative models, such as protection against misuse of the digital person (Oswald, 2016 Information & Communications Technology Law (pending)).

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Tina Davey (UEA), ‘Post-mortem Privacy: Legal Intuition meets Philosophical Harm’

Upon death the law ceases to protect the living’s qualified right to privacy under Article 8, so that which is legally protected as private today can, upon death tomorrow, be made public. Indeed the immediacy, indeliability and viral nature of the digital era is making it progressively more difficult for that which we would wish to remain private, to be buried with us upon

death. This paper will argue that the law should continue to protect the right of, or interest in, the living's private life posthumously.

So far as the law is concerned, the concept of post-mortem privacy is still within its embryonic stage and is not protected as a single overriding principle. Attempts to protect the same concentrate on the digital aspects of privacy and the interpretation of current statutory provisions relating, inter alia, to data protection, intellectual property, breach of confidence, succession and trusts. Rather than shoe-horning post-mortem privacy into existing law by way of commodification and propertisation of privacy, this paper seeks to establish the rationales and justifications to underpin its protection from within the human rights framework by extending the qualified article 8 right posthumously.

This paper is in two parts starting with an exploration of society's 'intuitive' feelings that the dead do have interests and rights that should be protected and that respect for the dead should prevent intrusion into their privacy. It can also be seen that in some circumstances these intuitive feelings are recognised and acted upon by the courts. The second part of the paper looks at the philosophical debate on 'post-humous harm' concluding that a lack of post-mortem privacy can harm the ante-mortem person thereby justifying the continuation of the living's right to privacy beyond death.

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Helen Ryan, Marion Oswald and Emma Nottingham (Winchester), 'The "Holby City" Curtain of Privacy: The illusory nature of the privacy of patient information in healthcare settings'

It is common in every episode of the BBC's popular hospital drama series 'Holby City' for the curtains to be drawn around a patient's bed in order to carry out an examination, discuss a diagnosis or occasionally, discuss their own personal lives! This curtain hides the patient temporarily from the gaze of others but can do little to protect against eavesdropping and thus the association of sensitive information with the patient once the curtain is drawn back. So this type of privacy in a medical context cannot mean secrecy, being totally hidden or unobserved. It also cannot mean being able to own or control all information about oneself: the provision of effective healthcare depends to a large extent on the sharing of information. The 'privacy curtain' suggests that privacy in a medical context is particularly concerned about a person being free from detailed scrutiny from other people and a wish to avoid offensive observation and intrusion. The privacy curtain cannot hope to prevent completely the association of sensitive information with a particular person, but it can dilute the effect: a barrier that helps create a level of practical obscurity.

Although the privacy curtain exists to protect our physical bodies from offensive observation, can the same be said for our digital person? The datafication of healthcare combined with a society that values data flows, social media sharing and ubiquitous connectedness means that a person can now be broken down into representational parts to be analysed and deciphered, and with their future predicted by algorithms. Harari argues that 'The shifting of authority from humans to algorithms is happening all around us, not as a result of some momentous governmental decision, but due to a flood of mundane choices....Today corporations and governments pay homage to my individuality, and promise to provide medicine, education and entertainment customised to my unique needs and wishes. But in order to do so, [they] first need to break me up into biochemical subsystems, monitor those subsystems with

ubiquitous sensors and decipher their working with powerful algorithms.' ('Homo Deus: A Brief History of Tomorrow' by Yuval Noah Harari (Harvill Secker 2015)).

This paper will consider whether the laws and practice surrounding medical privacy and confidentiality are fit-for-purpose when faced with the algorithmic challenges of tomorrow, and suggest ways that an appropriately robust privacy curtain can protect our digital person against offensive intrusion

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Matthew Kay (London Borough of Hounslow), 'Data Sharing between local authorities'

This paper will follow the following format:

- Introduction – This section will explain the legislation behind data sharing together with giving a high level of overview of the risks vs rewards of data sharing as a concept and process.
- Main body – This section will focus on the issues local authorities face when sharing data discussing topics such as security, governance and training for individuals involved with sharing. Together with considering the influence of politics and the media. It will also look at the effects of storage and retention of information together with problems around inconsistent agreements and information being shared incorrectly.
- Conclusion – The conclusion will summarise the key findings of the research together with recommendations for reform and discuss the initial research findings from a forthcoming article in collaboration with Dr Ashley Savage and Dr Richard Hyde.

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Tim J Wilson (Northumbria), 'International information exchange as the 'hidden wiring' of criminal justice and the implications of Brexit'

Several post-Referendum Parliamentary inquiries have considered international information sharing, particularly the legal and technological systems that make such exchanges possible, when looking at the implications of Brexit. This presentation will examine the discussion of such issues at an oral evidence session held on 10th January 2017 by the House of Commons Justice Committee. The speaker will reflect on his participation as a member of a three person professional and academic panel that was cross-examined by MPs on that occasion. Additionally, as a measure of the effectiveness of EU initiatives, information sharing will be placed in the broader context of criminal justice cooperation beyond the geographical area of the 28 member states.

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Ashley Savage (Liverpool) and Richard Hyde (Nottingham), 'Cross-border sharing of rail safety concerns - on the right track?'

Across Europe, trains regularly carry passengers and freight over multiple international borders. Whilst cross-border travel in Europe is relatively simple, these trains operate in a complex and inconsistent regulatory landscape. The effective sharing of transportation safety concerns requires the support of industry, train operators, government and safety regulators. However, with no common operating language, different regulatory cultures and approaches to enforcement, there are considerable challenges to overcome before the benefits of any information sharing can be realised.

The paper will discuss findings obtained from semi-structured interviews and official reports to provide a detailed picture of the current scheme for cross-border information sharing and

co-operation. It will discuss formal information sharing with reference to initiatives administered by the European Railway Agency and informal and bi-lateral arrangements with reference to individual member states.

In order to conduct the research, the authors obtained an SLSA small grant funded project on the sharing of safety concerns in air, rail and sea transportation across Europe. The authors will highlight best practice and will draw upon comparative examples from the air and sea transportation sectors to propose reform.

# Intellectual Property

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## Wednesday 5th April (13:30-15:00)

Emmanuel Oke (Edinburgh), 'Territoriality, Trademark Law, and Tobacco Products'

The principle of territoriality is one of the foundational principles of International Intellectual Property Law (including International Trademark Law). Despite the fact that the International Intellectual Property system has undergone an evolutionary process from territorialism to multilateralism, the principle of territoriality is still firmly entrenched in the International Intellectual Property system. However, while it is true that this principle has managed to survive the incorporation of intellectual property into the International Trade Law system (via the WTO's TRIPS Agreement), some scholars have expressed concern that the incorporation of intellectual property into the International Investment Law system via investment agreements (such as Bilateral Investment Treaties) constitutes a potential threat to the principle of territoriality in the International Intellectual Property system. This is because a number of these investment agreements empower corporations to challenge regulatory measures (such as measures relating to intellectual property law, including trademark law) implemented by host countries before international arbitration tribunals via the Investor-State Dispute Settlement system.

This paper will investigate the tension between the principle of territoriality and the global harmonization of intellectual property standards in the context of the current iteration of intellectual property as an asset in investment agreements. Specifically, it will critically examine how this tension was resolved in the recent investment arbitration between Philip Morris and Uruguay which concerned the latter's implementation of certain measures to curb the consumption of tobacco products in its country. In this case, Philip Morris had contended that the challenged measures constituted an expropriation of its trademarks while Uruguay argued that the said measures were implemented in order to protect the health of its citizens. This case will be used to assess the impact that the incorporation of intellectual property into the International Investment Law system has had on the principle of territoriality.

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Yuanqiong Hu (SOAS), 'Groups, Meanings and the Dynamics of (Re-)Construction: Analysis of the Discourse on Patent and Health before the WIPO Standing Committee on the Law of Patent (2014-2016)'

Since 2011, Patent and Health has become one of the five standing agenda items of the Committee on the Law of Patent (SCP) of World Intellectual Property Organisation (WIPO). Competing proposals, group politics and the constant construction and reconstruction of the meanings and the key concepts of the issue during the Committee meetings have turned the standing normative discussion into a contingent site of negotiation with little success in reaching agreement.

The paper intends to present a discourse analysis concerning the agenda item of patent and health before SCP from 2014-2016, building upon the participatory observation of the author during the period, and analysis on the text, proposals, language and patterns of presentations used by the main parties in the process. It locates the discussion in the global context of the controversies around patent and health, drawing attention to the interplay of SCP process

with the discursive processes and influences from outside of the Committee room, and discusses its normative impact on the future discourse of patent law and health.

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Smita Kheria (Edinburgh), 'Visual artists and copyright: friends or foes?'

This paper will discuss the role of copyright in the day-to-day creative practice of visual artists, drawing upon qualitative data from ongoing empirical research that investigates the interaction of copyright with the everyday lives of creative practitioners.

The overarching study, titled 'Individual Creators', was funded by the CREATE centre (a national research hub based in the United Kingdom and funded by Research Councils UK), with the remit of investigating the future of creative production in the digital age, and in particular the role of copyright. The study's aim was to investigate a range of pertinent issues including: what is the role of copyright in the day to day practice of creative practitioners, and how is it changing? What is the actual, as well as perceived, value of copyright as creators might see it? To this end, a mixture of formal (interviews), and informal (conversations and observations at events), data was collected over a three year period. Project participants (including writers, illustrators, visual artists, and musicians) were identified by engaging with creators directly at notable events and festivals, through organisations that represent their interests, and using snowball sampling.

This paper will focus on findings from the data pertaining to visual artists with particular emphasis on: the changing economic and social contexts of the creative practices of a range of visual artists as well as their experiences in relation to copyright; and, the perceived role and importance of protecting moral rights. It will also question whether the perspectives of visual artists are significantly different from other creative practitioners that were part of the study's dataset, and if so, how.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Andrew Griffiths (Newcastle), 'The Contribution of Trade Mark Law to the Consumer Society'

This paper will consider how trade mark law has increased the ability of some firms to attract demand to their products through exploiting the transformation of the nature of consumption associated with the rise of the "consumer society". With this transformation, consumers have come to treat many kinds of product as a means of self-expression or self-realisation and source of emotional satisfaction as much as if not much more than a means of meeting their functional needs and desires. The rise of the consumer society has accompanied the rise of advertising and brand-based marketing, a growing recognition of the importance of the presentation, design and other aesthetics of products, and the cultivation of brands as a focus for "values, attitudes and lifestyles" ("VALs") marketing with their distinctive personalities and even mythologies. As the legal platform for branding, trade mark law has enabled some firms to attract demand to their products despite the space that may lie between them and consumers in the age of market globalisation. Trade mark law has also enabled many firms to distance themselves from the production of their products and to rely on global supply chains. The paper will also consider the social value of this development and relate it to broader issues of business ethics and social responsibility.

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Sabine Jacques, John Street and Morten Hviid (UEA), 'The effect of automated anti-piracy systems: the consequences for cultural diversity'

It is now well-established that certain online intermediaries (most notably the hosting providers) can be protected by domestic safe harbour provisions from liability where they have no knowledge or control over the content provided on their platform. Once made aware of the alleged infringing content, the intermediary must respond promptly to the notice-and-take-down request. Often in reality, the decision seems to favour right-holders in the absence of rigorous factual validation (one reason being the numerous non-disclosure agreements existing between CMOs and intermediaries and the huge number of requests received by intermediaries daily). Consequently, intermediaries and CMOs have invested in and developed technological tools to tackle online copyright infringement more effectively.

In essence, this article deals with the consequences of using algorithms to promote the exercise of human rights by focusing on the impact of these technological law enforcement mechanisms on the balance struck between freedom of expression (article 10 ECHR) and the right to property granted to right-holders through copyright law (article 1 of the First Protocol). Given the expansion of such automated algorithms, this article is both topical and necessary to understand how stakeholders in the creative industries enforce copyright law and what the hidden costs of such enforcement are. This article asks whether, despite the attempt to strike a fairer balance between right-holders and users to promote freedom of expression and protect creativity, such business practices lead to the strengthening of the right-holders' position and to a loss of cultural diversity which is itself justified by freedom of expression theories. It answers this question by analysing the use of automated anti-piracy systems to determine whether it is the automated system itself or other factors that are key to the impact on the diversity of works we enjoy. It also evaluates the extent to which

algorithms restrict the opportunities available to creators to disseminate their work effectively disseminated in order to preserve the right-holders' property right enshrined in the work.

These technological tools consist of complex algorithms able to automatically detect and act upon the alleged infringing content without human intervention, as well as algorithms aimed at automated processing of infringement notice. While technology seems to offer new ways of performing those tasks more efficiently, the overreliance on these tools may have a deterrent effect on the dissemination of cultural works and the variety thereof.

This article addresses these questions by adopting an empirical methodology and lays down the foundations for a possible future research that looks at the balance being struck between copyright protection and freedom of expression. To do so, we created quantitatively examine a random sample of YouTube videos to determine its diversity. This quantitative analysis is based on manual review and coding. We then isolated the taken down links and measure them against the notice-and-takedown requests which are published to establish which ones have been takedown automatically and extract patterns. It also calls for more transparency of intermediaries on the functioning of automated anti-piracy systems and for some independent human intervention in the content removal process. As such, this contribution aims at a wide audience including activists, technologists, policy makers, legislators, law enforcement, judges and lawyers amongst others.

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Tania Phipps-Rufus (Bristol), 'Fashion & Intellectual Property Law; Applying A Bourdieusian Theoretical Framework'

This research explores the significance of intellectual property to the commercialisation of cultural production in the fashion industry. One of the most active voices on cultural production in contemporary society is associated with the writings of Pierre Bourdieu, and his studies on the emergence and reproduction of consumer culture. Bourdieu's work on cultural production has been particularly popular in sociological and cultural studies scholarship, but has not yet generated as much interest in the field of intellectual property scholarship. This paper addresses the major reasons why his sociological apparatus is fertile for the study of intellectual property law. In IP scholarship economics has been the main theoretical framework for analysing and understanding IP's significance to the production of cultural goods, but scholarship on IP for creators is limited in terms of empirical methods, or drawing on theoretical frameworks outside economics that can help develop our understanding of fields of cultural production. The general purpose of this paper is to offer an alternative approach to the study of intellectual property law in creative fields. Applied to intellectual property law or to any other topic, Bourdieu's virtuoso is a way of 'thinking' and 'questioning' the social world that combines theoretical frameworks with empirical fieldwork. This paper maps out the way I use two of his main concepts "capital" and "field" in order to conduct legal research on creators in the cultural industry of fashion. Much of the existing literature on intellectual properties operation for the fashion industry functions without providing a clear empirical link to theoretical concepts. I aim to show how the use of Bourdieu's theoretical framework helps remedy this, and argue that it is beneficial for intellectual property specialists

to read and use Bourdieu because his sociology on fields of cultural production, can help “broaden the methodological tools available for analysing intellectual property policy.”

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Jasem Tarawneh (Manchester), ‘The Legality of Comparative Advertising in the UK Post Brexit’

Comparative advertising refers to a type advertising in which the product of a particular trader is contrasted with the products of others, mainly through the use of their respective trade marks. As Jacob LJ noted in *British Airways plc v Ryanair Ltd* “it is difficult to advertise comparatively without using the other side’s registered trade mark”. Clearly those to whom the reference is made may seek to challenge this method of advertising. The effectiveness of any challenge depends on the attitude of the courts towards trade marks and their perceived functions in the context of comparative advertising.

The English courts’ approach to comparative advertising under the 1994 TMA has been generally consistent with the classic rationale for trade mark protection. Under this rationale, trade marks are protected in so far as they are information providers – both as to source and quality – and on this basis only a misleading or confusing use of the trade mark merits legal redress. The classic approach does not look favourably on the validity of legal protection for the advertising or promotional function of trade marks, i.e. the “modern” function of marks. However, the position of English courts became complicated once the EU harmonised the regulation of comparative advertising in the EU by Directive 2006/114/EC concerning misleading and comparative advertising. This Directive requires Member States to permit comparative advertising, although it provides for more stringent conditions than does the 1994 TMA. The Court of Justice of the European Union has indicated, in a number of recent cases, its recognition of the modern functions of trade marks and that the compliance with the conditions specified in the Comparative Advertising Directive should determine whether or not the use of a trade mark in such advertising constitutes infringement. Despite some reservations, the CJEU approach was adhered to in the UK after the decisions in cases such as *O2* and *L’Oreal*.

On 23 June 2016 the UK voted to leave the European Union (EU). European trade mark law forms an integral part of UK law which means that UK courts must interpret the 1994 TMA in line with European Directives and the case law of the CJEU. Such an approach seems unlikely to continue in the UK post Brexit. This in turn could transform the entire basis for the interpretation of trade marks law in the UK and could have a major effect on the practice of comparative advertising. The aim of this paper is to assess how the UK will shape this part of the law in the post Brexit era.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Nevena Kostova (Edinburgh), 'Stakeholder Dynamics and the Illegality of Private Copying: A story of an undesired, yet tolerated outcome'

The repeal of the UK private copying exception in 2015 as a consequence of the successful judicial review launched by music industry organisations is a tangible example of the impact that stakeholder activity can have on the substance of copyright law and policy. In the present paper, I therefore use this case to explore the process by which organisations engage with copyright policy, the differences between individual actors, as well as the dynamics and challenges that characterise their operations and broader environment. The findings presented in this paper emerged from my doctoral research, a socio-legal study into four creators' organisations (COs): The Society of Authors, the Authors' Licensing and Collecting Society, the Musicians' Union, and the Performing Right Society, as actors in copyright policy. This research was funded by CREATE, the RCUK Centre for Copyright and New Business Models.

On the basis of primary data obtained from interviews with CO representatives, as well as documentary data (public consultation responses, the judicial review judgments, and more), the paper captures and discusses differences in the approach taken by organisations in the music and publishing industries on the topic of private copying, as well as in the primary motives that drove various music industry organisations to take joint action. It thereby illustrates the granularity of interests and priorities existing in the copyright policy environment and considers the way coalition-building to address a common problem affects this granularity. The paper further discusses the implications of inter-stakeholder and inter-industry dynamics for the policy process. It concludes that these dynamics affect and possibly limit the outcomes achievable for law and policy. Against this backdrop, albeit unsatisfactory and out of touch with common practice, the current status quo on private copying reflects a compromise between competing interests and is thus likely to hold, at least for a while.

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Moreten Hviid, Sofia Izquierdo Sanchez and Sabine Jacques (UEA), 'Digitalisation and intermediaries in the Music Industry'

Prior to digitalisation, the vertical structure of the market for recorded music could be described as a large number of artists [composers, lyricists and musicians] supplying creative expressions to a small number of larger record labels and publishers who funded, produced, and marketed the resulting recorded music to subsequently, sell these works to consumers through a fragmented retail sector. We argue that digitalisation has led to a new structure in which the retail segment has also become concentrated. Such a structure, with successive oligopolistic segments, can lead to higher consumer prices through double marginalisation. We further question whether a combination of disintermediation of the record labels function combined with "self-publishing" by artists, will lead to the demise of powerful firms in the record label segment, thus shifting power to another segment, but keeping the number of powerful segments to one.

Anthony O'Dwyer (University College Cork), 'The Nature of the Artists' Resale Right (droit de suite) – from Antiquity to Modernity'

The artists' resale right (ARR) is not a product of modernity, its antiquity can be traced back to late 19th century France. The droit de suite as it was then known was as much a welfare right as it was a response to the failures of the French droit d'Auteur system to adequately reward visual artist for their creative endeavours. Today, the success of the ARR may be attested to by its prominence in international law, however this internationalisation has not brought with it uniformity. The European experience speaks to this; under the harmonisation framework of the Artists' Resale Right Directive 2001/84/EC, member states are granted significant scope in its implementation and accordingly ARR models have come to pass which encompass a social security function reflective of the original French formulation. This article, by drawing on the social history of visual artists, and by considering the nature of the ARR and its predecessor the droit de suite, argues that socially orientated ARR models, which exist in Germany and Norway, represents a modern formulation of the droit de suite which more fully responds to the needs of visual artists today.

# International Criminal Justice – Theory, Policy and Practice

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Clare Frances Moran (Edinburgh Napier), 'The authority of international criminal law'

The concept of the authority of law has caused many legal theorists to spill much ink over many decades. Writers such as Kelsen, Raz, Rawls and Locke have explored the reasoning underlying obedience to the law, and the rights of lawmakers and sovereigns to impose rules. Authority is a critical aspect of any democratic domestic legal system because of its connection to the legitimate exercise of power. From a Western and European democratic perspective, the exercise of power in a legitimate fashion is necessary if the government is to have any legitimacy in the eyes of the public.

This situation is no less critical at the international level, although it is notoriously difficult to analyse legitimacy because of the central differences between domestic and international law. It is posited here that one of the main difficulties encountered is because the fundamental, and essentially prior work, has not been carried out: the notion of the authority of international law has not been properly explored. Indeed, there has been little written, in detail, on the authority of international law, and from where this form of law derives its authority. International criminal law is one of the main areas which suffers from a crisis of legitimacy, but the discourse does not take the prior step of assessing the authority of international criminal law.

This work examines the authority of law generally, based on the work of theorists such as Kelsen, Hart, and Raz. Their work on the authority of law will then be used as a foundation on which to discuss the authority of international criminal law and from where this may derive. The assumption that law has authority as soon as it has been made by a legitimate holder of power shall also be discussed in the international context, including a discussion of the limitations of such analysis when it is derived from the domestic context as well as the way in which it can be used.

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Annika Jones (Durham), 'A Quiet Transformation: Efficiency Building in the "Fall" of International Criminal Justice'

Following a wave of institution building from the 1990s onwards, optimism about the future of international criminal justice has given way to disappointment and disillusionment. In the words of Payam Akhavan: after the rise of international criminal justice has come its, perhaps inevitable, fall. One of the key concerns about the operation of international criminal tribunals is the low number of cases that they have completed, particularly in light of their high costs of operation. This concern has prompted a growing focus on efficiency building and measurement of the performance of international criminal tribunals. Concern for efficiency is reflected in the completion strategies of ad hoc international criminal tribunals and numerous initiatives within the International Criminal Court (ICC), including the recent development of performance indicators to measure the effectiveness of the Court's operation.

This paper looks at how the recent focus on efficiency building has affected the function of international criminal tribunals and their ability to achieve the numerous, and often conflicting, goals that have been attributed to them. The paper draws primarily from a series

of in-depth interviews undertaken with participants and stakeholders in proceedings at the ICC, the International Criminal Tribunal for the Former Yugoslavia and the Extraordinary Chambers in the Courts of Cambodia, as well as review of relevant court documents and case law. It is argued that concern for efficiency is causing international criminal justice to undergo a quiet transformation, not in the goals to which international criminal tribunals aspire, but the manner in which, and extent to which, they are being and can be achieved. The transformation is quiet because of its piecemeal and largely uncoordinated nature, which opens up possibilities as well as risks.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Charlotte Wick (Leicester), 'From Rwanda to Burundi: Learning from the International Criminal Tribunal for Rwanda Approach to Incitement to Genocide'

Until recently, Burundi's efforts to achieve peace had been hailed as a success story. However, the period of relative calm ended when President Pierre Nkurunziza sought an unconstitutional third term in office. After almost two years of political instability, reports continue to emerge of incendiary rhetoric and incitement to violence which are 'fuelling fears' that the crisis could spiral out of control and lead to genocide. These fears have been magnified by the announcement that Burundi intends to withdraw from the International Criminal Court. This word of caution draws attention to the impact that such speech may have in inflaming ethnic tensions in a potentially volatile situation. However, even though inflammatory speech may be ethnically divisive and repugnant, if it does not directly and publicly encourage the commission of genocide, it does not fall under the jurisdiction of international criminal law.

Given the 'painful past' of the region the UN Security Council has expressed fear over the potential for such speech to trigger future violence. Therefore, it is necessary to be able to identify the point at which speech may be deemed to be internationally criminal. However, considering some of the problems faced at the ICTR it has become apparent that this task is not straightforward. The crisis in Burundi will be used to give current context to an appraisal of the approach of the ICTR. As part of this discussion, this paper will consider how the Tribunal identified incitement to genocide and the challenges it faced in assessing speech offences in order to draw conclusions about how successfully the Tribunal delineated the previously untested international offence of incitement to commit genocide.

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Elina Almila (Helsinki), 'International Criminal Courts and Children as Victims of Conflict Related Sexual Violence'

Children are vulnerable to sexual violence in armed conflicts. Numerous reports from conflict areas show that children fall victims of conflict related sexual violence, regardless of their gender. Professionals working with children in conflict areas, including Unicef, have over the years emphasised the importance of getting justice for child victims of armed conflict related sexual violence. Yet there is very little research on how the incidents of sexual violence involving specifically children are treated in international criminal courts or if they reach the courts at all.

In this paper I look at how cases involving child victims of sexual violence have been treated in international criminal courts. The research method is critical textual analysis of the cases, which is conducted as content analysis. The cases are from the International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and Special Court for Sierra Leone. The paper considers questions and reasons which may affect the ways in which child sexual violence is treated in international criminal courts and which affect the processes leading to criminal cases. I also consider, whether cases of both girl and boy victims are treated similarly. I argue in the paper that previously armed conflict related sexual violence against children has been relatively little discussed issue in

international criminal courts and has not – despite the recommendations of professionals working with children – been made into a separate and specific issue that would demonstrate the extreme gravity of the crime. Nevertheless, it seems that this may now be changing.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Noelle Higgins (Maynooth) and Mohamed Badar (Northumbria), 'Cultural Defences at the International Criminal Court'

Cultural defences, i.e. claims that certain aspects of a defendant's cultural background should be taken into consideration by courts when adjudicating on their guilt or innocence, have been raised before domestic courts in a variety of jurisdictions. However, defences are one of the most neglected aspects of international criminal law, and the topic of cultural defences is the most neglected of all. While the Statute of the International Criminal Court is silent as to whether cultural defences can be raised before it, the possibility remains theoretically open to defendants. It has also been argued that cultural defences must be allowed as an element of their right to a fair trial. Indeed, the introduction of this defence may also serve to improve the reputation of the Court against claims of the anti-African bias which have plagued the institution. However, the introduction of cultural defences at the Court would bring with it a number of problems, including challenges to the principle of equality as individuals may not be treated the same if they come from different cultural backgrounds.

This paper considers how cultural defences can be opened before the Court, focusing on the sources of law enshrined in the Statute and the defences recognised under it. It also analyses the reasons for and against the acceptance of cultural defences at the Court. In particular, the paper considers the case of Prosecutor v Al Mahdi, and assesses cultural issues which arose in this case, including the issue of hisbah (commanding good and forbidding evil) which is considered 'a cardinal Qur'anic principle which lies at the root of many Islamic laws and institutions'.

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Margaux Raynaud (Erasmus University Rotterdam), 'Judicial Discretion at the International Criminal Court: Delimiting the Boundaries of ICC Judicial Decision-Making on Anti-Impunity'

The fight against impunity is increasingly perceived as requiring states to investigate, prosecute and punish international crimes. This 'anti-impunity norm' could proscribe states from for instance passing amnesty laws. However, inconsistent state practice supports the claim that this norm has yet to crystallize as customary international law. The International Criminal Court (ICC) could potentially play a role in the crystallization of this norm. Along with the ICC Prosecutor, the ICC judges have the tools to shape this anti-impunity norm and to incentivize states to internalize this norm in their domestic legislation and practices. Yet, the proper role of the ICC judges in the development of customary international norms has remained largely under-explored to date.

The ICC judges may influence the development of the anti-impunity norm through two types of decision-making: judicial review of a Prosecutor's decision not to prosecute and judicial interpretation of statutory provisions on admissibility. The main contribution of this paper is to develop a set of criteria to define the boundaries of judicial discretion in this context. This paper will consider factors such as the division of power on the international plane, applicability of rules on treaty interpretation, the mixed adversarial-inquisitorial nature of ICC proceedings, and the ICC's complementary jurisdiction. The proper scope of judicial discretion as regards anti-impunity will be assessed in light of the norm's status, its determinacy and

specificity, and the possible effects of ICC judicial decision-making on the crystallization of that norm.

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Djeyhoun Ostowar (King's College London), 'Past Sequencing and the Peace versus Justice Dilemma: Timing of Transitional Justice in Kosovo, East Timor and Afghanistan'

To shed light on key driving forces of transitional justice in contemporary peace building settings, this research comparatively examined the outcomes and timing of transitional justice in several case-study countries. Conducted against the backdrop of a perplexing contrast of, on the one hand, academic and policy debates' frequent references to the importance of timing in accountability and justice measures, and on the other hand, a dearth of research on the topic, this project addressed an important analytical gap. Given their strong and relevant commonalities, Kosovo, East Timor and Afghanistan were selected in a Most Similar Systems Design, and qualitatively analysed by means of historical analysis and process tracing in order to explain the wide variation in transitional justice outcomes and timing. The research involved inter alia fieldwork in all three countries and over 50 semi-structured interviews and background conversation with informants selected through purposeful sampling and snowballing. A number of carefully selected determinants guided the inquiry as various independent variables. In showing what drives transitional justice measures, the results of this research countered the prevailing narratives and arguments on the topic. Relevant transitional justice outcomes and timing were shown to be driven less by constraints of conflict resolution (e.g. peace negotiations) or strategies on timing (e.g. sequencing) but by (geo-)political interests of the external actors and of the (empowered) domestic political elites. Equally, the state and reform of domestic (justice) institutions and justice demands of the local population played a marginal role, while (inter)national human rights actors appeared capable of triggering certain transitional justice responses. As the practice of peace building and transitional justice continues and possibly further expands, this project contributes to a deeper understanding of the dynamics of transitional justice, and potentially to better and more empirically grounded conceptualization of relevant issues as well as sounder policy designs.

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Patricia Hobbs (Brunel), 'The ICC Cooperation Regime: in search of meaning'

The horizontal system of cooperation among equally sovereign states has certain advantages, mainly because it relies on the principle of reciprocity and states are therefore more likely to comply. However, states have a tendency to protect their own interests when entering into bilateral or multilateral treaties, and such interests do not necessarily coincide with the aims of international criminal justice. The Rome Statute regime, on the other hand, established a cooperation system between member states and the International Criminal Court (ICC) in order to ensure its effectiveness when investigating and prosecuting international crimes. Under this regime states retain primary jurisdiction for investigating and prosecuting international crimes, and it is only when they are unable or unwilling that the ICC may take up the task. It follows that the need for states' cooperation is generally quite limited. Having said

that, the Rome Statute negotiations' proceedings revealed a number of reservations by some delegates with regard to the cooperation regime, centered around the respect for state sovereignty, cultural sensitivities and a balancing exercise between cooperation and sovereignty. This leads to the question on the meaning of cooperation, and its relationship with state sovereignty. Members of the international community, and indeed member states to the Rome Statute, interpret cooperation in different ways, and the ICC will have yet another interpretation. In fact, despite establishing a regime with a relatively low set of states' obligations (in order to ensure a high level of membership) there are still a number of difficulties with cooperation in practice. This paper will then examine different theories of interpretation, as well some political theories, to gain a better understanding of the meaning of cooperation, and it will set the foundation for a further qualitative study on the different understandings of cooperation from selected ICC members of staff.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Mateusz Piątkowski (Lodz), 'The Crime of Undeclared Armed Attack in International Humanitarian Law'

From the temporal applicability of the international humanitarian law, is essential to establish the beginning point of the armed conflict. Most scholars before the modern era agreed, that prior declaration of war is a required noble act and condemns the armed operations conducted without any notification. In 1904 when the Russian Pacific Fleet inflicted heavy losses during a surprise Japanese attack in Port Arthur. This event leads international community towards a new international agreement - the Third Hague Convention, which required a proper notification of hostilities to be delivered before the first salvo of guns. Nevertheless, the state practices rather ignored the above-mentioned requirement, and frequently commence hostilities to gain a tactical advantage in the unexpected strike. This pattern was followed by the acts of Axis armed forces, both on European` and Pacific theater of war. After the war, during the trials of the war criminals in Tokyo, the prosecution made an attempt to accused the commanding officer of the Japanese Navy Pearl Harbour Striking Force of the crime of murder the U. S sailors in the circumstances of undeclared war. The aim of the presentation is to cross - examine the case of Pearl Harbor strike and to evaluate whenever the crime of undeclared attack exists in international humanitarian law.

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Anna Brennan (Liverpool), 'Forging a New Path for the Accountability of the Non-State Armed Group as a Collective Entity under International Criminal Law: Perspectives from Complexity Theory'

The contested legal status of non-state armed groups suggests that it is difficult for international lawyers to conceptualise their accountability under international criminal law. Legal approaches to the issue have thus far failed to resolve the problem, and although the literature on international criminal law suggests that individual members of non-state armed groups must bear the most responsibility for international crimes, this is not a completely satisfying deduction since the non-state armed group does habitually make decisions about whether or not its members will execute operations on its behalf. This article bridges this gap by contending that systems theory – in particular complexity theory – may bolster our analysis on the prospects for constructing an accountability model for the non-state armed group as a collective entity under international criminal law. Conceptions from complexity theory illustrate why this is the case. If the theory is correct, a non-state armed group is neither a legal abstraction nor reducible to the individuals who supposedly comprise it. Rather, the non-state armed group is an emergent phenomenon that has resulted from complex interactions between individuals and the conceptual tools and structures that individuals use to understand and interact with their political and social environment. This theory is inconsistent with the basic premise of international criminal law that the individual as such is the most appropriate bearer of responsibility. Nevertheless, because in a complex system there is no linear connection between the emergent phenomenon and its individual members, this implies that the divide between a non-state armed group and its members in the distribution of criminal responsibility may never be overcome. The argument developed in this article is that these insights may provide the foundation upon which an accountability model for the non-stated armed group as a collectivity can be constructed.

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Aisling O'Sullivan (Sussex), 'The Eichmann Trial and narratives of justification for universal jurisdiction over crimes against international law'

The Eichmann Trial was a cause célèbre in early 1960s and continues to excite debate among scholars over its legitimacy and in turn, its legacy. As modern institutions, war crimes trials use narratives of justification that refer to 'origins, struggles and ideals that led to the current status' (Koskenniemi, 1999) in their attempt to 'actively construct the legitimacy of the trial' (Stolk, 2015). Conversely, the defendant's counter-narrative, challenging the legitimacy of the trial, contests those same claims of origin, struggle and ideal. This contestation means that war crimes trials 'do produce pluralist histories' (Simpson, 2014) and therefore, every tribunal adopts a particular (contested) account of the past. We observe such conflict (and opposing narratives) in the Eichmann Trial as the Israeli Courts were called upon to determine the trial's legitimacy, including the contested question over Israel's claim to jurisdiction over crimes committed abroad by a non-national. Among their chosen narratives, the Israeli courts constructed a "meaning" and justification for universal jurisdiction over crimes against international law. Its portrayal interwove a set of particular narratives from debates since the end of the 19th century on jurisdiction over fugitive offenders, sea-piracy and over violations of the laws of war. In this respect, the Israeli Court judgments pulled on one side within each of the historical debates to construct what they presented as a linear, uncontested and "progressive" history of universal jurisdiction. Conversely, Eichmann's Defence counsel pulled on the opposing position within those same historical debates that was presented in a similar linear fashion. Therefore, this paper explores the Israeli Courts portrayal by referring to the multiple earlier narratives between the 1920s and 1940s, which are critical for its narrative construction.

# International Economic Law in Context

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## Wednesday 5th April (13:30-15:00)

Polona Florijancic (Brunel), 'WTO - Providing Incentives for Transition into Green Production'

Despite stark warnings from the scientific community about the future impacts of climate change, humanity keeps racing towards disaster. The current WTO regime not only fails to rectify, but directly contributes to this race to the bottom. Firstly, the WTO does not include any agreement on environmental standards, despite the fact that failing to take into account the cost of damage to the environment is de facto a subsidy to the firm that is causing the damage. In this sense, environmental damage should at least be considered under the WTO subsidies and countervailing duties disciplines, however this is not the case. Moreover, said disciplines further do not sanction the direct subsidisation of fossil fuels, despite the fact that they encourage wasteful consumption, distort markets, impede investment in clean energy sources and undermine efforts to deal with climate change merely because this does not strictly breach the national treatment rule. There is however a third element to the WTO failure in encouraging economies to transition into clean energy and it is this aspect that this paper focuses on in light of the recent dispute between India and the US concerning certain measures of India relating to domestic content requirements under the Jawaharlal Nehru National Solar Mission (NSM) for solar cells and solar modules.

As India pointed out, several international instruments call for the responses to the dangers of global warming to be conducted in a manner that is economically beneficial to the developing country in question yet whenever environmental concerns are addressed in a manner which also incorporates economic policy measures aimed at upgrading the productive structure of developing countries' economies, these are routinely brought to the dispute settlement mechanism, where they suffer defeat after defeat. This is not surprising in light of the fact that the dispute settlement bodies have by now become notorious for their bias towards liberalisation and a fetish with the dictionary meaning of specific provisions coupled with a disregard for the objects and purposes of the agreements, such as sustainable development. At the same time this is hardly surprising given the legal framework in which they operate.

This paper considers how the WTO rules and their implementation through the dispute settlement system could be improved to provide incentives to developing countries to transition into clean energy production by allowing them in this context additional policy space aimed at economic development beyond currently WTO allowed measures.

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Abdulmalik Altamimi (Leeds), 'Interactional Trade Law in the Islamic Civilization'

Praised by many historians and economists as the civilization of trade that connected the East with the West, the Islamic civilization was a pivotal pillar of the foreign trade we enjoy today. Studies that looked at this civilization recognise its openness and humanistic underpinnings that sustained interactions of foreign traders for centuries. Suffices to say that this civilization, like many others, was not devoid of turbulence; its disappearance has historical significances. Yet, interactions supported by shared legal principles of trading were instrumental to Muslim and non-Muslim traders who shared sea and overland trade routes. Drawing on the interactional legal theory, which is founded on the economics of trade, this presentation

underscores the universality of the Islamic principles of foreign trade. These principles are enshrined in Islamic commercial and maritime laws. Some historians allege that the Islamic trading system was exclusionary of “others” amounting to modern day trade protectionism, others disagree saying the system was open and legally well-developed, mainly because of its central geographical location. This presentation will explore whether the stability of the Islamic international trading system was due to sustaining long term legal interactions or only coercive adjudication, which would have been difficult to administer between traders of different regions, origins, and religions passing through the Mideast. What were the legal characteristics of the vastly open Islamic legal trading system stretching from Spain to China? These questions are relevant for understanding today’s multilateral trading system as represented by the World Trade Organization (WTO), which suffers from the institutional imbalance between its political and judicial branches. The overreliance on adjudication, which is increasingly failing to yield effective results, is worrisome for WTO experts. What can the legal practice in one of the highly admired and sophisticated human civilization teach us about international trade law?

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Anil Yilmaz Vastardis (Essex), ‘Justice bubbles for the privileged: A critique of the Investor-State Dispute Settlement Proposals in European Trade and Investment Agreements’

Historically, the use of international arbitration to resolve foreign investment disputes was favored particularly in order to prevent discrimination against foreign investors and avoid violation of their due process rights by abusive governments with weak judiciaries. For this reason, international investment arbitration (‘IIA’), with its flaws and its strengths, has been perceived as facilitating access to justice for foreign investors at the international level. In fact, IIA is arguably the strongest rights enforcement mechanism that one can find in international law. The central argument presented in this paper is that the use of special international tribunals or courts to improve access to justice for a class of privileged investors is a contributing factor to undermining access to justice for all. The point of departure for this critique is the EU’s attempt to render permanent the IIA model by adopting the investment court system (ICS) in its new generation trade and investment agreements.

While the critique presented in this paper is relevant beyond the EU’s agreements, the latter deserve particular attention. Permanent outsourcing access to justice for investors in EU’s agreements would signify a significant leap away from working towards ensuring access to justice for all. These agreements are likely to result in a deeper entrenchment of the prioritisation of commercial interests of the wealthiest few over the interests of wider society at a global scale: a) by making the justice bubbles for investors more permanent through the establishment of a standing court system; b) by locking in a relatively large number of states to this mode of dispute settlement for decades; and c) by potentially defining the new international order for trade and investment as templates of good governance.

## Wednesday 5th April (15:30-17:00)

Osayomwanbor Bob Enofe (University College Dublin), 'Situating Effectiveness: The Criminalisation of Cartel Activity in the U.S.'

Mainstream discussions of the transplantability and desirability of 'cartel criminalisation' draw heavily from the successes of the U.S. This paper adopts a post-modern comparative framework—proceeding from an acknowledged 'singularity' and 'difference' of examined entities—to hermeneutically set out the distinctiveness of the U.S.'s approach and experience. Particularly, the paper argues that an intrinsic, distinct, 'Yankee' psychology, or ethos, coupled with a specific historical dynamic, originally informed the U.S approach to criminally prosecuting cartels. These, together with desirable institutions/institutional realities, and procedural criminal law frameworks, continue to sustain the vibrancy of criminal anti-cartel enforcement in the country. As such features might not be easy to replicate in other countries (i.e., a distinct anti-cartel cultural norm, favourable institutions/ institutional context, and a distinct favourable law enforcement reality), transplanting the U.S approach, to duplicate widely noted successes, will be hardly straightforward—if at all possible (or even advisable).

The paper is broken down as follows: Part I provides an overview of the U.S approach and experience with cartel criminalisation- prompting arguments of desirability of transplant. Part II outlines the constitutive singularity of the U.S regime, together with implications such can have for unreasoned transplantation. Part III concludes. Overall, the paper argues that the widely advanced success of the U.S, with cartel criminalisation, i.e., in terms of enforceability and result, is a direct consequence of a distinct 'coupling' and co- simultaneous evolution of law with favourable cultural, political, as well as policy and institutional realities, together with co-existing desirable procedural laws. This poses serious implications for mainstream theories of 'transplantability' and paradigmatic 'desirability.' Specifically, the interface of social and political outlooks, as well as institutional and structural realities, together with the way such might affect law reform should not be substituted for theoretical hypotheses or formulaic arguments.

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Jing Wang (Bangor), 'Why the Anti-Monopoly Law of China 2007 Fails to Protect Privately-Owned SMEs: Struggling against Administrative Intervention'

The study presented here investigates State intervention in the marketplace in China, by way of certain laws and industrial policies, to assess how various aspects of these interventions have impacted on the development of privately-owned small and medium-sized enterprises (SMEs) in certain traditional State-controlled industries, namely the steel, gas station, and fixed-broadband sectors. This study demonstrates weaknesses in the legal framework of Chinese laws designed to promote competition and advance the interests of SMEs, and identifies reasons why this framework has failed, as well as providing recommendations for improvement.

During China's economic transition era, the State-market relationship has been tightly controlled by the central government. The Economic Charter, namely the Anti-Monopoly Law of China 2007, did not come into force until 2008. However, although dynamic enforcement of this Law commenced in 2014, it has so far failed to alter the parameters of the State-market

relationship: industrial policy retains its traditional prominence and dominance in State intervention, and continues to protect the anti-competitive exercise of specific or exclusive rights by administrative agencies and State-owned enterprises (SOEs). Therefore, privately-owned SMEs often experience confrontations with SOEs. This tendency not only prejudices fair competition, but also harms the uneven-balance between different types of interest groups in the Chinese marketplace. Privately-owned SMEs and consumers suffer discrimination from the anti-competitive application of State industrial policies and the administrative actions of implementation agencies. Accordingly, the public interest, the reconciliation between the State's interest, the interests of enterprises, and consumer welfare, has not been advanced under the 2007 Act.

Hence, this study proposes key reforms which are necessary in order to establish, and bring about the operation of an effective legal framework for the promotion of the interests of Chinese privately-owned SMEs, in order to ensure their sound growth, and in order to bring about the realisation of the public interest: First, this work recommends measures designed to improve the enforcement of the Anti-Monopoly Law of China 2007, by proposing to restrain inappropriate administrative intervention, in order to restrict the State's industrial policies and the abuse of administrative rights from adversely impacting on SME-generated growth and competition. Second, the work suggests increasing the alignment between the Anti-Monopoly Law of China 2007 and other elements, such as administrative discretion and corporate social responsibility, in order to establish a fair competition environment for privately-owned SMEs in traditional State-controlled industries.



# Interrogating the Corporation

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## Thursday 6th April (09:00-10:30)

Ciarán O'Kelly (Queen's University Belfast) 'Corporate Governance and its Accountabilities'

Questions of accountability in corporate governance have very much come to the fore in recent years. Senior officers in large corporations have been described as sitting behind an 'accountability firewall,' reaping rewards without being

exposed to consequences for organisational failings or for misconduct down the organisational line. Given this, a number of scholars have turned to the relational model of accountability in order to generate a more nuanced sense of board accountability's internal structures (Loughrey and Keay 2015) and to highlight accountability's role in legitimating the structures of managerial power (Moore 2013; 2015).

In this paper I seek to build on these previous insights in order to examine accountability's \*moral\* core. Corporate governance is at its heart a series of claims about moral economy. Recent innovations, contained for instance in the Government's recent Green Paper on corporate governance, places an increasing burden on corporate governance to answer for questions of economic justice. What role, I ask, ought the corporate form have in pursuing such ends? And what role can corporate governance play in achieving them?

I address these questions through a discussion of Stephen Darwall's 'second personal' ethics. Corporate actors already give a range of accounts of their conduct towards both internal and external others. A broader sense of corporate governance is required that recognises and formalises this multiplicity of corporate accounts social expectations. Perhaps most importantly this sense of corporate governance must rely on and support mechanisms that bring hitherto marginalised voices into the corporate form.

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Ngozi Okoye (Lincoln) 'Board Composition, the Conscientious Personality and Enforcing Directors' Duties in Corporate Governance: Connections and Possibilities.'

The United Kingdom (UK) Department for Business, Energy and Industrial Strategy issued a Green Paper on Corporate Governance Reform in November 2016 and in its introduction, it was stated that in recent years, the behaviour of a limited few has damaged the reputation of the many [in the corporate world]. It is also stated that companies need to be supported to take better decisions for their own long-term benefit and that of the economy as a whole. In the foreword to the Green Paper, the UK's legal system, company law framework and corporate governance standards are stated to be competitive in a global economy. The current interventions in the realm of corporate law and governance necessitate an insightful exploration of pertinent issues which have the potential to impact on the effectiveness of corporate governance reforms, particularly in relation to the behaviour of company directors. The board of directors is responsible for the control and direction of companies and some of the most important and significant guiding factors in terms of their engagement in companies are their duties as enumerated under company law and the recommendations espoused in corporate governance regulation. Corporate governance recommendations usually provide for board composition whilst the company law provisions impose directors' duties on the persons so appointed as company directors. The main aim of directors' fiduciary duties in law

is to safeguard the interests of shareholders, the principals for whom the directors are agents. It could also be argued that the duties of directors aim to ensure that companies are run effectively for the benefit of all interested or affected parties. It follows, then, that the principles and provisions on board composition influences the outcomes in terms of effectiveness in companies for the reason that the directors who are a product of the provisions would then be expected to carry out their duties which should in turn result in effectively governed companies. Corporate law and the corporate governance framework, therefore, must ensure that the provisions on board composition engages with all the necessary elements which selects the directors who can undertake their duties. One key element which has not been explored by the corporate law and corporate governance framework in any sufficiency is the issue of the personality of board directors, a factor which influences their behaviour and hence their ability to undertake their duties. This paper discusses the significant influence of personality and behaviour on the propensity for board directors to engage effectively with their duties under the law. Arguments are made to the effect that the corporate governance framework is consistently failing to incorporate an ex-ante mechanism which contributes towards ensuring that corporate governance is effective by ensuring that board directors are persons who can indeed undertake their duties and behave as expected. It is clear that the impact of the corporate failures which occur when directors have not behaved appropriately or have reneged on their duties can be far-reaching and negative for society as a whole. Arguably, engaging with personality issues can be controversial and challenging, however, if it is an element which can indeed make a difference in terms of the effective governance of companies, then there is a cogent reason to explore the possibilities it holds. Ultimately, this paper emphasises the argument that the conscientious personality dimension is a requisite element in the considerations as to board composition for the reason that this personality dimension is the one which is most likely to be capable of abiding by any duties, including directors' duties.

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Joan Loughery (Leeds), 'Directors' Business Judgment and the Courts'

Directors of large public companies take decisions that can impact significantly on companies, shareholders, other stakeholders, and society, sometimes causing serious economic loss and social harm, as illustrated for example by the global financial crisis or the Deepwater Horizon oil spill. Yet it is rare for directors to be sued by their companies or shareholders, or subjected to regulatory sanctions for decisions that cause harm. This has caused widespread public dismay, rendering the question of the appropriate degree of director accountability a matter of public interest and a key policy concern.

A key reason for directors' lack of accountability is that the courts in England and Wales have asserted that directors' business judgments should be immune from judicial review. In the US and Australia directors' decisions are protected by the business judgment rule. Classifying a decision as a business judgment consequently provides directors with a powerful shield from legal accountability. It is therefore critical to understand when and why decisions are categorised as business judgments, and so immune from review, and when they are not so categorised and thus found to be challengeable. These questions have never been closely considered, and so the precise boundaries of the special protection from liability for decisions with poor outcomes that is enjoyed by directors have never been delineated.

This significant gap in knowledge raises important social, legal and practical issues. Directors of public companies exercise great power. Courts' refusal to review decisions classified as business judgments has resulted in a lack of legal accountability. Yet without knowing exactly what kinds of decision are exempted from review and why, and which decisions are reviewed, it is not possible to assess whether it would be appropriate to institute more reviews of directors' decisions. Again, because there is no clarity about what constitutes a business judgment, when the courts do pass judgment (positively or negatively) on directors' decisions they may be assessing business judgments, but not recognising this. This could be problematic: holding directors liable for their decisions may discourage entrepreneurial risk taking and deterring able people from becoming directors.

This paper explores the parameters of the concept of a business judgment, by examining how, if at all, the courts of England, Australia and the US (primarily Delaware) have defined directors' business judgment; what are the differences/similarities in the types of decision reviewed/refused review in these jurisdictions and those reviewed/refused review in England and Wales? Is it possible to categorise different types of decision? A comprehensive database search has been conducted of the case-law in England and Wales on the directors' duty of care; wrongful trading, applications for leave to bring a derivative claim, unfair prejudice, improper purpose cases, and director's disqualification to identify cases in which business judgment or equivalent terms have been used, or in which the courts have reviewed directors' decisions; key US decisions on the business judgment rule; and Australian cases examining business judgment.

This is part of an inter-disciplinary AHRC funded project conducted by the School of Law University of Leeds, and the Management School University of Liverpool that is examining the concept of business judgment.

## Thursday 6<sup>th</sup> April (11:00 – 12:30)

Neshat Safari (City University), 'British Home Stores collapse: evidence for the need of employees' enforcement power'

British Home Stores, one of the iconic high street chains, collapsed in 2016, and this led to the loss of 11,000 employees' jobs and 20,000 current and future pensioners facing substantial cuts to their entitlements with a £571million pension deficit.

The House of Commons report has described the owners' misconducts as the insult to the company's employees and pensioners.

However the important fact that the BHS scandal unwrapped was the weakness of the UK corporate law in supporting corporate employees.

Although Section 172 of the Companies Act 2006 requires company directors to promote the success of the company by having regard for the interest of employees, it only has to be for the ultimate benefit of shareholders. It does not empower employees with any enforcement mechanism.

This paper argues that employees are human capital of the company and have a vital role in the company's success. The BHS scandal shows that the current amount of protection under the company law, as well as employees' contractual protection, is not sufficient enough to protect them in all circumstances. Therefore the paper suggests that employees should be empowered with the right to make a claim on behalf of the company to stop damages to the company and consequently protect their own interests.

The paper explains how BHS could have been saved if the company employees had the derivative claim right. The paper also argues that the benefits of employees' derivative claim right would outweigh the probable risk of too much litigation against directors.

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Ronán Feehily (Middlesex), 'Balancing Corporate Activity with Conflicting Corporate Governance Stakeholder Interests'

The boards of directors of public companies in the UK are granted significant powers and there is a consequent need for accountability for their actions and decisions. The fallout from the 2008 financial crisis has demonstrated the need for a review of regulatory issues concerning corporate activity, specifically the way corporations can be most effectively directed and controlled for the benefit of a diverse range of stakeholders. This paper addresses the concept of accountability within, and of, the boards of directors of public corporations in the UK. It examines the meaning of the notion as well as the rationale for holding directors to account. The role of non-executive directors in ensuring accountability within the corporate boardroom is also assessed. The paper then evaluates the mechanisms currently in place in the UK corporate governance framework for ensuring the accountability of the board of directors, before discussing the ways in which accountability could be improved. Reforms that will be discussed to improve the current state of board accountability in the UK and to address the anomalies that exist include the creation of a profession of non-executive directors, rewarding long-term shareholders through loyalty shares, the adoption of a Swedish-style, shareholder-

led nomination committee, broadening the range of applicants entitled to bring a derivative claim and the introduction of additional public enforcement mechanisms for breaches of directors' duties. The boards of directors of public companies in the UK are granted significant powers and there is a consequent need for accountability for their actions and decisions. The fallout from the 2008 financial crisis has demonstrated the need for a review of regulatory issues concerning corporate activity, specifically the way corporations can be most effectively directed and controlled for the benefit of a diverse range of stakeholders. This paper addresses the concept of accountability within, and of, the boards of directors of public corporations in the UK. It examines the meaning of the notion as well as the rationale for holding directors to account. The role of non-executive directors in ensuring accountability within the corporate boardroom is also assessed. The paper then evaluates the mechanisms currently in place in the UK corporate governance framework for ensuring the accountability of the board of directors, before discussing the ways in which accountability could be improved. Reforms that will be discussed to improve the current state of board accountability in the UK and to address the anomalies that exist include the creation of a profession of non-executive directors, rewarding long-term shareholders through loyalty shares, the adoption of a Swedish-style, shareholder-led nomination committee, broadening the range of applicants entitled to bring a derivative claim and the introduction of additional public enforcement mechanisms for breaches of directors' duties.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Aurora Voiculesco (Westminster), 'The Corporate Form and Corporate Social Responsibility: A Socio-Legal Astigmatic Perspective'

This paper puts forward a number of reflections related the encounter between socio-legal and theoretical perspectives on the corporate organization. From this perspective, the paper scrutinizes the weak conceptual foundations on which notions such as the one of corporate social responsibility (CSR) and the one of business & human rights (BHR) have been built in the past decades. The analysis and the research undertaken under this umbrella brings forward two complex platforms of reflections that require to be treated distinctly: the two platforms relate to the place that the normative human rights discourse can be seen to have in the corporate social responsibility and in the 'business and human rights' debate first of all from a theoretical perspective, addressing the shaky theoretical foundations of the BHR and CSR discourse when placed on the exiting corporate agency platform. Secondly, from the perspective of the evidence brought forward through a socio-legal approach. The paper focuses in particular on the first platform of reflection, the one building on theories of responsibility as presented in the theoretical and philosophical thought on corporate agency and reflected in the legal discourse. The contention of this paper is that, while human rights discourse brings an already complex normative make-up and enters into contact – some would say competition – with yet another normative environment, the one of the 'host' corporate discourse, the business (ethics) discourse, reflections on the theoretical basis of this encounter may help bring some light in a field full of pitfalls. The paper looks into the conceptual foundations of the corporations in order to shed light on the rationale of corporate ethical responsibility and into the connecting spheres with the 'business and human rights' responsibility.

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Eghosa Ekhaton (Chester), 'Civil Society Organisations as Behaviour Modification Agents in the Oil and Gas Sector in Nigeria: A Legal Assessment'

Arguably, Civil Society Organisations (CSOs) play considerable even if not 'so-obvious roles' in the emerging civil regulatory paradigm in Nigeria's oil and gas sector. The contention of this paper is that civil regulation in Nigeria is civil society-led and we can posit that a variant of the 'regulatory society' as postulated by Braithwaite is emerging in the Nigerian context. Thus, CSOs have engaged in a bottom-up approach in attempting to change the status quo in the oil and gas sector regulatory framework in Nigeria.

This paper relies on the framework developed by Hood's et al on risk regulatory regimes to amplify this assertion. The contention of this article is that civil CSOs have engaged in the regulation of oil MNCs (multinational corporations) in Nigeria via the three control components of the risk regulatory risk regulatory regimes as enunciated by Hood et al.

However, this paper focuses on the roles of CSOs as behaviour modification agents in the oil and gas industry in Nigeria.

Youseph Farah (UEA) and Malakee Makhoul (Essex), 'Remediation of Business Related Human Rights Violations in the Context of EU's Oil and Gas Sector'

EU oil and Gas companies occupy a significant share of the extractive industry, and have a significant global reach. While this can bring benefits for communities by creating wealth and jobs, adding value and providing services, sometimes corporate activity can have adverse effect for people and the environment. When this happens, the people who have been harmed often seek reparation, and expect the company to be held to account.

Victims have increasingly sought a remedy in the home state of the parent company either in relation to its direct act or the unlawful conduct of its subsidiary in the host state. However, current legal framework still lacks a coherent EU approach to an effective remedy. Evidence suggests that victims choosing court litigation within the EU or in other home states such as the US, continue to face factual and legal challenges associated with court litigation.

We place the debate within the EU's commitment to business and human rights. The European Commission has endorsed the 'UN Guiding Principles on Business and Human Rights' (UNGPs), and committed to supporting their implementation, and encourages companies to adhere to internationally recognised human rights, guidelines and principles. The European Commission issued a non-binding 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights'.

The paper critically assesses the strengths and weaknesses of the remediation part of the Guide. In particular, this paper makes the case for binding non-judicial dispute resolution processes to be used in relation to business related human rights violation. The paper demonstrates that due to the unique legal and business structure of oil and gas companies, engagement by the latter with such binding processes, complement's and strengthens the state's duty to remediate business related human rights violation, and will improve the effectiveness of the UNGPs.

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Mary Cosgrove (NUI Galway), 'Now you see it, now you don't: The corporate veil within groups Contradictory practices in taxation'

Large businesses are typically configured into complex structures with many legal entities. This separation of legal identity within a group allows the business to limit liabilities, reduce taxes and avoid public disclosures of information.

Although the law allows, in certain circumstances, for members of a corporate group to be treated as the same person, this is generally done when it is to the benefit of the business rather than the state, creditors or other impacted parties. The EU Commission has proposed unitary taxation of large groups (the Common Consolidated Corporate Tax Base (CCCTB)) on their activities within the Member States, though this measure is opposed by a number of countries. This paper considers the current treatment of corporate groups for tax purposes identifying the implications and beneficiaries of the recognition (or not) of the corporate veil within a group. Focusing on Ireland, the paper will analysis tax law and practices, highlighting how a refusal to pierce the corporate veil has provided an opportunity for tax avoidance while, at the same time, group relief rules provide relief from tax by effectively treating related companies as one.

The paper will expose the conflicts between good governance and deference to the legal fiction of corporate personality and provides theoretical support for unitary tax treatment of groups.



# Labour Law and Society

NB: all sessions will be held in Herschel Training Room 4

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## Thursday 6<sup>th</sup> April (16:15-17:45)

Alysia Blackham (Melbourne), 'Combatting age discrimination in employment: A comparison of Australian and UK legal limitations'

Demographic ageing is a key emerging challenge for the labour market in the UK and Australia. To secure the sustainability of pension systems and labour markets, governments in both jurisdictions are seeking to extend working lives into older age. However, survey data indicates that age discrimination is a significant problem facing older workers who wish to remain in the labour market, and is a barrier that might significantly curtail working lives.

While laws in both jurisdictions prohibit most forms of age-based discrimination in employment, there is significant concern that these laws have not been effective in practice to curtail age-based discrimination. In Australia in particular, there is a noticeable absence of claims of age discrimination by older workers, and claims that are brought are rarely successful.

Drawing on comparative doctrinal and statistical analysis of the UK and Australia, this paper offers suggestions that might explain the absence of age discrimination claims in Australia, despite the reported prevalence of age discrimination in employment. In particular, it considers doctrinal limitations in age discrimination laws (such as a narrow conception of 'discrimination' and extensive exceptions to age equality law); enforcement limitations (such as the reliance on alternative dispute resolution to redirect discrimination claims, and the cost of court proceedings); and societal age norms that, if internalised by older workers, may deter individual claimants.

The situation in Australia is particularly pertinent for the UK, where the growth of early conciliation by Acas and the introduction of Tribunal fees risks undermining the enforcement of age discrimination claims. This paper considers the lessons that may be learnt by each jurisdiction for age discrimination law and its enforcement, and equality law more broadly.

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Marjo Ylhainen (University of Eastern Finland), 'From Obedience to Initiative? Precarious work and changing subjectivities'

By analysing specific types of legal texts, this paper critically explores some of the founding ideas of Finnish labour law as well as the unfolding dynamics of these foundations when the manner of production and social surroundings, both material and symbolic, change. The analysis teases out discourses which define, firstly, the central object of this legal discipline, namely the social practice called work, and the contractual sphere where terms concerning this practice may be privately arranged by the parties. Secondly, and intertwined with these discourses defining work, the analysis identifies discourses that produce and reproduce the subjects of labour law – the employer and, especially, the employee. On the one hand, the subject pair of obedient subject and directing subject come about as part of the discourse of normal work, where the employee's subordinated position is balanced by the classical protective mechanisms of labour law. On the other hand, the negotiating pair of subjects come about as part of the business discourse, where the employee is viewed as an economic agent roughly on a par with the employer.

The line of development from strictly controlled forms of work carried out by obedient workers towards autonomous workers and flexible modes of work is crystallised in the image of a run-down factory. There is a resemblance to Alain Ehrenberg's diagnosis that the norm of contemporary society is based on responsibility and initiative. Indeed, one might ask if this in fact will lead to new ways of commodifying the personality and identity traits of the individual. The skills of employee are no longer enough: their character and personal qualities should be made available too. While the empirical material analysed does not directly support such conclusions, what it does reveal are the structural limitations of labour law to adequately address the consequences of such a shift.

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Katie Bales (Bristol) and Lucy Mayblin (Warwick), 'Captive Labour: Immigration Detention and Spaces of Exception'

The vast majority of asylum seekers in Britain are forbidden from working. There is, however, one exception to this ban: asylum seekers are permitted to work in detention centres. Here, they are excluded from minimum wage laws and other worker protections and are consequently paid by the companies that run the detention centres between £1 and £1.25 per hour to undertake tasks which include jobs integral to the running of the centres, such as cooking and cleaning. Through a political-economic analysis drawing on documentary evidence of political deliberation on asylum detention, this article advances three key arguments regarding these practices. First, that such practices do not amount to forced labour but that they are on the spectrum of 'unfreedom', being both coercive and exploitative of a highly vulnerable population. Second, that detention centres, and such practices within them, can best be understood in relation to Giorgio Agamben's concept of 'spaces of exception', with the exception often rhetorically justified on the basis of humanitarianism.

## Friday 7<sup>th</sup> April (10:00-11:30)

Liz-Mari Welman (Reading), 'Securing career mobility for working women with caregiving responsibilities? A critique of the UK's right to request flexible working'

During the last 30 years women have become increasingly more active participants in the employment market which has resulted in a significant change in the gender composition of the UK workforce. The ability to work flexibly has addressed some of the challenges faced by women when combining paid employment with caregiving responsibilities, but this has not come without a price. Working part-time instead of full-time can reduce a women's earning potential by a third whilst 14% of the gender pay gap could be attributed to employees taking career breaks for caring purposes. Notwithstanding various initiatives to promote gender equality in the workplace, the "glass ceiling" remains a problem for women in employment as women constitute for example only 22.8% of board members on FTSE 100 companies and 22% of professors at UK universities.

The right to request flexible working is since June 2014 available to all employees and whilst it is an important addition to the package of family-friendly legislative measures in the UK, its potential in facilitating working women with care-giving responsibilities to advance in their careers is limited. In this paper I will, drawing on my ongoing research, provide a critique of the policy considerations and interests which the Government considered and prioritised in its implementation of the right to request flexible working legislation in order to highlight its deficiencies as a means of improving the career mobility of women.

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Lydia Hayes (Cardiff), 'Care workers in the dock: questioning the regulation of worker conduct via criminal law'

Reports of the abuse of older and disabled people by care workers are rapidly increasing in both volume and prominence. In response to public concern, the UK government has considerably expanded the scope of criminal measures in relation to ill-treatment and wilful neglect (s.20 Criminal Justice and Courts Act 2015). This new criminal offence applies to all care workers at the level of the workplace, whether that workplace is a formal institutional setting or a private domestic dwelling and extends protection to all users of social care services irrespective of mental capacity. This paper explores criminal law as a means to regulate individual worker conduct in the context of the strategic weakening of employer-worker relationships which have accompanied intense marketisation of social care provision in the UK.

International evidence about abuse in the care sector points to strong correlations between poor quality employer / worker relations and poor quality worker / service-user interactions. It suggests that abusive behaviour is sensitive to the industrial context in which care is organised and the workplace context in which abuse occurs. In the UK, employer-worker relationships in social care sector have been deregulated, there are widespread problems of non-compliance with minimum labour standards across the care industry and loyalties between workers and employers are very weak.

My research traces connections between this deregulation of worker–employer relationships in the care sector and the criminal law provisions which seek to hold individuals to personal account for ill-treatment and wilful neglect. The lines between employee misconduct and criminality appear increasingly blurred. The paper reflects on previously unpublished extracts of interviews undertaken by the author for the monograph *Stories of Care: A Labour of Law. Gender and class at work* (2017). Care workers talk about their fear of prosecution and the ways in which their perceived vulnerability to prosecution shapes relations with managers and service users. The evidence suggests that care workers respond to coercive pressure from outside the traditional boundaries of the employment relationship in ways which are un conducive to a goal of better care standards within the firm. Strategies in evidence include, exiting the firm for fear of exposure to prosecution, increased personal friction between workers and managers and loss of confidence in personal capacities to make professional judgments.

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Pauline Roberts (Cardiff), 'Employment security and disability: dismissal for misconduct and the duty to make reasonable adjustments'

There has been much discussion recently about how to support inclusivity in the workplace for disabled people. The Government's 2016 Green Paper on work, health and disability highlights the need for a 'more inclusive and understanding society' and emphasises the benefits to employers of seeking ways in which long-term sickness absence can be avoided. From an academic perspective, Mark Bell has examined how the law can play a part in promoting an inclusive workplace for people with mental health problems, with a focus on the impact of the duty to make reasonable adjustments in the context of mental health and sickness absence policies.

At the same time, David Cabrelli has used the example of a case in which a disabled employee claims both unfair dismissal and a breach of the duty to make reasonable adjustments to illustrate the problem that tribunals are often required to adjudicate in cases involving claims for breaches of rights, based on common facts, which attract different 'behavioural standards of review'. While noting justifications for differing standards of scrutiny, Cabrelli cautions that this problem may also lead to criticism of a level of incoherence within labour law.

This paper focuses on disability discrimination and unfair dismissal claims in which it is employees' behaviour at work, rather than long-term sickness absence, which provides the context for their dismissal. The purpose of the paper is two-fold: first, it reviews decisions in light of Cabrelli's argument outlined above and assesses how adjudicators apply the different standards and whether there is evidence of confusion. Secondly, it considers the specific issues which may arise in claims involving conduct, when compared with the focus on capability in cases involving sickness absence.

## Friday 7<sup>th</sup> April (12:00-13:30)

Michelle Weldon-Johns (University of Abertay, Dundee), 'Working 9 to 5 no more? 24/7 employees in a social media driven society'

The division between the public and the personal are now blurred in so many ways. This is increasingly apparent in relation to the division between working and personal life. The increasing reliance on smart phones and similar technologies makes it more difficult for people to switch off from work, even in the evenings or during annual leave. This could mean that individuals are constantly considered to be 'at work'. The widespread use of social media also means that individuals are being held accountable for actions that they may consider to be private, reflecting or impacting negatively on their employment relationship. This paper examines the changing ways in which conduct outside of work has impacted on employment relationships and questions whether individuals should always be accountable to their employers for actions outside of employment, or conversely whether employers should owe them a duty to respect their privacy. In order to do so, the analysis will be framed with a discussion of the separation of public and private spheres to distinguish the boundary between work and private life. Recent cases on unfair dismissal in relation to the use of social media will be critically examined in light of a potential duty to respect the employees' privacy. Comparisons will also be drawn with other conduct outside of work cases raising privacy concerns. Finally, conclusions will be drawn as to whether employees are able to have a 'private' life outside of work, and what this might mean for the future of the employment contract.

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Beth Gaze (Melbourne), 'Is employment discrimination law an integral part of labour law? Exploring the intersection of labour and human rights law'

Employment discrimination law is located at the intersection of labour law and human rights law. Labour law and anti-discrimination law have separate (perhaps conflicting) conceptual foundations that determine different priorities, and are often practiced in different legal cultures. They also vary between jurisdictions, based on historical and institutional differences that usually reflect power structures. This paper considers to what extent employment discrimination law is an integral part of labour law, and the effect of the conceptual and cultural differences between them. Tracking Nancy Fraser's work on recognition and redistribution, the human rights focus is primarily on principles, individual rights and marginalised workers, while labour law generally looks to power relations and collective organisation for workers whose attributes of disadvantage are not of particular concern. Although this picture is oversimplified, there are concerns about the visibility of marginalised workers in labour law, and of power structures in anti-discrimination law.

This paper analyses the recent legislative attempt to introduce discrimination-like provisions into Australia labour law, in the form of the adverse action provisions of the Fair Work Act 2009, drawing on a major research project. This apparent integration of human rights into labour law raised hopes that institutional and judicial approaches of labour law might support more effective enforcement of anti-discrimination law, where previously, judges have failed to give weight to the public interest nature of discrimination law. But while ostensibly

employment discrimination has been recognised in labour law, there is still resistance in the labour law system to the concerns of marginalised workers. The paper will consider the reasons for this resistance in conceptual and cultural differences between the two areas, and whether these problems are avoidable. It will consider the challenges in seeking to improve enforcement of human rights in the structurally-charged area of employment.

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James Murphie and Michelle Weldon Johns (University of Abertay, Dundee), 'The Future of Scottish Labour Law: reconceptualization and modernisation'

The potential implications of Brexit on labour law are extensive, with many UK employment rights derived from EU legislation. This is perhaps keenly felt in Scotland, which voted to remain in the EU and maintains that position. Currently, the Scottish Government's policy is to seek devolution of employment law to preserve and maintain current labour standards within Scotland (Scottish Government, *Scotland's Place in Europe* (2016)). This reiterates earlier proposals to devolve Employment and Equality laws, including laws relating to Trade Unions, Health and Safety at Work and the National Minimum Wage, to the Scottish Parliament (Scottish Government, *Beyond Smith – Scottish Government proposals for more powers for the Scottish Parliament* (2015)).

This paper focuses on the proposal to devolve labour law and related competences to the Scottish Parliament and examines how labour law might then be redesigned in a Scottish context. This analysis takes account of the distinct industrial relations partnership model that exists in Scotland. In this regard, we argue that there are two main strands of divergence and potential areas where distinctly Scottish approaches could be adopted. The first is the dispute resolution framework, some aspects of which could fall within the competence of the Scottish Parliament following the Scotland Act 2016. The second is redesigning the industrial relations framework to create a clearer social partnership model which more closely reflects the mainstream European model.

A comparative approach will be taken, examining several European countries, particularly the Republic of Ireland, similar to Scotland in terms of size, population, industry, trade and culture. Firstly, an analysis of the UK approach to labour law will be provided, with a forward look towards re-conceptualisation in a Scottish context. Recent changes to UK labour law will be considered which could be addressed differently in Scotland, before examining the two areas of proposed reform.

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Margaret Downie (Robert Gordon University), 'The impact of BREXIT on Labour Law'

The UK government has confirmed that it will retain, for the moment, the existing employment legislation which originated in Europe. This paper examines the extent of protection of labour rights offered by that undertaking. It looks at the impact of losing the influence of the European Court of Justice on the UK courts interpretation these rights and the likelihood of rights being repealed piece by piece.



# Law and Emotion

NB: all sessions will be held in Percy G13

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## Thursday 6<sup>th</sup> April (09:00-10:30)

Elena Kapardis (Birmingham), 'Judicial "Belongingness": The Cypriot Tale of Transformation and Crisis'

This paper reconsiders the image of the judiciary and, in particular, the Cypriot judiciary, through the lens of judicial identity. Research on judicial identity has traditionally been centered on how the background features of judges generate a personal identity, how these influence judicial decision making, sentencing processes, and the attractiveness of the profession for potential applicants. This paper shifts the focus of judicial identity, by drawing on data collected through an original qualitative study of one-third of the members of the Cypriot judiciary, and uncovers that at the root of the Cypriot judicial identity is the emotion of belonging.

By exploring the ways in which this 'belongingness' impacts the ways that judges form, maintain, articulate and reshape their own self-concept and collective identity, this paper seeks to provide a way forward. It applies 'belongingness' as the emotion medium in understanding how, and why, member relations are transformed and reproduced. In this way, the feeling of belongingness helps us delve beyond the 'ideal' understanding of membership and explore the ways in which judges use this emotion to manage crisis or seek internal transformation. In a difficult socio-economic and political time for Cyprus, judicial 'belongingness' provides the platform through which to deconstruct the 'ideal' judge and, instead, argue in favour of the transformative value of a re-imagined multi-vocal judiciary that gives its members the experience of knowing that they belong.

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Ana Carolina Faria Silvestre (Southern Minas Gerais Law School), 'Judges and the education of desire: Brazilian legal cases'

In this paper I intend to explore Aristotle's education of the desire proposal and Terry Maroney's emotional regulation model for judges as the background to evaluate the judges' behaviour and their decisions under some Brazilian legal cases.

Maroney's emotional regulation model is based in recent emotional regulation studies but in its source we can find the Aristotelian influence. According to Aristotle we should feel emotions in the right way, for right reasons, in the right moment and related to the right person. Professor Maroney starts from Aristotle's advice but the most prominent reference of her work is not Aristotle but emotional regulation studies. The intention in this paper is different to the approach by Maroney. It will seek to follow more closely Aristotle, and the emotional regulation model will be brought to the argument as a support tool to non-virtuous judges who cannot trust in their emotions but can voluntarily decide to be oriented by the emotional regulation model in order to better deal with their own emotions and passions. From this background, the paper will explore criminal cases, the Brazilian Criminal execution law and the important role of judges in criminal execution. The main argument of the article is that judges should take their emotions into account and that the practical realization of law can be much more adequate to the legal cases as much as the legal judges assume themselves as real persons constituted of mind and heart.

Heather Conway and John Stannard (Queen's University Belfast), 'Judicial Disgust: Experienced Emotion or Performance Emotion?'

Emotions infuse and influence all aspects of law, and the practice of judging is no exception—something that law and emotion scholars have been keen to point out. While much has been written about judicial anger and whether this constitutes an appropriate emotional response to courtroom events, little attention has been paid to another emotional trait which judges frequently exhibit: that of disgust.

Psychologists describe disgust as an intense feeling of displeasure or revulsion, triggered by an offensive or revolting object, person or behaviour. It is a complex emotion which digs deep into the human psyche, and seems to have both cognitive and physical elements. But what does disgust denote in the judicial arena? Law reports and media coverage contain numerous examples of judges expressing disgust about events or the actions of certain individuals. But disgust is not the same thing as moral outrage, and there are questions over what judges say and what they actually feel when they describe something as disgusting. This paper explores this particular emotion, and argues that there is a fundamental disconnect between disgust as an experienced emotion (what someone instinctively feels, as irrational or idiosyncratic as that might be) and as a performative emotion (what someone says they feel, even if the particular response is a little less visceral). In deconstructing the concept of judicial disgust by drawing on selected examples, it questions whether many such statements fall into the latter category.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Marie Burton (Middlesex), 'The role of emotion in lawyer-client interaction: comparing telephone and face-to-face advice in social welfare legal aid'

Telephone-only advice in social welfare law is an essential part of the government's cost-cutting reforms in legal aid. The drive towards telephone-based provision raises fundamental questions about the consequences of remote service-delivery for the interpersonal elements of lawyer-client interaction and whether telephone-only services can be equivalent to face-to-face advice. In this paper, I propose to examine these issues drawing on my recent research in this area.

The impact of the relational quality of lawyer-client interaction is a much-overlooked aspect of effective lawyering. It is argued that, because of the historical preference for viewing the practice of law as emotionally neutral, the dominant discourse of law and legal practice has largely ignored the impact of clients' and lawyers' feelings on the provision of advice. Nevertheless, several works suggest that the nature and degree of the emotional connection between lawyer/adviser and client can have profound effects on the quality of communication between them, with wider implications for the conduct of the client's case (see, for example, Binder et al, 2011; Sommerlad and Wall, 1999; Sommerlad, 1999; Buck et al, 2010). However, how these issues are affected by telephone-only interaction has not previously been given in-depth consideration.

This paper will explore the differences between telephone and face-to-face advice in relation to the emotional components of the lawyer-client relationship. This analysis will be based on the findings of a recent qualitative study involving observations of and interviews with housing clients, their lawyers and advisers. It presents a challenge to the conventional neglect of emotion in studies of lawyer-client interaction and the advice process. I will examine how the relational elements of lawyer/adviser-client interaction, such as trust, empathy and rapport, differ between telephone and face-to-face advice, and seek to explain the significant role that these interpersonal factors play in effective casework.

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Philip Drake (Huddersfield), "It's been emotional" - An ethnographic study of student interaction in a university law clinic'

Whilst many lawyers believe that financial cost is the most important factor to clients, in a recent survey clients identified understanding their particular needs as their foremost concern (Bellwether Report 2016: 28). However, in a profession where the predominant values are power based (Sommerlad 2007) and with negative cultural capital associated with attributes such as empathy (Thornton 1996; Woods 1993) addressing this concern is not without difficulty. Nowhere is this problem highlighted greater than with the ground-breaking ethnographic study of family lawyers by Sarat and Felstiner (1988). Whilst it might be expected that dealing with family issues would suggest a sensitive approach, Sarat and Felstiner identified an emotional battle of wills in the interaction between lawyer and client; where clients wanted to explain their past, focus on character and personality dispositions and explain how they were victims of external circumstances; whereas lawyers sought to avoid negotiating or engaging with the reality of the situation and prioritised rules analysis and

problem solving. Indeed, emotions were only seen as a reason to invite total client dependence.

This approach to emotions can be contrasted with the outcome of a recent ethnographic pilot study of a university law clinic where emotions were identified as a common theme throughout the data. Through a Bourdieusian lens and adopting Weber's model of rationality, this paper will explore the reasons why the participants in this particular law clinic identified emotions as so important and consider if an advice only model seeking to empower individuals might require a focus upon emotions that the traditional representation model ignores. The paper will explore how the students give meaning to what they say and do and their recognition that their values in the law clinic differ substantially from the perceived values of the interlinking fields of legal education and the legal profession.

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Emma Jones (The Open University), 'Emotional intelligence as a key legal competency'

Since its original introduction in the academic literature, the term emotional intelligence has become popularized as a way to achieve greater fulfillment and success in a vast range of spheres, including personally and in business and education. In relation to law, the Legal Education and Training Review (2013) suggested emotional intelligence as a key competency required by the legal profession and there is already a significant body of literature in the US arguing for its inclusion in legal education and training, as well as a growing interest in this topic within the UK. This paper will consider the theory behind emotional intelligence as a scientific construct, including identifying the different models available, and their strengths and weaknesses. It will go on to explore the potential benefits and challenges involved in incorporating it as a key legal competency. It will conclude that, although emotional intelligence is a useful and easily understandable shorthand term, more attention must be paid to the underlying competencies it encompasses to ensure that a valid and workable model of emotional competency can be constructed to enhance the work of legal professionals.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Keren Lloyd Bright (The Open University), 'Controlling or coercive behaviour in an intimate or family relationship: An evaluation of the new domestic abuse offence'

A new criminal offence recognising that domestic abuse can take a variety of forms, was brought onto the statute book of England and Wales by the Serious Crime Act 2015. The new offence of controlling or coercive behaviour in an intimate or family relationship is set out in Section 76 and has been in force since December 2015.

Section 76 provides statutory recognition that serious emotional and psychological harm may be caused to an intimate partner or family member by a perpetrator, through extreme abuse which stops short of actual physical and sexual violence. It also recognises that domestic abuse is not confined to isolated violent events, but may consist of a pattern of behaviour taking place over a period of time which may encompass many separate incidents. Taken by themselves, the separate incidents may appear fairly harmless; but it is the overall cumulative effect of the abuse which can have serious emotional and psychological consequences.

Often victims of controlling and coercive behaviour do not recognise themselves as victims as such. Even if they do have awareness that they are victims, they may fear retribution from the perpetrator should they reach out for help. Victims may also feel constrained from seeking help by feelings of shame about the abuse they have suffered.

This paper considers the origin and ambit of the new offence. It also considers the emotional impact of drama, media and social media in raising public awareness of the new offence. The paper provides an evaluation of the new offence; the apparent successes and failures; and the various impediments to bringing successful prosecutions.

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Caroline Henaghan (Manchester), "'Raging Hormones" and Criminal Responsibility: premenstrual tensions in the law and a potential defence for "that crime of the month"?"

Hormones have a lot to answer for. Scientific evidence of the endocrinological effects of various hormonal steroids - e.g. estrogen, progesterone, testosterone - is starting to show how vital a role hormones can play in regulating our emotions. This prompts some intriguing questions: for example, how should the law respond to suggestions of the potential impact of hormones on human behaviour and what might this mean for our longstanding legal notions of the autonomous rational agent?

This paper focuses on one particular hormonal/emotional issue - severe premenstrual syndrome (PMS); and one specific area of liability - the criminal law. The proposal being that there is scope for the recognition of a potential 'PMS defence'. Perhaps somewhat surprisingly, this is not actually a new area of academic analysis. The catalyst that sparked the original debate being a series of early 1980's headline-grabbing homicide cases, involving female defendants who successfully pleaded just such a defence in the English criminal courts.

Much academic ink was spilled on the 'PMS problem' in the immediate aftermath of these cases. The overriding reaction being that hormonal, emotional excuses have no place in the criminal law: thus was the 'PMS defence' quietly laid to rest. However, more recent clinical

research has prompted a re-evaluation of the aetiology of severe PMS; a re-classification of the condition as a serious hormonal imbalance, resulting in a series of recognisable emotional disturbances; and a re-branding under the nomenclature of 'Premenstrual Dysphoric Disorder' (PMDD).

In light of the scientific re-conceptualisation of the age-old premenstrual phenomenon and an acknowledgement of the part that hormones might play in influencing human behaviour and emotions, this paper discusses how these precepts might be carried into the criminal law arena and asks how the 'PMS defence' might be contextualised within existing doctrinal notions of individual criminal responsibility?

## Thursday 6<sup>th</sup> April (16:15-17:45)

Neil Graffin (The Open University), 'Interviewing Asylum Seekers: Ethical Issues for Legal Practitioners'

This paper will assess the ethical issue of how retelling asylum stories can affect legal practitioners and asylum seekers. It will discuss how the telling of narratives concerning, for example, persecution, torture, ill-treatment or sexual violence can have the effect of re-traumatizing asylum seekers, but also causing psychological harm to listeners. This paper will consider whether the possibility of 'burnout' or other negative mental effects associated with working with traumatised individuals could have the potential of having a negative impact on the quality of legal representation provided to clients. This paper will assess the education and training given to asylum practitioners in the UK and will consider if this is sufficient given the multi-faceted issues presented. Research presented will be based on initial findings of empirical research conducted in early 2017.

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Senthorum Raj (Keele), 'Queering Asylum Anxieties: Sexual Orientation and Gender Identity Refugee Claims'

Over the last three decades, an increasing number of Anglophone courts have recognised asylum claims on the basis of sexual orientation and gender identity. Such jurisprudence has been heralded for "progressing" LGBTI rights. Yet, the progressive promise of these "pro-LGBTI" decisions leaves much more to be desired. Often formulated under the rubric of a "particular social group," the extent to which queer refugees have been granted protection has been contingent on whether they subscribe to normative ideas of intimacy, identity, and injury. Specifically, queer refugees must demonstrate they have a "well-founded fear of persecution" by subscribing to ethnocentric assumptions about sexual citizenship, gender expression, erotic relationships, and state violence. While the concept of fear has been central to the grant of asylum under international law, it has also been mobilised in legal, political, and academic responses to the adjudication of such claims. Specifically, the fear about having a refugee jurisprudence that is too queer has led to states attempting to curb opening the proverbial "floodgates." This anxious attempt at control has been painfully fleshed out in the way courts navigate the nexus between "authenticating" immutable sexual or gender identities and "counting" what amounts to sustained state persecution. Drawing on appellate case law from Australia, UK, US, and the EU, my paper will disturb how fear stifles the recognition of queer identity, intimacy, and injury. By disrupting judicial gestures, I will consider how "asylum anxieties" continue to undermine queer claims for protection.

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Jessica Giles (The Open University), 'Religion as an (un)protected characteristic essential to human dignity'

The Court of Justice of the European Union currently has before it two cases on the wearing of the muslim veil at work, the resolution of which could set the EU on a distinctive path in the field of religious freedom protection. In Bouganoui and Achbita Advocate Generals Sharpston and Kokott have given their respective opinions. The cases are of interest in and of

themselves because they provide the Court with the opportunity to examine religion as a protected characteristic under the Anti-Discrimination Directive, Directive 2000/78/EC. The cases are particularly important from a comparative perspective due to the contrasting opinions of the AGs on the link between human dignity and freedom to manifest religious belief as demonstrated in the protection accorded to religious believers within equality legislation, the balancing task to be considered *inter alia* when the freedom to run a business comes into play, and the status of religion within the hierarchy of protected characteristics. The stark differences between the British and German AGs opinions highlights the theoretical divide between the UK and EU member states on the concept of human dignity.

## Friday 7<sup>th</sup> April (10:00-11:30)

Matthew Howard (The Open University), 'The emotional texture of community belonging'

The theme of law and emotion resonates with approaches to the study of law that seek to understand what ostensibly 'non-legal' work is being done in buttressing the reach of the law. This current paper restates the well-worn case made by critical and socio-legal scholars for the inclusion of a number of ostensibly 'extra-legal' sources of law and an appreciation of its porosity and pervasiveness. In doing so, it highlights that law is an effect of a number of widely distributed and entangled actors. As such, it ascribes a sense of belonging to hitherto disregarded agencies—a belonging that opens them up to interrogation.

This paper uses an example of an exclusionary community identity in order to demonstrate this point. An appreciation of the complexities, situatedness, and entanglements that come to effect 'the law' opens up the possibility of critically interrogating the Anzac Day commemorative programme in Australia. It helps articulate the problematic disjuncture that exists between the sense of exclusion from the Australian national community felt by Aboriginal and Torres Strait Islanders and their apparently secure, and 'strictly legal', inclusion as Australian citizens. By identifying the formative and normative standards invoked by memories, this paper seeks to articulate how a sense of belonging within a legal and political community is indebted to emotionality.

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Renata Grossi (Australian National University), 'Does law and emotion scholarship change what we understand objectivity in law to be?'

Law and emotion scholarship constitutes an important new field of scholarship with important consequences for the administration of the law and the delivery of justice. It has also been argued that law and emotion scholarship changes how we understand law itself - that it has had both a practical and a theoretical impact on the discourse of law. In this paper I wish to analyse in more detail whether in fact, law and emotion scholarship changes our theoretical understanding of law - in at least one of its foundational ways.

Objectivity is critical to our understanding of what law is, and how it should operate in a democratic system. It has come to stand in for legitimacy, predictability, good decision making, and even it seems at times, truth. It has come to be seen as being opposed to subjectivity, opposed to interested and biased decision making. And, as being central to individual freedom and autonomy, and essential to the rule of law.

In this paper I will argue that when we drill down to ask what we mean by objectivity in legal discourse, accepting a law and emotion discourse in law, as per the law and emotion agenda, does not threaten objectivity in any concerning way.

## Friday 7<sup>th</sup> April (12:00-13:30)

Eleni Kaprou (Nottingham), 'How aggressive is too aggressive? The role of emotions in assessing aggressive commercial practices'

Aggressive commercial practices were regulated for the first time on a European level with the 'Unfair Commercial Practices Directive' (hereafter UCPD). The importance of the UCPD lies in its broad scope covering the vast majority of business-to-consumer transactions along with its maximum harmonisation character. This paper draws attention to the emotional dimension of aggressive commercial practices and examines the obstacles in the UCPD system for taking it into account. It argues for how emotional impact should play a role in the assessment of unfairness of a commercial practice and challenges the prevalent ideas on consumer rationality.

Aggressive practices, as stated in art. 8-9 UCPD, are those that use harassment, coercion or undue influence. There is a strong connection between aggressive practices and emotions as they center on feeling pressured into taking a decision. Aggressive practices are also ones that appeal to emotion whether it is informing the consumer the trader's livelihood is in jeopardy or whether the practice relates to taking advantage of a special relationship, such as that between a parent and a child.

In marketing it is widely acknowledged that emotion can influence consumer behaviour. In the UCPD, however, the standard is the average consumer, who behaves rationally, and is designed to be an objective standard. The average consumer is unlikely to be emotional in economic decisions, making it an ill-suited standard for aggressive practices. This is a factor that can account for the lack of attention the aggressive practices provisions have received, in contrast to misleading practices which can be assessed more easily. Aggressive practices present a unique opportunity to challenge consumer rationality and approximate legal standards with consumer behaviour as suggested by empirical evidence.

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Lisa Flower (Lund), 'The Subtle Drama of Loyalty: Revealing the Emotion Management and Impression Management Strategies of Defence Lawyers'

The role of a defence lawyers is to loyally represent their client's best interest, irrespective of the lawyer's personal opinions or feelings. Irritation when a client says something damaging in court; disbelief at the client's unlikely version of events; dislike towards an unpleasant client; or even anger at a prosecutor or judge who does not follow procedure - all of these emotional experiences should be managed in the courtroom in order to give a professional impression. This entails conforming to the feeling rules and display rules which permit and constrain the emotional performance of loyalty, and enable the flow of courtroom interaction. This paper will show how the emotions of defense lawyers in Sweden are managed within this specific cultural context of the courtroom in order to give the impression of loyalty. Specific emotions will be discussed: anger, irritation and pride along with strategies for managing these emotions such as strategic kindness. The emotion management and impression management strategies used by defence lawyers to shape their own emotions and others', along with the impression given include not only the management of one's own emotions but also those of others: one's client, the witness(es), the prosecutor, the plaintiff(s) and even the

judge(s). Others' emotions are expected to be managed in order to ensure the interaction flow and in order to attain the best possible outcome for one's client. The emotional regime of the courtroom which outlines the emotions that are permitted or prohibited and which determines the emotional and interactional order of the courtroom will also be explored in this paper.



# Law and Literature

NB: all sessions will be held in Barbara Strang 1.48

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## Thursday 6<sup>th</sup> April (16:15-17:45)

David Gurnham (Southampton), 'Of Mirrors, Windows and Lenses: re-viewing rape myths'

This paper seeks to build on scholarship from across a range of disciplines theorising notions of 'visuality' in order to bring an original perspective to the subject of rape myths. For example, 'visual criminologies' of the state (its ability to objectify and control through surveillance and the use of carceral space, and its authority-assuming symbolism) tend to pre-suppose an unequal relationship of between a 'looking subject' and a 'looked-at' object. As a relation that carries troubling implications that are both violent and sexual, it is not surprising to find such a relation visualised in metaphors such as 'mirrors' and 'windows' deeply and powerfully embedded within the conceptual apparatus of feminist critical engagements with rape. This paper analyses these uses of metaphor and the potential that they might have as a basis for, firstly, critiquing the objectifying tendencies of dominant visualisations of sexual offending, and secondly for producing alternative visualisations. The paper adopts an interdisciplinary approach that combines legal and literary texts and methods in order to allow for an opening up of possibilities for subjectivities to flourish that might otherwise remain muted or obscured.

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Lynsey Mitchell (Strathclyde), 'Re-affirming and rejecting the rescue narrative as an impetus for war: Performing gender stereotypes in a Song of Ice and Fire'

From Paris' capture of Helen in Homer's Iliad, Western literature has a long tradition of narrativising the turn to war as a dispute in service of a woman. Yet in contemporary Western society it is assumed that legal arch-positivism now governs the decision to go to war. George RR Martin's 'A Song of Ice and Fire' evokes the European tradition of war in the middle ages, but also explores modern aspects of liberalism, statehood and international relations. This paper explores how the turn to war is narrativised and understood by various female characters in the novels, and how this influences their acceptance or rejection of predetermined gender roles. It does so in order to demonstrate how calls to war rooted in chivalry and protectionism can gain more currency than those rooted in legalist language, but only if they are endorsed by those who are constructed as victims. This paper draws on descriptions of Lyanna Stark, whose 'kidnap' provides the impetus for a great war that changes a nation. Lyanna's subsequent death provides the key (male) actors with a blank canvas on which they can narrativise the conflict, and their own actions, as masculinist and heroic. Yet, later hints and accounts of Lyanna's conduct begin to challenge the dominant narrative and force the reader to re-evaluate the legality and necessity of the war. The subsequent subversion of the masculinist narrative offers a template for modern society that would allow a more nuanced analysis of the merits of war, and an acceptance that state power is rarely benign towards women.

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James Gray (Northumbria), 'A Ballardian phenomenology of the legal order?'

Metaphors are often drawn from the built environment in the discussion of law for there are obvious connections between architectural order and social order. In the work of the architect Christopher Alexander we find a career long attempt (through the development of pattern language and his monumental *The Nature of Order*) to uncover the elements that contribute to a meaningful sense of place and of “wholeness” in architectural and product design. But what of the experience of the absence of law and of the disordering of society and the individual? In the work of the English novelist and short story writer JG Ballard, we find treatments of the built environment that gave rise to the adjective ‘ballardian’: “resembling or suggestive of the conditions described in Ballard’s novels and stories, especially dystopian modernity, bleak man-made landscapes, and the psychological effects of technological, social or environmental development. Rather than a rich sense of place and of wholeness, the buildings and urban spaces that feature in Ballard’s work are frequently associated with or are the causes of fear, isolation, violence and the development of psychopathologies. This paper considers the relevance of Ballard’s work to law and literature in developing a phenomenological account of the experience of order and its absence.

## Friday 7<sup>th</sup> April (10:00-11:30)

John Magyar (Cambridge), 'Law, Literature and Textualism'

Textualism is regarded as a modern American phenomenon—a doctrine of statutory interpretation propounded by a small but prominent group of judges at the US federal courts, including the late Justice Antonin Scalia. However, when textualism is identified by the core principles and practices of the judges that propound the doctrine, it becomes clear that textualism is neither modern nor strictly American. It is a, in fact, the modern revival of a doctrine that was developed in the treatises on statutory that were published in England and America in the Victorian era. There were two significant motivating factors for the authors of these treatises. The first motivating factor was a quest to make law a science in an Aristotelian sense. The second factor was the belief in the unity of the Anglo-American common law. These motivations, coupled with an increasing demand for legal education in the 19th century, provided a fertile environment for legal treatises of all kinds, and a dozen treatises on statutory interpretation were published between 1831 and 1900. Each new treatise explicitly built on the claims of the previous works, and collectively, these works can be regarded as a genre of literature. Within this genre, one finds the doctrine of textualism developed and refined over time through the iterative attempts to encapsulate and theorise the entire contents of the subject matter into a unitary whole using doctrinal common law techniques. Textualism is a product of this process, and as a result, the doctrine does not stand up to in-depth theoretical analysis. Instead, one finds a pragmatic doctrine that meets the rhetorical needs of practicing lawyers and judges, and which becomes more credible and authoritative as the claims are repeated in each new treatise.

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Annelize Nienaber (Pretoria), 'Colonising time: The international law principle of uti possidetis and the poetry of WB Yeats'

As a part of customary international law, the principle of uti possidetis juris holds that colonial boundaries, no matter how arbitrarily they were drawn, should be respected and maintained. In terms of the process of decolonisation and self-determination in Africa and elsewhere, the principle 'freezes' territorial title in time and confines the right to self-determination of peoples to a specific colonial boundary. The obvious link with Yeats's poetry is that a phrase from Yeats's poem, 'The second coming', was adopted as the title for the critique of colonialism in Chinua Achebe's novel *Things Fall Apart*. As well, Yeats's poetry in the context of Ireland's colonial history has been the subject of wide-ranging debate: notably Edward Said's essay 'Yeats and Decolonization', in which he selects to focus on the role of Yeats's art and the decolonising project. I do not intend to offer a postcolonial perspective on Yeats's poetry in the paper, yet the issues will resonate with aspects of postcolonial theory. My focus is the idea in international law that a territorial boundary – and a people's aspirations for self-determination and an identity – may be 'fixed' in time. Yeats may not have known of the principle of uti possidetis: clearly his poetry is not about uti possidetis and its consequences. My paper, instead, proposes that Yeats's poetry is an emotive vehicle for expressing the devastating consequences of the principle for people's lives.

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Debbie De Girolamo (Queen Mary, University of London), 'Theatre and a Relationship with Law and Justice'

This paper will explore what theatre tells us about ourselves, law and society. Exploring the way law is treated and conveyed by the dramatist offers insight into the ways a society views the law and concepts of justice in the everyday. Sherwin states that law "exists in images and that we make sense of reality by drawing upon the stories and storytelling modes that are most popular among us." (Sherwin 2004: 88) Further, "[cultural images] can help us to understand the way things are (or how we perceive them to be), how life is lived now, so to speak, and how we might learn to live better, more wisely. This includes the life we live in the law" (Sherwin 2005). Through the framework of theatrical imagery (see Geertz 1983, 1973; Turner 1996), this paper will explore contemporary understandings of law and justice in London theatre. It is the 'conscience collective' that this paper will explore. (Shevtsova 1989: 182) The dramatist voice sees that which society at large does not: "[dramatists] convey through their work ... the transformations taking place in the social structure ... dramatists are something of an avant-garde, necessarily an alienated one, who are aware of changes that the overwhelming majority of people will not or cannot admit" (Shevtsova, 1989:184). The data relevant for this project comes from participant observation and textual analysis of newly premiered plays written by British playwrights and staged in London England between October 2014 and June 2015. The live performance augments the text, bringing the words to life resulting in a lived experience for the spectator (Kaplan, 2005). Ultimately, this project seeks to explore the narrative of the interrelationship between theatre and a society's conception of law and justice.



# Law, Politics and Ideology

NB: all sessions will be held in Research Beehive Room 220

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Gavin Byrne (Birmingham), 'The Jargon of "Law and Order" - From Nazism to Trump via Heidegger'

The military and political apparatus of Nazism was destroyed in World War II. Its philosophical wing survived through the work of Carl Schmitt and Martin Heidegger. Indeed it has flourished. I explore the relationship between this philosophy and the re-emergence of the far right in law and politics. I use Theodor Adorno's concept of Nazi philosophical 'Jargon' to show how this metaphysics was a key component in Nazi jurisprudence and substantive Nazi law. I go on to show how President-elect of the United States, Donald J. Trump, used this jargon in relation to law during his 2016 campaign. This is but one example in an era of so-called 'post-truth' politics. I argue that the prevalence of a Heidegger-influenced worldview is one important factor in this resurgence of the far right in legal and political discourse; acceptance of Nazi jargon in legal academia can most clearly be seen in various 'critical' responses to Nazi law and the legality of The Holocaust. My paper concludes with the idea that if we are determined that such atrocities must never happen again, we must begin at the level of metaphysics and ontology. I suggest that an important flaw in Heidegger's philosophy is that it does not allow for the possibility that we might be wrong; this makes it a philosophy of prejudice. I argue that both analytical and critical jurisprudence must take the concept of 'being wrong' as a key starting point. It is vital to our claims about the external world that we might be wrong about its nature. It is vital to our humanity that we embrace the possibility of 'Being-wrong' as a fundamental existentials. It is vital to our law that in our arguments about what specific laws ought to do we accept that our claims are falsifiable.

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Kate Cross Wilkinson (De Montfort University), 'Critiquing the ideologies that inform the development of international environmental law'

This paper traces the evolution of key environmental principles, such as sustainable development, common but differentiated responsibilities, and the precautionary principle. These principles form the normative core of global responses to environmental problems such as climate change, biodiversity loss and environmental harms. Some of these principles have proven to be very contentious due to their content and the effect on the obligations of States.

This paper starts from the view that political ideologies inform the content and meaning of environmental principle, and also the way in which international environmental law (IEL) is structured to address environmental problems. It will examine the ideologies informing environmental principles from an ecofeminist perspective.

Ecofeminism offers a nuanced and rigorous critique of the ideologies informing IEL. This is because it explores the nature of the connections between the domination of women and nature. It offers a strong critique of the exploitative and gendered conceptual frameworks which underpin the dominant and rational discourses in western society. These are formed by a set of values, attitudes, beliefs and assumptions that shape and mirror how an entity views itself and the world around it, and a number of different factors such as class, religion, nationality, gender, and race/ethnicity can alter the mirror in which an entity views itself.

Therefore, by analysing the underlying values, beliefs and attitudes within distinct ideologies, this paper will consider how they have shaped the content of these principles, and how they may impact the current trajectory of international law.

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Steve Crawford (Kent), 'The influence of theology in constitutional transition: Protestantism and the legitimacy of the 1688 English Bill of Rights'

The Bill of Rights can be argued to have been the legal foundation for the development of representative parliamentary constitutionalism in the English constitutional tradition. In what way can the theology of the Protestant Reformation be perceived as influencing the politics of the constitutional contests of the English seventeenth century, and the eventual settlement provided by the 1688 Bill of Rights?

The legitimacy of top down monarchic government can be seen to be influenced by Medieval Catholic Church constitution (Berman 1983; Siedentop 2014); and the authority of the Pope as the sole source of the Word of God (McKim 2003). When the Protestant reformers challenge this position and provide an alternate perception of the legitimate constitution of authority as being a process built from the bottom up, and founded upon a relationship between the individuals of the governed and their governor(s) (Bagchi & Steinmetz 2004; McKim 2004), what implications does this have in the politics of constitutional reform? Martin Loughlin has suggested that constituent power might be seen as a motivation for the unsuccessful reform manifestoes of the Levellers (Loughlin & Walker 2007), but that ultimately this dies out in the English context, only truly acting as a constitutional driver in later events such as the French and US Revolutions.

I suggest that by perceiving a theological framing of the context of the Bill of Rights one might be able to show that an element of constituent power is inherent in Protestant theology concerning church and societal constitution; especially when addressing the Calvinist tradition. As has been shown previously, Calvinism influenced the shaping of the English Legal Tradition (Berman 2003). I argue it might also be seen as a driver of the politics of constitutional reform and settlement in the English seventeenth century, particularly the Bill of Rights.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Chris Morris (Northumbria), 'Brainwashing, the Islamic State's ideology, and key concepts in law'

"Brainwashing" remains a much-contested term, commonly understood to describe a process by which an individual is subjected to intense psychological pressure capable of altering his/her personality and behaviour. This paper aims to explore the viability of brainwashing as a defence in criminal law, with emphasis on terrorist offenders. The focus on brainwashing as a concept in law reflects on developments within the fields of psychology and sociology, recognizing the possibility of "coercive persuasion" as a mechanism capable of overriding an individual's will.

Given the alarming success the Islamic state (ISIS) have had in recruiting, the concept that they are utilising a programme of brainwashing has entered the public consciousness – an accusation that has been levelled previously at Communist governments, New Religious Movements (NRM'S) and genocidal regimes. The implication is that ISIS have developed or co-opted a system of indoctrination capable of modifying an individual's behaviour effectively altering an individual's awareness to make terrorist acts not only admissible, but a moral imperative. Such a mechanism would conceivably have repercussions for the position of indoctrination, coercion and grooming in law certainly serving to mitigate culpability in cases where brainwashing could be asserted. Moreover, the concept could serve to provoke a re-examination of the philosophical underpinnings of the legal system, addressing the concept of free will.

This study will draw on key cases from the US, where the term brainwashing has been invoked in several high-profile cases. In addition, it will involve a survey of current scholarship on the subject of brainwashing. Findings will highlight the transformative impact the inclusion of brainwashing as a concept in law, analysing its effect on principles of free will and criminal liability.

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Johanna Hoekstra (Greenwich), 'Ratification of International Commercial Law Conventions: The Importance of Political Ideas and Political Factors'

In 2012 the Swiss Government proposed to UNCITRAL (United Nations Commission on International Trade Law) to investigate which work could be done to further the harmonisation of international contract law. Although the proposal recognises the importance of the Convention for the International Sale of Goods, it states that this is 'a piecemeal work, leaving important areas to the applicable domestic law'. Different contributions were made following this proposal which included the idea to draft a new convention.

The role of state politics within international commercial law conventions is threefold. Firstly, they influence whether a convention should be drafted. Secondly, they influence the substance of the convention. Thirdly, state politics play an important part in whether a convention is ratified. Politics are not the only factor in this process, but they do play an important role.

This paper discusses the third aspect. It examines why conventions in international commercial law are ratified (or not ratified). Through this discussion, it can be better understood whether a new contract law convention could be successful.

This paper begins with a short discussion of the influence of political ideas and state politics on the drafting process. The second part of the paper discusses several conventions which have a high number of ratifications and contrasts these with conventions that have few ratifications. The paper focusses on the process surrounding ratification to determine which (state) political factors and ideas played a role in the decision to ratify (or not) a convention. The third part of the paper focuses on these political factors in the light of a new contract law convention. It examines through the lens of these political factors whether a new convention would likely be successful in attracting a high number of ratifications.

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Rawin Leelapatana (Bristol), 'From Kelsenian-ising Schmitt to Schmittian-ising Kelsen: Unity under 'Thainess' and its challenge in the 21st century'

The notion of 'Thainess unity' resembles Lee Kuan Yew's concept of Asian Values, in that, it underscores that the nation is united by a leader (i.e., a benevolent Buddhist monarch). In the age of 'colour-coded' crisis together with the increasing rise of liberalism, the military and their supporters ('the Yellow') generally criticised parliamentary democracy/liberalism for inviting 'evil' politicians of the 'Red' faction especially Thaksin Shinawatra, who is accused of purported disloyalty to the throne, to participate in politics in order to justify two coups in 2006 and 2014. Yet, these coups were intermittently protested by many Red Shirts and other pro-democracy movements.

I will consider this Thainess notion in the light of Carl Schmitt's and Hans Kelsen's public law theories. Such notion inherits Schmitt's anti-liberal liberal, in that, it strives to deal with instability caused by liberal pluralism through shattering the iron cage of formal legality. However, owing to rising liberal forces, the military—in order to secure the Thainess hegemony—can no longer simply rely on a coup, but has to rationalise such notion through Kelsen's legal-rational mechanisms—the constitutional court and the notion of constitutionality. Since 2006, the Thai constitutional court played a significant role in suppressing the Red camp, and in paving a way for a coup. Nevertheless, rather than facilitating peace and stability as the Thainess notion intends, the process of 'Kelsenian-ising Schmitt' which later leads to 'the Schmittian-isation of Kelsen' has sparked hatreds among many Red Shirts, and therefore makes it questionable whether this Thai-version of Asian Values is still 'a uniting force'. Due to the country's polarised politics, peace and stability in Thailand can no longer depend on the Thainess notion (i.e., the creation of a homogeneous community), but increasingly on John Locke's approach which recognises the tensional relationship among normativity (Kelsen), extra-legal emergency power (Schmitt) and an empirical multitude into account.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Richard Percival (Cardiff), 'Six notions of "political" and the Law Commission'

It is commonly said that law commissions are "non-political", and that this is fundamental to their nature. This paper seeks to critically evaluate this view through the lens of Richard Hodder-Williams' "six notions of 'political'" (22 B J Pol S 1) developed in respect of what is accepted to be the political nature of the United States Supreme Court. It argues that law commissions can be said to be "non-political" in the sense of only one of his "notions" – they are not directly party politically partisan. Accordingly, the paper argues, Law reform should be seen as a form of (political but non-partisan) public policy generation, rather than a species of legal practice and/or academic endeavour. It is, however, a form of public policy generation characterised by legitimisation other than, and partly in contrast to, the legitimacy of mainstream democratic government. The paper explores the way in which law reform is legitimised by reference to legal expertise, by the development of the law reform process – particular the place of consultation within that process – and finally by its very distance from the partisanly political.

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Byron Karemba (Leeds), "'Keeping up with Society": In Search of a Methodology to Judicial Law-Making in the Supreme Court of the United Kingdom'

A defining feature of common law jurisdictions is the mandate held by judges to develop the law 'to keep up with societal change.' As Lord Nicholls stated in *Re Spectrum Plus*, from time immemorial, 'judges have been charged with the responsibility of keeping this [common] law abreast of current social conditions and expectations.' This refrain is repeated by common law jurists when justifying a departure from an established legal position, or when adumbrating a set of new principles to govern a particular area of law. Such judicial progression of the law was evident in the recent judgment of the Supreme Court of the United Kingdom in *R v Jogee* [2016] UKSC 8. In that instance, the Court not only reversed, but set a new course for the development of the criminal law on joint enterprise.

However, rarely does the common law judge ever give a frame of reference for what his or her understanding of what the needs of society are. In extra-judicial speeches and writings, common law jurists employ subjective phrases like "common sense;" "common public decency;" "situation-sense;" and "a sense of what is just" to explain their understanding of what "society" demands of the law. This paper argues that judicial understandings of the "needs of society" are not as easily ascertainable as those phrases suggest. Through examining the jurisprudence of the UK's apex court, this paper demonstrates that there are divergences in what the Justices of that Court understand to be the needs of society at any given instance. This begs the question; to what extent does this standard which underpins the common law's development really represent an objective methodology for judicial law-making?

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Dimitrios Tsarapatsanis (Sheffield), 'Reading the ECHR Politically: the Example of the *Lautsi Saga*'

The purpose of the paper is to explore the possibility of a distinctively political reading of the ECHR, as a third interpretive approach that aims to go beyond both standard doctrinalism and the so-called 'moral reading' of the Convention. While the moral reading of the ECHR, as exemplified by authors such as George Letsas, has provided a robust critique of normatively less sophisticated doctrinal approaches, it is claimed that it has underestimated the importance of the characteristically political questions that ECtHR judges face in hard cases. The paper's goal is to start filling in this gap by exploring a set of conceptual tools aiming at a distinctively political theorising of the Court's decision-making practice. It then applies those tools to offer an analysis of the well-known *Lautsi* cases. Accordingly, the paper is divided into three parts. The first part sets out the distinctively political conceptual tools that shall be used to make sense of the Court's decision-making practice. Emphasis is placed on justifying the proposition that the successful resolution of political issues requires a normative approach that is characteristically 'suboptimal' if judged by the standards of any ideal moral theory of human rights. The second part situates the proposed tools in aspects of the Court's practice and traces out their implications with regard to a number of doctrinal devices used by the ECtHR, most importantly the margin of appreciation doctrine and the consensus approach. The third part explores how political considerations can be plausibly understood to have played out in the context of the high-stakes *Lautsi* saga, providing a defence of the Court's reasoning. The general upshot is that a more politically sophisticated representation of the Court's practice unearths an area of normative considerations, which cannot be reduced to ideal theorising about the moral content of Convention rights.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Steffan Evans (Cardiff), 'More than just politics? Understanding legislative divergence in a devolved UK'

There is growing awareness within the UK that the law in each of its component parts has diverged as a result of devolution. This paper will explore the divergence process and will argue that its exploration provides an opportunity to further our understanding of the way that politics, the law, and external pressures interact in the UK.

In exploring the divergence process, the paper will focus on the way in which the law on social housing regulation has diverged between England and Wales. The paper will demonstrate that divergence has developed as a result of a number of factors combining to drive and constrain its development. In doing so, the paper will question what this means for our understanding of the way that law develops, and will argue that a number of external pressures have a direct impact on the ability of the UK and the Welsh Government to legislate.

Amongst the factors that the paper argues contributes to the development divergence and convergence between Wales and England are; policy and politics, technocracy, and private finance. The first of these factors will consider whether devolution has permitted the perceived differences in political ideology in Wales and England to lead to the development of divergence. The second will consider the recent decision of the Office for National Statistics to reclassify housing associations in Wales and England as part of the public sector, and the legislative reaction to it, on the development of divergence. The third factor will explore how the concerns of lenders has both influenced the way in which regulation is implemented in practice in both nations, and on how it has shaped legislation concerning social housing regulation.

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Liviu Damsa (Birmingham City), 'Post-Communist Privatisation: an incomprehensible neo-liberal ideological project?'

In this paper I explore the consequences of some of the political ideas which informed law-making in post-communist Central Eastern Europe. As one of the most salient goals of law making in post-communist Europe was the transformation of regimes of property, I analyse the most important claim of the neoliberal policy prescriptions for Central and East European states in the early 1990s, that property should be privatised. My argument is that this policy prescription was based on a number of false assumption about what property was under socialism and about communist law. The reality of property arrangements during 'Actually Existing Socialism' in Central Eastern Europe was totally different from that assumed by neoliberal agents and policies. Contrary to their assumptions, the distinctiveness of the communist era property arrangements resided not in the absence of private property, which was tolerated under 'Actually Existing Socialism', but in the organisation of property as an administrative matter, based on unwritten 'operational' rules. This distinctiveness was even more manifest for socialist corporations, where communist formal law was more or less similar to western corporate law, yet unwritten operational rules determined how all the exchanges and transfers of property took place among these socialist corporations. Nevertheless, the neoliberal policies totally ignored the operational unwritten rules, which

should have been changed if a 'transformation' was desired, and proposed instead a change of formal law, which was not necessarily needed. As a result, the post-communist process of privatisation was plagued by many unforeseen and negative effects. The consequence was the great enrichment of the former communist managers who were able to manipulate the formal law and operational rules to benefit from 'privatisation' at the expense of the public, in a process which was not 'rights based' or 'democratic.'

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Jing Wang (Bangor), 'The Public Interest Test: How Fairness in the Chinese Market Can be Promoted through the Anti-Monopoly Law of China 2007'

This study investigates how marketplace fairness in China can be hampered by political preferences, and which element of the Anti-Monopoly Law of China 2007 should be highlighted as important for handling this stressful situation. An examination of the Anti-Monopoly Law of China 2007 now shows that government preferences in markets create far greater obstacles than benefits for Chinese long-term economic development, so that not only economic actors and consumers, but also the public, have been negatively affected. Accordingly, the author aims to explore the root causes of the situation with regard to differences between economic and non-economic objectives from the political, market and legal perspectives. Further, overcoming this conundrum requires treating the Chinese anti-monopoly law with a dose of "public interest medicine", which could mix economic and non-economic objectives harmoniously for both State and non-State economic actors in the application of the Anti-Monopoly Law of China 2007. Thus, creation of a "public interest test" under the Anti-Monopoly Law of China 2007 will be discussed from the perspective of significant elements and characteristics of the "public interest test". This study concludes that a "public interest test", which is designed to harmonise both economic and non-economic objectives in the Chinese market, could contribute to marketplace fairness in the application of the Anti-Monopoly Law of China 2007.



# Law's Empire, Empire's Law – Justice, Law & Colonialism

NB: all sessions will be held in Percy G10

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## Thursday 6<sup>th</sup> April (11:00-12:30)

Nadine El-Enany (Birkbeck), 'Brexit as Nostalgia for Empire: Law, Migration and the Production of Race'

Through a conceptual framework that builds on racial formation theory and critical race theory, this paper argues that Britain's vote to leave the European Union (EU) must be understood in the context of its imperial history. The debate on the EU referendum was dominated by the topic of migration. Yet, absent from the discourse was an understanding of how Britain's imperial history both set in motion the migration of today, as well as having been the major driving force in legal developments in the field. By examining the historical development of Britain's immigration and asylum law in the context of its imperial history, we can understand how the vote to leave the EU materialised, as well as the effects of immigration and border control on people racialised as non-white. Drawing on the work of Ruth Wilson Gilmore, Renisa Mawani and Dean Spade, the paper argues that law is productive of racial categories, making certain groups vulnerable to structural violence and premature death. Finally, the paper explores the theme of nostalgia for empire, examining the rhetoric of 'taking back control' and 'making Britain great again' to ask how the romanticisation of the days of empire, when Britain was defined by its racial and cultural superiority, and was 'first among equals' in the Commonwealth, played a role in the vote to leave the EU.

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Gareth Evans (Aberystwyth), 'The Times They Are a-Changin: The March of Sub-State Nationalism in Contemporary Constitutionalism'

The lyrics 'the times they are a-changin' have come to embody the liberalising reforms of the second half of the twentieth century. Whilst Dylan's classic was primarily concerned with the social reforms taking place in the West, its release coincided with the European Court of Justices' 1964 ruling in the case of *Costa v ENEL*. From this landmark case, the principle of supremacy in European Law was born, and the sovereign competence of the nation-state became increasingly called into question.

Nowadays, this ruling sits within an ever-increasing pantheon of rival sites to the authority of the nation-state. With the dilution of the economic power and political capacity of the state in the second half of the twentieth century, and the new era of pluralised constitutionalism which has taken its place, the idea of the state as a bastion of political identity has become increasingly qualified. In the case of the United Kingdom, its pluri-national construction is now directly influencing the progression of its constitutional system; a phenomenon catalysed by the advent of devolution in 1998.

The aim of this paper will be to assess as to how the post-imperial construction of the United Kingdom influenced the rise of neo-nationalism in the 'home nations'. It will then move on to discuss how these neo-nationalisms have come to challenge the constitutional structure of the British state, and how ideas of 'Britishness' have evolved to reflect an identity far removed from the shared pursuits of the eighteenth century. Finally, this paper will conclude with a look to the future, examining how the proposed solutions to the presently unsettled constitution are reflective of the history of the constituent nations to the Union.

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Colin Murray (Newcastle) and Tom Frost (Sussex), 'The Public and Private in the Chagos Cases'

The establishment of the British Indian Ocean Territory (BIOT) as a "defence colony" in the 1960s stands as an example of the UK's efforts to sustain its global role through imperial possessions into the twenty-first century. Taking place during a period of rapid decolonisation the creation of the BIOT and the expulsion of the Chagossians stand together as a paradigmatic example of imperial interests placing the good of the commonwealth above the needs of specific colonised peoples. The interests of the Chagos Islanders were marginalised on the explicit basis that they were uncivilised and the hardships they underwent were necessary in bringing them the imperial dividend of industrial society. This paper re-evaluates the Chagos Islanders' litigation, arguing that it generated a renewed jurisprudence of imperialism, with the courts deferring to imperial assessments of what is in the common good in both private and public law. Throughout this litigation, the UK Government's interests have been consistently elided with notions of the imperial common good, and used to justify the continuing exclusion of the of the Chagossians from their homeland. Drawing upon recently released archival materials, which shed light on the earliest stages of the legal resistance to deportation, this paper contends that private law rights of exclusion have underpinned the entire litigation, ensuring that the UK's courts have not been able to adequately address the Chagossians' interests, let alone reverse their expulsion.

## Thursday 6<sup>th</sup> April (14:00-15:30)

John Harrington (Cardiff), 'me, Space and Security in Global Health Law: A Critical Perspective from Kenya'

This paper develops a critical-rhetorical reading of the emerging field of global health law through exploring the salience of spatio-temporal figures in debates and initiatives in this area. This approach allows us to attend to processes of implementation and transformation, as well as resistance to international and transnational health law at national level in the global south. It also helps to specify the enduring resonance of colonial practices and figures of discourse in globalized health law and governance. The paper proposes a pattern of analysis which combines Valverde's recent work on legal chronotopes with the theory of nodal health governance developed by Drahos, Burris and Shearing. It uses this model to examine a 2010 US initiative to support biosecurity improvements at health research laboratories in Kenya and elsewhere in Eastern Africa. This initiative responded to the perceived threat that unsecured pathogens could be seized and 'weaponized' by international terrorist groups. Significant governance nodes, in Kenya, the US and at international level are identified and the attempts to link them are considered in rhetorical terms. It will be seen that legal and policy arguments aimed securing both the laboratory improvements and the required funding were structured by a range of spatio-temporal figures. The plausibility of these distinctive chronotopes is examined through considering their historical resonances.

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Raza Saeed (Warwick), 'Law and Negotiated Coloniality in British India'

This paper is part of an on-going collaborative and archival research project on 'Law, Gender and Coloniality in the Indian subcontinent: A case study of the Dissolution of Muslim Marriages Act 1939'. The project seeks to explore an area of British Indian law that has not previously been analysed through the theoretical frame of gender and its politics within colonialism.

The instrumentality of law employed by the colonial regime in British India served not just the purpose of control, but also transformed, co-opted or destroyed local knowledges, customs, laws, religions and normative orders. Through this encounter, the local legal, religious and normative systems of the colony (the Indian subcontinent in this instance) underwent a significant change as they became fossilised and were radically altered to suit the purposes of the colonial state and the local comprador. The DMMA research is an attempt to consider this idea in relation to a particular legal regime linked to family and divorce laws in the Indian subcontinent. Through archival research of laws, cases, commentaries and newspaper reports, the aim is to address how family law, traditions and even religious norms underwent a significant shift to aid the purposes of colonial control. The project also aims to examine how the local comprador, including legal experts, clerics and parliamentary representatives, negotiated with the colonial system for their mutual advantage, at the expense of gender equality and women's rights.

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Martin Jones (York), 'The frontier of the international refugee regime: Refugee protection, legal orientalism, and what better alternative in the Middle East and Asia?'

Traditional accounts of refugee protection in the Middle East and Asia foreground the hesitant relationship of these two regions with the international refugee regime. It is often remarked that an overwhelming majority of states in these regions have not become party to key international refugee treaties and that the domestic law of almost all states in these regions ignores the protection of refugees. Flowing from this account, the international community (through the activities of UNHCR) has taken the lead in the protection of refugees in these regions. This approach results from a legal orientalism that both mischaracterises the law and legal institutions in these regions and compares them to an idealised account of these entities elsewhere. The resulting zone of exception from the international refugee regime is fundamentally unsustainable and privileges international interests, fora, and UNHCR as the negotiator. Resistance to this approach within these regions has a record that is worthy of both caution and further examination.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Dania Thomas (Glasgow), 'The sovereign debt relationship and the limits of contracts and economic self-interest: a historical overview (1800-2000)'

The legal history of US sovereign debt markets can be told through a description of the legal instruments that have characterised the sovereign debt relationship between sovereigns and their creditors. Since the inception of modern debt markets in the early 19th century, legal scholarship has assumed that these relationships are defined solely as contracts. More recently, an influential economic literature relying exclusively on the notion of private self-interest arose to explain why sovereigns repay their debts. This literature attempted to predict how the systemic risks to the US banking system through widespread sovereign defaults in the 1980s could be avoided. Based on new historical and empirical legal research, this paper shows that the conflation of contract and self-interested behaviour to explain sovereign behaviour is metaphorical and not evidenced in actual markets.

Sovereign debt markets have always been sustained by social relationships between market actors – the debt contract is only one part of a much wider sovereign debt relationship that includes sovereigns, creditors, creditor organisations, informal market arrangements such as the London and Paris clubs, multilateral institutions and now increasingly central bankers. In the early days of US imperialism in Latin America, the imposition of debt obligations furthered US foreign policy aims (1800-1900). This was possible as the debt relationship was embedded in the close ties between the US government and the providers of private capital. By the time, US foreign policy interests in the region were established the debt relationship was sustained by relationships first between private lenders and sovereign governments and then commercial banks and sovereign governments (1900-2000). In this period, widespread debt workouts reveal the salience of relationships in which debt contracts were embedded .

The resolution of debt repayment crises through market-driven, debt workouts distributes the pain of post-crisis economic adjustments between debtors and private creditors. This current period is marked by widespread concern that they can no longer be taken for granted and that the pain of post-crisis adjustment will now be imposed solely on the citizens of sovereigns in crises and through larger bailouts on taxpayer contributions to multilateral institutions such as the International Monetary Fund and the European Central Bank. The latter imposing more pain on citizens through structural adjustments, conditionality and austerity that perpetuate the metaphorical view of self-interested behaviour. Building on new historical evidence, this paper offers a counter-narrative to this entrenched academic and policy discourse. It draws on recent work by David Campbell that contests the notion of economic self-interest attributed to Adam Smith and re-describes embedded sovereign debt relationships premised on Campbell's 'other-regarding duties'.

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Bronwen Jones (Newcastle), 'IP and Postcolonialism: a continuing legacy'

Egypt and Tunisia, both founding members of the World Trade Organisation (WTO), have recently amended their constitutions to make specific reference to the protection of Intellectual Property Rights (IPRs). Following WTO membership, IP legislation has been implemented to meet WTO obligations. However, there is continuing pressure to adhere to

standards that disadvantage developing countries. Since its establishment in 1994 the WTO, an organization that now numbers 164 state members of vastly different social, legal and economic backgrounds, has promised prosperity for all. In particular, among its supposed benefits was a more fairly balanced rule-based system. This was initially embraced by developing countries as a means of achieving a degree of equality of bargaining power, with treaty rules binding the powerful and weak alike, through a compulsory dispute resolution system. The IP rules however, have had the, much underestimated, effect of entrenching power and wealth in the 'North'. The Annexed Trade Related Aspects of IPRs Agreement (WTO-TRIPS) requires adherence to a minimum standard of protection for IPRs. Compliance with WTO law has, therefore, required the amendment of laws and involved the transplantation of IP norms more suitable for the developed countries that initially drafted them. The provisions, exceptions and exclusions that should provide a margin of appreciation for signatories to meet the development goals expressed in the aims and objectives of the Organization and to address injustices arising from strict implementation, have been limited at every turn. Not satisfied with minimum standards the United States (US) and European Union (EU) have entered into bilateral trade agreements increasing standards yet further. Thus, the international power imbalance remains. This paper argues that far from accepting that this situation is now merely the status quo, it is necessary to continue to raise the fact that IP laws disproportionately privilege the 'North' and to challenge Orientalist narrative that wrongly characterizes developing countries' implementation of IP laws as inadequate.

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Mirosław Sadowski (Wrocław), 'Law and Conflict in a Postcolonial Reality: The Case of Hong Kong and Macau'

In the wake of the fall of the Iron Curtain, many people were eager to believe Francis Fukuyama, who said that 'the end of history' had come. The 21st century, however, has turned to be the era after 'the end of the end of history' (as 9/11 has been described), when events of historical importance may happen any day. In this age of permanent crisis, conflicts might arise in anywhere in the world, also in places, which, like the US or the UK, seemed to have had the times of conflict behind them. The purpose of this article is to analyse, from a socio-legal perspective, the conflicts which arise in a postcolonial environment on the example of Hong Kong and Macau. In the first part of the paper, M. M. Sadowski investigates the idea of conflict itself from a variety of viewpoints: linguistic, cultural, psychological, and ultimately sociological. In the second part of the paper, the author briefly introduces Hong Kong and Macau's complex legal and political systems, which, while being deeply immersed in the colonial past, function in the postcolonial present, thus also contributing, as the author argues, to conflicts in the two cities. This idea is further developed in the third part of the article, in which the author ventures to analyse the situations in Hong Kong and Macau in which law (its proposed or introduced changes, its interpretations, or its present form) has led to intense public reactions, e.g. Hong Kong's constitutional crisis over the right to abode issue; the case of the article 23 in Hong Kong; the two Special Administrative Regions problems with housing, ecology, cultural heritage and collective memory; Macau's labour shortage crisis; the recurring issue of 'Mainlandisation;' and the most recent 'Fishball Riots' and the oath swearing dispute.

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Kimberley Brayson (Sussex), 'Institutional Islamophobia and Islamic Dress'

The criminalisation of visibly Muslim women through the enactment of French law 2010-119211 is a violent reminder of the precarity of colonial bodies in public space. This act of law making demonstrates the ongoing management of colonial bodies and communities which speaks over time from historical colonisation to present, and future, neo-colonial narratives. Despite this enduring colonial condition and its manifestation in the current epoch as institutional Islamophobia, the colonial narrative is largely absent from "legitimate" public discourse on the issue of Islamic dress. As per the imperatives of this stream, this paper seeks to move beyond the repetitive logic of security, terror and public order and the gender oppression arguments that surround Islamic dress. The paper argues that these logics are invoked in a strategic manner to obfuscate the colonial condition and engender a normative Islamophobia in the public-political imaginary. Secularism in this context is used to convey and cloak all manner of political agendas. The paper explores the instrumental use of the bodies of Muslim women to control wider communities. In turn the paper focuses on the instrumental use of law in furthering assimilationist political agendas and reflects on the whiteness of public space and institutions. The paper questions the decision of the European Court of Human Rights in upholding French law 2010-119211 on the basis of "living together" and examines the political and economic imperatives at play which function beyond a mere security analysis. The sociological significance of the role of law in shaping social attitudes and in legitimising behaviours associated with Islamophobia is explored. In conclusion the paper reflects on both the affect and effect of this legal-normative instantiation of Islamophobia and offers some conclusions as to the alienation and reduced capacity for action experienced by visibly Muslim women.

# Law’s Empire, Empire’s Law – Justice, Law & Colonialism

NB: this session will be held in Barbara Strang B32

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## Friday 7<sup>th</sup> April (12:00-13:30)

Andrew Francis (Leeds) and Matthew Brannan (Keele), 'Aging, Inter-Generational Fairness and Professional Cohesion: Re-framing the Challenges for Legal Professionalism'

Age and Generational Change are important and overlooked categories through which to analyse the challenges facing legal professionalism. The implications of an aging legal profession in England and Wales require in-depth analysis similar to that which has sought to address diversity and fragmentation in the profession.

Individual older lawyers face challenges in planning their exit from, or further participation in the profession, and may find themselves in conflict with their firms' interests. Law firms have to balance these succession issues amidst increased competition in the sector. Moreover, generational theory, suggests that aspirant entrants, growing up under austerity and connected through social media, have very different identities and priorities, all of which pose huge challenges for professional cohesion.

This paper maps the contours of a research agenda which, we argue, will be critically important for researchers of the legal profession – and in organisational studies and gerontology. We argue that a sustained interrogation of the implications of aging and generational change will be important in re-framing our analysis of legal professionalism and requires a much sharper focus on individual stories, (in addition to occupational and organisational narratives) in the unfolding evolution of legal professionalism. Moreover, it also presents an opportunity to understand dimensions of disadvantage that are often hidden from critical scrutiny. In developing this approach we draw on an inter-disciplinary framework building from organisational studies, gerontology and the sociology of the legal profession.

In particular, we develop three key avenues of analysis - an emphasis on 'professional cohesion' alongside fragmentation narratives; a focus on lawyer anxieties arising from personal and professional uncertainties and age as a key dimension of diversity and discrimination. We suggest that the variable disadvantages facing different lawyers throughout the life course may come into sharp focus, and even intensify, at the point of exit from the profession.

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Sara Dezalay (Cardiff) and Peter Brett (Queen Mary, University of London), 'Who gets on the bench? Constitutional judges and the judicialisation of politics in Sub-Saharan Africa'

Since 1990, there is a growing judicialisation of politics in Sub-Saharan Africa. However, compared to research on other regions, there is no systematic data measuring the impact of this trend on judicial independence or the quality of democratization on the continent. Focused on constitutional judges in four Western, Central and Southern African countries - Côte d'Ivoire, Burundi, Botswana and Namibia - this paper outlines the preliminary hypotheses and fieldwork of a research project sponsored by the British Academy/Leverhulme Trust. The objective of our research is to assess the conditions where increasing formal judicial independence accompanies substantive judicial autonomy. Research on other world regions suggests that judicialising politics inevitably politicises the judiciary (e.g. Malleson and Russell 2006; Hirschl 2008). By contrast, we apply a sociohistorical approach to judicialisation (e.g.

Vaucher 2008) in our four country case-studies, by investigating the profiles and trajectories of all judges entrusted with statutory and constitutional judicial review mandates since 1990. Our hypothesis is that judicial autonomy is conditioned by the strength of domestic legal fields in relation to political elites, specifically in the Sub-Saharan context under the influence of aid dependency and uneven globalisation (e.g. Ellett and VonDoepp 2011; Cooper 2004; Dezalay 2015). Tracing judicial careers and professional patterns beyond formal rules of appointment, our research will thereby measure the empirical significance of social ties with national elites, regional and international connections, and donors for judicial autonomy. The outcomes of our research are intended for academic and policy audiences interested in rule of law reforms and they are also designed to contribute to an open-access database of judicial profiles in Sub-Saharan Africa developed in collaboration with an international network of researchers (Africa/Germany/UK/US).

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Emma Cooke (Kent), “‘Injected” precarity? Questioning the stylized existence of the Legal Aid Lawyer within the Neo-liberalist context’

Following the radical implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, significant cuts to civil, family and criminal legal aid budgets threaten to change the legal aid terrain beyond all recognition. Based on an informed ethnographic account of Legal Aid Lawyers in the context of the workplace, this paper explores the changing nature and connotation of professionalism in light of crumbling nature of Legal Aid. This paper critically examines the way in which precariousness exponentially increases under conditions of neoliberalism. The insecurity experienced by these altruistic workers has particular implications as the Legal Aid Profession becomes subject to the type of degradation traditionally associated with blue-collar work (Beck, 2000; Standing, 2011). Changes to the legal aid regime that encourage the enactment of acquisitive as opposed to altruistic modes of work, the privatisation of public services and the removal of systems of state welfare can be seen as contributing to the precariousness experienced by these professionals. This paper argues that the Legal Aid Lawyer themselves have been placed in the position of a ‘precariat’ at the occupational level, which has particular implications for the demoralization and professional diminishment of their practice. Questioning the stylized existence of the legal-aid lawyer in the current neo-liberalist context offers a unique opportunity to apply concepts, which have previously been applied to blue-collar work in the white-collar context. This vitally paves way for an original contribution to the largely under-researched field of the profession of legal-aid lawyering.



# Legal Education

NB: all sessions will be held in Research Beehive Room 220

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## Thursday 6<sup>th</sup> April (14:00-15:30)

Janine Sargoni (Bristol), 'Exploring Students' Experiences of Research-Based Learning in a Russell Group Law School'

The Russell Group considers the research environment to be a valuable one for student learning. The aim of this research is to understand how students experience the interface between research and teaching in their legal education at the University of Bristol Law School. The paper focuses on the 'mini case study', a mechanism for enquiry-based learning at the heart of Socio-Legal Studies, a third year elective course on the LLB. The data suggests that participant students tend to experience the substantive content of researcher activity only in the final year of the LLB and not in the first two years which are dominated by core subjects required for the professional Qualifying Law Degree (QLD); that students positively experience acquisition of their own process-based research skills as beneficial to their own learning; but that students neither linked those skills to ones exhibited by research-active staff nor were aware of the value of those skills in constructing their own learning nor still of their value in wider employment context or legal practice. The paper concludes by recommending strategies to enrich student experience of research-activity of staff, both in substantive and process-based terms.

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John Harrington (Cardiff), 'Pericles and the Professors: Struggles over Legal Education in Nkrumah's Ghana'

Historically Ghanaians wishing to study law had to attend the Inns of Court in London. In 1958 President, Kwame Nkrumah, opened the Ghana School of Law which aimed to provide relatively short and practical training for new lawyers, suited to the needs of a developing nation. By contrast the law department founded at the University of Ghana in 1959 drew on American ideas of a 'liberal' legal education and kept some distance from the immediate needs of new state. In 1963-64 a significant conflict developed between the government and ex-patriate teachers at the university over appointments, governance and curricula in law, leading ultimately to the deportation of the American Dean of Law. In this presentation, which draws on a joint project with Professor Ambreena Manji (Cardiff University), I explore the terms of this debate, relating them to broader conflicts over education in the newly independent states and to related controversies over legal pedagogy in Britain and the US. Ghana presents an interesting example of debates over the meaning and purpose of legal education that were to characterise African legal education at its start, including in Tanzania, Ethiopia and Nigeria. This area was, we argue, an important, though neglected intellectual and political battleground in this period: a site in which academic, but also class and geopolitical tendencies were manifest.

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Sajida Ismail (Manchester Metropolitan University), 'WoW Law – Walk Out With Law'

'WoW Law' is a concept for an action research project to develop knowledge, awareness and skills of law students in both urban and rural outdoor settings through a series of 'themed

legal walks'. This paper seeks to test the concept in order to develop the design of the project, with a particular focus on the relationship between the open space, the often constrained narrative of the law and critical pedagogy.

The themes for the walks are to be constructed so as to enable discussion on a broad range of legal topics, ranging from the commercial to the socio-legal, each of which will intersect with the geographical, historical, political and social connections of the physical outdoor space we arrive at. Walks will take us to places of legal significance, but will also enable an exploration of the structural boundaries of the law relating to each legal subject. In this regard, the project draws from some of the creative ideas developed in psycho-geography surrounding the notion of the 'unbordered space', as exemplified by, for example, the Loiterers Resistance Movement. WoW Law is therefore fundamentally inter-disciplinary in its aims.

This concept also draws from established outdoor learning initiatives in primary schools, the FE sector, and other subject disciplines in higher education in which the outdoor environment provides a tool for enhancing teaching, learning, and skills development. It is well documented that the outdoor open space promotes physical and mental well being, and, importantly, provides an effective and natural stimulus for creative teaching, learning and skills development. Existing projects within schools and colleges suggest that there is a direct link between this holistic approach and improvements in attendance, critical reflective skills, quality of coursework, confidence building, communication skills and ultimately, in employability.

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Catherine Edwards (BPP), 'The Big Bad Wolf- Exploring the differences between public sector and commercial Law Schools- it's not what you think!'

Many assumptions are made about the role of commercial providers, particularly in the post graduate legal education sector where they are often seen as the 'Big Bad Wolf'. Some have been heard to refer to them in more extreme terms, as 'evil', 'vampires' or 'money grabbing leeches'. Are they really that bad and what do such providers offer the student which is different in an education sector which may change radically with the advent of the proposed Solicitors Qualification Examination?

Having worked within vocational legal education for 12 years the author has taught predominantly in post 1992 institutions across undergraduate and postgraduate legal education before moving to BPP University, a leading commercial provider of legal education, as Head of Law in Birmingham.

This paper explores the different pedagogic and cultural approach in course design, delivery and development. We will also look briefly at the practicalities of running a Law School which forms part of a national commercially focused institution as opposed to managing a course within a public sector university. The profile of tutor recruited and role of research within the Law School will be explored as will the crucial relationship with the legal profession.

The 'Big Bad Wolf' has a lot to teach other institutions as they prepare for the SQE and the consequent changes in legal education which will follow.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Helen Rutherford and Jennifer Taylor (Northumbria), 'Squaring the circle: exploring the use of reading circles to encourage law students to read'

Reading is the fundamental foundation of a law degree yet many students seem to avoid exploring beyond the lecture notes and core text. We wanted to encourage independent research, wide reading, active participation and used a new module on Inquests to explore if reading circles encouraged students to be self-directed learners, to engage on a deeper level and to take a greater responsibility for their own education within the subject matter of the module.

The new module was designed in 2014 for an undergraduate law degree programme with the aim to involve much student-chosen reading. The module was designed not to be prescriptive in its content and to enable students to tailor their study, and what they wrote for the final assessment, with regard to their specific interests.

Reading circles have their roots in literature circles, or book groups, that were first described by Daniels in 1994. Literature circles have been renamed by Jane Gee "reading circles" as a way to widen their applicability beyond traditional literature teaching. However, the prefix is not crucial because it is the "circles" element of the method that is important.

This paper will explain the method, how we implemented the method within a law module, our early observations and reflections and how we intend to adapt the approach within the module going forward.

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Anthony Cullen and Lughaidh Kerin (Middlesex), 'The Use of Meditation to Inculcate Resilience in Students of Clinical Legal Education'

The launch of mindfulness sessions at the Honourable Society of the Middle Temple, and Bar Council's the reference the initiative among others to promote wellbeing at the bar, suggests a potential role for meditation in strengthening resilience and balance while managing the demands of legal practice. This paper considers the current and future use of meditation by CLE students as a way of developing resilience to cope with the realities and demands of practice. It begins by first defining what meditation consists of. It then surveys of the growing body of literature on meditation and legal practice and presents some analysis of trends in the area. In light of the benefits reported, the authors speculate on a potential role for the incorporation of meditation into clinical legal education and the programmes of continuing professional development.

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Rebecca Mitchell and Claire Bessant (Northumbria), 'Redesigning Distance Learning: Challenges and Opportunities'

The past decade has seen the development of many technological innovations which can positively enhance distance learning delivery, coupled with a growth in pedagogical literature

and expertise in the area. Programmes designed prior to this period may have been more heavily reliant on an instructionist approach to delivery (Paliwala, 2001) through, for example, workbooks produced primarily with hard copy consumption in mind. More limited use may have been made of collaborative tools, such as Discussion Boards, and then with little in the way of scaffolding, which reduced their efficacy (Salmon, 2003; McNamara and Burton, 2010).

This paper explores the experiences of distance learning programme designers at Northumbria Law School and the drivers for redesigning the way in which postgraduate legal education is delivered. These included: the stark contrast between subsequent modules and the more cognitivist and constructionist approach to delivery (Paliwala, 2001) of the first compulsory module (involving the students in group work, including collaborative use of Discussion Boards, and peer review); the opportunity to find ways to reduce reported feelings of isolation and encourage collegiality and contact between students and with tutors (Bernard et al 2000) and; the opportunity to take advantage of and integrate more modern learning technology, bringing the programmes up to date.

The redesign process was informed by a review of relevant literature, consideration of colleagues varied experiences with distance learning delivery and canvassing student views of proposed changes.

The paper goes on to consider the revised delivery model now being implemented in the Law School, which makes far greater use of technology and a variety of materials, to reflect different teaching approaches (Moule 2007; Ally, 2008). These include interactive on-line materials and synchronous and asynchronous collaborative tools. Although an improved delivery model has been designed and implemented, it is recognised that the model operates within “real world” constraints and that further development work is needed to realise its full potential.

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Laurel Farrington and Charlie Irvine (Strathclyde), ‘The respectful understanding of another person: the importance of empathy in mediation’

Mediators, like lawyers, can choose to ignore emotions when displayed by disputants. Alternatively, they can seek to acknowledge them, communicate their understanding and act appropriately towards the parties involved: in short, they can respond with empathy.

Empathy can be considered a personality trait and, crucially, a skill to be developed. Restorative Justice attempts to broaden and extend empathy, particularly in the case of the perpetrator. Therapeutic Justice makes use of empathy in those involved in administration of law to improve outcomes for all. Yet scepticism exists within the legal profession, where empathy is viewed often with suspicion, not least because it may be considered irrational and a risk to neutrality.

This presentation is based on our recent book chapter(1). It builds on past and current understandings in the field and proposes new and original ways of thinking about theory and practice of empathy in mediation. It argues that empathy enables disputants to reach authentic and sustainable high-quality agreements. However, the construct of empathy is fraught with semantic confusion. We define and consider empathy through the lens of cognitive and developmental psychology and neuroscience, describing it as synergy of both

affective and cognitive components. We discuss the key elements of empathic concern, emotion regulation, and perspective taking, underpinned by non-judgmental self-awareness or self-empathy.

We demonstrate how these components can generate mediator interventions, which stimulate similar, constructive responses in disputants: mediator empathy towards each party creates a climate in support of mutual empathy. While the progress of mediation can seem slow and circular, the trajectory tends to move forward and agreements reached through empathic understandings often can be transformational.

We also show how the mediator's empathy can improve outcomes in the increasing numbers of intractable disputes, which include one or more parties with difficult, 'high conflict' behaviours or personality traits.

1. C Irvine and L Farrington, 'Mediation and Emotions: Perception and Regulation' in H Conway and J Stannard (ed), *The Emotional Dynamics of Law and Legal Discourse*, (Oxford, Hart Publishing, 2016)

## Friday 7<sup>th</sup> April (10:00-11:30)

Julie Adshead (Manchester Metropolitan University), 'Apprenticeships in Law: Panacea for social mobility and diversity in the Legal Services Sector?'

Widening participation and diversity have been central tenets of the Higher Education (HE) agenda for many years. At the same time, the Legal Profession has been seeking to draw its talent from a broader ethnic and social pool. The elevation of apprenticeships on the government agenda from 2010 onwards and the current target of 3 million apprenticeship starts by 2020 bring further opportunities to both address the very poor social mobility record in the UK (1) and to move towards a more proportionate representation of black, Asian and minority ethnic (BAME) across all employment sectors.

These aspirations have been repeatedly linked to the drive for a viable alternative route into employment alongside the traditional higher education pathway. However, looking at the evidence to date across the apprenticeship portfolio, there is a danger that the potential will not be fulfilled. A recent report from the Social Mobility and Child Poverty Commission (SMCPC) (2) points to a series of concerns about the capacity of the current system to become an engine of social mobility. Furthermore, improving the representation of BAME in apprenticeships and the achievement of the government target of 20% of apprentices from BAME backgrounds by 2020 represent a significant challenge.

The contribution of legal services apprenticeships to increased social mobility and diversity in the sector is also doubtful. A number of concerns flagged up by the SMCPC Report are particularly evident in this sector. Until recently the most popular legal services apprenticeship was at level 3 and this gave no opportunity for progression for 18 year olds already holding GCSEs and A levels. Furthermore, the A level tariff for entry onto a level 3 or 4 legal services apprenticeship was little different to that for entry onto a degree programme. Experience suggests that representation of BAME backgrounds on legal services apprenticeships is also poor.

The Apprenticeship Team at Manchester Law School (MLS) is undertaking a research project to assess the capacity of legal services apprenticeships to deliver on the social mobility and diversity agendas. As the first HE provider of legal apprenticeships and a large law school delivering a full range of academic and vocational qualifications, there is a good deal of data and student experience for the Team to draw upon. This paper marks the very start of the project, which will be a long-running longitudinal study. MLS will be delivering level 7 solicitor apprenticeships from 2017, which will provide an additional source of data for the study.

The paper provides an analysis of the background literature and reports in these areas along with an outline of the planned research, which will draw upon information on previous and current cohorts of level 3 and level 4 apprentices and compare with data from undergraduate programmes. As it becomes available, information from level 7 recruitment will also be analysed. The quantitative analysis will be supplemented by a survey of current and alumni apprentices. Full conclusions will be drawn many years from now, but some preliminary findings are presented in the paper. Bearing in mind, the concerns raised by the SMCPC, it seems that the legal services sector may well be failing to deliver in terms of some of the key selling points of the apprenticeship agenda.

(1) The UK has one of the poorest rates of social mobility in the developed world (Social Mobility and Child Poverty Commission, 2015).

(2) Social Mobility and Child Poverty Commission Apprenticeships, young people, and social mobility, March 2016.

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Amy Revell (BPP), 'Embedding employability skills in a commercial, academic programme'

The Graduate Diploma in Law is a postgraduate conversion course for non law undergraduates who wish to gain a qualification in Law. It is a gateway programme for any non law student who wishes to qualify as a solicitor or barrister and must be undertaken before any non law undergraduate joins the Legal Practice Course (for solicitors) or the Bar Professional Training Course (for barristers). The course normally takes nine months on a full time basis and is considered to be intensive in contrast to undergraduate study.

The nature of the course creates a unique student profile; bright, engaged, skilled but with limited relevant legal employability experience. These students are entering a highly competitive vocational field where they will compete with law undergraduates who have had three years to build a legal CV.

Another unique qualifier for these students is that they are market savvy. They have made a conscious decision to pursue this career path and the majority are self funded. They are therefore approaching this decision as a consumer (whether we like the term or not) and will evaluate institutions on the ability of the institution to train them for the market, as well as training them in the law. This has to, by necessity, address the recent move in recruitment towards testing of soft skills rather than just competencies.

Evaluating this from the perspective of a commercial provider, where the offering is market focussed, blended programme that offers both black letter law and the opportunity to develop employability skills, the latter being in addition to the usual extra curricular opportunities. This presentation will therefore look at methods of incorporating those employability skills into an intensive academic course, with particular reference to:

- Content;
  - Design; and
  - Teaching methodology.
- 

Angela Macfarlane (Northumbria), 'An interactive model for delivery of a distance learning LLM programme using the eXe learning tool - my journey'

In order to keep pace with the changing demands of our distance learning master's students and to take advantage of advances in technology, in 2016 the interactive delivery of the LLM Employment Law in Practice began, replacing the traditional work book style delivery.

The new model delivery is designed to encourage and support the distance learning students to become part of a collaborative learning community. The delivery of the module is via Blackboard and includes discussion boards, virtual classrooms using Blackboard collaborate, and materials provided through the eXe learning tool. The design is to encourage online communities to flourish by offering a variety of opportunities for the students to interact with their peers.

The eXe learning tool is an open source authoring application to assist academics in providing materials electronically on the web, but do not require the academic to have advanced programming skills etc. The finished materials offer a much more modern look that is user friendly and a digestible method of providing the materials. The application means that the students can keep pace and measure their learning as it offers a wide variety of instant formative feedback. The summative assessment is also marked electronically giving the student instant access to their mark, individual feedback and feedforward comments.

This paper explores my journey from old style delivery to a modern, technology based online delivery. The trials and tribulations, the significant development of my information technology skills, the lessons learned and initial student feedback from a cohort who had optional access to both types of delivery.

## Friday 7<sup>th</sup> April (12:00-13:30)

Simon Sneddon (Northampton), 'Strength through Collaboration?'

This paper explores and evaluates the use of Blackboard Collaborate Ultra as an alternative to physical lectures. Initial pilot study results showed that not only did "attendance" improve when the sessions were delivered in this fashion, but engagement with the material improved as well. This paper is based both on that pilot study and a full project (to be completed in March 2017), which assesses the qualitative impact of the change of delivery mode on levels of student satisfaction, as well as quantitative impact on metrics such as achievement, retention and progression.

The pedagogic rationale behind the project and the paper is the notion that lectures to large cohorts are often "broadcast" lectures rather than interactive, and that interactivity boosts both retention of knowledge and levels of understanding. The module which forms the basis of the study is a 2nd year designated (non-compulsory) module on the LLB programme, which is also offered to students studying Criminology. The module has around 100 students enrolled and the project will demonstrate the feasibility of this type of delivery for larger cohorts.

There has been work on the benefits of recording live lectures as a resource for students to access at a later stage (Tarrant, 2013; Williams et al, 2014), and also of online lectures (Kinash et al, 2015) and this paper links into both threads by assessing the impact of recorded, interactive, online delivery.

Sources:

Kinash, S., Knight, D., & McLean, M., 2015, Does digital scholarship through online lectures affect student learning? *Educational Technology & Society*, 18 (2), 129–139

Tarrant, J., 2013, Recorded Lectures: An Opportunity for Improved Teaching and Learning, *ergo*, vol 3 no 1 37-42

Williams, A., Birch, E & Hancock, P., 2012, The impact of online lecture recordings on student performance, *Australasian Journal of Educational Technology*, 28(2), 199-213

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Rachel Ann Dunn (Northumbria), "'Hard" skills as the foundation, with "soft" on top? Problematising our assumptions about what is learned, when and how in lawyers' development'

Since 2014 I have been collecting data from live client clinics (LCCs) within Europe. I have specifically focused on the knowledge, skills and attributes which LCCs can develop with students, exploring if they can go on to start practice competently as a result. My main method of collecting data was the Diamond16, developed from its use in primary education and adapted for my research into higher education in law. It is a form of visual methods, allowing me to collect quantitative and qualitative data quickly. Participants were asked to place certain skills onto the Diamond16 board in a hierarchal system, with the most important at the top and the least important at the bottom. I encouraged participants to discuss the placing

of the cards with each other and each group were recorded during the session. This model was used with 6 firms in Northumbria's Student Law Office, their tutors and also 2 law firms in Newcastle. It was then replicated with students at 2 European universities, to examine the consistency throughout the continent, in light of new networks and partnerships developing.

This paper will explore the results of the data collected by the Diamond<sup>16</sup>, specifically focusing on which knowledge, skills and attributes were commonly seen as important to practice and whether students believed that they were developed during their time in a LCC. Particularly, I wish to focus on the assumed divide between "hard" and "soft" skills which lawyers need in order to practice competently. The quantitative data shows which knowledge, skills and attributes participants perceive to be important to practice, with a comparison between students, clinicians and practicing lawyers. The qualitative data adds depth the quantitative, explaining why certain cards were placed as they were and which skills are believed to only be developed whilst in practice.

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Francisca Anene (Buckingham) and Laura Osayamwen (Nigerian Law School), 'Gentlemen in Skirts? Locating Gender in the training of Law Students in Nigeria'

Nigerian laws and policies are generally believed to be gender-neutral. However, the extent of their neutrality may be coloured by the patriarchal foundations of the Nigerian society which contribute to and further strengthen the inequalities that exist against women. Similarly, though there may be no gender bias in the admission of candidates for the Bachelor of Laws (LL.B) degree, implicit gender biases exist in the training of law students, which may colour perceptions of their capabilities and influence their ability to compete in the profession.

Using the University of Benin as a case study, this paper examines the extent to which the gender perspective is incorporated in the training of law students. With particular attention to the law curriculum, students' representation and the 'language' of teaching/learning, the paper explores the extent to which gender inequality and associated stereotypes are strengthened in the training of law students and the effects of the aforementioned factors on perception of these female law students' capabilities.



# Medical Law, Healthcare and Bioethics

NB: all sessions will be held in the SU History Room

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

César Palcios-Gonzâles (King's College London) and Maria De Jesús Medina-Arellano (National Autonomous University of Mexico), 'Mitochondrial replacement techniques and Mexico's rule of law: on the legality of the first maternal spindle transfer case'

News about the first baby born after a mitochondrial replacement technique (MRT) broke on September 2016 and, in a matter of hours, went global. Of special interest was the fact that the procedure happened in Mexico. One of the scientists behind this world first was quoted as having said that he and his team went to Mexico to carry out the procedure because, in Mexico, there are no rules. In this presentation, we explore Mexico's rule of law in relation to MRTs.

In the first section of the paper, we present a brief account of mitochondrial DNA diseases and MRTs. We explain how these techniques are carried out and describe two important characteristics of them.

In the second section, we explore Mexico's rule of law in regard to MRTs. First, we very briefly describe Mexico's political composition and examine whether Mexico's highest national law, the Political Constitution of the United Mexican States, specifically protects life from the moment of conception or fertilization. Secondly, we investigate the legality of MRTs from the perspective of federal laws. Thirdly, we identify those states in which local laws protect human life from the point of conception and fertilization, and investigate how MRTs interact with such local laws. We pay particular attention to the state of Jalisco, given that it was there that the MST was carried out. Fourthly, we examine MRTs in terms of Mexican laws regulating both human genome modification and human genetic engineering.

In the third section of the paper, the conclusion, we briefly present our main points and explore how Zhang's team's actions have affected the assisted reproduction debate in Mexico. Specifically, we discuss how their actions have helped those who wish to pass federal legislation to prohibit MRTs, and that would restrict access to assisted reproduction.

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Kelly Dannielle Jones (Manchester Metropolitan University), 'Ova in Mitochondrial replacement therapy'

In 2016, the press heralded the birth of the first baby following spindle transfer, also referred to as mitochondrial replacement therapy (MRT). This technology, as with most forms of IVF, requires sufficient available donated ova. These ova are currently in short supply, below the amount needed for artificial reproductive technologies. There are only two legal methods for ova procurement in the UK: altruistic donation, and 'egg-sharing' programmes. The process of donation in either context is cumbersome, and carries risks and side-effects. Moreover, egg-sharing programmes raise issues of payment and commodification.

As the first country to legalise and use MRT, significant growth is expected. The last legislative review concerning sources of ova for reproductive technology suggested that live donors who were unpaid (egg-sharing schemes notwithstanding) were the only proper sources of ova. Cadaver and foetal donation were dismissed as sources of ova on the grounds of genetic connection. While genetic connection is contentious in itself, it arguably does not apply in the

context of MRT as MRT only allows for transfer of mitochondrial DNA and not chromosomes. Biologically the donor of the mitochondria has no connection at all to the resulting child.

This paper suggests that in the absence of any genetic link, that there is room for a review of the use of ova, obtained from both cadaver organ donation and foetal tissue donation. It argues that if such tissue could be obtained via other means, then continuing to encourage donation from live donors is unethical. In exploring the relationship between legal discourse and social narrative this paper seeks to argue that the framework of organ donation could be applied equally to cadaver and foetal tissues. If this were the case we could seek to remove the issues of harm experienced by women who currently are encouraged to donate ova in the UK.

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Catriona McMillan (Edinburgh), 'The Human Embryo: a Processual Entity in Legal Stasis'

More than ever, we are able to visualise and track embryonic development in vivo and in vitro; increasingly we see and understand the embryo as occupying a process of becoming. In parallel, the politics of fertility and embryo research have been extended considerably with the control and enhancement of processes in the biotechnology industry. Law's ability to keep up adequately with such advances must therefore be questioned.

Since the inception of the Human Fertilisation and Embryology Act 1990, the law has taken a marked step back from the legal-moral status of the human embryo. While there is indeed no explicit 'moral status of the embryo' in law, it has been accorded a 'special status' within the Act. This is realised through a 'compromise' between contrasting moral views, for example through the 14-day limit on embryo research. However, discussions surrounding recent scientific advances, including the maintenance of an embryo in vitro for 13 days, highlight the ever-increasing gap between the variable contexts in which the embryo can be produced and used under the Act, and thus the need to (re)consider the legal status of 'the embryo'.

This presentation offers an analysis of embryo regulation through the lens of liminality, an anthropological concept coined by Arnold Van Gennep. Liminality offers an analytical framework that reveals the gaps between ontological categories created by law. This work therefore encourages the law to reconsider its current representation(s) of the embryo, and posits that there are ways in which the law might better embrace the multiplicity of environments through which the embryo in vitro can travel. These variable, relational liminal states of the embryo are important for the future of artificial reproduction and embryo research. Thus, this presentation finally recommends a context-based alternative to the embryo's singular legal 'special status'.

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David Lawrence (Newcastle), 'Legally Human? The Status and Challenge of Novel Consciousness in Law'

Emerging advanced bio- and computer- technologies are highly likely to pose significant challenges to existing societal and legal conventions. Artificial Intelligence, synthetic biology,

human enhancement, and other developments promise to draw into question the nature of personhood and humanity, a concept upon which many significant institutions are founded- not the least of which being human rights law. In the potential new era of novel consciousnesses that we are likely to encounter, it is vitally important to establish whether existing law will remain sufficient, and if not, how it ought to be adapted to meet the requirements of the future.

This paper will provide a template with which to accomplish the former for forward-thinking policy, and which could be applied to any of the types of entity we are likely to encounter. By examining the conceptualisation and positioning of the human in law, and attempting to determine the moral basis for this, it will establish a reasoned baseline from which to judge any emergent being. It will then be necessary to determine whether, or under what conditions, a conscious being might diverge from this legal understanding. If possession of personhood is the deciding factor that an entity ought be subject to law, then there is reason to believe and precedent that other consciousnesses should qualify. If it is some other factor, the question then becomes whether or not it is appropriate to adapt our understanding of the human in law to encompass the particular entity at hand- dependent on their characteristics, needs, and disruptive potential; and our own moral duties. Furthermore, in building its argument, the paper will highlight reasons as to why we cannot afford to ignore these potential challenges; via existing issues in various legal spheres that are the result of technology outpacing legislation and which are the prelude to more far-reaching problems.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Nataly Papadopoulou (Leicester), 'Should you be suffering unbearably, or be terminally ill to be allowed to die?'

In England and Wales, suicide and attempted suicide were decriminalised in 1961 with the enactment of the Suicide Act. Since then, several unsuccessful attempts have been made to reform the law. Some countries and states around the world, however, do permit some form of assisted dying, all using some type of eligibility criterion based on the physical or mental condition of the individual requesting assistance. This criterion falls mainly into two categories: a terminal illness eligibility, preferred largely by states in the US (Oregon, Washington, Vermont, California, Colorado), and a suffering-based eligibility, preferred largely in Europe (Belgium, the Netherlands, Luxembourg). For Switzerland and Canada, the eligibility criterion is straddling between Europe and the US. In England and Wales, the earliest reform proposals used a suffering-based eligibility, but the most recent have followed the US model.

Both types of eligibility have advantages and disadvantages, and this presentation will consider both to attempt to establish what could be the most appropriate for the UK in case of a future reform. The arguments used in this presentation are based on the parliamentary debates of past reform proposals in England and Wales, scientific evidence on the matter of prognosis and terminal illness, evidence from jurisdictions outside the UK, and commentary by academics and practitioners. It is argued here that none of the two types of eligibility is appropriate because of identification and practical application problems. An alternative solution, or reform proposal, may well be a laissez-faire approach towards the eligibility criterion that is based on the physical or mental condition of the individual requesting assistance, and a strict (but not inappropriately obstructing the assisted dying procedure) approach towards the other eligibility criteria (including the mental capacity and voluntariness). This is in order to compensate for this liberal reform proposal in favour of assisted dying.

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Angelika Reichstein (UEA), 'A (European) right to die – a utopia?'

Article 2 of the European Convention on Human Rights (ECHR) grants individuals a right to life. While the necessity and value of a right to life are obvious, there is a detrimental side-effect to said right: it is used as an instant stop to claims concerning a right to die and assistance in dying. This paper will argue that assisted dying needs to be legalised on a national level, based on ideas of dignity and autonomy, in order for the European Court of Human Rights (ECtHR) to be able to have a firmer affirmative approach towards a right to die.

The paper starts off with an overview of the right to die cases the ECtHR has had to deal with so far, showing the ECtHR's dilemma in the absence of a European consensus due to the inherent sensitive nature of the subject. It will then analyse how dignity and autonomy ask for a legalisation of assisted dying to enable individuals to get the assistance they wish for in order to die in a dignified way. Dignity and autonomy both work as relational concepts which hasn't been recognised by the law on assisted dying so far.

This paper takes the position that current law is discriminating in that able bodied individuals are free to commit suicide while those requiring assistance cannot legally obtain it. Ultimately, this goes against ideas of a dignified death and relational autonomy and therefore needs changing. In order for the ECtHR to be able to change its approach, law has to be changed on a national level, a change this paper strongly endorses.

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Glenys Williams (Aberystwyth), 'Assisted Dying: Where do we go from here?'

The last three years have seen an increase in the number of assisted dying cases (and to a lesser extent, legislation) in various parts of the world. In the UK and following Nicklinson, it appears that an application for judicial review will imminently be brought by Noel Conway a patient suffering from motor neurone disease.

Cases have also been brought in Ireland (Fleming); Scotland (Ross); Canada (Carter); New Zealand (Seales); South Africa (Stranham- Ford); New Mexico (Morris v Brandenburg), and in 2009, the Montana case of Baxter.

The bases of these decisions are different (e.g. some are based on human rights; others on constitutional or consent grounds), but there are a number of questions which must be asked:

1. What has caused this surge of cases?
2. Looking at the geographical position – is it a cultural shift? Are some (Western) countries evolving a pioneering pattern?
3. As cases brought by individuals, how did we get to the position whereby we expect the law to provide one answer? Why this desire to shift bodily autonomy (in those cases where the individuals could die without assistance, albeit before they are ready).

The aim of this paper is to explore these current and controversial issues.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Claudia Carr (Hertfordshire) and Danielle Adams (Hertfordshire Partnership University Foundation NHS Trust), 'The impact of Montgomery v Lanarkshire Health Board (Scotland) 2015 on patients with Intellectual Disabilities'

The decision in Montgomery, which rejected the accepted Bolam approach in Sidaway may have significant ramifications where those with intellectual disability (ID) are concerned. The judgment leaves no doubt that all patients have rights and choices and patients should be treated holistically. Healthcare professionals must now take reasonable care to ensure that their patients are aware of all material risks. How does this apply to those with intellectual disabilities? On 31st July 2016, The Accessible Information Standard (AIS) came into force for all publicly funded providers of adult health and social care. The AIS aims to ensure that people who have a disability or sensory loss receive information they can access and understand, together with any communication support they might need. Empowering individuals to take an active part in the decision making of their healthcare needs may contribute to improving the health inequalities seen in people with ID.

Communication is a key factor as a barrier to accessing healthcare and therefore healthcare professionals should consider reviewing their communication strategies involving people with ID. In mental health where the medicines used can cause short term and long term adverse effects, it is imperative that there is awareness enabling the person with ID (together with their carer if relevant) to seek help and advice if necessary. The person with ID, just as any other person who does not have ID, should be an equal partner in the decision making process to reduce the risk of morbidity and mortality and to be treated equally, without discrimination.

There does not appear to be any guidelines or standards on the quality of easy read material in terms of medicines information. Intellectual disability is a spectrum and therefore how can we impose a standard level of information on a diverse population of people with very different abilities and needs in terms of reading and comprehension? Although it should be noted that information does not need to be in the written form and for some individuals the spoken word will be more effective.

When developing suitable written information for patients, it is our experience that service user groups frequently advise that the information is too detailed and needs to be scaled down. There may be a potential conflict here with 'accessible information' not providing 'sufficient information' in order to make an informed decision or be part of a decision making process in order to satisfy the requirements set down in Montgomery.

This paper will evaluate data from an audit to be carried in January 2017. The audit will seek to establish the extent to which the Montgomery guidelines are being adhered to when patients with learning difficulties are prescribed medication. This data is likely to form part of ongoing research and will seek to highlight the importance and ongoing challenges of informed consent in people with learning difficulties.

Kevin De Sabbata (Leeds), 'Realising Article 12 UN Convention on the Rights of Persons with Disabilities in the context of Dementia and Treatment Decisions: Good Practices from Europe'

Article 12 UN Convention on the Rights of Persons with Disabilities (CRPD) states that disabled individuals enjoy legal capacity on an equal basis with others. In this context, it indicates supported decision-making as the way of promoting the decisional power of people with serious mental impairments. Such provisions apply also to the case of individuals with dementia, a class of degenerative brain diseases which causes the progressive impairment of memory and reasoning ability.

One of the areas in which Article 12 CRPD may contribute to improve the lives of people with dementia is healthcare decision-making. In fact, individuals with this condition are frequently in need of medical assistance. Nevertheless, because of their illness, they often have difficulties in understanding and weighing the information on their treatment. In this context, assuring that they receive adequate support throughout the decisional process is crucial in order to guarantee their involvement in the final choice.

However, achieving this goal requires to address some practical challenges. In fact, as stressed by scholars, practitioners and activists, we need to identify appropriate ways to help people with dementia in deciding on their care. Moreover, appropriate training should be provided to doctors and carers on how to properly assist their patients in this context. Finally, safeguards need to be put in place in order to avoid that support turns into undue influence.

This paper analyses how these issues can be tackled, looking at reforms and good practices emerging in various European countries. In this context, it studies legislative initiatives, policies and projects carried on by national governments, hospitals, nursing homes and NGOs throughout the continent, evaluating them in light of Article 12 CRPD. In doing this it also refers to evaluative reports issued by national and international bodies and to surveys reporting the opinion of people with dementia.

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Michael Thomson (Leeds), 'Embodied integrity, shaping surgeries, and the profoundly disabled child'

In 2004 Seattle's Children's Hospital Ethics Committee considered an application pertaining to a six year old girl - Ashley X - suffering from static encephalopathy who was developing pubic hair and breast buds. Having consulted hospital doctors, Ashley's parents requested that she be given high doses of oestrogen to stunt her growth permanently, and that she undergo a hysterectomy and mastectomy. The Committee approved the interventions in Ashley's best interests as they would render her body more manageable, enabling her to participate more fully in family life as she could more easily be carried and cared for. During surgery the surgeons also removed her appendix since doing so presented no additional risk. Although the case is often cast in the bioethical literature as 'exceptional' we contest this understanding, arguing that the case should be understood as part of both a long lineage of cases involving coercive sterilisation of disabled women and girls, and of a more recent trend for surgeries which allow parents to shape their children's bodies in various ways. Thus, in the wake of the case it emerged that a sizeable demand exists in North America, the UK, and elsewhere for the 'Ashley treatment' to enable parents to surgically manage their children's impairments. In this paper we draw on data derived from Freedom of Information requests made to UK

hospitals, which seeks to ascertain the prevalence of such requests. Locating this exercise and the resulting data in the context of our earlier work on bodily - and embodied - integrity, we unpack the tensions between protecting the child's individual bodily integrity and shoring up notions of family integrity, which we suggest become entangled in current best interests assessments. We conclude by arguing for the importance of legally protecting the embodied integrity of profoundly disabled children.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Imogen Jones (Leeds), 'Criminal Bodies: Reconciling Forensic Pathology and the Interests of the Dead'

A great many people feel strong attachments to the dead. This underpins the social, and legal, importance assigned to the (mis)treatment of deceased bodies. Despite general consensus that dead bodies matter, views diverge as to which acts are desirable and/or permissible. For example, whilst some people opt to donate their bodies for dissection, many others would be horrified by the thought of their body being chopped up and used as a 'thing'. Despite its imperfections, consent now dictates the permissible use in most medical contexts. However, where a person has died in suspicious or unexpected circumstances, their body remains under the jurisdiction of the coroner and is likely to be subject to an autopsy. This nearly always involves some invasive and mutilating procedures.

In this paper I discuss the findings of an empirical study involving semi-structured interviews Home Office Registered Forensic Pathologists. During the interviews, respondents were asked about their attitudes to, and work involving, deceased bodies. The unique context of suspicious deaths raises significant questions about the intersection between the criminal law and medical practice. In particular, the balancing of the interests of criminal justice in a deceased body with those of individuals, families, communities and medics is examined with a view to understanding how these might be best reconciled in the future.

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Caroline Jones (Southampton), 'Shadow Hunting: (In)visible law-making?'

This paper considers the potential significance of Health Care Law cases that fall away and become 'shadow cases'. That is, cases that might have proved important in law-making terms, but that for various reasons did not proceed. These reasons include the decision not to appeal, the lack of finances to appeal, or indeed to apply to the court in the first instance, among others. If we were unaware of these cases, or potential cases (where no legal action ensues), we could perfectly reasonably expect not to find them through traditional legal searches or routes, as they would, ordinarily, simply not appear in the results. Yet, awareness of these possible legal actions and/or appeals may be derived from media coverage, or latterly, social media sources.

The focus of this paper will be 'shadow cases' in the context of assisted conception, where a number of such instances have arisen in recent years. This observation raises the question of what mileage there might be in interrogating what is 'visible' law-making? Further, what was lurking in the shadows, and might determination of these issues have provided greater clarity?

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Mary Guy (Lancaster), 'Two categories of "English patient": how does patient movement between the NHS and private healthcare sectors affect the competition reforms of the Health and Social Care Act 2012?'

The complexities of the relationship between the English NHS and the Private Healthcare (PH) sector have been in evidence since the inception of the NHS, and range from the contentious

issue of “NHS pay-beds” to acknowledgement of increasing linkages between the two by the Competition and Markets Authority in its 2014 Private Healthcare Market Investigation.

Based on policy documentation by the Department of Health and recently NHS England, it is possible in certain circumstances for patients to move between the NHS and PH sector (and back again) for treatment.

As a result, it has become possible to speak of at least two categories of “English patient” – NHS and private. While “private” can refer to either patients with medical insurance or self-paying patients, it is interesting to note that new facilities are advertised as catering for three categories: NHS, private medical insurance and self-funding patients.

“Patient choice” is a wide-ranging concept, but has been increasingly linked with competition-based reforms. However, its relevance to competition vis-à-vis the English NHS is limited essentially to movement between NHS and private providers for a particular treatment. This can be seen in the patient choice policies introduced under New Labour and now enshrined by the National Health Service (Procurement, Patient Choice and Competition) Regulations (No.2) 2013. This enables NHS patients to choose between NHS and private providers, while remaining within the NHS.

This paper explores the aforementioned and lesser-known policy framework underpinning patient movement between the NHS and PH sector. In so doing, the aim is to establish a sense of the extent of patient choice between the NHS and PH sector and assess whether – and how – this may overlap with patient choice within the NHS.

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Michelle Robson and Kristina Swift (Northumbria), ‘Montgomery: The unanswered questions in relation to Causation’

The causation issue in Montgomery was almost an afterthought. Following the complexities of the standard and breach of duty issues, the causation question received only cursory consideration in the wake of the patient’s evidence that if she had been told of the risks associated with natural delivery she would have elected to have a caesarean section. Given the seriousness of the risk involved, this evidence was accepted and causation could be established on a simple factual causation basis.

But what if the evidence had presented the court with a different causation conundrum....

What if...

the claimant had given evidence to say she could not honestly say what she would have done had she known of the risks associated with natural delivery, that she would have given a great deal of thought to the alternatives, but she is unsure what the outcome of her deliberations would have been?

Or

What if...

the court had been presented with firm evidence of the claimant’s likely determination to proceed with a natural delivery in any circumstances, but the claimant offered an alternative

argument namely that the failure to provide her with the necessary information regarding alternatives represented an affront to her autonomy?

How would the causation problem have then been dealt with in either of these scenarios?

This paper explores the scope and application of *Chester v Afshar* outside the narrow confines of truly elective surgery. Additionally, it will consider the weight that should be given to the importance of autonomy in determining causation issues in different risk disclosure settings. Should respect for autonomy be the 'golden ticket' to dispense with traditional causation requirements?

## Thursday 6<sup>th</sup> April (14:00-15:30)

Stephanie Pywell (The Open University), “‘Innocent’ ‘killers’: legal, ethical and religious dilemmas when X’s life threatens Y’s’

This paper examines two distressing and high-profile cases, in each of which a court had to decide whether to permit the termination of the life of a person whose continued existence was causing a threat to another’s life. One of the cases, *PP v HSE*, was heard by the Irish High Court in December 2014; the other is the seminal UK Court of Appeal case of *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001]. The words “innocent” and “killers” appear in separate sets of inverted commas in the title of the paper because each merits separate scrutiny.

An interesting ethical feature of both cases is that Roman Catholic doctrine was discussed at some length in the court, and this gives rise to the wider question of whether – and, if so, to what extent – ethics and religion should, and do, influence courts’ interpretation of the law, especially in cases involving life-and-death decisions. The paper argues that courts, perhaps inevitably, tend to reflect the prevailing ethics and traditions of the societies in which they are located, and that, in these cases, they focused on the ethical and doctrinal principles that supported the conclusions they felt to be right.

It is notable that both courts attempted to limit the implications of their decisions, possibly suggesting a degree of judicial unease with them, but the courts’ statuses means that each case is highly influential within its jurisdiction.

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Jonathan Nash (Northumbria), ‘The Development and Regulation of Psychedelic Medicines’

Psychedelic research into mental disorders is currently re-emerging after a near 40-year morass and appears to offer a new paradigm of treatment for civilians and veterans suffering from mental disorder and / or addiction.

The paper will briefly introduce delegates to psychedelic research history, its near-complete prohibition from the late 1960s and recent rebirth in a small number of US and European universities such as Johns Hopkins, New Mexico, Zurich, UCLA, NYU, Imperial College London as well as at non-academic bodies with research into substances such as MDMA, psilocybin, LSD, THC and CBD in marijuana, ketamine, DMT (found in ayahuasca) and ibogaine.

Imperial College London's 2016 study of psilocybin for treatment-resistant depression (published in the *Lancet*), its 'brain mapping' research using LSD and psilocybin and on-going studies at Johns Hopkins and NYU into psilocybin for existential distress in terminal cancer patients will all be considered.

Psychedelic studies into alcohol, heroin and nicotine addiction will be focused on as will a 2016 Salk Institute study on THC's ability to break down protein plaques in the brains of Alzheimer's sufferers.

The US-based Multidisciplinary Association for Psychedelic Studies' (MAPS) trials of MDMA-assisted psychotherapy for veterans with treatment-resistant PTSD with a reported 80% 'success' rate will be considered. The Food and Drug Administration (FDA) gave permission in

2016 for the trials to proceed to Stage 3 and MAPS will now apply for expedited status. Full approval from the FDA and the European Medicines Agency for MDMA-assisted psychotherapy is projected by MAPS to be granted in 2021. MAPS have also received approval for a medical marijuana drug development study and together with Johns Hopkins will treat US veterans with treatment-resistant PTSD funded by a \$2 million Colorado state grant.

The legal impediments to psychedelic research and regulation will then be analysed including international drug conventions, drug schedule classification, medicines regulation, the patent system and 'big pharma' interest where patents are available (for example in 'esketamine' nasal sprays for depression) or disinterest otherwise as well as university ethical procedures.

Psychedelic research is in its second infancy and it is yet to be seen whether the law will follow or reject the science. The paper will consider the controversial nature of the research and its implications which could drive significant medical change through new forms of treatment for mental disorder and addiction.

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Helen Ryan, Marion Oswald and Emma Nottingham (Winchester), 'The "Holby City" Curtain of Privacy: The illusory nature of patients' informational privacy in healthcare settings'

It is common in every episode of the BBC's popular hospital drama series 'Holby City' the curtains to be drawn around a patient's bed in order for those treating her to carry out an examination, discuss a diagnosis or occasionally, discuss their own personal lives. This curtain hides the patient temporarily from the gaze of others but can do little to protect against eavesdropping and thus the association of sensitive information with the patient once the curtain is drawn back. Therefore, this type of privacy in a medical context cannot mean secrecy, being totally hidden or unobserved. It also cannot mean being able to own or control all information about oneself: the provision of effective healthcare depends to a large extent on the sharing of information. Perhaps instead the 'privacy curtain' in this context is particularly concerned about a person being free from detailed scrutiny by others and a wish to avoid offensive observation and intrusion. The privacy curtain cannot hope to prevent completely the association of sensitive information with a particular person, but it can dilute the effect: a barrier that helps create a level of practical obscurity: an illusion of informational privacy. If this curtain of privacy exists to protect our physical bodies from offensive observation, can the same be said for our digital person? Healthcare has become increasingly reliant on the datafication of our information. When this is combined with a society that increasingly values data flows, social media sharing and ubiquitous connectedness does this mean that the concept of medical privacy will become even more illusory in the future?

This paper will consider whether the laws and practice surrounding medical privacy and confidentiality are fit-for-purpose when faced with the digital challenges of tomorrow, and suggest ways that an appropriately robust privacy curtain can protect our digital person against offensive intrusion.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Olufunke Aje-Famuyide (National Open University of Nigeria), 'Financing Treatment for Highly Prevalent Non-Communicable Diseases under Nigeria Health Landscape'

This paper intends to evaluate the adequacy of domestic laws and policies with respect to the financing structure and options available to persons suffering from the prevalent non-communicable diseases. While it does appear that Nigeria has evolved good health policies and laws in recent times, their resultant effects may be at best described as blurry and unrealistic as regards persons suffering from chronic diseases. Thus, the study seeks to identify the barriers to implementation of policies, highlight the costs of non-inclusion of the rights of sufferers in human and economic terms; as well as make recommendations that could drive the evolvement of effective domestic laws and policies that could ameliorate the health financing problems of present and future NCD sufferers. In that regard, this study is predicated on the health financing challenges posed by NCDs to the significant population of Nigerians as critical test case for the veracity of health care reform proposals. The cost of care has always been a critical component of any effective public healthcare delivery program or policy and the success of the treatment program for persons with NCDs is unconditionally tied to how well the cost factor is integrated into the system of care so as to sustain progression of care with time. The system of care in this study refers to the sum total of policies, laws, mechanisms and resources that drive an effective health care delivery system. Considering that disproportionate burdens of treatment of chronic illnesses create long term social and economic costs; this study will highlight the extent to which the existing health landscape promotes effective care through health care financing schemes aimed at NCD sufferers in Nigeria.

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Annelize Nienaber (Pretoria), 'The law pertaining to the regulation of clinical research into gene therapy in South Africa and the United Kingdom'

Because of its relatively well-developed health infrastructure, South Africa has become a much sought-after destination for international medical research and, consequently, medical research has become a huge industry. As Deputy-Chairperson to a health research ethics committee which judges the legal and ethical acceptability of clinical research protocols, I have become acutely aware of the vulnerability of South African research participants. The vulnerability of South African and other developing-country research participants may be attributed to a number of factors, including poverty, low literacy levels, inadequate scientific literacy, and a lack of access to health care.

When clinical research is undertaken into the development of new (medical) technologies, the vulnerability of developing-country research participants often is further amplified, not only because these technologies potentially pose significant risks to research participants, but also because informed consent becomes a vital issue in such a context.

In light of this, I propose to focus my paper on the limits of the law regulating clinical research into gene therapy in South Africa, focussing specifically on the issue of informed consent to research participation. I will use the model for the regulation of gene therapy research used

in the United Kingdom as a comparative tool in order to highlight some of the problems in the South African system of regulation.

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John Bates (Northumbria), “Patient knows best” and the “paradigm” patient: the tensions of relative blame in a clinical context’

In *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, Lord Reed and Lord Kerr considered that ‘patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession. They are also widely treated as consumers exercising choices’ The Royal College of Surgeons described *Montgomery* as a ‘resolute move away from the more paternalistic traditional model of consent and towards a patient-centred perspective.’

In ordinary negligence claims, a defendant may raise the partial defence of contributory negligence: if the court is satisfied on a balance of probabilities, that the claimant has been blameworthy relative to the defendant’s conduct, the fault has contributed to the harm sustained and that it would be just and equitable to reduce damages, then damages may be reduced.

Yet contributory negligence has rarely been successful in clinical negligence claims. Why is this? The pre-*Montgomery* paternalistic approach to the scope of the healthcare practitioner’s duty of care and the patient’s reliance on this led to a weighting of ‘relative fault’ towards the practitioner. Is this now changing? In *Zeb v Frimley Health NHS Foundation Trust* [2016] EWHC 134 arguments were heard about a patient’s failure to continue with a previous course of treatment and failure to give an accurate history to a treating practitioner.

How far does the greater public understanding of the consequences of healthcare and lifestyle choices shape the expectations of the ‘paradigm’ claimant? To what extent can pre- and in-treatment ‘lifestyle’ choices, including exercise, diet and substance abuse, be considered to be causally potent blameworthy conduct leading to a reduction in damages? How do other jurisdictions approach this issue?

This paper aims to explore some of these topical issues.



# Mental Health and Mental Disability

NB: all sessions will be held in Barbara Strang B29

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## Thursday 6<sup>th</sup> April (14:00-15:30)

Jaime Lindsey (Birmingham), 'Observations of the Court of Protection: P's absence and testimonial injustice'

In this paper I draw on observations of a number of Court of Protection (COP) proceedings and review of case files carried out over an 11 month period. I particularly focus on one striking aspect of the research – P's (the subject of proceedings) absence. I explore two aspects of P's absence which were of concern. Firstly, P rarely attended hearings about her case. Secondly, even where P did attend hearings, she rarely gave formal witness evidence. I argue that both forms of absence result in testimonial injustice; that P is wronged as a giver of knowledge and this is done because she is perceived to be vulnerable as a result of her disability. I argue that this leads to assumptions that P's evidence would lack credibility and therefore she is pre-emptively excluded from being heard. Whilst the evidential rules that apply to the COP do not prevent P from giving evidence, the interpretation of them in practice leads to P rarely giving direct evidence and instead her voice is heard through others, particularly the experts appointed to assess her capacity.

I conclude by exploring the reasons why P's increased participation in COP proceedings is so important. The reasons include respecting P as an agent and that hearing P's voice is likely to have positive benefits for the outcome of proceedings. Furthermore, P's increased participation is essential to ensure compliance with the UNCRPD. I briefly consider how increased participation might be achieved, for example through the wider use of special measures. However, in addressing the finding that P rarely gives witness evidence in her own case, I argue that more fundamental attitudinal changes are required before this barrier is likely to be overcome.

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Alex Ruck Keene (King's College London), 'Rethinking DOLS: reflection on law reform'

The Law Commission's Mental Capacity and Deprivation of Liberty reported in March 2017, proposing legislation to replace DOLS. The presenter, a practising barrister, was on secondment to the Law Commission during the process of drafting the legislation and accompanying report, and will present a personal reflection on the process of law reform in one of the most contentious areas in mental disability law in England and Wales.

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Peter Bartlett (Nottingham), 'Matter of Engagement: Analysing the Submissions to the CRPD Committee on General Comment #1'

The first general comment of the CRPD Committee has been controversial. This paper considers the submissions following the publication of the draft comment: who submitted, and what did they ask for? The paper considers how the draft comment was amended following receipt of the submissions, and what this tells us about how the CRPD is being understood as regards mental disability, both by the CRPD Committee and by the contributors of briefs from civil society. It further considers what the process tells us about the relationship

between the Committee and civil society, and how the process determines the parameters of engagement in UN policy development.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Rebecca McGregor (Edinburgh Napier), 'Exploring the Right to Health for Persons with Mental Disabilities'

The right to health has been somewhat neglected in discussions about human rights at both the national and international levels. States are often reluctant to implement socio-economic rights which they consider to be a resourcing issue, rather than a matter of rights. In relation to mental health, the right to health has received even less attention and is rarely mentioned in national laws and policies, with the focus remaining largely on compulsory care and treatment. Additionally, the rights which are associated with defining the limits of compulsory measures have tended to be civil rights which is where the focus of discussions about mental health and human rights has largely remained.

This paper considers whether Article 25 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which restates the right to health in the context of disability, could potentially offer an alternative way of approaching mental disorder. It suggests that a biopsychosocial approach to understanding health more accurately reflects the reality of health and illness and, like the CRPD, promotes a holistic approach to helping people to achieve their highest attainable standard of health.

In this regard the 'twin-track' approach, which requires both measures to include people with disabilities in mainstream service delivery and the provision of specialist services, will be used to shed light on the right to health and corresponding state obligations. In line with the interdependent nature of the CRPD, Articles 12 (the right to legal capacity) and 26 (the right to habilitation and rehabilitation) of the CRPD will also be considered as integral to realising the right to health beyond a purely medical focus and by providing people with the support they need to do this.

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Jean McHale (Birmingham), 'Speaking up to safeguard those with mental illness and those lacking mental capacity: the whistleblower in health and social care- twenty years after'

The role of the whistleblower in blowing the whistle on abuse and malpractice in the care of those with mental illness and lacking mental capacity has been long documented. Whistleblowers can and indeed have played an important part in raising awareness and stopping harm but frequently such actions come at great personal and professional cost to themselves. Over the last two decades successive governments have acknowledged about the need to provide safeguards for those blowing the whistle in the public interest in health and social care. Since 1998 when the Public Interest Disclosure Act was passed there has been express protection in employment law for whistleblowers both within and outside the NHS. However the effectiveness of such legislative provisions has been thrown into question as the position of whistleblowers in health and social care continues to be exceedingly problematic subject in some instances to victimisation and bullying. The Government asked Sir Robert Francis to look specifically at the question of NHS whistleblowing following the Mid Staffordshire Inquiry and his Report "Freedom to Speak Up" was published in 2015. However this Report has been criticised for not going far enough and the aftermath to the Report has

proved problematic, not least because the new National whistleblowing Guardian post established in 2016 has from its creation been subject to controversy.

The paper draws upon some of the findings from the NIHR research project “Understanding Employee Whistleblowing in Health Care” (PI Professor Russell Mannion, University of Birmingham) which Jean has been a co-investigator ( other co-I’s Professor Martin Powell, University of Birmingham,; Professor John Blenkinsopp, University of Hull; Dr Nick Snowden, University of Hull; Dr Ross Millar, University of Birmingham; Professor Huw Davies, University of St Andrews). It explores and critiques the existing legal framework and the “Freedom to Speak Up” Report. It focuses specifically on the problems facing those blowing the whistle in relation to those subject to care and treatment under the Mental Capacity Act 2005 and the Mental Health Act 1983. It highlights the particular challenges in support for and responses to whistleblowing which can arise where service provision is fragmented between NHS and private care providers. It asks why twenty years on since the Public Interest Disclosure Act 1998 was drafted so little has changed to safeguard whistleblowers in health and social care in the UK and what reform is needed in this area in the future.

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Rosie Harding (Birmingham) and Elizabeth Peel (Loughborough), ‘Polyphonic Discourses of Capacity: Exploring medico-legal interactions in context’

In this paper, building on the work of Mikhail Bakhtin on discourse, and Marianne Valverde’s idea of ‘chronotopes’ of law, we use the concept of polyphony to explore the different registers or timbres of understandings of ‘capacity’ in medico-legal contexts. Drawing on empirical data from two interlinked research projects exploring everyday experiences of dementia and care, we demonstrate how legal and medical understandings of capacity operate in contrapuntal motion, with each context carving their own, and slightly different, understanding of capacity onto the lives of people with mental disabilities. Using the concept of polyphony allows interrogation of how, why and where these discourses work together to create consonance, or operate out of sync to iterate dissonance for people with cognitive impairments. Through tracing the discords and resolutions of medico-legal approaches to capacity in discourse, we bring into view the mechanics of how these different contexts differentially construct capacity. We argue that exposing these differences allows for a more nuanced application of ‘capacity’, one which can bring us closer to respecting the rights of people with disabilities to ‘enjoy legal capacity in all aspects of life’, as mandated by the UN Convention on the Rights of Persons with Disabilities.

## Friday 7<sup>th</sup> April (10:00-11:30)

Amanda Keeling (Leeds), 'From "being vulnerable" to "at risk of harm": creating empowering practice in Adult Safeguarding'

This paper argues that the changed scope of adults safeguarding in the Care Act 2014, changing to 'adults at risk' from 'vulnerable adults' in No Secrets, may not have the results that was sought. In consultation on No Secrets, the phrase 'vulnerable adult' was seen as suggesting that vulnerability was inherent to certain groups by virtue of their biological characteristics and that this was disempowering. However, it is argued that the problem with No Secrets was not the use of the word 'vulnerable' itself, but the suggestion that only some groups are vulnerable. This understanding suggested that vulnerability is innate to these specific groups and cannot be changed, resulting in the disempowering practice. While the word 'vulnerable' itself has been removed from the statute, the 'at risk adults' are still defined by reference to their care needs. This continues to suggest that only this group are 'at risk of harm' and thus in need of protection.

This paper uses vulnerability theory to analyse the changes in the Care Act, and to consider whether or not the new provisions will have the desired effect of empowering service users in the safeguarding process.

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Beverley Clough (Leeds), 'Care and Vulnerability: Moving Beyond Binaries in Mental Capacity Law'

This paper will explore the development of law and policy relating to mental capacity and vulnerable adults, situating this within the context of the binaries that have driven this development. Whilst the story of this historical development is well-worn, considering it through this lens allows some of the previously hidden problematic consequences of these binaries to come to the fore in our debates. The paper will uncover these issues through considering the binary between capacity and incapacity, and the interlinked binaries of empowerment/protection and autonomy/paternalism underpinning policies in this area. It will be shown that the struggles around the boundaries of this framework are becoming more pressing given the UN Convention on the Rights of Persons with Disabilities, which presents a more fluid and potentially transformative framework for thinking about the legal subject in this context. As Quinn has argued, the CRPD represents "the latest iteration of a long extended essay at the international level about a theory of justice- a theory that is applied to disability to be sure, but one that is woven from a much deeper cloth and has universal reach", and is an antidote to the 'reductionist and essentialist picture in liberal theories of justice'. As a result of this, commentators have been struggling with the implications of Art 12 for our mental capacity law, and are beginning to think about ways in which there might be tensions between Art 12 and Art 16. There is here a danger, however, that we may end up falling too easily into seeing these issues through our current framework and in turn missing the opportunity to realise the transformative potential of the CRPD. In considering the ways to respond to the challenges posed for our current liberal legal framework, the oppositional thinking underpinning the binaries will be dismantled through engaging with insights from vulnerability theory, the ethics of care, capabilities theory and republican political philosophy. What emerges is the idea that to move beyond these binaries, we need to reconceptualise

our thinking about the relationship between the legal subject and the role of the state, and the ways that law as part of the institutional structure of the state can either facilitate or foreclose the values said to be underpinning it. Crucially, what also emerges through this is the idea that this is not simply an issue for people with disabilities, but it is something affecting all within society and ought to feed into broader debates about justice.

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Paul Skowron (Manchester), 'The Relationship between Autonomy and Adult Mental Capacity in the Law of England and Wales'

The relationship between the concepts of autonomy and mental capacity is generally accepted to be important, but judges characterise it in three different and apparently contradictory ways.

In the 'gatekeeper' account, to have mental capacity is to have a right to be regarded as autonomous, but to lack mental capacity is to lack such a right. For instance, in *Bailey v Warren*, Lady Justice Arden states that 'capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making'. In contrast, in the 'insufficiency' account, mental capacity is necessary for autonomy; but it is not enough, freedom from coercion is also required. For instance, in *DL v A Local Authority*, Lord Justice McFarlane talks about persons 'whose autonomy has been compromised by a reason other than mental incapacity'. Finally, in the 'survival' account, those without capacity can nevertheless have a right to be treated as autonomous. For instance, in *W v M*, Mr Justice Baker says that 'personal autonomy survives the onset of incapacity', so 'proper regard' must still be paid someone's expressed wishes and feelings.

When facing these contradictions, two simple stories should be resisted. First, different judges do not rely on different accounts. Rather, the same judge will use different accounts in different cases. Second, no straightforward narrative of progress from one account to another can be told. The first two accounts have coexisted for at least a quarter of a century, and the third is over a decade old. Instead of these stories, this paper shows that, despite the apparent contradictions between the three accounts, the relationship between autonomy and mental capacity is stable and coherent, but frequently misrepresented.

## Friday 7<sup>th</sup> April (12:00-13:30)

Jill Stavert (Edinburgh Napier), 'Is there a role for supported decision-making in mental health legislation?'

Article 12 CRPD and the Committee on the Rights of Persons with Disabilities (the Committee) General Comment No. 1 emphasise the need for recognition of the universal right to exercise legal capacity and the provision of access to appropriate support for its exercise.

Research to date in the UK has tended to focus on the compatibility of capacity/incapacity laws with Article 12 CRPD (for example, see Essex Autonomy Project reports (2014) and (2016)) with much less attention being paid to mental health legislation. However, mental health legislation raises important questions about the exercise of legal capacity and the role of supported decision-making. It also raises issues concerning the right to liberty as identified in Article 14 CRPD and interpreted by the Committee's 2015 guidelines.

This paper will therefore explore the compatibility, in its current or an adapted form, of mental health legislation in Scotland with Articles 12 and 14 CRPD and the role that supported decision-making can potentially play.

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Kevin De Sabbata (Leeds), 'Realising Article 12 UN Convention on the Rights of Persons with Disabilities in the context of Dementia and Treatment Decisions: Good Practices from Europe.'

Article 12 UN Convention on the Rights of Persons with Disabilities (CRPD) states that disabled individuals enjoy legal capacity on an equal basis with others. In this context, it indicates supported decision-making as the way of promoting the decisional power of people with serious mental impairments. Such provisions apply also to the case of individuals with dementia, a class of degenerative brain diseases which causes the progressive impairment of memory and reasoning ability.

One of the areas in which Article 12 CRPD may contribute to improve the lives of people with dementia is healthcare decision-making. In fact, individuals with this condition are frequently in need of medical assistance. Nevertheless, because of their illness, they often have difficulties in understanding and weighing the information on their treatment. In this context, assuring that they receive adequate support throughout the decisional process is crucial in order to guarantee their involvement in the final choice.

However, achieving this goal requires to address some practical challenges. In fact, as stressed by scholars, practitioners and activists, we need to identify appropriate ways to help people with dementia in deciding on their care. Moreover, appropriate training should be provided to doctors and carers on how to properly assist their patients in this context. Finally, safeguards need to be put in place in order to avoid that support turns into undue influence.

This paper analyses how these issues can be tackled, looking at reforms and good practices emerging in various European countries. In this context, it studies legislative initiatives, policies and projects carried on by national governments, hospitals, nursing homes and NGOs throughout the continent, evaluating them in light of Article 12 CRPD. In doing this it also

refers to evaluative reports issued by national and international bodies and to surveys reporting the opinion of people with dementia.



# Methodology and Methods – Abstracts

NB: all sessions will be held in the SU Martin Luther King Room

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## Friday 7<sup>th</sup> April (10:00-11:30)

Edward Dove (Edinburgh), 'Towards an anthropology of regulation'

Socio-legal researchers can confront methodological challenges when examining regulation rather than law. This paper asks: what methodology should guide the researcher who wishes to study the form and function of regulation, and the experiences of actors that impact and are impacted by it? Extant research approaches may not suffice, and consequently, there may be a need to develop a novel methodological approach. Drawing on my ongoing PhD research on NHS research ethics committees and health research regulation, I discuss how an 'anthropology of regulation' structures my overall empirical inquiry and may provide benefits for other researchers of regulation. I claim that anthropology of regulation is both an interdisciplinary and a methodological development of existing anthropological and socio-legal research approaches. It sits neither fully within anthropology nor within law nor regulatory studies; it is a mode of enquiry in its own right within the broader social science tradition. As an interdisciplinary contribution, it is a study of the nature of regulation and of the experiences of actors within a regulatory space (or spaces), and the ways in which they themselves are affected by regulation. It draws on insights provided from law, regulatory studies, and anthropology. As a methodology, it draws on empirical qualitative research through methods of documentary analysis, observation, and interviews. As anthropology of regulation draws explicit attention to regulatory processes, passages, and change, I will also explain how the methodology incorporates the anthropological concept of liminality, which refers to moments or periods of transition, and brief and important spaces of living through the in-between. Together with insights from regulatory theory, liminality helps construct anthropology of regulation as a robust framework for understanding the nature of transformations of actors within regulatory space(s), the form of regulation within spaces, and the experiences of actors as they go through processes of change.

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Clare Williams (SOAS), 'The ugly face of foreign investment: examining the always (or never) embedded economy'

The scene is Beragama, southern Sri Lanka, where recent riots have followed rumours of the sale of another 15,000 acres to China. This may alleviate some of Sri Lanka's \$64 billion of debt (\$8 billion of which is owed to China alone), but it threatens to uproot entire communities in the process. Despite following the World Bank's "ideal investment climate" doctrine almost to the letter and courting vast levels of foreign investment, the unrelenting orthodox economics-based discourse continues to spotlight solely the economic voices. The consequent suffering of Sri Lankan society and those with non-economic demands is tacitly side-lined.

An economic sociology of law (ESL) methodology can address these criticisms both in its plurality of voices and its focus on causation rather than correlation. However, most ESL approaches are based on the embeddedness paradigm. From a distance, the concept of the "always embedded" (or never embedded) economy appears to offer a convenient handle on which to hang much of the anti-neoliberal, anti-orthodox-economics movement. Yet if one zooms in, the picture is not at all clear, and through charting the biography of embeddedness with reference to its embodiment in the context of empirical research in Sri Lanka, I show how

ambiguous it is. By constructing interviews with foreign investors in Sri Lanka, and taking a few sample questions as an example, we can see the impact of various incarnations of “embeddedness”. We can then address how these enhance or obfuscate the empirical, analytical and normative dimensions of the research.

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David McArdle (Stirling), ‘Student Pregnancy Policies in US Universities: A Content Analysis of Colleges Websites’

Notoriously, the Supreme Court ruling in *Gebser v Lago Vista Independent Schools District* 524 US 274 (1998) made it far harder for US school and college students to sue an educational institution in respect of sex discrimination than it would be for employers of those institutions to sue under the same circumstances. Briefly, the Court rejected a vicarious liability approach and ruled that under Title IX of the Education Amendments 1972 (20 USC §§1681-1689), the institution would only be liable if the discriminatory behaviour was brought to the attention of a person with supervisory authority and that person then failed to take prompt and effective remedial action. This ruling is considered in conjunction with Title IX’s Pregnancy Regulation (34 CFR 106.41) which prohibits institutions which receive federal funding from discriminating against “any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of...pregnancy.

After *Gebser* there were suggestions that colleges were ‘hiding’ student pregnancy and other anti-discrimination policies in order to prevent students being aware of their Title IX rights, especially in ‘Division I’ institutions which offered scholarships to women who play sports (primarily basketball) and whose scholarships would be ‘wasted’ if they were unable to play (*Brady v Sacred Heart University* (3:03 Civ. 514 (D.Conn, 2003))). As the 20th anniversary of *Gebser* approaches, this paper reports on a content analysis of university websites to provide current examples of good, bad and potentially unlawful practice in the publicly-available documents which detail their pregnancy policies, whether applicable to sports scholarship athletes or to the wider student body. The paper further discusses the strengths and weaknesses of content analysis as a methodology for exploring websites generally and stresses that Title IX demands robust and easily-available policies in respect of all female students, not just those receiving athletics scholarships.

## Friday 7<sup>th</sup> April (12:00-13:30)

Laura Bliss and John McGarry (Edge Hill), 'Feminist Research and Philosophical Hermeneutics: Overlaps and Synergies'

For a long time, social research was essentially 'male study of male society' (Millman and Kanter 1987, 30). Thus, women were 'subjected' to research in a top-down manner, from a distant and privileged position. Over time, and as a challenge to this, feminist researchers developed methods of conducting research with the aim of empowering women, valuing their experience and promoting equality between researcher and researched.

These aspects of feminist research echo the non-hierarchical approach implicit in Hans-Georg Gadamer's exposition of philosophical hermeneutics and, particularly, in his account of a true conversation. For Gadamer, a true conversation is characterised by an openness, receptiveness and non-dogmatic willingness to learn: 'there is no higher principle than this: holding oneself open to the conversation ... recognizing in advance the possibility that your [conversation] partner may be right, even recognizing the possible superiority of your partner' (Gadamer 1997). In such a conversation 'one does not try to argue the other person down but that one really considers the weight of the other's opinion' (Gadamer 1960, 367).

Drawing on existing work (eg: Okin 1989; Warnke 1993; Hoffmann 2002), this paper seeks to explore the overlaps and synergies between the central principles of feminist research and philosophical hermeneutics, specifically Gadamer's account of a true conversation.

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Lydia Hayes (Cardiff), 'Stories of Care: A Labour of Law. Analysing law, gender and class through "character narratives"'

This paper discusses the methodological structure of the monograph *Stories of Care: A Labour of Law. Gender and class at work*, 2017, Palgrave Macmillan. Its chapters are distinctively organised around of four 'character narratives' – Cheap Nurse, Two-a-Penny, Mother Superior, Choosy Suzy. The character narratives are created from ethnographic data gathered in research with thirty individual homecare workers. They conjure up a series of word pictures that enable me to connect legal concepts with the stuff of everyday life. By drawing together doctrinal analysis with richly detailed descriptions of caring for a living, this is unique contribution to the international body of literature about paid caregiving.

Character narratives provide an intellectual springboard from which to trace how working-class women employed in homecare are widely judged to be inferior participants in the labour market. Such judgments (whether legal, managerial, political, cultural or otherwise) find expression in poverty pay, disrespect and low social status. I identify the persistent and pervasive judging of homecare workers as a process of 'institutionalised humiliation'. My methodological approach is founded on two basic propositions. Firstly, that what is said by people who are the objects of regulation can profoundly challenge assumptions made about its utility and impact. Secondly, that individual experiences of working life in the homecare industry are shaped by social assumptions about the personal qualities, motivations and character of homecare workers as a collective group. It is by showing how these assumptions

of sex and class are expressed in legal doctrine, and how employers, politicians and judges act upon them, that I explain how institutionalised humiliation is created and reproduced.

Each character narrative serves to challenge gendered and classed assumptions about homecare workers that are reinforced, imagined or set to work in law. They serve to illustrate how judgments of inferiority achieve legitimacy through law at work. My assessment of law includes equal pay and sex discrimination; the right to employment protection in the event of unfair dismissal or a transfer of undertakings; the UK's national minimum wage scheme; and the organisation of social care according to the Care Act 2014.

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Marjo Ylhainen (University of Eastern Finland), 'How to study legal discourses?'

This paper introduces a method that combines law as a legal discipline and law as discourse, as a social construction that both reflects and constructs the society. The method, based on critical discourse analysis, and the theoretical background, Pierre Bourdieu's theory of practice (emphasis on the concepts of field and habitus) were applied in my doctoral thesis on labour law in a society of multiple ways of working.

My research questions were: What kind of discourses are constructed in the legal texts; how do these discourses reflect and reconstruct the ideas indispensable to the discipline of labour law; and how do they both owe and contribute to the changing society? My research material consisted of legal documents, cases from the Finnish Supreme Court and Labour Court. The cases dealt with precarious work (fixed-term contracts) of employment. The problem that I faced while reading the texts, was the inevitableness of "the law" – both in the texts and in my mind. In other words, there were difficulties in finding out something more or something different, something other than the legal framework of rules and interpretation permitted.

This led to a methodological idea of taking the legal discipline (the tradition, the rules and the interpretation) seriously– the idea of the linguistic legal framework as the narrow context of the texts studied. It conditioned any discourse inherent in texts. At the same time this mental structure, the legal discipline, was the connection, the intermediary between the discourses and the broader context of the society, reflecting certain ideas of work in Finnish welfare society. This method generated two discourses; an obvious discourse of dependent work with objectified employee and a power-exercising employer and an unsuspected discourse of business, with a powerless employer and autonomously responsible employee; both embedded in the legal discipline of labour law.



# The Pop-up Museum of Legal Objects

NB: all sessions will be held in Herschel Training Room 3

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## Thursday 6<sup>th</sup> April (09:00-10:30)

Karen Richmond (Strathclyde), 'DNA Swab Stick (University of Strathclyde Forensic Science Department, 2017)'

The DNA swab collection kit consists of a sealable transparent evidence bag and a sterile 'swab stick'. The collection stick is a sterile paper wand, with a serrated edge, designed to be inserted into the mouth and rubbed against the inner cheek. Alternatively it may be used to swab a range of body fluids, from blood and semen to saliva. These actions deposit DNA-bearing skin cells or fluids onto the collection stick, which is then screwed into the sterile plastic container, and deposited in the 'tamper evident' transparent bag. The collection kit is intended as an efficient tool to be used by institutional actors, both within - and allied to - the criminal justice system, in order that they may successfully capture the bio-identities of suspect individuals.

Material objects - such as the DNA swab collection kit - occupy a particularly significant place within my research, which attempts to show whether, and to what extent, forensic expertise (as enacted through the analysis and interpretation of DNA profiles) is shaped by the interposition of a number of policy, cultural, and socio-economic factors. I am interested in exploring, and revealing, the series of laboratory translations through which that evidential material is converted into textual and visual inscriptions. Each phase of this 'evidential trajectory' (from the collection and stabilisation of trace samples to their transmutation into graphical representations and statistical probabilities) revolves around the use of material objects or the production of graphical representations.

In the case of the DNA collection kit, the focus on sterility, a recordable chain of evidence, and evidence of unauthorised contact, accords with a scientific-realist perspective, and implies that any loss of evidential value can only derive from a derogation from administrative protocols. Crucially, this perspective fails to account for the socially constructed nature of DNA-profiling (and associated forensic techniques).

With its focus on sterility and regulatory objectivity, the swab stick may be viewed as a procedural prompt: the means through which institutional actors enact, and reaffirm, their belief in 'the forensic imaginary'. The 'forensic imaginary', as outlined by Williams (2010), rests upon a commitment to two principles. The first of these is the assertion that all objects are unique, and that it is possible to capture the unique identifiability of any object (whether or not tied to an ineradicable bodily substrate). The second principle is encapsulated in the proposition - widely attributed to the French scientist Edmond Locard - that 'exchange always happens'.

Recourse to the 'forensic imaginary' may serve a particular purpose within the criminal justice system. As Williams (2010) states,

'...the imaginary has been carried in 'images, stories and legends' (Taylor 2014: 23)...and it has contributed hugely to the willingness of governments to fund forensic science developments and ambitions.'

Those whose task it is to craft criminal justice policy, and to alleviate public concerns, often seek recourse to 'the demonstrably effective use of current and emergent technologies': techniques which are deemed capable of capturing, knowing, and recording, individuality, and of anchoring members of suspect populations to an inscription derived from a stable and ineradicable biological substrate. However, the principles upon which the 'forensic imaginary'

is based are demonstrably ambiguous, and as open to criticism and revision as the DNA collection kit itself.

Thus, from a research perspective, the DNA collection kit may represent a somewhat ambiguous object. While it serves to capture the identity of suspect populations it fails to represent the entire evidential trajectory, and the sequence of translations which convert raw biological material into statistical probabilities. It is static, not dynamic: a point of departure on an interdisciplinary process, rather than a discrete focus for reflection. Thus, while the collection kit may serve a useful purpose within the context of my research, more is required. Therefore, I intend to experiment with socio-legal modeling in order to disclose the missing elements.

Williams, R. DNA Databases and the Forensic Imaginary, in Hindmarsh, R. & Prainsack, B. (Eds.) Genetic Suspects: Global Governance of Forensic DNA Profiling and Databasing (Oxford: OUP, 2010).

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Matthew Nicholson (Durham), 'The Horniman Walrus'

Object Location:

Digital: <http://www.horniman.ac.uk/collections/browse-our-collections/object/190371>

Physical: Horniman Museum, 100 London Road, Forest Hill, London SE23 3PQ

Research Question: 'How Does International Law (Mis)Represent Nature?'

How the Object Helps to Answer that Question:

The Horniman Walrus 'most likely came from the Hudson Bay area of eastern Canada and was first seen in London in the "Canada" section of the Colonial and Indian Exhibition in South Kensington in 1886' (<http://www.horniman.ac.uk/collections/browse-ourcollections/object/190371>, hereafter 'Horniman website').

It misrepresents the animal it purports to represent – 'it lacks the skin folds characteristic of a walrus in the wild' (Horniman website) – and this misrepresentation is the result of human ignorance: 'Over one hundred years ago, only a few people had ever seen a live walrus, so it is hardly surprising that ours does not look true to life. This is probably why it remains one of the most popular exhibits on display in the museum today' (Horniman website).

The Horniman Walrus is a 'legal object' because it objectifies the objectification, the (mis)representation, of nature by international environmental law. Global climate law, for example, conceptualises the earth's atmosphere as a collection of tradable commodities, dividing it into 'carbon credits' or, in the language of Article 6 of the 2015 Paris Agreement, 'internationally transferred mitigation outcomes'. Ubiquitous praise for the productivity and potential of global carbon markets (see, for example, <http://www.worldbank.org/en/topic/climatechange/brief/globally-networked-carbon-markets>) ignores the fact that those markets do not offer a 'true' representation of the earth's atmosphere; the gases which form the atmosphere are not like shares traded on a

stockmarket but humans have made them so, hence their 'popular[ity]' with investors. In a similar vein, the Convention on International Trade in Endangered Species (1973) facilitates and regulates trade in endangered species, 'popular[ising]' animals as tradable commodities in order to conserve them.

In these, and many other ways – consider the Stockholm Declaration (1972) and its language of 'natural resources' and 'man[']s ... special responsibility to safeguard and wisely manage the heritage of its wildlife and its habitat' (see Stockholm Principles 2 and 4) – international law engages with nature, with the earth, as thing or commodity.

If, then, 'The Horniman Walrus' is not a Walrus, the earth's environment, as exhibited for sale by international environmental law, is not the natural environment:

'After the Fall ... the appearance of nature is deeply changed. Now begins its other muteness, which is what we mean by the "deep sadness of nature." Speechlessness: that is the great sorrow of nature ... Because she is mute, nature mourns.'

(Walter Benjamin, 'On Language as Such and on the Language of Man' in Marcus Bullock and Michael W. Jennings eds., *Walter Benjamin: Selected Writings: Volume 1 1913-1926*, The Belknap Press of Harvard University Press, 2004, 62, 72-73).

Research Benefits and Limitations Associated with Using Objects (such as 'The Horniman Walrus') in this way:

A focus on objects, on the materiality of something like 'The Horniman Walrus', hints at a turning away from law's structural formality; at a way of moving beyond the all-too-common technique of laying law's normative structure over the natural, the material, the earthly and of seeing existence only through that normative structure.

If law all too often seeks to 'say' what is, a 'Pop-Up Museum of Legal Objects' 'merely show[s]' (see Walter Benjamin, *The Arcades Project*, Howard Eiland and Kevin McLaughlin tr., The Belknap Press of Harvard University Press, 2002, 460 [N1a, 8] – 'I needn't say anything. Merely show'). That is as much a benefit, from a critical, socio-legal perspective that seeks to represent the world, as it is a limitation from a normative, positivist, control-oriented perspective that seeks to 'tell' the world what it is and how it should be through law (on representation and control see my article 'Walter Benjamin and the Re-Imagination of International Law', (2016) 27(1) *Law and Critique* 103)

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Kelly Stathopoulou (Nottingham), 'United Enemies: Binding former warring parties through peace agreements'

The legal object is titled 'United Enemies I 2011'.

I first came across the object Outside Serpentine Gallery, a November afternoon of 2012: two bronze statues, almost 13 feet high capture the attention of bystanders. The legal object consists of two pairs of bronze statues, has been purchased by the Museum of Modern Art in New York, (<https://www.moma.org/collection/works/174098?locale=en>) though it is has been displayed outdoors (Central Park), in Castello di Rivoli in Turin, in London (outside

Serpentine Gallery in Hyde Park), in Zurich, in Berlin, and in Skeppsholmen in Stockholm, to name but a few places.

My current research question deals with the use of internal self-determination language and rhetoric in intrastate peace agreements. More specifically it develops an international legal framework for understanding and assessing the benefits and limitations of the use of such techniques to bring former warring parties to share power within existing states, as a means of establishing peace. Though peace agreements tend to be unpopular legal compromises, often breaking down within the first five years since their conclusion, they are often put forward as a realistic way of rebuilding stable non-genocidal human rights observant states. Former warring parties, which have either lost the control over a state's territory, or the monopoly over the means of violence, or their legitimacy to govern, in instances of stalemate, agree to give up fighting in exchange for their participation in the transitional governing of the state, during which a state's internal power structures of power are reconfigured through the use of international legal standards.

Those two sets of human-esque figures fastened to one another with tight rope, barely standing on three pegs, on the verge of collapsing to the ground could be said to illustrate or personify the central object and purpose of those peace agreements, and the immediate parties signing up to such pacts: they can only stand together, otherwise they would fall apart, still they do seem very grim and dissatisfied, still they seem to be searching for a way out of this 'sealed with the rope' alliance. In fact, taking a closer look, their faces are not just annoyed, but also disfigured, as if their joining together has brought about this distortion, one might even say mutation to their own faces. I have to admit that every time I tried to visualise the application of self-determination to African peace agreements, I would think of Schütte's 'United Enemies 2011'.

More specifically, the use of this legal object can be summarised as follows. The research question is answered through the study of a considerable amount of texts of intrastate peace agreements, which are the primary materials used to deduct more generalised conclusions situated within an international legal framework of analysis. In this process other artefacts, such as images and other visual evidence of the making of the inspected documents can support the research. However, the use of this particular object has a different function. It helps in the process of moving from the individual examples to more general findings and observations. Therefore, it constitutes a visual aid in the conceptualisation of the research, and a constant reminder of the key themes of the research. It can also serve as a visual analogy for introducing the research findings to a more general audience, thus assisting with engaging and making dissemination more.

Since, the object is used to visualise the conceptualisation of research findings and to illustrate related conclusions, it goes without saying that it is dependent on the author's own methodological assumptions and the context of the research it aims to support.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Valentina Vadi (Lancaster), 'Grotius' Book Chest and the Disputed Roots of International Law'

1. Name of the object: Book Chest of Hugo de Groot

2. Object location (URL + where it is physically displayed): <https://www.rijksmuseum.nl/en/rijksstudio/historical-figures/hugo-de-groot> ; Rijksmuseum, Amsterdam, The Netherlands.

3. What is your current research question? Hugo de Groot (or Hugo Grotius as he preferred to call himself) (1583–1645), is deemed to be one of the founders of international law. Considered 'the miracle of Holland', he wrote treatises which deeply influenced the development of international law as we know it. Imprisoned for his religious beliefs—he was considered to be too 'Catholic' by the Protestants and too 'Protestant' by the Catholics—he aptly escaped his prison hidden in a book chest, which his wife used to send him in prison.

While Grotius, his work and his escape are renown worldwide, what are less known are the source of his inspiration and the extent of his originality. Grotius was an erudite and an avid reader. How did he use previous sources to develop his own thinking? This study aims to contribute to ongoing investigations on early modern international law. It also illustrates that the roots of international law may be more pluralistic than we are used to think.

4. How might your chosen object help you to answer your current research question? Usually considered as the evidence and the tool of an incredible escape, Grotius' book chest also shows that he was an erudite and avid reader. The existing letters that Grotius wrote to his relatives show that Grotius managed to purposefully read specific books, for writing his masterpiece, the *De iure belli ac pacis* (On the Law of War and Peace).

5. What research benefits / limitations might be associated with using objects in this way? The principal benefit of using the visual for illustrating specific legal issues lies in the fact that one picture is worth a thousand words. The book chest powerfully epitomises a promise of freedom. Books have an emancipatory potential. They can improve our lives and ourselves, by making us better human beings. In Grotius' case, reading books provided him inspiration, relief, and ultimately a way to escape. At the same time, the book chest is a token of gratitude and humility at the same time. On the one hand, the book chest is a powerful reminder that 'no man is an island', but scholars are much indebted to their masters and predecessors. In other words, we are all building our knowledge while 'standing on the shoulders of giants'. On the other hand, the bookchest teaches scholars to remain humble as nothing comes from nothing, and acknowledging our predecessors is the only way to find our own originality. Finally, the book chest epitomises the imaginative ways which some religious refugees have invented to save their own lives. While it reminds us of the dangers of religious intolerance, it also highlights the importance of solidarity. Two brave women enabled Grotius' flight— Maria van Reigersbergen, and Elsje van Houwing, Grotius' wife and maid, respectively—.

There are some research limitations associated with using the bookchest in this way. The book chest is a mere starting point for an in-depth analysis of written sources. It cannot constitute the sole object of analysis. At the end of the day, it was a mere container of books. It does not indicate which books Grotius was reading in prison. Additional written sources, such as Grotius' letters to his relatives, shed light on the content of the bookchest. Moreover, the chest may not have outstanding legal, economic or artistic value per se. Visitors at the

Rijksmuseum are often startled by the chest, which is exhibited amidst the finest paintings of the Dutch Golden Age. Most visitors are not jurists let alone experts in international law or legal history. What they see is a rather simple wooden box.

Despite these material limitations, Grotius' book chest has deep symbolic meanings and immaterial value. It can constitute a meaningful tool of investigation and a useful key for unveiling the complex roots of international law. Therefore, its use can contribute to the study of the history(ies) of international law.

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Clare Williams (SOAS), 'Wedgwoodn't, would you? The Digital Revolution through a Polanyian lens'

Object: Wedgwoodn't Tureen

Location: <http://collectionssearchtwmuseums.org.uk/#details=ecatalogue.286804>. Also on display at the Discovery Museum, Newcastle

Title: "Wedgwoodn't, would you? The Digital Revolution through a Polanyian lens"

About the object: This tureen, made by a process called "rapid manufacture", is a 2008 replica of an original by Wedgwood, made possible by the massive advances in digital technology and 3D printing over recent decades.

Similarly, Wedgwood (1730-1795) found fame for the quality of his pottery, stemming from his ability to regulate kiln temperatures effectively. This technology allowed him to standardise the process of pottery making, and is characteristic of the new technology transforming Britain throughout the Industrial Revolution. As such, both the original tureen and its modern replica are products of new technology and the massive social upheaval that went with it. The impact of these in both cases had significant and far reaching effects on the society of the time.

The Industrial Revolution saw mass migration to the cities where factory-based employment was piecemeal, exploitative and dangerous. Karl Polanyi identified the social upheaval in the shift from a market economy to a market society, the result of which was huge social dislocation and the disembedding of the economic from the social. The intervening decades of the 19th and 20th centuries saw the State respond with the introduction of workers' rights to temper the worst excesses of the disembedded market in the form of a counter movement.

The advent of the internet and the Digital Revolution, and its rapid expansion into all aspects of life, has arguably had an even greater impact on society than the Industrial Revolution. The Digital Revolution has changed the manner of our interactions in terms of who, where, when and why we now interact. Brought about by the ubiquity of the smartphone, this has also had a dramatic impact on the labour market. Using similar technology to that which created the Wedgwoodn't Tureen, the workplace has been transformed into the "gig economy". With a smartphone, anyone can become an Uber driver, or a Deliveroo courier. But they are consequently self-employed, and not only bear 100% of the start-up costs and risks, but forego any of the hard-won employment rights that characterised the last century and protected workers from the worst excesses of the self-regulating market. There is little separating this new class of workers – this precariat – from factory workers in the 18th and 19th centuries, and the words piecemeal, exploitative and dangerous once again apply.

The Digital Revolution is continuing to change the way we work. In some senses, we could see a subtle re-embedding of the economy within society. Proponents of the gig economy argue that we can choose how, when and where we want to work. However, seen from a different angle, the gig economy is reminiscent of a deeper dis-embedding of the economy. Not only have the labour rights been stripped back under the banner of “self-employment”, but workers reliant on the gig economy for their total income are left to compete for every hour of work, every shift, on a day by day basis with no guarantee of income from one week to the next. The inability to plan one’s life can be seen as the epitome of the total subjugation of the social to the economic, and relates not just to the gig economy, but the prevalence of zero-hour contracts and rolling contracts.

Interestingly, while Wedgwood was attempting to develop a technology that would allow him to mass produce items, Michael Eden deliberately employs mass production-based technology to produce single items of artistic value. Thinking more broadly about the tureen brings into question the role of technology within society, and its impact on the labour market. Both revolutions, industrial and digital, brought about social upheaval and dislocation, along with the most brutal excesses of the disembedded self-regulating market. This time, how might technology be brought to internationally re-embed the economic within the social, or bring about a spontaneous counter movement, in an effective and timely way?

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Owain Johnstone (Oxford), ‘Anti-Slavery Medallion’

Name and location of object:

Anti-Slavery Medallion, on display at the British Museum, London: <http://tinyurl.com/harfzb9>

Current research question:

How has the development of anti-trafficking law and policy in the UK contributed to the construction of the social problem of ‘human trafficking’ since 2000?

How my chosen object might help to answer my research question:

My focus is on contemporary responses to the problem of ‘human trafficking’, but it is common for political rhetoric and media coverage on the topic to recall historical forms of slavery. An example was the use of the 2007 bicentenary of the abolition of the slave trade to announce anti-trafficking commitments. More recently, the widespread adoption of the term ‘modern slavery’, replacing ‘human trafficking’, has continued to emphasise the parallels. To some extent, these alleged historical parallels have influenced recent governmental and civil society responses to trafficking.

It is far from obvious that the application of this historical perspective to trafficking is helpful. Modern ‘victims’ of trafficking are not always physically coerced, may have (to some degree) chosen their situation, and may not always want to be rescued, for various reasons. They may be men, women or children, from a variety of origins, and subject to a range of forms of exploitation. Arguably, applying a somewhat simplistic historical parallel occludes these nuances.

This medallion, produced 200 years ago as part of a campaign to abolish the transatlantic slave trade, can help to interrogate this aspect of recent anti-trafficking activity in two ways. First, it provides a concise encapsulation of many aspects of the historical model that is often invoked. Second, it can situate that model in its particular historical context, showing its contingency and specificity. If we understand the movement to abolish the slave trade as a specific historical phenomenon we can more easily challenge the transfer of its ideas to present-day circumstances.

The medallion can also highlight parallels and contrasts between the abolition movement of the C17th-C19th centuries and its C21st equivalent. Such parallels are sometimes explicitly invoked by contemporary anti-slavery activists.

Potential research benefits and limitations of using objects in this way:

I have found that focusing on an object has the capacity to spark associations and connections that might not otherwise have occurred. It offers me a more tangible target than the language that I usually focus on, and can constitute a kind of anchor that I can then use to provoke or organise arguments. More practically, it can facilitate the communication of my research with non-experts by forming a tangible basis for conversation.

A possible limitation - apart from the logistics of access to collections, which can sometimes be problematic - is perhaps also a strength. It is that viewing a single object in isolation is such an open-ended experience that it can lead to an almost ungovernable number and variety of speculative ideas. These are then winnowed down by attention to the object's various contexts. But this is also a strength, insofar as it allows for the generation of insights that might not otherwise have had a chance to germinate.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Sarah Keenan (Birkbeck), 'Gweagal Shield'

1. Gweagal Shield

2. British Museum:

[http://www.britishmuseum.org/research/collection\\_online/collection\\_object\\_details.aspx?objectId=490919&partId=1&searchText=bark+shield&page=1](http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=490919&partId=1&searchText=bark+shield&page=1)

3. What is the temporality of Torrens title registration? What are the effects of this temporality on residents of registered land?

4. The Torrens system of title registration was first implemented in colonial South Australia in 1858. It introduced a way of transferring land title which was radically different from the English common law system. Instead of title being based on physical possession, Torrens title is based on the singular act of registration. This change in the basis of title in turn shifts the process of transferring land from being oriented toward the past (proving historical chains of title through paper deeds and local testimony) to being oriented toward the future. The Torrens system draws a metaphorical 'curtain' across unregistered historical claims to land, preventing them from ever taking future effect in property law. Registered titles are guaranteed by the state to be the 'mirror' of the rights and interests that in fact exist on the land. By providing guaranteed up-to-date information about the proprietorship of land, the Torrens system produces a predictable temporal order for the everyday business of the land market. Whereas the old system of conveyancing through deeds required retrospection for managing the risk of unknowable pasts, the Torrens system eliminates that risk: the mirror pretends the land has no unknown history, the curtain blocks such histories out, and the insurance principle provides buyers with total peace of mind. The registry thus enables market coordination and also produces a shared orientation toward the future.

The Gweagal shield is part of a historical and ongoing relationship with land that is blocked out by the Torrens curtain. Made from the bark of trees grown from the land now known as Australia, the Gweagal people used this shield to protect themselves against British Lieutenant James Cook when he arrived on the shores of their land in 1770. The hole that pierces the shield was made by a bullet shot by Cook, and represents the beginning of the violent theft of land upon which Australia continues to be founded. Following this originally violence, the British declared sovereignty over Australia on the basis that the land was terra nullius ('belonging to no-one'), and thus ripe for a new, future-oriented system of title registration. In being an object literally composed of an element/product of Australian land, made prior to the British arrival and for the purpose of defending Gweagal land, the shield thus demonstrates the fictional nature of the Torrens 'curtain' and 'mirror', and evidences a different history of Australian land than is told by the Torrens system: a history of Aboriginal custodianship and sovereignty. One of the effects of the Torrens system's orientation toward the future is that those who have unregistered, historical claims to land are categorised as belonging to an era of history that has now ended. Aboriginal Australians are systematically constructed as 'pre-modern', their claims to land obsolete. The ongoing dispute between Rodney Kelly, a Gweagal man, and the British Museum over ownership and custodianship of the shield is representative of the ongoing Aboriginal relationship with and claim to Australian land. For Kelly, the shield is not a historical artefact but a legal object demonstrating Gweagal

sovereignty over land; the bullet-hole evidencing a criminal breach of Gweagal law. The shield operates as a powerful counter-archive to the Torrens curtain and mirror.

5. A major benefit of using the shield in research is that its educative effect is very powerful: its physicality and the archived violence of the bullet-hole offer a counternarrative to terra nullius that is stronger than the Mabo case (1992) which theoretically corrected the founding Australian myth that the land belonged to no one.

The limitation of the shield for my own research is that it is only one part of the history that the Torrens curtain has blocked out. The shield does not provide a theoretical framework to understand the temporality of land and colonialism, although if explained by its Gweagal owners, it does provide an anti-colonial way of understanding both.

The most significant limitation to using the shield for its educative effect regarding the temporality of Torrens title and its effects is that the shield is held by the British Museum in London. The shield would have significantly greater educative impact in Australia, the land from which it originates and where the colonial history that followed the encounter continues to define.

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Jackie Gulland (Edinburgh), 'All under one umbrella: the family guide to National Insurance 1948'

This little leaflet, not much bigger than a mobile smartphone, was distributed to 14 million households in the UK in 1948. It tells people about their legal rights under the scheme: who was required to pay national insurance contributions, how to claim benefits, the importance of time limits, and rights of appeal. The leaflet is illustrated with owls, claiming benefits, chasing their orders books, and sheltering under a giant umbrella, with the caption 'The system will provide for everybody without exception' explains in plain language, the new National Insurance Scheme.

The benefit of this object is to draw our attention to a particular view of rights within the UK welfare state at a particular stage of its development. It provides a bridge between the early pre-war sickness, unemployment and retirement benefits, with their connotations of conditionality, deservingness and links to the Poor Laws to a vision of a future welfare state where everyone was covered (literally, depicted with an umbrella) and where there is a legal contract between the state and the people to protect everyone from life's difficulties.

A limitation of this is that it is propaganda like any other and disguises the ongoing debates about dependency and malingering which lay under the proposed scheme. The new scheme may have been for everyone but only on condition of contributing, literally, through the National Insurance scheme and, in a wider sense, by signing up to the expectation of the male worker, the family wage and the dependent housewife.

The object can only be used within its social and historical context but is an important reminder of how ideas such as welfare and rights within the welfare state have been viewed in the past.

Steve Crawford (Kent), 'Janus and the 1688 English Bill of Rights'

#### Object and Location

Intaglio (Janus-faced), from the British Museum

URL:

[http://www.britishmuseum.org/research/collection\\_online/collection\\_object\\_details.aspx?objectId=430585&partId=1&searchText=janus&page=1](http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=430585&partId=1&searchText=janus&page=1)

Display location: G1/fc7/Townley/C2/D9 (Museum no: 1814,0704.2738)

#### Research questions

My PhD research focuses on the influence of Protestant theology on the legitimacy of the transition from monarchic to parliamentary constitutionalism, specifically addressing the 1688 Bill of Rights. Currently I am addressing questions of conflict and transition in the constitution of authority, between Catholic influenced top-down authorities, and bottom-up representative theology of Protestant church and social structure.

Answering my research questions with Janus

Restoration era government in England has been described as Janus-faced. Possessing the capacity to present the will of the executive to the people, and the ability to survey the demands of the people and report back; but not to simultaneously integrate these functions, or faces of governance, for responsive government (Southcombe & Tapsell 2010, 97). This can be argued to have led to dissatisfaction and distrust in the relationship between governed and governors (Harris 2007; Pincus 2009).

Janus, while not necessarily an obvious fit with the English seventeenth century, provides a useful alternative frame for viewing this period, and the constitutional settlement provided by the 1688 Bill of Rights. As the guardian of doors and gates invoking him in the above context of Restoration governance seems apt. Yet, as he is also the god of beginnings there is also applicability to the Glorious Revolution and Bill of Rights. Not only can this document be argued to usher in a new era of representative parliamentary constitution, but by using Janus to think of a dual faceted doorway for change, the Bill of Rights can be found to be a document to providing conceptual 'access' for perceptions of both conservative restatement of the immemorial ancient constitution; and simultaneously radical reformers, perceiving the constitution of a representative Parliamentary government. This allows for different aspects of the settlement to be considered side by side, as opposed to having to prioritise one line of historical commentary over the other.

The material of the intaglio, a black glass paste, adds further depth to the consideration of these problems. Glass is traditionally considered at its best when translucent and clear, facilitating true clarity of vision. Yet here it is dark and opaque, counter-intuitively this provides for greater clarity, allowing a starkness of image that would be impossible with clear glass; but retaining a seamless transition between the two faces of Janus. Overall I find this to be most helpful alternative perceptual frame, one that allows a unified simultaneous analysis of competing narratives of the basis and legitimacy of the Bill of Rights, but can additionally facilitate concentration upon one or other face if required.

Benefits and limitations of objects in research

One strength of using museum objects in this way might be found in the 'open source' access to not only the objects themselves, but also to the professional and amateur expertise available through digital collections. This expertise might otherwise be difficult or impossible to collect together in a single location. Additionally, use of objects to address research questions allows for problems to be perceived in a 'hands on' way, rather than purely focusing on mental abstraction of problems objects can facilitate new angle of tactile approach to a physical manifestation of an issue.

Weaknesses to this approach might be found in historical anachronism, while I am fully embracing it in Janus and the English seventeenth century, the structure and organisation of museums by historical period and geographical location might in other circumstances close off interaction between collections and researchers not thinking in terms of that particular period or location. Problems may also be encountered with focus upon a single object as a medium for re-interpretation of a research question. This may lead to alternative pathways to the solution to a particular question or sub-question to be missed, by limiting one's thinking to a single object and the insights that it might provide; missing alternatives inherent to other objects.



# Property, People, Power and Place

NB: all sessions will be held in the SU Kate Adie Room

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## Wednesday 5<sup>th</sup> April (15:30-17:00)

Henry Jones (Durham), 'Scaling Legal Geography, Internationalising Property'

In the past few years, the spatial turn in the social sciences has come to law. Geographers and lawyers have engaged productively with questions of both how law operates in space, and how space operates in law. One of the great strengths and appeals of legal geography is that it combines high theory with on the ground material practice. Property has been a particular and exemplary subject for legal geography, involving theoretical questions of what ownership is and practical questions of how to own, and real world practice such as commonsing. In this paper I seek to "scale up" these insights to international law.

Insights at the local cannot be simply applied to the national or international level. Instead, I abstract away from legal geography to a theoretical starting point which can be applied at different scale. I do this through three steps. First, I return to a classic engagement between law and spatial theory in De Sousa Santos' 'Law: A Map of Misreading'. In this article Santos takes seriously the idea that law is literally a map, and draws several insights for what that means. De Sousa Santos' used as a framework the philosophy of Deleuze and Guattari. In their work is found a sustained engagement with questions of spatiality, of how the physical world is organised and created through ideas and practices, in particular ideas of deterritorialisation and reterritorialization. Third, this theme allows the drawing together of legal geography and international law, and specifically the scaling of work on property up to the international and questions of territory. In conclusion, I scale back down again, to see how the detail might change with a greater appreciation of how international law shapes, and is shaped by, physical space.

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Jill Dickinson, Ellen Bennett, Lynn Crowe and Elizabeth Freeman (Sheffield Hallam), 'Managing Urban Public Green Space: Challenges of austerity, management and public perception'

Against a backdrop of public-funding cuts, closure of central community facilities, an increased reliance on the voluntary sector, and a programme of urbanisation which has seen the demise of public space, this paper forms part of a larger project which seeks to explore the extent to which public urban green spaces are becoming privately-managed and resourced and the potential implications of that.

Whilst in its initial phase, the project will examine the concept of 'public urban green space', the spectrum of stakeholders involved and conflicts borne out of competing demands, for example in terms of the overarching legal framework which governs both the strategic and operational management of such spaces. The methodology will involve a comparative qualitative case study of two public urban green spaces.

Where existing literature focuses on the principal, practical implications of public parks becoming increasingly the domain of non-state bodies (see for example Mathers et al (2012) and Nests (2013)), the project seeks to analyse whether, and to what extent, key stakeholder perceptions of such spaces might be shifting in response. This paper draws together a review of literatures from the voluntary sector, law, third spaces and perceptions to apply a new lens on public urban green space management.

In particular, the project aims to consider some of the challenges that are posed by public sector budget cuts to public urban green space management, and identify and analyse particular strategies that may be employed. The project will then explore key stakeholders' perceptions as to the suitability of such response, particularly with regard to the future survival and potential development of such sites.

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Steven Cammiss (Leicester), 'Conceiving the Street: Producing Space through the Regulation of Street Trading'

Within England and Wales, the regulation of street trading has historically utilised a licensing regime to control trading in public streets (defined as areas to which the public have access, without payment). Comments on, and criticisms of, this regime have usually focused upon the economic and social nature of the activity; street trading as an entrepreneurial activity (and one that may, or may not, harm established retail premises) and the importance of public space in the construction of social life. The courts, however, in interpreting these provisions, largely adopt an approach that seeks to avoid obstructions in the highway. Flows and movement, therefore, dominate the way in which space is to be conceived, rather than sociability and economic activity. Following Blomley (*Rights of Passage: Sidewalks and the Regulation of Public Flow*, Routledge, 2011) public space is regulated so as promote and protect pedestrianism, 'peds' (pedestrians) and flow. Suggested reforms of the street trading regime need to engage with this rather mundane (and therefore ignored) but deep-seated emphasis upon pedestrianism.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Sarah Neild, Emma Laurie (Southampton), 'The Private-Public Divide in Housing Provision'

This paper seeks to analyse the recent UK Supreme Court decision, *McDonald v McDonald* ([2016] UKSC 28) which, for the first time sought to challenge an eviction, on mandatory grounds, by a private body using article 8 of the European Convention on Human Rights. We will locate our analysis within the developing article 8 jurisprudence, of both the UK courts and Strasbourg. While the Supreme Court rejected the tenant's claim that the court was obliged to undertake an assessment of the proportionality of her eviction, we argue that the Court neglected to address significant issues. In particular, we position our claim within the broader context of the on-going process of using the private sector to deliver what might broadly be referred to as welfare services. This trend, which is evident in many contexts, makes the public-private 'divide' an increasingly untenable concept.

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Edward Burtonshaw-Gunn (Bristol), 'The Art of 'Viability' in Private Sector House Building: Economic Feasibility or Avoiding Policy Obligations?'

In 2012, the Conservative-led Coalition Government expressed its position with regards to the national planning agenda for the development of towns and cities across England and Wales. The National Planning Policy Framework (NPPF) set out the Government's planning policies which sought to achieve "sustainable growth" through the increased attraction of private investment and development. Through this policy framework, the process of economic viability - that is, profitability - has subsequently become an increasingly important consideration for both developers and local planning authorities. When the private sector proposes a residential development, the local planning authority requires them to contribute to the provisions of social, physical or economic infrastructure, local authority affordable housing levels, or to mitigate potential negative effects of the development. Viability appraisals are the developer's response to such obligations to balance, through negotiations, these policy obligations and their own profitability.

This paper exams the process of striking the right 'balance' between the financial assessment of specific development proposals – principally through s.106 agreements (Town and Country Planning Act 1990) – and the policy obligations they conflict with. By analysing viability documents from residential developments in Bristol, this paper highlights three areas: i) The discursive language employed in both the viability documents, and the policies and accompanying guidance issued at national and local level; ii) The calculation process of financial viability which places increased limitations on the local planning authority to negotiate with; and finally, iii) The confidentiality and commercial sensitivity of these documents which, as argued here, underpin the entire process with a guise of private sector secrecy. Development viability inherently impacts on the deliverability of much needed residential dwellings, and subsequently the land use in urban and rural areas across England.

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William Walton (Northumbria), 'Trump's Golf Resort in Aberdeenshire, Scotland: "The Greatest (self inflicted) Planning Disaster in the World?"'

In 2006 Trump International Golf Club Scotland (TIGCS) submitted a planning application to transform an area of protected dunes and open countryside along the coast of north east Scotland into a major golf and leisure resort. Donald Trump claimed the golf course would be the greatest in the world and would transform the economy of the region. Citing the claimed economic benefits the Scottish Government approved the project in 2008. TIGCS has constructed the golf course but has failed to deliver the hotel and other elements of the project. Set against the backdrop of the liberalisation of the Scottish planning system this paper examines why the various gatekeepers failed to anticipate the scheme's economic failure. Invoking Sir Peter Hall's metaphor it is contended that the project is a 'great planning disaster'.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Susan Bright (Oxford), 'A case study of deep retrofit in mixed tenure tower blocks'

More than a fifth of the UK's carbon emissions are attributable to residential buildings, and carbon emission targets will require the upgrading of the existing housing stock. This will require a refurbishment at building scale, which presents a particular challenge for blocks of flats as the multiplicity of stakeholders, the dimension of owning 'part within a whole', and the interaction of technology with property law all add to the physical and technical challenges of achieving this goal.

Bright and Weatherall (JEL, forthcoming) suggest that the problem needs to be understood through a building governance framework that takes account both of property law 'as a technology which in itself shapes energy related outcomes in the social and material world' of multi-owned properties, and of the complexity of decision making arising the multiple parties involved and the interaction with legal regulation of decision-making.

This paper presents a case study on the non-technical aspects of a current refurbishment project taking place in Oxford: the deep retrofit of five residential tower blocks owned by Oxford City Council, at a total cost of £20 million. The paper discusses the nature of the refurbishment works; the impact of tenure mix on the refurbishment project; OCC's rights to recover costs from individual flat owners; and the effectiveness of consultation and engagement.

The study provides key insights into the difficulties of deep retrofit of MoPs. These include the challenge of effective communication and consultation; financing and cost recovery (and legal challenge); the tensions between the costs and benefits of large-scale whole block energy refurbishment versus smaller scale renovations to individual flats; valuing benefits (aesthetic, comfort and financial); access rights; and tensions between different classes of occupiers.

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Helen Carr (Kent), 'Law and the precarious home: a case study of thermal comfort in English homes'

English homes appear to be peculiarly vulnerable to the characteristic cold and damp of the local climate. This porousness to the weather impacts disproportionately on the poor and the vulnerable, and it has consequences. Annually, in England, there are around 25,000 excess winter deaths (that is the number of deaths during December to March which exceed the average number of deaths over the rest of the year). The energy inefficiency of English homes is a major factor in fuel poverty (DECC 2016) and, because domestic energy consumption accounts for 27% of England's carbon emissions, unless the energy efficiency of housing is significantly increased, England will fail to meet its carbon emissions reduction target which is a minimum requirement for positive action on global warming. More recently the problem of inadequate thermal comfort has intensified; there is increasing evidence, particularly in England's urban areas, of the letting of accommodation not designed for human habitation either to the young temporary workers who take up property guardianship (Hunter and Meers 2017 Ferreri 2016) or to the hyper-precarious undocumented migrant (Lewis et al 2015) accommodated for instance in 'bed in sheds'. There is one further twist, just as much a consequence of the contemporary intensification of urban living as the degradation of private

rental accommodation, the problem of excess heat in the home, which it is suggested, might lead to a further 7000 deaths a year by the 2050s.

The paper uses the inability of English homes to protect their occupiers from unpredictable weather conditions as a case study of the relationship between law and everyday housing precarity which, although superficially mundane, has the potential for catastrophic consequences on multiple levels. The focus is the intersection between two different governmental strategies, the Housing Health and Safety Rating System, (HHSRS), a recent and innovative governmental strategy which utilizes notions of risk to reduce the thermal inefficiency of English homes and property law, which I suggest has a quite different purpose; drawing on Ettinger (2007) I argue that it is designed to create the illusion of certainty in the face of inevitable precarity.

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Sarah Blandy (Sheffield), Susan Bright (Oxford) and Sarah Neild (Southampton), 'The Dynamics of Enduring Property Relations'

This is a proposal for a new way of looking at property relationships that will enrich our understanding of how property relationships operate in the real world. At present the focus is on property rights in land which are consensual in origin, although this approach could be usefully applied both to non-consensual property relationships and to other types of property. Whereas current property law scholarship has largely ignored the temporal dimensions of property (and the spatial dimensions of land), the dynamics approach reflects the fact that property relationships are lived relationships affected by changing patterns and understandings of spatial use, relationship needs, economic realities, opportunities, technical innovations, and so on.

This approach also recognizes the broad range of legal, regulatory, social and commercial norms that shape property relationships, and that although property relationships evolve responsively to accommodate changing uses of land and new rights-holders, the relationships themselves are sustained and enduring. There is scope for discretion in decision-making, by a range of agents from the parties themselves to the courts, to reflect this approach to understanding property relationships.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Shantanu Dey (Indian Institute of Management, Calcutta), 'Land, Laws, Emotions & Politics in India: Spaces and Flows of Power'

In India, land, its ownership, and laws surrounding it have been a critical element in its politics; land has been a primary arbitrator of power in India acting through a complex of spaces and flows of transactions, emotions, ethics and laws that have generated political discourses, developmental discourses and urbanism discourses. We will engage with the question: why is the ownership of land critical in the power complex that spans the political, developmental and ethical spaces in these times when the idea of 'ownership' of property is being challenged in a digitalized, virtual world? . After registering the major legal developments surrounding property in postcolonial India, the paper will discuss the recent 'Prohibition of Benami Property Transactions Act (PBPT Act), 2016,' which targets illegally owned properties, which is part of the current 'anti-corruption' discourse; it aims to dissolve the 'black market' space that is interpolated with the power-infused spaces of electoral politics, urbanity and finance.

We will also discuss the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR)'. The Supreme Court and High Courts have already quashed arbitrary land acquisition in 78 cases based on the LARR Act. In postcolonial India, a 'politics of dispossession' has emerged. We will propose that a 'space of absentia' is embedded with affective value that can unleash political power.

Land has been perceived in emotional ways in India beyond its materiality to intervene in political discourses. The various discourses surrounding land have skilfully leveraged 'affect' in political space. The primacy of the ownership of land in political discourses is likely to continue even in changing times given its capacity to articulate a discourse of political sentiment that penetrates the developmental space, the urban space and the ethical space in innocent and insidious ways.

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Evgenia Kanellopoulou (Salford) and Nikolaos-Foivos Ntounis (Manchester Metropolitan University), 'Place Management and Policy Making in Urban Squats: Lessons from Ljubljana's autonomous areas'

Illegally squatted and self-proclaimed autonomous areas in urban centres present a perplexing case, which intensifies power relationships between a place's stakeholders. These become more evident in the field of relevant policy making and place management, as well as law and regulations enforcement. Nevertheless, calls for participatory forms of place management and relevant policy making that could be instrumental for the political and social legitimisation of these areas (Braun et al. 2013; Kavaratzis & Kalandides 2015), are often dominated by the interests of place authorities and property owners (Bennett & Savani 2003). In theory, effective collaborations between place stakeholders can leave plenty of room for participatory place management initiatives to flourish that stem from flexible citizenship, collective discursive practices, and from one's right to participate in place-making (Lepofsky & Fraser 2003). However, the occupant communities wish to distance themselves from the "mainstream" and the "official" and take control of place management processes, whilst distancing themselves from authorities and enforcement agencies. Such autonomous networks not only mirror the identity of the place, but also develop a collective self-governing

capacity and institutional memory (Sorensen & Sagaris 2010), which often by-passes any top-down managerial approach to place management and broadens citizen involvement in direct democracy (Kearns 1995). These social movements and organic forms of participation (Guarneros-Meza & Geddes 2010) can lead to a fundamental transformation of how we interpret place management and relevant policy making practices not only on the neighbourhood, but also on the municipal and regional level.

This study focuses on implications and opportunities emerging from community-based forms of participation, by exploring and analysing the case of a “successfully” squatted urban zone within Ljubljana, Slovenia, the Autonomous Cultural Zone of Metelkove Mesto and contrasting it against the “unwelcomed” similar squat of Rogue Factory, just a few minutes down the road. Metelkova is being promoted by the City of Ljubljana as national jewel for Slovenia, and it appears to have succeeded in striking a balance between its stakeholders; place brand formation and place-making policies are left into the hands of Metelkova’s networks, while the city of Ljubljana reaps the benefits of an acclaimed cultural centre and tourist attraction, which nonetheless borders illegitimacy by remaining an unregulated squat. On the antipode, Rogue Factory is considered an “enter at own risk” incivility, condoned by the official channels, even though the same groups of occupants / squatters operate between the two autonomous zones. By examining the self-governing principles within the two squats and the role of the squats’ networks not only as place-makers, but also as policy-makers, this study aims to appreciate the uncertain boundaries between participatory place – making, legitimacy, and illegality. Is what separates the two similar urban squats what also unities them from the point of view of municipal and state authorities? What lessons can the city of Ljubljana learn by its own appreciation of the one area as opposed to the other? Shedding light to the above, the study emphasises the importance of Metelkova’s networks in creating strong place associations over the years, and tries to apprehend the present and future of Rogue Factory in its urban setting.

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Sarah Hayes (Oxford Brookes), ‘Permissions to enter the private religious precinct: a pathway to further freedoms?’

Increasingly religious buildings are used for wide ranging community purposes as well as worship. These complex, privately-owned sites I identify as ‘religious precincts’. Judicial findings and scholarly consideration suggest that the public may acquire rights to use quasi-public space as a forum for the expression of fundamental freedoms. Where an ecclesiastical landowner’s invitation to the public transforms its private space into quasi-public space it must be mindful of whether any rights acquired by the public enhance, or conflict with, its own obligations. This paper considers how public access to the religious precinct contributes to its characterisation as quasi-public space, and the way in which other laws governing access enhance or contradict that characterisation. The material presented is part of a wider examination of an ecclesiastical landowner’s autonomous control of its religious precinct.

The paper examines invitations to the religious precinct and areas entered by the public. It uses the access elements of judicial and scholarly conceptualisations of quasi-public space to understand how findings from qualitative case studies in the Anglican diocese of Birmingham illustrate whether religious precincts are quasi-public space. The case studies reveal general

and restricted accessibility characteristics, and include analysis of the effect the impact of occupants' community activities has on those accessibility characteristics. Plotting these characteristics against accessibility axes facilitates an analysis of how, if at all, access contributes to the religious precinct's status as quasi-public space.

The study demonstrates the complexity of laws governing access to the religious precinct. It evidences accessibility characteristics determined by layout, invitation and activity, demonstrating the fluidity which some arrangements give to those characteristics. It further illustrates the impact which laws governing access have on accessibility characteristics and so the precinct's status as quasi-public space.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Chiu Yin Leung (Chinese University of Hong Kong), 'Negotiating the fragmented governance of rural heritage in postcolonial Hong Kong: Stakeholder conflicts among indigenous landlords, farm tenants and civic communities'

This paper explores the stakeholder conflicts in the transformation of border landscape in post-colonial Hong Kong. The northernmost borderland in colonial Hong Kong had been designated as the Frontier Closed Area for security and defence against its mainland counterpart for more than 60 years. In such transient landscape, the government had restricted the rights of access and development to most people except the local and indigenous villagers whose traditional rights were legally recognized. The juxtaposition of indigenous, war and colonial histories has inherited a variety of cultural and natural heritage in the border landscape. The inequality and informality in rural governance has led to persistent decline in productivity but also fragmentation of land and housing ownership. In recent years and especially after the sovereignty transfer, meanwhile, borderland heritage and livelihoods are increasingly challenged by state projects in territorial planning and cross-border infrastructure.

Through the case of heritage treatment in above context, this paper investigates the stakeholder conflicts in the complex interplays among property ownership, village organization, and state apparatus. It is argued that the fragmented governance of rural population, land, housing and economy has left the memory landscape and some of its long-deprived borderers vulnerable against the post-colonial state imperatives. Empirical evidence illustrates an apparent bias towards the colonial representation of powers in grading historical monuments and drafting development plans to re-incorporate the borderland under state control. Not only the squatter and farm tenants but also many other recognized indigenous villagers were often deprived of property rights, participation process and livelihood option, especially in the site selection of new cross-border infrastructure. The enactment of heritage preservation is furthermore disturbed by village collective ownership, technocratic bureaucracy and multi-scalar political mobilization. As many heritage traces of colonial misfortune are whitewashed without proper management, postcolonial justice is yet reconciled in this border landscape.

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Chamu Kuppuswamy (Hertfordshire), 'Securing tenure for food security'

The Voluntary guidelines for the responsible governance of tenure of land, forests and fisheries (VGGT) is underpinned by the premise that a diversity of tenure rights is good for achieving food security. As food security is high on the agenda of most governments, especially developing countries there is support for this instrument that has been formulated by the Committee on World Food Security, whose membership is drawn from a conglomerate of international organisations, and which promoted a much lauded bottom-up approach to the formulation of the VGGT. In the recent CFS assembly in October 2016, approximately 2 million people are said to have benefitted from the implementation of the VGGT since 2012. This paper will explore Indian forestry laws and will measure up how they align with the VGGT in terms of securing private, communal and common property rights to forests. The difficult

issues surrounding ownership and access to common property resources, i.e forests, the sustainability versus conservation debates surrounding forests, the issue of farming versus forestry, and outdated administrative land revenue and recording structures and these issues play in a human rights based approach to land governance and food security will form the main part of analysis in this paper.

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Ting Xu and Wei Gong (Sheffield), 'The Exclusivity of Communal Property'

'Communal property' refers to resources owned, used and governed by a group of people defined by reference to some common characteristics. However, there is a lack of legal parameters for determining the nature of communal property. Communal property is often juxtaposed with private property or equated with everyone's property. This paper examines the nature of communal property through the lens of exclusivity. Part I probes the meaning of the exclusivity of property as control over access to a resource. Part II looks at the embeddedness of exclusivity in the structure of communal property, which not only differentiates communal property from everyone's property but also blurs the boundaries between communal property and private property. Part III analyses the close link between exclusivity and community and how it determines the extent to which community members can exercise communal property rights. The paper concludes that communal property is a hybrid property system with permeable boundaries; exclusivity imbues the concept of communal property with legal meaning.

## Friday 7<sup>th</sup> April (10:00-11:30)

Tola Amodu (UEA), 'Revisiting the ethos of the modernization of land law through the lens of The Land Registration Act 2002: the case of indemnity'

The insurance principle underpins the legitimacy and effectiveness of the system of land registration. Yet, differing interpretations of this have the potential to undermine the wider objectives articulated at the emergence of the modern land law system. One example is the right to be indemnified under Sch 8 to the Land Registration Act. By looking at these provisions and the decisions arising from its application in the terms of risk, it becomes possible to identify where those elements are in tension with some of the objectives underpinning transacting in land which we have hitherto taken as a given.

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Francis Sheridan King (Westminster), 'Visually Linking Property, People, Power and Place'

As socio-legal property lawyers we are perfectly positioned to encourage our students to make those vital connections between property, people, power and place. This paper builds on a recent call to arms for a more 'visual' form of pedagogic practice in property law, providing both an academic context for such practices and demonstrations as to how they can be achieved.

Visual pedagogy practices seem particularly suited to the 'real' nature of property, allowing connections to be made with the rights and responsibilities that attach to, bind, or fetter the property in some way. Using a more visual approach in our teaching also allows us as practitioners to encourage our students to identify the various actors and power dynamics underlying property-related disputes.

While it is tempting, and definitely less time-consuming, to 'teach as taught' in a traditional Socratic style, the opportunities for critical thought and debate are increased with a more visual form of teaching practice. This paper provides a brief overview of some of the visual tools available to the contemporary property law academic, but its primary aim is to promote the use of visual aspects such as these within teaching practices, and to engage both lecturer and student in an effective learning relationship that draws upon a wider range of resources.

## Friday 7<sup>th</sup> April (12:00-13:30)

Tola Amodu (UEA), 'Computing Competing Rights in Registered Title to Land'

The Court of Appeal's decision in *Best* affirmed what, at first glance, appears to be a counter-intuitive outcome; that the commission of, what is ostensibly, a criminal offence can contribute evidentially to support a claim of adverse possession. In the case the applicant was held by the court to be able to substantiate a claim to the title of a residential property by way of his adverse possession despite the fact that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at s144 made 'squatting' a criminal offence.

Whilst the case itself is interesting in relation to the role of illegality in the making of applications for title to land, it highlights also the evident tensions in the broad rationales dating from the early twentieth century and in particular the value attributed to land utilization as against 'ownership' per se and, in particular, how these are to be resolved. This paper looks at the implications of land registration when the courts attempt to reconcile the effects of criminal and civil law provisions in this context. In particular, the limitations and opportunities offered by registered title to land and indeed implications of false hope offered by the rationale of title by registration in permitting the making of applications, which inevitably must fail will be considered.

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Sarah Keenan (Birkbeck), 'From Land to Futures: Title Registries as Time Machines'

While conveying land through title deeds under English common law was reproductive of the land's local history, conveying land via title registries frees title from the land to which it pertains. Registered title can then be reformulated into securities and other speculative financial instruments which are conceptually and practically located in the future. This reformation and temporal relocation is made possible via the mirror and curtain principles which underlie Torrens and other contemporary title registration systems. First innovated for speculative land sales in early colonial South Australia, the mirror and curtain principles of the Torrens system create an enforceable legal fiction that land has no history and no life beyond what is recorded on the register. This legal fiction makes possible the production of real landscapes that are reminiscent of dystopias of science fiction time travel stories - life-filled suburbs become derelict, tent cities appear beside rows of vacant houses and flower farms appear where rice once grew in areas where residents die of hunger. In science fiction, time travel narratives function as a literary device to indicate that a subject has become radically out of place without physically moving anywhere. I argue that by making land liquid, title registries achieve a similar result. As such and engaging with literary and philosophical understandings of time (Bastian, Greenhouse, Mawani) and with critical finance studies (Alessandrini, Poovey, Riles), I argue that title registries might usefully be understood as time machines.



# Sentencing and Punishment

NB: all sessions will be held in Barbara Strang G34

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## Thursday 6<sup>th</sup> April (14:00-15:30)

Emma Milne (Essex), 'Crisis pregnancy, newborn child death and punishment'

How should the state respond to women who conceal their pregnancies, resulting in the death of the baby? It is widely expected that a pregnant woman will act in the best interests of her unborn child, including submitting herself to medical examination. However, these expectations are not always met and this causes particular problems for vulnerable women who experience crisis pregnancies. In such situations women have hidden their pregnancies, given birth in secret, and are suspected of causing the death of the baby. While there are no accurate statistics, approximately 15 babies/foetuses die in this way every year. In such instances, archaic legislation is drawn upon in order to punish deviant behaviour.

This paper draws on research from my PhD, examining seven cases where a woman has concealed and/or denied her pregnancy and subsequently been convicted of infanticide, concealment of birth, child neglect, or illegal abortion. The women in each case are vulnerable and have experienced difficult personal circumstances that influenced their decision to not seek medical attention. This resulted in a solo birth that led to the delivery of a living or stillborn child. Through an examination of transcripts from sentencing hearings, I explore how and why these women have come to be dealt with through the English criminal law. I ask two questions: what action does the state appear to be punishing? and, is punishment the correct response?

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Lynsey Black (University College Dublin), 'The worst of the worst? Women, murder and the death penalty in Ireland, 1864-1914'

Two women met their death on the gallows in Ireland between 1864 and 1914. These two women represented a small proportion of all those women who had been sentenced to death in this period. Overwhelmingly, the women who had been convicted of murder and sentenced to death were reprieved. However, although it was rare that condemned women would face the hangman, certain features of the murder cases rendered execution more or less likely. For example, the victim status rendered execution much more likely in cases of women who had killed an adult male. Conversely, all those women who had been sentenced to death for the murder of an infant had their sentence of death commuted. This paper examines 'degrees of reprehensibility' in the cases of women convicted of murder, across a period of 50 years in Ireland. Issues of offender and offence characteristics are explored, as is the issue of victim status. Drawing on the body of literature on the historical experience of women and the death penalty, the paper locates the Irish example in a broader context, and begins to tease out features peculiar to Ireland.

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Karen Brennan (Essex), 'Murdering mothers and gentle judges - punishing women who kill their babies'

It is well known that infanticide statutes are gendered. Indeed, somewhat uniquely in the context of the wider criminal law, where defences are often characterised as being male in nature, they specifically allow for lenient punishment of women who kill. This differential treatment is based exclusively on female experiences – childbirth and lactation – and feminist scholars have long criticised these laws on the ground that they medicalise female violence.

This paper explores the criminal justice response to women charged with murdering their babies in Ireland after the enactment of the Irish Infanticide Act 1949. Drawing on court and newspaper archives, it focuses on the approach taken, both in terms of how the infanticide law was implemented and how women convicted under this 1949 statute were sentenced. The evidence shows that from 1949 onwards, women charged with murdering their babies were (virtually) always disposed of under the infanticide law and were overwhelmingly given a lenient sentence. This paper argues that whilst on the surface this may appear to be 'lenient' treatment of women who would might otherwise have been liable for a murder conviction, this was really a form of paternalism. The 'benign compassion' shown by the courts ultimately served patriarchal interests by diverting attention from the causes of this crime, namely the grossly unequal position of women in Irish society, particularly with respect to their reproductive autonomy.

## Thursday 6th April (16:15-17:45)

Cyrus Tata (Strathclyde), 'Displaying Justice. What, if Anything, Does "Ritual Individualisation" at Conviction & Sentencing Achieve?'

The criminal process claims cherished liberal values (e.g. the presumption of innocence; free choice; participation; concern with the unique individual; legal equality; individual culpability). Yet, sentencers, lawyers and report writers as the very professionals expected to uphold and embody these cherished values, find that they have to resign themselves to a system which seems to them to necessitate an industrial conception of efficiency demanding the disposal of high volumes of standardised guilty plea cases in a cursory manner. This dissonance between professional self-image and sense of pragmatic reality leaves professionals vulnerable to doubt about the justice of this assembly line process. How is this sense of discord managed?

This paper proposes that the central way in which this doubt is managed so that professionals can do their work is through what I refer to as 'Ritual Individualisation'.

Ritual Individualisation performs three-stages of work: delegation of 'dirty work'; case cleansing; and transmutation.

First, the case is delegated to backstage communication with and enquiry about the individual and her attitude to the crime. Delegation through preparatory work (eg pre-sentence inquiry and its anticipation). Second, and recalling Mary Douglas' work on purity and pollution, the case is cleansed of its impurities and ambiguities, (not least concerning explicit or implicit denials of guilt), which would otherwise be seen to contaminate the aesthetic purity of legal justice. The case is then returned to the front-stage of the court ready to be displayed as a unique individual, about whom there is bolstered certainty about guilt and culpability. Through this process of Ritual Individualisation the defendant is, third, transmuted into a punishable offender, who is seen to accept her true legal and moral guilt – thus in effect fusing the conviction and sentencing processes in Anglo-American systems.

In this way, Ritual Individualisation protects the sanctity of key legal myths and values in the criminal process. In so doing, Ritual Individualisation solidifies belief and belonging among court professional communities enabling them to perform their work.

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Jose Pina-Sanchez (Leeds) and Ian Brunton-Smith (Warwick), 'Mind the Step: A More Comprehensive Empirical Study of the Functioning of the England and Wales Guidelines'

The new 'England and Wales Sentencing Guidelines' have been presented as an original reform of the sentencing practice, seeking to promote consistency without incurring in excessive judicial restrictions. By organising the guidelines as a sequence of steps, where preliminary sentencing decisions are considered based on a list of relevant case characteristics, the sentencing process has been clarified and consistency improved. However, to date, existing evaluations of the new guidelines have concentrated on a particular sentence outcome, disregarding the novel step-structure in operation. Here we demonstrate the use of a multivariate model capable of modelling different sentencing decisions simultaneously and in so doing offer: a) more precise estimates of the effect of the factors listed in each step, b)

more accurate estimates of the degree of between court consistency, and c) new insights into how the particular step-structure operates. Focusing specifically on offences of assault sentenced at the Crown Court we show that some specific factors are being inappropriately used in what could be defined as an otherwise highly consistent sentencing practice in general. Furthermore, we find evidence that unwarranted disparities between courts are not due to some of them sentencing more leniently or more harshly systematically across the steps of the guideline.

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Carly Lightowlers (Leeds), 'Drunk and doubly deviant? Gender, intoxication and assault: an analysis of Crown Court sentencing practices in England and Wales'

**Background** Little is known about how the guidance issued by the Sentencing Council to treat intoxication as aggravation is applied in practice, or whether it is equitably applied to male and female defendants. **Aim** With reference to assault offences, this study aims to assess the extent to which intoxication differentially aggravates sentence outcomes for male and female defendants. **Methods** It does so by modelling the probability of custody and sentence severity using the Crown Court Sentencing Survey. **Results** Whilst female defendants are associated with fewer custodial (Odds Ratio=0.48) and less severe sentences (on an ordinal scale; Odds Ratio = 0.57) than their male counterparts, controlling for the relevant case characteristics. When intoxication is cited as aggravating the offence, females are associated with higher a probability of a custodial outcome (OR = 1.42) and attract more severe sentences (OR = 1.39), although these are still not quite as high as for their male counterparts. Any chivalrous effect is effectively halved when intoxication features in female offending. **Conclusion** There is less support for the chivalry hypothesis once appropriate interactions are accounted for in modelling sentence outcomes. This points to the need for methodological precision in studies examining how gender impacts sentencing practice and the aggravation of intoxication specifically. Moreover, the apparent 'equalisation' of outcomes for males and females raises concerns about the administration of 'justice' and gender equality in sentencing practice.

## Friday 7th April (10:00-11:30)

Angelica Reichstein (UEA), 'A right to die for prisoners?'

Death in prison is a multi-faceted issue. Aging prison populations lead to more prisoners dying of old age; regularly, occurrences of violence in prison are leading to death; additionally, some prisoners wish to die, prematurely. The so far unresolved question is how a State should react to a prisoner who wants to die.

While this seems to be a rather minor issue in imprisonment studies, it is an important one to address, as suicide rates in prisons are rising. But that is not the only argument why the topic of a voluntary death in prison should be approached, what has to be answered is the question whether a prisoner should be entitled to decide over some basic aspects of his or her own life and if so, whether that includes his or her death. While some of the (attempted) suicides might be based on mental illness or drug abuse, the question is how prisoners should be treated who have the mental capacity to make the informed decision to wish to die.

This paper will start by looking at the more general idea of a right to die in Europe to then look at a possible right to die for prisoners, drawing on the case of Ian Brady. In doing so, reference will be made to general theories of imprisonment and punishment.

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Kevin Cheng (Chinese University of Hong Kong), 'The Punitive Nature of Pre-Trial Detention: Perspectives of Detainees in Hong Kong'

Pre-trial detention plays an integral role in the criminal justice process. It is justified as serving as a form of "preventive justice" despite its coercive nature. The aims of remanding an accused in custody is to: prevent the accused from absconding and not appearing in court; prevent the accused from interfering with witnesses, and prevent the accused from committing further criminal offences. Pre-trial detention is not regarded as a form of punishment because it would violate the sentencing principle of retribution and defendants' due process rights, in particular the presumption of innocence. The purpose of this study is to show that pre-trial detention is indeed punitive, at least in the minds of defendants.

This study emerged from a larger project on guilty pleas and cracked trials, where it was found that there was a strong correlation between defendants denied bail and the likelihood of pleading guilty compared with their counterparts who were granted bail. This led to an interest in understanding why this was the case. 46 in-depth semi-structured interviews were conducted with defendants who had experienced pre-trial detention before in Hong Kong. Hong Kong continues to operate under the "one country, two systems" framework where its legal system and laws from its colonial era remain largely intact, including the presumption of innocence, notwithstanding its handover back to the sovereignty of the People's Republic of China in 1997. The interviews reveal that the conditions of the remand centre in Hong Kong are difficult for defendants, being remanded has adverse effects on detainees' employment and family relations, and how for many defendants, prison is considered as the better option. The findings demonstrate that pre-trial detention is viewed as more punitive than the eventual sentence and possible implications are discussed.

Dejana Radisavlevic (Sheffield), 'International Punishment and Public Perception: Who is to blame for persistent denialism in the former Yugoslavia?'

This paper is concerned with the public perception of the sentences rendered by the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the persistence of denial. in the local media and rhetoric of the political elite in the states of the former Yugoslavia. This is a particularly important subject in international criminal law and sentencing in view of the imminent closure of the ICTY at the end of 2017 and the need to consider what lessons can be learnt for future ad hoc courts and the International Criminal Court.

As this paper will argue, despite numerous convictions, lengthy sentences and Outreach efforts of the ICTY, all ethnic communities in the former Yugoslavia remain unconvinced of the truth established by the ICTY. This is evident in the persistent and open denial of responsibility shared by all communities. This paper will look at the sentences of the ICTY, focusing particularly on the punishment of high-profile individuals, and expose the negative perceptions of the public in the States of the former Yugoslavia, ultimately exploring with whom lies the responsibility for these perceptions and the continued denial.

Whilst public perception of the ICTY has received a lot of scholarly interest, the question of responsibility for negative public perceptions particularly when it comes to sentencing, remains understudied. This paper will fill the gap in the literature and will include the perceptions of key officials from the ICTY, tasked with communicating the tribunal's sentences to the local public, including their views on the responsibility of local actors. This paper will argue that the biased coverage by the local media and the inflammatory rhetoric of the political elite have only strengthened negative public perceptions of the ICTY's sentencing practice. These local actors, it will be argued, must also bear their share of the burden for the continuing negative perceptions and denial.

The ultimate aim of the paper is to inventorise the lessons learnt from the ICTY for future international courts, which may be particularly important for the Kosovo Specialist Chambers, as it works in much of the same political climate and societal polarisation.

## Friday 7th April (12:00-13:30)

Jay Gormley (Strathclyde), 'Guilty Plea Discounts in Scotland: what can be legitimately expected?'

In common with other adversarial jurisdictions, in Scotland most criminal cases result in a Guilty Plea at some stage (about 90%). This means that Guilty Plea Discounts are potentially applicable to the vast majority of cases and that most accused persons and defence lawyers will have to consider this when deciding how to plead. Within Scotland there have been several projects intended to reduce the pecuniary costs of criminal justice by increasing the number of earlier Guilty Pleas. Given the limited evidence available, much of this work has assumed that Sentence Discounts are the best (perhaps only) way to promote these early Guilty Pleas. For example, a 2004 report to Ministers notes that 'a clear and well understood system of discounts is likely to result in early pleas in a significant proportion of cases which currently plead at or shortly before the trial'.<sup>1</sup> Yet, in Scotland there has been little exploration of the role Sentence Discounts play in plea decision-making. This is surprising as there are a myriad of reasons an accused might plead guilty. How a potential discount interacts with these other factors is something my own research will explore.

The belief in the merits of Sentence Discounting have resulted in section 196 of the Criminal Procedure (Scotland) Act 1995. This requires that guilty pleas be considered when passing a sentencing. Yet, requiring a guilty plea to be considered, does not necessarily require a Guilty Plea Discount to be given. When a discount may be given has been the subject of debate in several cases. However, the most recent "Guideline Judgment" on the matter stressed that Guilty Plea Discounts in Scotland are discretionary and that an accused has no entitlement to a discount (*Gemmell v HM Advocate* [2011] HCJAC 129). This leaves an accused (and their lawyer) in a difficult position regarding assessing the advantages and disadvantages of pleading guilty. They may plead guilty at the first possible stage and receive a large discount, or they may receive no discount. Both results are possible under the law.

It is somewhat surprising that debate on Sentence Discounting in Scotland, and indeed elsewhere, has not focused more upon what an accused can expect, and should be entitled to expect when pleading guilty. The reason this is surprising is that the law typically assumes accused are rational decision makers. Indeed, this assumption of rationality is necessary for the argument that the presumption of innocence is not violated by Guilty Plea Discounts (i.e. the argument that an accused would not surrender their right to trial unless they were guilty and the Sentence Discount benefited them). For now, the question of what is "rational" can be stayed: though it can be noted that legal actors may have an essentialist concept of rationality that accords with their own habitus, and that this is not necessarily the same as that accused persons (who generally have vastly different life experiences).

Thus, one question to explore here is whether, in the light of substantial indeterminacy, accused persons are provided with enough knowledge to fulfil the rational decision maker role that the law presumes they play. If they are not, then this raises serious normative challenges regarding the fairness of Guilty Plea Discounts. A second question is what the reality of Sentence Discounting in Scotland is. While legally it is a discretionary matter, this does not necessarily mean it incoherent. Discretionary decisions can be patterned by a variety of factors. Thus, Sentence Discounts in Scotland may actually be relatively predictable.<sup>2</sup>

If Sentence Discounts are not predictable, then this poses a number of normative and practical issues. If they are predictable then questions can be raised regarding whether discounts could be clearer, 3 and whether there should be some entitlement to a discount.

1 <http://www.gov.scot/Publications/2004/03/19042/34191>

2 I am undertaking fieldwork from February and hope to have some interim results to share.

3 For example, in Scotland there are no “Goodyear sentence indications” of the kind that exist in

England and Wales.

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Eoin Guilfoyle (Limerick), ‘What exactly is a Community Service Order in Ireland? An important question that has yet to be answered’

The negative effects of a prison sentence are well documented as is the extremely high financial cost of keeping a person in prison. This has led many jurisdictions around the world to search for ways to try to reduce the use of imprisonment. In Ireland the community service order (CSO) has been the primary tool used by policy makers in attempting to achieve this reduction. The CSO was first introduced in 1983 and over the years numerous attempts have been made to try to increase and expand the use of the sanction. Despite these efforts, however, the use of the CSO remains relatively low and the high use of short term prison sentences continues to be a major concern for policy makers.

Since its introduction in Ireland there has been a significant degree of uncertainty and confusion surrounding the CSO. This uncertainty and confusion has not only failed to dissipate over the years but has in fact increased. It will be shown in this paper that it is now a significant contributing factor to the low and inconsistent use of the CSO as well as being a major obstacle for policy makers, academics; and the wider public when discussing the abilities of CSOs and when debating the future of the sanction.

This paper will begin by identifying the root cause of the uncertainty and confusion that has surrounded the CSO and by showing how it has grown over the years. The focus of the paper will then turn to overcoming, or at least reducing this problem. It will seek to do this by providing clarity as to what a CSO actually is in Ireland. While this may seem like a straightforward task it is one that has yet to be performed. The paper will identify and focus in on the core structures of the CSO. Doing so will not only provide clarity as to what the CSO actually is and what it is designed to do but will also make it easier to identify and assess the potential abilities of the CSO as well as the limitations and boundaries of the sanction. Doing this is vital in order to provide a solid basis for future discussions about the CSO and the role the sanction can play in reducing the use of imprisonment in Ireland.

Darren McStravick (Dublin City University), 'Broadening the Rights of Stakeholders through a Restorative Justice Approach to Crime: an Irish perspective'

The notion of human rights protection within the conventional criminal justice system usually concentrates on procedural rights for stakeholders in and around the criminal trial itself. Within the written Irish Constitution, these fundamental rights are clearly defined. For example, Article 38.1 states that 'no person shall be tried on any criminal charge save in due course of the law' while Article 40 further outlines fundamental personal rights including Article 40.1 which states that 'all citizens shall, as human persons, be held equal before the law'. Furthermore the Criminal Justice (Victims of Crime) Bill, recently published in December 2016 in order to transpose into Irish law Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, offers added protections within the Irish jurisdiction

While such rights are fundamentally important in safeguarding freedoms, including the right to silence and the presumption of innocence, it should be further recognised that a broadening of the rights discourse is required when attempting to solve criminal conflicts. These additional rights, which I have classified as 'restorative rights', have been identified as part of a three year research study of two Irish based restorative reparation panel schemes managing adult offenders. The broadening of criminal justice based rights was identified through inclusive dialogue between stakeholders, equal participation in case deliberations, a burgeoning relationship between criminal justice professional and community representative actors and an added emphasis on restorative principles. These principles included an individualised social care ethos which prioritised welfare concerns and rehabilitative and re-integrative options for participating offenders. Such an approach, allied with an emphasis on full accountability and reparation for any harm caused by the offence, can prove an example for other restorative models in the future.

# Sexual Offences and Offending

NB: this session will be held in the SU Kate Adie Room

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Anneleise Williams (University of the West of England), 'Cross-Examination of Complainants and Defendants within Rape Trials'

How rape complainants and defendants are being cross-examined is a largely under-researched area. Despite reforms in the last two decades, literature suggests very little has changed in how the criminal justice system responds to rape complainants. As such, this study seeks to provide an understanding of the process of cross-examination for complainants and defendants within rape trials, as separate phenomenon but also comparatively. It examines the content and style of cross-examination questioning for both complainants and defendants, and other interrelated practices, such as special measures. For this study, eighteen English rape trials were observed and contemporaneous notes were taken for thematic analysis, which is still on going. A theme that is beginning to emerge from the data is 'welfare', and this will form the basis of the conference presentation and discussion. How the court enables complainants and defendants to feel comfortable and able to deliver their best evidence during cross-examinations is an important consideration. Observations found special measures to be widely implemented for complainants. Improvements could still be made, for example ensuring a complainant's first choice of measure is available in all courtrooms. Also, most complainants were informed on their choice to take breaks and to sit or stand, as they felt most comfortable. Defendants were not always informed of such choices. How the court accommodated for the different emotions expressed by complainants and defendants when being cross-examined varied. Furthermore, the barristers' approaches to cross-examination varied from conversational to confrontational, when considering the complainants and defendants as distinct and comparative groups. The trial observations have already highlighted areas of good practice and potential improvements to the cross-examination process. Progress still needs to be made on this PhD research, but new insights are beginning to emerge and should be discussed.

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Susan Leahy (Limerick), 'Irish Sexual Offences Law reform: An Assessment of the Criminal Law (Sexual Offences) Bill 2015'

The Criminal Law (Sexual Offences) Bill 2015 is a much-awaited addition to Irish sexual offences law. The last significant legislative activity in this area were the Criminal Law (Rape) Act 1981 and the Criminal Law (Rape)(Amendment) Act 1990 which represented the Irish legislature's first attempt to legislate in this area. Unfortunately, since then, Irish sexual offences law has remained largely untouched, apart from some ad hoc and often reactionary reforms such as the Criminal Justice (Sexual Offences) Act 2006 which responded to the problems which arose when the existing statutory rape laws were declared unconstitutional by the Supreme Court.

This paper considers the Bill, highlighting the improvements which it will make to the law in this area and, perhaps more importantly, the idiosyncrasies and shortcomings of the current law which it fails to address. In particular, the paper will consider Irish debates surrounding the introduction of a legislative definition of consent in the Bill with reference to the

experience of other common law jurisdictions who have already introduced similar definitions.

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Phil Rumney, Duncan McPhee and Rachel Fenton (University of the West of England), 'A Comparative Analysis of a Specialist Rape Investigation Unit'

Most police forces in England and Wales make use of specialist rape or sexual assault investigation units. Yet, there is little robust research concerning the impact of such units or their efficacy compared to a non-specialist policing response. This paper is based on the results of an analysis of 441 police case files involving a specialist rape investigation unit (Operation Bluestone) and a comparator non-specialist policing area. The case file data comprises all rape investigations conducted over a two year period. The research sought to examine the progression of recorded cases through the criminal justice process, case characteristics, victim care and support, vulnerability and crime recording. Analysis of the case file data found that the Bluestone unit outperformed the comparator across a range of performance measures. This was despite the fact that Bluestone investigations featured a larger number of highly complex cases and victims with multiple vulnerabilities. Finally, the paper considers the implications of these findings for the future of specialist rape and sexual assault investigation units.



# Social Rights, Citizenship and the Welfare State – Abstracts

NB: all sessions will be held in the SU Martin Luther King Room

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## Wednesday 5<sup>th</sup> April (13:30-15:00)

Edward Kirton-Darling and Helen Carr (Kent), “Tommy this and Tommy that”: welfare, the homeless veteran and citizenship’

On 25 April 2016 the body of Philip Fox, a sixty year old homeless man, was discovered in a tent on a retail park on the outskirts of Canterbury, Kent, UK. There was something more to his death than the everyday tragedy of the premature mortality of the street homeless. As the front page of the Kent Gazette on 20th May 2016 revealed, not only had he been shot and killed some nine months earlier but he was also, ‘an ex-soldier refused a place on the council’s housing register.’ The implicit rebuke is both long-standing, as the reference from Kipling illustrates, and contemporary: In the 1990s research suggested that 25% of the rough sleepers in London were former members of the armed forces. The findings prompted a series of high profile campaigns to urge central and local government and the charitable sector to understand and respond to the problem. The argument we suggest is potent; the street homelessness of veterans demonstrates that the state has failed to protect and provide for those who have served it and are therefore deserving of its support.

The inclusionary work that the state does – and has been made to do – to recognise and address the welfare claims of veterans provides the context for this paper which aims to make a distinctly socio-legal contribution to the emerging scholarship on the relationship between military and civilian life. Drawing upon Cowen’s ground breaking work (Deborah Cowen, *Military Workfare: The soldier and social citizenship in Canada*, University of Toronto Press, 2008) and the authors’ research into practices of London local authorities, the paper seeks to make visible the complex and gendered relationship between social citizenship and the military that has existed from the origins of welfare to the present through the lens of homelessness. The argument we make is that there is something important to be learned about the co-construction of welfare and the veteran that, as Cowen argues, ‘yield new ways of understanding our present and past’ and, in particular, ‘helps us rethink social citizenship and social obligation in neoliberal times’.

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Kate McCarthy (Chester) and Tola Amodu (UEA), ‘Confining that sole and despotic dominion? Private Landlords as Proxies for Government Actors and Implications for Tenants under the “Right to Rent” Legislation’

Part 3 Immigration Act 2014 establishes a new regime where private landlords may incur penalties if they allow those disqualified, by reason of immigration status, to reside in a property as their only or main home. Known colloquially as the “right to rent”, the regime is one of a series of measures adopted by Government having the stated aim of combatting illegal immigration. Before letting a residential property, checks on prospective tenants’ immigration status must be carried out. If they are not, landlords may incur both civil and criminal penalties.

By harnessing the resources of private actors, the regime makes private landlords ‘proxies’ for immigration officials and effectively co-opts them into the public regulatory space. The provisions, which cover not only leases, but licences, sub-leases or sub-tenancies (s20(3)(a) of the 2014 Act) therefore encompass many occupation types including various forms of

tenancies as well as informal lodging situations. The provisions are designed to prevent illegal immigrants from occupying property in the private rented sector and arguably from developing a 'settled' life, a prerequisite for idea(l)s of citizenship. Protections are stated to be included in the legislation in order to prevent discriminatory activity in the sphere of private lettings, however whether such protections are effective is an issue in need of further investigation. The paper will examine how shifting understandings of property law using the lens of Blackstone's Commentaries have resulted in denying certain members of society what must be considered one of the most fundamental human rights.

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Dave Cowan and Alex Marsh (Bristol), 'A perennial problem? On underoccupation in English council housing'

Addressing the issue of underoccupation has been a prominent feature in English housing policy since the Conservative-Liberal Democrat Coalition government was formed in 2010. A key move under the Coalition's welfare reform agenda was the implementation of the underoccupancy penalty – the so-called 'bedroom tax' – from April 2013. However, this was not a novel policy preoccupation. Variations on the theme have recurred at the core of housing policy almost since the advent of council housing. This paper presents an institutionalist analysis of four episodes in the history of English housing policy: the inter-war period; the 1960s; the 1990s-early 2000s; 2010-. It argues that, while concern for underoccupation recurs under very different housing market conditions, each policy episode is distinctively different at different levels. Not only does the broader policy context – the purpose of social housing and the role it fulfils in the housing market – differ sharply between episodes, but at the more detailed level of policy instruments the mechanisms proposed to address underoccupation differ in ways that are explicable in terms of prevailing policy logics. Most significantly, in each episode the nature of the underoccupation problem is framed differently: the rationales offered as justification for policy action to address the problem draw on very different vocabularies, in ways that allow us to trace the influence of more fundamental shifts in policy discourse into the domain of housing policy.

## Wednesday 5<sup>th</sup> April (15:30-17:00)

Paul Hunt (Essex), 'Is it time for a code of non-justiciable social rights?'

There is evidence of public support for the idea of social rights. Also, the UK has ratified numerous legally binding international human rights treaties that include social rights. Yet their public visibility within the UK is extremely limited. Social rights advocates often prioritise the incorporation of these rights into domestic law and their enforcement before the courts. However, the likelihood of this happening in the foreseeable future appears to be remote. This paper explores the proposal for a non-justiciable social rights code, not as an alternative to, but as a step towards, justiciable social rights. Is the call for a non-justiciable social rights code, which could be accompanied by non-judicial mechanisms of accountability, such as within national human rights institutions, a promising way of introducing the public, as well as progressive politicians and policy-makers, to the empowering potential of social rights?

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Egle Dagilyte (Anglia Ruskin) and Margaret Greenfields (Buckinghamshire New University), 'The 2013–2014 welfare benefits reform in the UK: What impact on Roma migrants who are European Union citizens?'

The 2013–2014 welfare benefits reform, which continues to undergo post-2015 election changes today, has introduced a dramatic reduction of welfare rights for European Union (EU) citizens. A particularly vulnerable and often discriminated group of these migrants are the Roma, who today come to the UK as economic migrants.

This paper will present findings from the research study, funded by the SLSA, that investigated the impact these changes had on UK-resident EU/European Economic Area (EEA) Roma migrants and their families, in particular focusing on the Income-Based Jobseeker's Allowance and Housing Benefit. It will draw on the three focus groups with Roma migrants held in London and Derby, supplemented with the data from the online survey administered to the NGOs and other organisations that advise Roma migrants.

It is an important study which provides real-life evidence for those who make policies and laws on social justice, and will benefit the NGOs that advise migrants. The findings indicate that claiming these welfare benefits can be a daunting process for this migrant group, and refusal of a claim may raise further investigations about their right to reside. This, we observe, is the result of institutional anti-immigration agenda that trickles down from the political elite to administrative bodies assessing welfare benefits claims.

Preliminary findings have been published: Dagilyte, E., Greenfields, M., 2015. United Kingdom Welfare Benefit Reforms in 2013–2014: Roma between the Pillory, the Precipice and the Slippery Slope. *Journal of Social Welfare and Family Law* 37, 476-495 doi:10.1080/09649069.2015.1121954

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Michael Adler (Edinburgh), 'Extreme Poverty in the midst of unrecented affluence'

Using the World Bank definition of extreme poverty, defined as average daily consumption of \$1.25 or less, as of September 2013, roughly 1.2 billion people currently live in extreme poverty. Nearly half of them live in India and China, with more than 85 per cent living in just 20 countries. However, people can also live in extreme poverty in wealthy countries as well. In a recent study, published earlier this year, by the Joseph Rowntree Foundation (JRF) of destitution in the UK, 1,250,000 people of whom 312,000 were children were defined as destitute because they or their children lacked two or more of the following six essentials in the last month: shelter (they had slept rough for one or more nights); food (they had had fewer than two meals a day for two or more days); heating their home (they had not been able to do this for five or more days); lighting (they had not been able to do this for five or more days); clothing and footwear (appropriate for weather); and basic toiletries (soap, shampoo, toothpaste, toothbrush). In my paper, I would like to investigate the existence of poverty in the midst of plenty, what it means for those who experience it and the efficacy of different ways of dealing with it. A possible title could be 'Extreme Poverty in the midst of Unprecedented Affluence'.

## Thursday 6<sup>th</sup> April (09:00-10:30)

Jackie Gulland (Edinburgh), 'The role of the labour market in defining incapacity for work in UK benefits schemes'

Across the twentieth century there has been a concern to get claimants off benefits and 'back to work'. The motivations for these policies range from economic concerns about cutting the welfare bill to more paternalistic ideas about helping people to fulfil their potential, often couched in the language of saving people from the peril of dependency. These discourses usually stress the conviction that 'work is good for you'. This concentration on the value of work has insidious implications, not only for people who are forced into increasingly punitive work-seeking activities as a condition of receiving benefit but also for those who must define themselves as incapable of it in order to gain state support. The discursive effect of this constant repetition of the value of paid work is that people who struggle to find work or who are disabled from the labour market find themselves caught at the centre of this maze.

It has been an established understanding of sickness benefit schemes throughout the twentieth century that labour market considerations, as such, should not be a determining factor in assessing capacity for work. There has always been a concern that sickness benefits should not be used as de facto unemployment benefits and there have been persistent attempts to put clear water between 'unemployment' and 'sickness'. This is clear from policy documents, from case law and from popular discourse. This individualised approach to the problem takes no account of the insights from the social model of disability which would ask us to consider the barriers created by labour markets rather than the perceived individual failings or incapacities of people who are unable to find work.

In this paper, I will use my recent work on the history of incapacity benefits since 1911, to show how legal decision makers have attempted to maintain the illusion that sickness and unemployment can be kept separate. The paper will focus on the development of key case law from the 1950s onwards.

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Camilla Jydebjerg and Freya Semanda (University College Zealand), 'Precarious workfare schemes'

Analyzing the Danish rules concerning activation of people who are receiving unemployment benefits, we argue that activation schemes can be understood as non-standard jobs or precarious work. We further argue that these workfare schemes add to a regime of precarity and accentuates vulnerability.

From the 1990's and onward activation strategies have been introduced in many OECD countries in an effort to combat unemployment. Activation strategies consists of re-employment programs, such as job trails and internships. The goal of activation strategies is to help people to regain entry in to the regular labor market. It can be argued that the labor markets in the same period have become more precarious, the possibilities of standard work with a high job security deteriorating and giving way to a rise in the number of people working non-standard precarious jobs. According to OECD non-standard jobs are adding to economic inequality. We argue that many of the activation schemes designed to help people with access to the regular labor force can be understood as non-standard jobs or precarious work making

it harder for people participating in the schemes to regain entry into standard jobs. We further argue that these precarious workfare schemes risk being contrary to the right to work as laid down in article 6 of the ICESCR, since the right to work, as stressed by the CESCR, entails a right to decent work that enables workers to support themselves and their families.

Drawing on the legal theory of Martha Fineman as well as Isabel Loreys analysis of precarization we argue that the laws regulating activation add to a regime of precarity – a government of insecurity - and thus contra-intuitively accentuates the vulnerability of the people participating in the workfare-schemes as well as in society as a whole.

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Keith Puttick (Staffordshire), 'From Mini to Maxi Job? In-Work Progression and the Duty to Work (Harder)'

Discipline has long been a feature of working life on both sides of the labour-social security interface and at all the key phases of the employment cycle – pre-employment, employment, and post-employment. On the social security side, for example, measures to inhibit leaving work voluntarily or as a result of industrial misconduct have been maintained. Moreover, it has been developing with the 'work readiness' demands of the Work Programme, the Claimant Commitment and work requirements in the Welfare Reform Act 2012, and design features of Universal Credit (UC) intended to 'mimic work'.

More recently, conditionality has been extended to in-work UC claimants seen as not doing enough to reduce their 'dependency' on benefits: more precisely, if they are earning below a prescribed 'conditionality earnings threshold'. Typically this will include low-paid, part-time workers like single parents, carers, and those with a disability or longer-term incapacity (many of whom may have perfectly valid reasons for limiting their availability for work). Subject to some easements, the aim is to expect them to take up longer hours, or better paid work, to the point where their gross earnings align with those of a person working 35 hours per week at or above the National Minimum Wage.

The paper will offer a critique of aspects of in-work progression, drawing on the views of a range of stakeholder groups. It will argue that whilst measures to support progression (and incentivise employers to play their part) are welcome, a lot of aspects of the scheme are not.

## Thursday 6<sup>th</sup> April (11:00-12:30)

Ruth Patrick (Liverpool) and Mark Simpson (Ulster), 'Social citizenship in the Cameron years: a cold climate for claimants, rich terrain for researchers'

Successive governments since the 1980s have sought to rework and in many respects reduce the social rights of citizenship in the UK, culminating in the 'welfare reform' projects of the recent Cameron governments. This period saw an already ungenerous, residual system of working age social security further pared back through cuts to benefit rates, more restrictive eligibility criteria and toughened claimant conditionality. Alongside a self-imposed policy imperative of reducing the public deficit, these reforms were driven by a vision of supporting 'welfare dependents' into paid employment as a mechanism for social and citizenship inclusion. The co-authors have each researched social citizenship in the Cameron years, but from different disciplinary perspectives and with a focus on different actors. Patrick's research, situated within the social policy discipline, examines the experiences of claimants faced with both an increasingly ungenerous, disciplinary system and a related political narrative that can appear to question their worth as citizens. Her findings reveal the ways in which the dominant citizenship narrative can serve to alienate, 'other' and undermine the lives and contributions of those in receipt of out-of-work benefits. Simpson's work, from a socio-legal perspective, focuses on elite actors' constructions of state responsibility for citizens' economic welfare, showing that policymakers at different tiers of government are not necessarily united in their vision for how the welfare state should treat claimants. In discussing both pieces of research, this paper demonstrates the need for a combination of approaches for a full understanding of how the current citizenship narrative is conceptualised by elites, how this translates into a set of legal provisions and how it is lived and experienced from below. The authors consider the insights gained from their respective approaches as well as their associated limitations and invite delegates to join a discussion about whether academic disciplinary affiliations help or hinder the development of a rounded understanding of social citizenship.

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Johanna Cortes Nieto (Warwick), 'Precarization and Fiscal Sustainability in Colombia'

In 2013 the Congress of Colombia passed a constitutional amendment that introduced fiscal sustainability as a criterion which should guide any public decision. It qualified the state's duty to intervene in the economy by subjecting it to a framework of fiscal sustainability. Fiscal sustainability was claimed to be an instrument necessary to achieve the objectives of the social state of law proclaimed in the Constitution - including the satisfaction of social and economic rights (SER) – progressively. The amendment introduced a judicial mechanism which could be activated by the Controller General of the Republic or any Minister in order to discuss the fiscal consequences of a judicial decision adopted by a High Court and, eventually, modulate the injunctions or agree on a plan for future fulfilment, all this without infringing the minimum core of the rights involved. Lastly, the annual national budgets, the national development plans, and the corresponding investment budget were subjected to fiscal sustainability.

The paper is concerned with how fiscal sustainability has been instrumental in the normalisation of precarity as part of a governmental project aimed at governing through insecurity and inequality (Lorey, 2015: 1; Lazzarato, 2009). Fiscal sustainability participates in this project by means of redefining rights – especially social and economic rights - and citizenship on the one hand, and increasing individual responsabilization through a moral demand for shared but individual sacrifice, reinforced by the stigmatisation of “greedy” public employees, pensioners, etc. who refuse to give up the entitlements promised by previous welfare arrangements.

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Konstantinos Alexandris Polomarkakis (Bristol), ‘Enforcing wellbeing, dismantling welfare through taxation? The underlying anti-social rhetoric of “sin” taxes’

The popularity of ‘sin’ taxes is on the rise, with the use of taxation as a new means to regulate public health. By increasing the final price of those products, it is expected that demand would drop in favour of more nutritious alternatives, making unhealthy diets and their repercussions, such as obesity, a thing of the past.

Are such intentions genuinely good and well-rooted, or could they result in as much harm as malevolence, to paraphrase Camus?

This paper argues that in terms of welfare, the consequences of such measures are anything but hopeful. This is primarily based on two overarching factors: the measures’ dubious moral foundations alongside the distortion of the idea(l)s of fairness and social justice. These comprise the underlying anti-social rhetoric of sin taxation, which is more far-reaching than its intended beneficial outcomes.

In terms of their moral foundation, the measures in question assume that a person’s lifestyle is the sole corollary of its wellbeing and welfare, a goal worth pursuing even if it involves coercion. This counteracts the notion of the free development of one’s personality, which is of constitutional value in many jurisdictions. It also echoes the lively literature on coercive healthism, portraying an Orwellian government imposing its own views on its citizens.

From the standpoint of fairness and social justice, the intrinsic regressivity of such measures is crucial, yet, alas, often undermined. Low-income household are the ones hit the hardest through consumption taxes, highlighting the latter’s questionable fairness. There must be less onerous and more socially just ways to promote healthier lifestyles. Otherwise, hunger is at the risk of being advanced as an alternative to unhealthy diets.

To conclude, serious safeguards need to be introduced before implementing sin taxes, for them to be both conceptually justified and welfare respectful at the same time.

## Thursday 6<sup>th</sup> April (14:00-15:30)

Grainne Mckeever (Ulster), 'Overseeing social security law: devolutionary challenges'

This paper outlines the current arrangements for social security oversight in the UK, beyond the standard form of legislative scrutiny to the unique function of the Social Security Advisory Committee, an arms length body with a statutory remit to scrutinise draft social security regulations and provide advice on social security to the UK and Northern Ireland governments. The paper examines the role of oversight in a devolved landscape, where the reach of the Social Security Advisory Committee does not extend to the newly transferred social security powers of the Scottish government or to localised control of decentralised provision. The oversight gaps that emerge have the potential to create adverse, unintended consequences for social security claimants, particularly those moving between the devolved and reserved systems. The paper proposes oversight options to enable system coherence across the UK and promote fairness in the treatment of social security claimants, regardless of their geographical circumstances.

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Jed Meers (York), 'Cut-and-Devolve: Structural and Epistemic Discretion in the Modern Welfare State'

A series of welfare reforms contained within the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016 have reduced centrally controlled welfare expenditure, while pushing the responsibility for their mitigation down to the local level. Those affected by high profile policies, such as the "Benefit Cap" and so-called "Bedroom Tax", are reliant on discretionary forms of mitigation often provided at the Local Authority level, such as the (ballooning) Discretionary Housing Payment scheme.

The problems associated with these discretionary approaches are often dealt with in the academic literature with a focus on the administrative worker or as a problem of policy implementation: the widely utilised theory of Street-level Bureaucracy being an example. Though these approaches garner useful insights, they can serve to neglect these bigger structural problems and how the law fits into them.

This paper argues for an approach to discretion which draws on Robert Alexy's conception of structural and epistemic discretion. By using the "Bedroom Tax" policy as a case study, using data collected from affected tenants and the local authorities tasked with its mitigation, it argues that analysing the structural placement of the discretionary powers and the epistemic obligations placed on key actors, can serve to demonstrate a number of key fallacies in the "cut-and-devolve" approach adopted in the welfare reform agenda.

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Ciara Fitzpatrick (Ulster), 'New Labour 1997-2010: Newer forms of Social Control and the Social Security System'

From its 'new-dawn' Labour made a commitment to rebuild the welfare state around work, where opportunity would be linked with responsibility, and where the 'option of staying on full benefit and doing nothing will seek to exist'. Therefore New Labour understood there to

be a requirement to create 'a new contract between the individual and the state', to counter the growing deference towards authority and the pre-established symbols of such authority. One of the legislative materialisations of this position was Labour's denunciation of 'welfare dependency', and subsequent efforts to eradicate its perceived existence by developing claimant's employability skills, through the use of a series of sticks (benefit sanctions in the circumstance of non-compliance with conditional requirements) and carrots (work incentives). The implementation of greater conditionality was enacted in the context of a rather contradictory approach to welfare administration. On one hand, the government sought to advocate de-centralisation through the development of inclusive policy processes, for example through its emphasis on the community as a viable solution to social problems, and its resolution to allow private sector firms to deliver the 'New Deal'. On the other hand however, its enactment of a more inclusive policy process was matched by the exercise of greater government control over party and government policy resulting in a clear recentralisation of political control, and greater involvement in the administration of social security. It follows that the trend toward using delegated powers in the making of social security legislation continued in earnest, entrenching a legalistic form of administrative control, creating a situation where the rules that determine the operation of the system are prescribed in statutory instruments which often succeed the primary piece of legislation. The resultant trend has been for social security rules to reflect political ideology rather than simply effect efficient service delivery of benefits and associated services to claimants. This paper wishes to focus on the 'newer' forms of social control that New Labour furthered during its time in government. It will focus on the intersections between politics and the development of the law, recognising the reformed interpretation of the Marshallian concept of citizenship and in the process it hopes to progress the contention that governments in western democracies are attributing expanding primacy to individual obligations in the contemporary covenant of citizenship, which in turn triggers a number of wide-ranging implications for the front-line administration of welfare in Britain.

## Thursday 6<sup>th</sup> April (16:15-17:45)

Daniel Edmiston (Oxford), 'Struggles For and Against Social Citizenship in Austere Welfare Regimes: Street-level Practices and Social Rights'

Alongside cuts to working-age social security, increasingly paternalistic approaches to welfare provision have created new modes of control, exclusion and subordination across liberal welfare regimes since 2008. This paper examines what impact these new liminal spaces of marginality are having on the political subjectivity of welfare claimants (Turner, 2016, Edmiston and Humpage, 2016). Specifically, this paper examines whether the shifting praxis of social citizenship has induced a change in how welfare claimants 'constitute themselves as political subjects under sometimes extreme conditions of subjugation' (Tyler and Marciniak, 2013: 149).

In New Zealand and the UK, political administrations have pursued a similar programme of welfare reform and fiscal recalibration that has denigrated the rights, identity and belonging of low-income social security claimants (Edmiston, 2017). These individuals have assumed a new political position as contingent subjects of the neoliberal welfare state. Against this backdrop, there is a need to investigate 'acts of citizenship' that focus on 'moments when, regardless of status and substance, subjects constitute themselves as citizens – or, better still, as those to whom the right to have rights is due...' (Isin, 2008: 18).

Drawing on a qualitative study undertaken in New Zealand and the UK, this paper demonstrates how an incipient welfare settlement of social insecurity has instigated an increasingly insurgent politics amongst welfare claimants. In light of the distinct acts of claims making exhibited, the paper examines the acts of collective (dis) identification that welfare claimants engage in to shape the nature and direction of social citizenship. Both countries exhibit similar institutional responses to 'welfare recalibration' but differ in the degrees and terms of discretion, autonomy and control exerted through street-level practices. The implications of this are considered for welfare administration and the distinct acts of claims-making low-income citizens engage in to defend their social rights.

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Marcello Sacco (Leeds), 'De-politicisation of Human Rights within the European Union: Political, Legal and Social Questions. The Role of the Convention on the Rights of Persons with Disabilities toward a new European Citizenship.'

The paper describes a constant tension between the European Union and its Member States. This derives from overlapping of competences managed by interpreting the principle of conferral as opportunities for the Union to expand its power, together with its democratic deficit.

European Member States try to maintain their sovereignty with regard to several areas of competence. However, the human rights issue seems to be one of the most difficult to be preserved within a national dimension. Therefore, it presents a democratic deficit as well, which becomes evident through its de-politicisation.

This has a simple explanation: European Member States' politicians can choose between less and less options. Three main questions represent this erosion of national power:

1. Legal: the European Court of Justice and its action of constitutionalisation;
2. Political: the use of soft law increases minimum standards and reduces subsidiarity;
3. Social: international networks of experts influence and monitor political choices.

Within this situation, the EU signed the Convention on the Rights of Persons with Disabilities, binding itself to promote the implementation of the treaty by its Member States. How the CRPD can influence the human rights discourse in Europe?

The presentation stresses how the CRPD aligns with the new European governance trend, which could be speeded by a narrow interpretation of the Convention due to two milestones: the anti-discrimination principle and the implementation mechanism.

Official and informal frameworks are effective in every direction and they are delegitimising two pillars of our modern society as borders and democracy, which should to be reconsidered to take advantage of all contemporary human potentialities, avoiding waste of resources and allowing a new equality era to start.

Human rights may offer fertile ground in order to relaunch the idea of a “continental citizenship” in Europe based on people more than economics and trade.

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Boldizsár Szentgáli-Tóth and Michaela Kiripolszky (Eötvös Loránd University), ‘Dual citizenship, simplified naturalization and social rights in Europe’

The Hungarian act on citizenship was amended in 2010, and again in 2013 respectively, both pieces of legislation have facilitated remarkably the acquisition of Hungarian citizenship for those, who has clear link to the Hungarian language and culture.

From a broader European perspective, the Hungarian amendments are relevant from two aspects:

1. Firstly, simplified naturalization is a contested issue also: numerous European countries privilege certain groups during the acquisition of citizenship;
2. Secondly, owing to simplified naturalization, a great number of people have dual citizenship, which is a highly debated status across Europe, especially as far as social rights are concerned;

The relevant Hungarian legislation constitutes only the background of this comparative research, our analysis would contribute considerably to the deeper understanding of current European tendencies as regard dual citizenship, simplified naturalization and the influence of the legal framework of dual citizenship on the prevalence of social rights.

Apart from the relevant constitutional and statutory provisions of the European legal systems, our article would be based on two strands of literature, which are rarely used in this integrated manner. In the one hand, we would rely on such academic contributions, which concentrate on the major theoretic issues, as regard citizenship. In the other hand, a wide range of academic, political and popular reactions to the establishment of simplified naturalization would be considered.

# Socio-Legal Issues in Sport

NB: all sessions will be held in SU History Room

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## Friday 7th April (10:00-11:30)

Claire Sumner (The Open University), 'The Spirit of Sport: The case for criminalisation of doping in the UK'

This paper will be based on an Article recently accepted for publication in the International Sports Law Journal. The paper examines public perceptions of doping in sport, critically evaluate the effectiveness of current anti-doping sanctions and propose the criminalisation of doping in sport in the UK as part of a growing global movement towards such criminalisation at national level. Criminalising doping will be advanced on two main grounds: as a stigmatic deterrent and as a form of retributive punishment enforced through the criminal justice system. The 'spirit of sport' defined by the World Anti-Doping Agency (WADA) as being based on the values of ethics, health and fair-play will be identified as being undermined by the ineffectiveness of existing anti-doping policy in the current climate of doping revelations, and will be assessed as relevant to public perceptions and the future of sport as a whole. The harm reductionist approach permitting the use of certain performance enhancing drugs (PEDs) will be considered as an alternative to anti-doping, taking into account athlete psychology, the problems encountered in containing doping in sport through anti-doping measures and the effect of these difficulties on the 'spirit of sport'. This approach will be dismissed in favour of criminalising doping in sport based on the offence of fraud. It will be argued that the criminalisation of doping could act as a greater deterrent than existing sanctions imposed by International Federations, and, when used in conjunction with those sanctions, will raise the overall 'price' of doping. The revelations of corruption within the existing system of self-governance within sport have contributed to a disbelieving public and it will be argued that the criminalisation of doping in sport could assist in satisfying the public that justice is being done and in turn achieve greater belief in the truth of athletic performances.

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John O'Leary (Anglia Ruskin), 'Criminalising Doping in Sport; A Gramscian repost'

This paper presents two arguments. The first examines the growing momentum behind the desire to criminalise doping in sport. It argues that there are three fundamental difficulties with criminalising such behaviour. They are the constitutional, the contractual and the conflict arguments which either in concert or alone provide a logical philosophical and legal rebuttal to the idea that doping in a matter for criminalisation. This part concludes that the arguments against criminalisation are so overwhelming that it becomes necessary to endeavour to frame, in theoretical terms, the substance of the movement in favour and how the illogicality can be countered effectively. The second argument proposes a Gramscian interpretation of the movement towards doping. It argues that the momentum can be defined in terms of cultural hegemony and attempts to identify ways of combatting and countering prevailing 'wisdom'.

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Jack Anderson (Queen's University Belfast), 'A game-changer: player-led negligence, litigation in contact sport'

Legal commentary on concussion in sport has tended to focus on the “acute” and the “elite”. The “acute” relates to the debate, led by physicians, as to the effectiveness of pitch side medical protocols used immediately to assess whether players (in a contact sport such as rugby) who have taken a head knock should continue or be stood down.

The legal implications are that if the medical protocols in question are not being enforced properly and players returning prematurely to play, or the protocols are not fit for purpose in the first place and are below reasonably prudent standards in general medical practice, then a vulnerability to negligence based claims from injured players arises. In such claims, a combination of the player’s club, team doctor, the referee, the national federation and even the international governing body could be named as a defending party.

The “elite” refers to the fact that the resourcing and provision of advanced pitch side assessment protocols, can apply only at the elite level of contact sports. In rugby union, for example, such facilities will never, for reasons of resourcing, be available to the vast, “plebeian” majority who play the sport as amateurs. And yet the brain does not distinguish between an injury sustained from a tackler who is paid to do so and one that is given gratuitously. This leaves sports governing bodies – the focus here is on rugby union – susceptible to the criticism that their medical and regulatory response is limited to assuaging the problem at the elite level. What can the governing bodies of sports such as rugby do to mitigate their exposure to litigation by retired rugby players suffering from the effects of cumulative concussive injuries?

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Alexandra Bohm (Lincoln), ‘Tort law and cycling: cycle helmets and magnitude of risk of harm’

This paper examines tort law aspects of cycling as a hobby rather than a competitive sport, on the assumption that one of the goals of any sport is to encourage the uptake and spread of the activity in question. This is particularly the case with cycling given that it is a healthy, environmental mode of transport, and successive governments have committed themselves to the promotion of cycling.

Cycling helmet use is not mandatory in the UK, but damages to cyclists injured in road collisions have been reduced for contributory negligence when the cyclist was not wearing a helmet and insurers routinely agree to a reduction in damages payable to a non-helmeted cyclist.

For contributory negligence to be a successful defence, the cyclist must have been negligent themselves, ie fallen below the standard of behaviour expected, and that negligence must have contributed to the harm suffered. This paper argues that a cyclist who rides without a helmet has generally not fallen below the standard of care required of them. Thus, the lack of a helmet should not be considered to be contributorily negligent on the part of the cyclist. In order to make this argument, the paper considers the factors relevant in deciding whether someone has fallen below the standard of care, focusing on the assessment of the magnitude of risk of harm. The paper explores safety data to argue that wearing a helmet actually increases the risk to cyclists in many cases, so it is a reasonable - non-negligent - decision for a cyclist to not wear a helmet.

The paper concludes that law reform proposals designed to increase cyclist safety and promote cycling should not seek to make cycle helmets compulsory but should instead focus on questions such as lighting or the possibility of a strict or presumed liability regime.

## Friday 7th April (12:00-13:30)

Beverley Williamson (Newcastle), 'The Rise and Fall (and Rise and Fall) of London Welsh: how the cartel is crushing Championship Rugby'

In the paper, 'Premiership Rugby Union: through the antitrust looking glass', the issue of central funding and Premiership shares, inter alia, were considered in the light of London Welsh's assent to the Premiership for the first time in the club's history.

This paper seeks to consider what happened following that initial dalliance with top flight rugby that ended with the club coming perilously close to closing its doors forever, by building on the position in that earlier paper that Premiership Rugby Union in the U.K. is operated in a fundamentally anti-competitive way to the significant detriment of Championship rugby.

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Simon Boyles and Tom Lewis (Nottingham Trent), 'Sport and Political Speech: Poppies and Protest'

The recent decision of the FIFA Disciplinary Committee to sanction the home nations football associations for breach of political speech prohibitions by displaying poppy symbols on their teams' shirts highlights a number of contemporary issues at the intersection of sports regulation and human rights.

Most high-profile freedom of expression claims tend to focus on restrictions imposed by the state rather than, as in this case, a sector-specific non-governmental organisation. Similarly, the restrictions on the expression in question are often generally applicable, not limited to a particular context.

As such the case raises important questions as to nature and extent of the interaction of human rights provisions - notably Article 10 ECHR - with the self-regulatory schemes operated by sports governing bodies.

This paper seeks to assess the applicability and application of human rights provisions to sport through the lens of this dispute, in particular focusing on the mechanisms by which, if at all, those sanctioned are able to access human rights protections.

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Mark James (Manchester Metropolitan University), 'Understanding ticket touting – creating a typology to enable the more effective regulation of the secondary market'

The secondary market in tickets to sport and entertainment events continues to grow without any significant regulatory control. Access to this market, whether as purchaser or vendor, has been facilitated by easier access to the internet, the growth of sales and auction websites and in some cases the use of sophisticated purchasing programmes, known as bots. Despite repeated calls for regulation from primary rights holders and fans' groups, government has continued to see the operation of the secondary market as an example of entrepreneurship rather than an activity in need of regulating or, potentially, criminalising, as has occurred in professional football.

Secondary market transactions are commonly referred to as 'ticket touting', an activity long-associated with sport and entertainment events in the UK. Despite the longevity of the activity, however, there is no universally accepted definition of ticket touting, making it difficult to define and apply laws that seek its regulation. The multiple meanings of ticket touting have resulted in a confused legal response that can result in actions in fraud, breach of contract, consumer protection, conversion and trespass. As part of a wider project examining the evolution of ticketing and touting, this paper provides an emergent typology of ticket touting. By distinguishing more specifically the range of activities that are commonly referred to as ticket touting, a more coherent response to the regulation of the secondary market can be developed.

# Systems Theory Thinking

NB: all sessions will be held in Barbara Strang G33

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## Thursday 6<sup>th</sup> April (16:15-17:45)

Dave Cowan (Bristol) and Sally Wheeler (Queen's University Belfast), 'Liquid times: Re-imagining corporate and social futures'

In this paper, we address the question, how might our separate field be re-imagined through the Bauman lens in his classic book, *Liquid Times* (2007). We argue that Bauman's influence has been differentially distributed between our fields, for no apparent reason, other than the particular theoretical peccadillos of the field itself. Or, perhaps, the reception of Bauman's work is predicated on the focus of the field itself, whether it be on processes of government or authoritarian but non-governmental regimes.

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Jiří Příbáň (Cardiff), 'Liquid Power and Legality'

Zygmunt Bauman defines liquid power as the art of escape and disengagement from all forms of social responsibility. Liquidity marks the disintegration of social networks and institutions of collective action such as the state and democratic party politics. The current rigidity of social systems consists of the paradoxically stable imperative to get rid of all social bonds and networks that may prevent the processes of the ever-growing liquidity of modern society. It is the world of 'togetherness dismantled'. The liquid art of escape transforms into the politics of fear, uncertainty and common anxiety. Safety policy and laws become a dominant form of political discourse and deliberation in the risk-prone liquid society. The population's perpetual demand for public safety feeds on the perpetual supply of liquid uncertainty and its political manipulation and abuse.

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Kenneth Veitch (Sussex), 'Ties, Bonds, and Obligations – Reflections on Zygmunt Bauman's Liquid Modernity'

A core theme of Zygmunt Bauman's *Liquid Modernity* is the idea of the steady weakening of the types of ties or bonds prevalent in the solid phase of modernity and their replacement with a life of risk, insecurity, and uncertainty, in which 'the burden of pattern-weaving and the responsibility for failure [falls] primarily on the individual's shoulders.' Thus, for example, the mutuality of dependence between capital and labour has been replaced by flexible employment and short-term contracts; capital flight severs the kind of local ties that previously embedded it within particular communities or nation states; the entry of private concerns into public space fails to render them public issues thereby impeding the production of notions of a common good.

This paper explores the theme of ties and bonds in Bauman's *Liquid Modernity* and offers some reflection on how this plays out in some areas of contemporary social policy and the welfare state. What types of bonds are discernable in these domains today? And what forms of obligation – a category whose meaning is grounded in the idea of ties/links/bonds – can be detected in those fields?

## Friday 7<sup>th</sup> April (10:00-11:30)

Emma Patchett (Kate Hamburger Kolleg), 'The European Spatial Imaginary: Human Rights Law, Deconstruction and Autopoietic Theory'

This paper seeks to put forward a distinctive reading of systems theory, by attending to the deconstructive critique of autopoietic theory, and in turn, encountering Luhmann's own perspective on postmodernism. Taking autopoietic theory beyond and through deconstruction enables this paper to engage with kaleidoscopic legality across the European space under the closed system of the European spatial imaginary, as it is defined through human rights law. Engaging with the production of space challenges definitions of the limit point and invites new questions about contemporary structures of openness, organisational closure and mutual specification. Such a perspective demands a new way of thinking about the spatio-temporal dimensions of the law and the construction of a closed system, and its imagined borders.

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Immaculate Motsi-Omoijade (Warwick), 'Systems Theory, Autopoiesis and the Reflexive Regulation of Cryptocurrencies'

Systems theory and autopoiesis form the bases of reflexive law as developed by Gunther Teubner. This paper argues that the consideration of autopoiesis provides the most effective means to adequately understand and analyse cryptocurrency markets and, subsequently, that reflexive regulation provides a regulatory response best suited to cryptocurrencies. Cryptocurrencies, such as Bitcoin and Ethereum, are a form of digital and virtual currency exclusively generated and transmitted online. In this way, they simultaneously straddle the spheres of technology, commerce and finance. The regulatory trilemma is well-evidenced in their oversight as seen by, for example, the conflicts in legal definitions surrounding cryptocurrencies where different jurisdictions classify them concurrently as money, property and/or commodities. Failure to adequately regulate cryptocurrencies, which present the threats of money laundering, terrorist financing, the purchase of illegal goods and services over the dark web and more increasingly, ransomware, highlights a need to further consider more jurisprudentially what they are and how they operate. This paper will present a brief overview of cryptocurrencies before presenting autopoiesis and systems theory as a means to understand and position cryptocurrencies. Here, the shortcomings in the regulation of cryptocurrency, highlighting the "limits in the scope of legality" will be presented before arguing for the need to understand the unique operational closure and cognitive openness of the cryptocurrency system as a distinct autopoietic system and how these characteristics should inform their regulation. Here, reflexive regulation will be presented as a viable option before concluding by examining how the advent of cryptocurrency presents an opportunity and a call for self-reflexion within the legal system through autopoiesis which allows legal structures to "reinterpret themselves ... in the light of external needs and demands" and, in so doing, enables them to retain their distinctively legal character without losing a broader social sciences perspective leading to a "rematerialisation of the law" into a new form.

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Karen Richmond (Strathclyde), 'Streamlined Forensic Reporting and Legal Autopoiesis'

Many of the studies which attempt to explore the boundaries of the legal system focus on the potential for improved interdisciplinary communication to diminish barriers and to enhance the mutual understandings of otherwise unrelated disciplines. Such approaches are frequently encountered in discussions relating to the consumption of scientific truth claims by the criminal justice system. The Ministry of Justice, for example, speaks of the need to move beyond a 'so-called system which operates in silos' towards an effective multi-agency partnership.

However, from an autopoietic perspective, the impulse to reconcile the truth claims of agents from competing disciplines - each grounded in its own epistemological traditions - may be seen as conceptually flawed.

This presentation uses Luhmann and Teubner's theory of legal autopoiesis to explore cross-boundary relations between the legal and scientific sub-systems. It focusses on the introduction of Streamlined Forensic Reporting in England and Wales (a non-expert form of forensic reporting which restricts forensic DNA reports to a 'match' or 'non-match'). This new form of inexpert inter-disciplinary communication provides a useful opportunity to explore the ways in which certain non-legal discourses are deemed capable of reproduction within the legal sub-system, whilst others are disqualified.

The presentation will demonstrate that, in cases of interdisciplinary competition and conflict, the dominant sub-system retains the power to impart normative meanings onto outgoing messages. Further, that meaning depends on context and that context is provided by the set of possible messages from which the resonant input is selected. Thus, in order for the legal system to shape the meaning of potentially disruptive scientific communications, that system must limit the set of possible messages from which the context of the report is selected. It achieves this by constraining expert input into the streamlined reporting process. The presentation will thereby attempt to demonstrate that the SFR scheme provides the legal system with the ideal means to reformulate and reconstruct forensic discourse, at the point at which that discourse threatens to import a penumbra of 'unhelpful' meanings and difficult contextual choices into the courtroom.

# Transnational Organized Crime

NB: all sessions will be held in the Percy G10

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## Friday 7<sup>th</sup> April (10:00-11:30)

Michael Woodiwiss (University of the West of England), 'Double Crossed: The Failure of Organized Crime Control'

Most people accept a history of organized crime that was made in the U.S.A. and given to them through the popular media. This focuses on the vision and organizational ability of gangsters like Al Capone, "Lucky" Luciano, and Meyer Lansky creating criminal dynasties. Organized crime was eventually made synonymous with a small number of giant, hierarchically organized criminal groups, most notably the Mafia. This paper makes those who constructed organized crime mythology central to its narrative rather than the alleged abilities and vision of career criminals, whose abilities and vision were, in reality, minimal.

Most governments and commentators, usually portray organized crime as a threat to rather than a part of society. This assumes that the only answer to the problem of organized crime involves following America's lead and increasing the law enforcement power of every individual nation state and, since many of these organizations are known to operate globally, increasing the collective power of the international community. An issue that should involve a thorough re-examination of each nation's laws and institutions and the constraints put upon the making of policy by commercial interests and misguided international commitments has therefore been reduced to a good versus evil equation that admits only one solution - give governments more power to get gangsters and those associated with gangsters. This "solution" has so far given the world a proliferation of entrepreneurial gangster networks, including many formed in prisons, and a virtual carte blanche for organized criminality within business and financial systems. The paper details the negative effects of poorly thought through organized crime control policy and suggests an alternative model of organized crime analysis which would allow the development of more productive organized crime control policies.

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Oriola Sallavaci (Anglia Ruskin), 'Strengthening Transnational Cooperation in Combating Terrorism and Organised Crime: Prüm Network of Data Exchange'

During the past decades, the EU member states as well as other countries in the world have increased their efforts to achieve a closer cooperation in combating terrorism, organised crime and illegal immigration. Prüm network was established to provide mechanisms and the infrastructure to achieve these goals through the cross border exchange of DNA profiles, fingerprints and vehicle registration data. Prüm network simplifies intelligence gathering and increases criminal detections - particularly regarding organised crime and terrorism. It provides for efficiency gains in international searching and a more efficient response by law enforcement agencies. It increases the resolution of cold cases and provides the only cross border mechanism in the EU for detecting volume crime. However Prüm continues to present challenges of a technical and scientific nature as well as legal, ethical and socioeconomic concerns. In order to maximise its potential, it is important to enhance the necessary dialogue and cooperation between member states so as to address challenges posed by Prüm through balanced measures. Such measures could include additional safeguards as to the type of data exchanged and data protection, further technological improvements as well as an increased

awareness of Prüm capabilities and of national legislation that impacts on the Prüm process through training and education. The gap created by the lack of implementation by some Member States need be addressed as the duality of data exchange methods jeopardises the Prüm system by draining resources. An EU level oversight of Prüm, greater transparency and accountability, alongside the harmonisation of national legislations on DNA retention and of safeguards on fundamental rights protection, would enhance the trust and dialogue necessary for transnational cooperation.

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Dawn Sedman (Oxford Brookes), 'Transnational Criminal Organisations and Human Rights'

A paper jointly written with Prof. Math Noortmann (Coventry): Transnational Criminal Organisations and Human Rights are in a dialectical relationship. Organisations can be subjected to criminal investigations and criminalisation, while they at the same time are protected by such rights as the right to association and free speech. While historically the successful criminal prosecution of organisations is rare, the criminalisation of organisations (and its members) is more common, for example biker gangs or armed opposition groups. This paper will examine the extent to which criminal organisations are considered, first of all, to commit crimes and what legal framework exists to investigate and prosecute, as well as the question of what kind of accountability is there for criminal organisations committing human rights violations.

## Friday 7<sup>th</sup> April (12:00-13:30)

Andi Hoxhaj (Warwick), 'The European Union's Fight against Corruption in the Balkans'

Since the successful integration of the Central and Eastern European states into the European Union, the EU is trying to make the same success in the Western Balkans. However, the widespread level of corruption, long-standing ethnic disputes, hybrid democracy, weak civil societies and the failure of EU policy in the integration of Bulgaria and Romania, have created many barriers to the policy's success. The paper objective is to discover why the European Union's enlargement policy integration in Western Balkans has not been nearly as successful in the Central and Eastern European states. At the core of the enlargement policy is to create democratic institution and the rule of law. The paper will argue that the countries of the Western Balkans that have more constructive relations with the European Union, engages more their citizens to tackle corruption, implements good economic governance, have constructive cooperation with political parties and clear political incentives have the greatest rule of law acceptance. By looking at the case of Albania and Romania, this paper will determine and access the various rule of law institutions, such as the independence and efficiency of the judiciary, the efforts in combating against organised crime and corruption, protection of minorities, the acceptance of international laws and norms recommended by International Organisations. With a combination of data and research provided by the watchdog organisations like the Transparency International, Freedom House, European Commission reports, World Bank reports and several scholars' research, the paper will provide a broad picture of why the enlargement policy has been half-heartedly implemented in the Western Balkans states and why there is an increased need for Inter-Institutional relations.

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Mary Alice Young (University of the West of England), "'Going Down the Glocal": Wildlife Crime in Vietnam'

The prevailing attitude of global law enforcement authorities combined with media hyperbole perpetuates the assumption that the illegal wildlife trade has a synchronic relationship with organized crime and additionally generates huge profits for the individuals involved. The global trade in rhino horn, which is poached, trafficked, sold and consumed as part of a thriving, illicit market, in wildlife products is viewed by many as perhaps one of the most heinous wildlife crimes given that the five species of rhino (white, black, greater one-horned, Sumatran and Javan) are regularly reported as being on the brink of extinction. While many support that a coetaneous contract exists between organized crime and wildlife crime at the general level, there is little to suggest that at the local level, the rhino horn trade in Vietnam constitutes organized criminal behaviour. Borrowing its title from Hobbs (1998) analytical work, which focused on organized crime situated in the local context and rejected transnational-focused models of organized crime, the purpose of this paper is to examine whether the illegal wildlife trade, and in particular, the rhino horn trade in Vietnam, meet the criteria of organized crime set out under existing international and domestic legal frameworks. The conclusions drawn from the research challenge the assumption that wildlife crime at the local level in Vietnam is organized crime. Through an analysis of international and domestic norms, it can be concluded that wildlife crime in Vietnam is not categorised by domestic law as a serious crime and therefore cannot be classified as organized crime at the international

level, although media and law enforcement reports claim contrary. Moreover, supplemental data gathered from interviews, underlines that in instances where a criminal offence is fulfilled under the Vietnamese law, the illegal wildlife trade is inhabited mainly by informal participants who rely on the profits for subsistence and who lack the formal organization required by international legislation, in order to satisfy the legal definition of organized crime. Overall, the research highlights the localisation of wildlife crime in Vietnam. The author stresses that the context of locality of the rhino horn trade has to form the basis of future policy making decisions if this destructive trade is to be effectively curbed.

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Simon Sneddon (Northampton), 'When the Elephant in the room is an Elephant'

The paper considers the role played by Transnational Organised Crime (TOC) groups and other criminal networks in the growing illegal trade in elephant ivory, and questions why more is not being done to tackle the demand for ivory-derived products in China and South East Asia.

In May 2015, the ex-CITES Head of Law Enforcement John Sellar said "[TOC] networks have taken control of rhino horn and ivory smuggling" (Steyn, 2015). Links have also been made between traffickers and Boku Haram in Nigeria (Schiffman, 2014), al Shabaab in Somalia and Yemen (Doshi, 2014) and Janjaweed militia in Sudan and Chad (Gettleman, 2012).

With increasing recent involvement of high-profile celebrities, publicity around international wildlife crime has risen dramatically, leading to International Conferences, Summits, governmental pledges, and countless photo opportunities. The paper explores the impact of this on practical enforcement measures, and concludes that despite the well-meaning rhetoric, little has changed.

The paper concludes that there are twin reasons for this.

Firstly, the demand for Ivory-derived products in China is insatiable. I explore why demand is growing, and question whether mistakes were made in 2008, with the sale of stockpiled ivory by the CITES Secretariat to the Chinese government.

Secondly, TOC groups have established networks of smugglers and corrupt officials to feed this demand. I consider the role played by TOC groups, and the level to which revenue raised by the ivory trade contributes to other forms of criminality.

Sources:

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Gettleman, J., 2012, Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits, New York Times, 3 Sept 2012.

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