

## **ANNUAL SOCIETY OF LEGAL SCHOLARS CONFERENCE:**

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We do not usually provide a conference report from the annual conference of the Society of Legal Scholars, partly because it is the author of this report along with Lorie Charlesworth who are the co-coordinators of the Legal History section and as a result, any report (such as this) would inevitably be a very 'bitty' report focusing on just one section. However, we feel that this year we should do so for a couple of reasons. First, both Lorie and I are thinking of stepping down, having acted as coordinators for some time. By providing a report which showcases the genuine merits of the section (there is, for instance, no regular echo at the SLSA!) we hope both to sustain the interest once we have 'passed on the torch' and to interest other possible candidates for the roles. It has undoubtedly been good for the health of the Section to have two coordinators with genuine expertise in history as well as law! Second, this year's offerings were particularly stimulating and thought-provoking in terms of current developments in law and its socio-cultural contexts.

The opening one of the four sessions allocated to the Section was a particularly serendipitous putting together of three interesting papers, stretching over a considerable chronological span, which produced a series of internal resonances between the papers but also (as the subsequent debates illustrated) provided potential for some interesting reflections on the modern realities. Ger Coffey (Limerick University) discussed the case study of Henry II and Thomas à Becket, as a way of establishing the basis for development, amongst other things, of the double jeopardy principle – of particular value given the following two papers which both addressed, in different periods, the issue of the right to silence before and during trials. The historical continuity of a need for defensive safeguards within the criminal justice system was amply displayed through Pat McNerney's paper on the issue in the context of the social and political landscape of the seventeenth and eighteenth centuries and that from Hannah Quirk on the current scenario in international trials, especially those for war crimes. The issue of the dangers of expanding and unchecked state power, in a Foucauldian sense, ran throughout this session. It was an unexpected challenge to reconsider Henry II's Constitutions of

Clarendon as attempts against what we would now consider individual human rights instead of just being a tussle between the power of church and state, for example. The two papers addressing the issue of the right to silence and its implications for the delivery of good justice from the perspective of the community and individuals, not the state made their points equally forcefully. They suggested how far modern states have gone down what I at least (using a historical perspective) would consider a dangerous path by establishing a position that Pat MacInerney characterised as an agenda where 'defensive safeguards in the criminal justice system are viewed as anathema to the omnipotent concept of the public or common good' by the managers of that system at the highest level. As Hannah Quirk pointed out, the current realities are that those states which have most advertised their interests in individual rights and the effective delivery of justice are also precisely those states where, for political expediency in the shape of managing terrorism for instance, 'the right to silence has been reconsidered (as in Australia), curtailed (in most of the United Kingdom), or circumvented (in the US by the creation of the military tribunals to try the Guantánamo detainees)'. It was, in many ways, a chilling session but also one that showed the crucial value of adding a historical dimension to present dilemmas.

The present value of a historical dimension was further underlined by the remaining sessions. What followed immediately was the group of papers discussing the legal history of war crimes. Sascha Bachmann reflected on the extent to which the concept of the use of military force in the shape of the *jus ad bellum* (just war) was now out-dated thanks to the threats and challenges which had emerged in the first decade of the twenty-first century. In this, he included the reshaping of global realities and the rise to prominence of new players such as China with, potentially, significantly different cultural outlooks. Could Western perspectives such as those currently dominating the peace conceptualisations of the UN (encapsulated by him as the legacy of Nuremberg) survive? This was very much contemporary legal history – that is, history used very consciously to inform current policy making and policy comprehension. Onder Bakircioglu provided an interesting inflection on Bachmann's conclusions with his discussion of the historical narratives of the Christian tradition of the *jus ad bellum*. His argument was effectively that the concept still shapes current Western attitudes because it permits a way of legitimising military force, in terms of the morality and 'justice' of that force, according to circumstance – that it has become the context in which force has

been used which is now the key measure, not the strict legitimacy or otherwise of that force. The clear echoes of recent conflicts featuring Western interventions such those in Iraq and Libya were apparent in the discussion – however, as Lorie Charlesworth reminded us, overly strict observance of the established legal protocols when it comes to assessing the delivery of justice in post-conflict situations can also be counterproductive! In the context of post-1945 Germany, she explored how, to enable war crimes prosecutions to take place for what were (and are) clearly crimes against humanity, British lawyers driven by a passion for justice evolved appropriate legal protocols despite the lack of clear precedent.

Coming to Cambridge from Deakin University, Danuta Mendelson's paper on punitive damages in the political context of the eighteenth century was a *tour de force*! In the wake of political scandals of varying kinds, including the expenses affaire, and at a time when the Leveson inquiry was getting under way, it was a treat to be reminded of another time when, as Danuta pointed out, judges needed in practice to be both lawyers and politicians with consequently substantial implications for the impartial and disinterested delivery of justice. Her discussion of the vulnerability of the less powerful to scapegoating, the significance of juries in politically and culturally sensitive cases and the importance of figures like Lord Hale and Charles Pratt LCJ with a passionate belief in the importance within the justice process of attaching legal blame where it lay appropriately, in terms of actual individual responsibility, rather than where it was convenient, provided a thought-provoking set of parallels for current affairs.

The value of attending conferences was underlined for me by the final session which featured a paper from Tom Mohr, who I had heard deliver a different, but complementary, paper a couple of months before at the British Legal History conference. Then, he had discussed the ways in which the Irish had to a considerable extent invented for modern use a tradition of Irish law which was not tainted by British rule. Not only was I, as a result, able to appreciate aspects of the current significance of Noelle Higgins' fascinating paper on the role of the judge in Brehon law (in early Ireland) in a way that would not have been possible otherwise; but also, I was able to develop my understanding of the constitutional development of Eire still further as a result of both papers. In looking at the relatively scanty evidence for early Brehon law, Noelle Higgins was still able to show the significance of localism and also of religion in the management

of the dispensation of justice and the rules, or laws, underpinning that. Again, while there were not direct parallels, listening to her account of the *brithem* as a public judge who adjudicated on conflicts between neighbours, I found myself thinking of the dangers of diminishing the localism of justice as is currently being planned (and implemented) within England and Wales.

Tom Mohr's was also an important paper because of its wider implications – an investigation of the role of the Judicial Committee of the Privy Council is already being undertaken by scholars in Plymouth and Reading. This paper revealed how significant the model, and the actual negotiations that surrounded the final removal in 1933 of the right of appeal to the Privy Council that was written into the original Irish Free State constitution, are for an understanding of the processes that accompanied the changing shape of the twentieth century British Empire, including the period of decolonisation. Tom Mohr's paper also provided a near perfect contextualisation of the following paper from Donal Coffey on the drive to create a new constitution within the Irish Free State in the period 1932-35. It is, at a time when new constitutions are being developed in so many quarters of the globe, instructive to be reminded of the extent to which history provides models which can be both warnings and inspirations of the dangers inherent in rewriting constitutions. For instance, the temptation to move forward by looking back – by rewriting a constitution that has a contemporary merit by appearing to stress difference from a past which is politically and/or popularly distasteful can fail to take advantage of new and progressive ideas because of that reactive (even reactionary) straitjacket. In listening to this paper following on immediately from Tom Mohr's discussion of religious minority rights in Ireland at the same time, the news I was currently reading of protests from women and other minority groups involved in the so-called Arab Spring in states such as Tunisia and Libya about the ways in which their constitutions were actually being rewritten had an ironic resonance. And that, at the time of writing this report, remains an issue where I remain grateful to this session for the insights (not very hopeful ones, sadly) it provided for me on the likelihood of moving forward successfully.

So, please consider offering either a paper to the Section for next year's SLS at Bristol and also consider offering yourself up as a possible coordinator over the next couple of years....