

## **EDITORIAL**

The editorial for this second issue of 2015 is, like the first one, written at a time of tension and turmoil globally. The proliferation and expansion of conflict, particularly (but not exclusively) in the Middle East and Africa has seen the development of a crisis associated with the large-scale movement of peoples from these afflicted regions. This has added to the ongoing, steady flow of migrants from Africa and parts of Asia to the wealthier developed parts of the world - for reasons to do with types of individual oppression or out of a desire for economic and other betterment - something that has been a visible characteristic and political concern for the last two decades at least. The reality has been a movement of peoples on a scale that often attracts the adjective 'unprecedented', and for once the adjective seems not to be indulging in superlatives. Looking for parallels in the historical past highlights the extent to which the figures involved now are almost unimaginably larger - Jewish refugees fleeing from Nazi persecution must be estimated against a baseline of less than a million Jews in 1930s Germany, for instance.

To take only one headline example of the last few years, recent figures from the UNHRC suggest that over nine million have fled from their homes in Syria in the last four years. Around six million remain, displaced within Syria itself, but up to four million have fled across Syria's borders. Most of them have remained in the Middle East, particularly in camps in Lebanon and Jordan (Lebanon's population has nearly doubled as a result of the influx from Syria) but increasingly, those who fled into Turkey have been moving to seek refuge and settlement as asylum seekers in Europe. But as well as Syria, Iraq is also involved in the conflict in the region, thanks to the efforts of the expansionist Islamic State that has come to dominate the politics of that state as well. As a result, in the last year alone, getting on for another three million have been displaced internally, and numbers of those have also been fleeing Iraq itself. Elsewhere, the resumption of fighting in South Sudan, the conflicts in Nigeria, Somalia, Libya, Yemen (not forgetting Afghanistan) have all seen significant displacement of populations with a knock-on effect on refugees seeking to relocate in the developed nations. And with the Turko-Kurdish civil war restarting, and currently escalating, there could well be more, rather than fewer, refugees on the move from the region once called the Levant.

It is the impact of these movements on the developed nations in the world that has ensured that the headlines over the summer have been dominated by sensationalist headlines about the 'crisis' caused by what is advertised as the migrants or refugees, according to preferred terminology. That an amount of the reporting of the crisis is sensationalist to the point of

downright inaccuracy is only to be expected. But the use of the term crisis is accurate in one sense at least - that it has exposed, and to crisis levels, the weaknesses of the various systems governing migration in developed nations around the world. From Australia to Austria, and places in between, the blunt reality is that the existing mechanisms have been tested and found wanting.

As of 15 September 2015, Hungary has closed its borders with Serbia, reinforcing that closure with a physical obstacle in the shape of a substantial fence, and is planning to do the same for its border with Romania and potentially then, Croatia. If, strictly, it is justified under the current regulations in claiming that it does not need to take in refugees claiming asylum because Serbia is a safe country and so, asylum claims should have been there - it is not a position that is likely to be tenable, practically and legally, over a longer period of time. The problem for the European countries is that approximately three times as many refugees are currently trying to enter Europe to seek asylum as were entering last year - and that had already been identified as being too much for many governments and communities, feeling themselves under unmanageable pressure to house, support and welcome such numbers. The UNHCR has, for the last two years, been pleading with countries around the globe to adopt an internationally robust and agreed plan of action. No sign that that is achievable is yet visible. In the UK, the Prime Minister (David Cameron) has pledged to take in more Syrian refugees - but refused to join in with fellow members of the EU by accepting a share of those currently fleeing into Europe from Turkey and into Serbia. Instead, his plan is to take those which apply from the hugely overcrowded camps in Lebanon and Jordan (a strategy underlined by his recent visit to Lebanon). This has infuriated the UK's European partners - and again underlines the lack of unity of response within the EU, and the will either to evade or avoid a straightforward and simple application of the Dublin Regulations or the responsibilities of countries under the 1951 Geneva Convention. This is the context for this year's SOLON *Experiencing the Law* Conference.

Taking the theme of *Experiencing the 'Migrant Crisis'*, this year's event will focus not just on the current pressures of refugees and asylum seekers from Syria and Iraq, but also on the wider context of managing migration and the legal experiences of those seeking entry and those attempting to manage it, as well as the human dimensions to asylum and migration. While most headlines concentrate on the numbers, stories are also entering the media on the extent to which people traffickers, amongst others, are seizing on the opportunities offered by the current mass movement of peoples fleeing conflict and other negative events to exploit vulnerable refugees, especially women and children. This is, as the UNHCR has underlined, very much a human rights issue affecting not just a few countries, but providing a

challenge to all nations, as well as a challenge to the UN itself, and its effective policing of conflict and post-conflict scenarios. Once again, the Institute of Contemporary British History is collaborating with SOLON on the event, and it will be held at King's College on the Strand, on 10 December 2015 with speakers already confirmed including Lesley Abdela, Nirmala Pillay (Liverpool John Moores), and Rosie Brennan (Plymouth). Further details will be on the SOLON website shortly.

Taking up the theme of human rights and the problems of associated with the UN's involvement in conflict and post-conflict reconstruction, is one of the four articles published in this issue: that from Fiona Tate, a PhD student at Queen Mary, University of London. She examines the challenge to human rights provided by the culture of impunity that operates in relation to the (mis)conduct peace-keeping troops. Tate highlights the responsibility of the UN, as well as of the Troop Contributing Countries (TCCs), in failing to provide adequate protection for women and children subjected to sexual abuse and exploitation by members of peacekeeping missions, independently or in collaboration with local individuals. As she argues, the problems associated with the culture of impunity that surrounds peacekeeping missions are rooted both in the inadequate application of UN policing and regulations for such mission, and in the inadequate will demonstrated by the UN itself to create a robust yet humanitarian framework for the successful implementation of peacekeeping under the UN aegis.

The need for robust legal frameworks, and for insights into why they have succeeded (and failed) underpins the first two articles in this issue. Alan Cusack's exploration of 'due process' in relation to the adversarial system that emerged coherently towards the end of the eighteenth century indirectly addresses this theme in exploring the transition from older models of justice management to the newer one that emerged at the start of the modern era in the legal history of England and Wales. Cusack draws on the work of Hay, and more recently of Peter King. His exploration of the pre-modern justice system in operation argues that it did have some benefits, being more flexible and exculpatory in its approach to justice dispensation, but also that it seriously disadvantaged defendants in a number of ways, including the speed of justice delivery in order to get through business. Cusack's effective summarisation of the pre-modern trial and prosecution processes works to remind us even more powerfully than Beattie's work has done of the reasons why the traditional criminal justice system did not survive the keen light of Enlightenment philosophical thought about the nature of justice. We are, for instance, reminded of the impact on Blackstone of Beccaria's thinking, (superseding that of home-grown thinkers such as Hobbes and Locke) and very significantly for nineteenth century developments of the Beccarian influence on

figures like Samuel Romilly, the Solicitor General whose reforming zeal helped to create the scenario in which the so-called Bloody Code could be unpicked. If none of this is precisely new, it is effectively put together and is a useful source for reminding us of the importance of understanding not just the mechanics of due process but also of the intellectual and political background to change.

The summary of the reasons for, and practical impacts of, the emergence of what Cusack dubs a 'Statist prosecution apparatus' accompanying the emergence of the adversarial system is interesting - though one should always be wary of assuming the effectiveness of the Leviathan state in taking over the prosecution process in the post-1879 period! After all, one reason why there was a reluctance on the part of the government to introduce a criminal code for England and Wales, in line with its practice in the colonies from the 1840s on, was the financial cost of such codification because of the greater involvement of the state in the prosecution process. The Treasury was distinctly hostile to any such development.

But importantly, this article underlines the extent to which state funding was being made increasingly available to defendants, as part of a will to ensure defendants had the ability to defend themselves properly. It is a lesson that both national and international legal processes (including those associated with the UN) could usefully remember - that one of the factors promoting substantial legal reform in nineteenth century England was contemporary fear that the legal system was becoming unworkable because it was no longer being actively supported by the population. It is (going back to the original points made at the start of this editorial) a factor that should alarm both the UN and European leaders, that the international laws and agreements intended to prevent exactly the kind of chaos and despair that we are currently witnessing have, in reality, failed to win widespread popular support. And the words of lawyers encouraging us to behave 'well' (ie: in accordance with official agendas) are not necessarily the best remedy for growing disenchantment with the legal establishments associated with the management of refugees now - or other vulnerable nineteenth century groups (the poor, for instance).

An interesting complement to Cusack's article is provided by Robert Shiels' piece on the employment of precognition as a part of the legal due process in Scotland. In the light of comments made in the last editorial about our desire to see more work relating to Wales, Scotland and Ireland (particularly reflecting on some of the comments made by Richard Ireland), this is a particularly welcome contribution to the journal. Its exploration of the distinctively Scottish practice of taking precognition statements from witnesses in criminal cases provides an illuminating base for more comparative work to be done on the parallels

(or lack of them) between the Scottish and the English legal systems and their due processes in practice. Shiels discusses the more consciously positive attitude of the Scottish system towards regular state involvement in the criminal trial process. It was, in many ways, a more honest acceptance of the implications of the concept of public interest in association with the criminal justice system than was present in the Westminster government. What is so particularly interesting is the realisation that the system developing around the regular use of precognition within the modern Scottish criminal justice process (it is used to make the Defence aware of the strength and dimensions of the Crown's case) accompanied the development of the adversarial (or accusatorial) system in England and Wales. It is also a reminder of the extent to which the differences between what was going on in Scotland, politically as well as legally, was very different in the nineteenth and early twentieth centuries, and that legal (and political) historians in focusing on England and Wales and using 'Britain' as an all-encompassing term for the mainland are failing to understand the full complexities of the legal and political realities of modern Britain.<sup>1</sup>

The nineteenth century Scottish reforms cast a very challenging light on the assumptions made by so many scholars investigating the nineteenth century development of the adversarial system. For a start, it underlines that knowledge of an alternative existed within the United Kingdom (consider how many lawyers in the English and Welsh system were originally Scots, or had links to Scotland, for a start). Certainly Fitzjames Stephen, an ardent advocate of introducing a criminal code to England and Wales, commented favourably upon aspects of the Scottish system - including, implicitly at least, precognition - in his work, emphasising that there was a conscious choice by English reformers not to be influenced by Scots practices. English trials were, similarly to Scottish ones, public inquiries but they were not public inquiries undertaken by public officials. The article contains a fascinating discussion on the nature of evidence, by locating the Scottish practice within a wider continental framework - though it is a shame there is not more direct comparison with the English model. This might, perhaps, inspire the author to a further piece directly investigating some of these aspects (editorial hint here....).

What is also welcome in this issue is the piece by Iyabode Ogunniran, reflecting on the past century of child justice reforms in Nigeria. Typically of British attitudes towards their colonies (and British is an appropriately used term here, given the numbers of Scots and Irish who formed part of the colonial administration in Africa and Asia), indigenous laws were considered to be unsuitable for the 'civilised' administrations that were being imposed on the

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<sup>1</sup> And it is also acknowledged that Ireland, and later Northern Ireland, need to be better and more fully considered in such surveys.

territories acquired by the British Empire. As already briefly mentioned, codification of laws was a favourite pastime of the British imperial system - the Colonial Office was enthusiastic about them from the days of James Stephen, the great colonial administrator. His son, James Fitzjames Stephen (mentioned above), was the originator of a number of codes, including the Indian Criminal Code, and tellingly, here the Jamaican Criminal Code of 1878. Subsequently, Lord Lugard introduced into the Northern Protectorate in Nigeria, in 1904, a version of the Code introduced to Queensland in 1899 which had been based on the Jamaican Code.

It can usefully be said that criminal laws (arguably especially those which are part of a criminal code) create and define both the crime and the criminal, as well as setting up the criminal justice process in any state or colony. What Ogunniran provides is an interesting reflection of the creation of the concept of the juvenile delinquent by the British, as part of their attempts to 'improve' and 'civilise' Nigeria, and the negative results of a system to manage juvenile delinquency as a foreign concept within the colony. The post-colonial legacy of such laws has been shown to have been enduring in many ways (unsurprisingly; after all, Roman law still affects aspects of English law, many centuries after it ceased to be a Roman colony). But what this article also shows is the extent to which change which is both practical and locally sensitive can come about, when there is a will to see a genuine reform. Such reform requires not only the intellectual dimension, but also a practical will 'on the ground' to implement thoroughly the changes in practice and thought. This seems, positively, to have taken place in Nigeria in the last decade and a bit. It would be good to be able to publish similar reflections on the post-colonial experiences of other areas of Africa and Asia in future issues, so we very much hope this will not be a *rara avis* of a contribution.

The issue also contains a report on the latest SOLON research initiative, emanating out of Plymouth but also including other UK universities and - it is hoped, in time - rolling out to encourage research elsewhere in Europe and the rest of the world. The focus is on summary or 'everyday' crime, that area of the criminal justice process which is the most pervasive in quantitative terms at least, and yet the least studied in any coherent and systematic fashion. The attempt here is to begin the process of remedying this. Again, we will hope to publish further updates and welcome any contributions on the topic for consideration by the journal. Finally, we include three book reviews, and are delighted that, thanks to John Wallis, our Book Reviews editor at Liverpool Hope University, our review section is being so effectively managed.

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