Briefs

LEGAL THEORY

Who is 'The Other'?

BARBARA ANN HOCKING reports on the Critical Legal Conference 'Other Justices, Others' Justice.

This conference held at the University of East London Faculty of Law from 6-8 September 1996 drew together strands of theoretical and practical scholarship from many jurisdictions. From the papers, much could be gleaned of the theoretical and practical scholarship currently at the forefront of British critical legal studies.

The Conference began with a panel discussion called *Concepts of Otherness,* at which four male academics discussed the increasing currency of 'the conceptual other' in critical legal accounts. This opening discussion was intended to showcase the different traditions within which the term is used and to ask how these relate to each other, indeed to question whether the different uses of the term are equivalent or even compatible. John Fletcher of the English Department at Warwick University spoke of 'the other' in psychic life, Michael O'Pray of the Department of Art and Design at the University of East London spoke of 'the other' and the existentialist tradition, Marinos Diamantides of the Department of Law at Birbeck College, University of London spoke of Levinas and 'the other', and finally Couze Venn of the Department of Cultural Studies at the University of East London spoke of 'the other' and post-coloniality.

The conference closed with a plenary session presented by three prominent women academic lawyers. Professor Kimberle Crenshaw of UCLA analysed and explained critical race theory, seeking to recover realism in a post civil rights age. The paper outlined some of the problems with much theoretical endeavour regarding race and with much discrimination law in practice. Expressing some despair at the situation in America at present, this paper contrasted with the optimism expressed by the next speaker, Professor Fran Olsen, also from UCLA, who spoke of the work of American feminist lawyers in Central and Eastern Europe. This paper provided a bridge into the very different final paper.

By way of conclusion, in a paper called 'Love me, Love my Dog', Professor Renata Saleci of the University of Ljubljana told of the Russian painter who pretended to be a dog and was arrested by Swedish police when he bit someone at an exhibition of his work. His defence was, of course, that he was a dog and could not be arrested. Much of the paper dealt with the attitude of authority to this creative spirit, and the difficulty of defining justice, but there were other dimensions, including perceptions of Russians and aspects of psychoanalysis.

These opening and closing conference sessions usefully provided the boundaries to the conference, indicating something of a schism between those interested in the more theoretically creative analyses of law and those seeking a return to a more pragmatic approach.

Over the three days, the 'BritCrits' had divided the conference into several sections, at each of which about 15 to 20 papers were presented. In the section dealing with European Community Law and Claims for Justice, several papers looked at issues emerging from European rights, particularly human rights and liberalism in the European Union and articulated by the European Court. These papers focused, in particular, on citizenship as a broad concept within the European Union, criticising the economic orientation of the European Court and the implications of that orientation for law.

A feminist perspective emerged, for example, from the paper by Margriet Kraamwinkel of the Faculty of Law of Tilburg University in the Netherlands, who compared the economic identity of European work, stressing the discriminatory facts of life in the law of the Union. The economic orientation of the European Court was seen to contribute to this discrimination, and this argument was advanced in the context of a comparison of the work of prostitutes, soccer players and housewives. From this comparative perspective, the argument was advanced that the concept of citizenship within the European Union must be viewed within the context of the court as the prophet of the free market capitalism.

This theme also surfaced in the paper by David O'Brien of the University of Virginia who wrote of the European Court's striking down of positive discrimination programs in *Kalanke v Freie Hansestadt* (Bremen 1995). The European Court of Justice struck down positive discrimination programs operating in the form of quotas for women. Citing a 1976 European Court Equal Opportunities Directive (Directive 76207) the European Court of Justice invalidated Bremen's ordinance. Two days later, the European Court of Justice invalidated a provision in Britain's health care program that provided women with free medicines at age 60 while making men not eligible until 65. In *Reg v Secretary of State for Health, ex parte Richardson* (1995). The European Court of Justice basically applied 'strict scrutiny' and rejected the Government's position that the discrimination in question was necessary to balance the social security and retirement pension systems. In sum, the paper examined the European Court of Justice's development of a substantive 'right to equal treatment' from the perspective of comparative law and judicial politics, drawing comparisons between the European Court of Justice's rulings on gender discrimination and the United States Supreme Court's rulings.

In the section on *Justice, History and Anthropology* Hamish McCallum and Lee Godden of Queensland University Zoology Department and Griffith University Faculty of Law looked at conflicts between legal definitions and scientific understandings of sustainable development. The concept was examined from a scientific and legal perspective to expose the disjuncture between the two fields of scholarship: to reveal in particular that law seeks to prove certainty while science suggests that much is uncertain and incapable of proof.

Various papers were presented in the *Intimacy and Justice* section. Rosemary Auchmuty of the University of Westminster Law School put the case against marriage by a lesbian feminist property lawyer, arguing that other legal models might more appropriately obtain justice for lesbians and gays. It was suggested that gaining rights for the coupled perpetuates the discrimination against the uncoupled, and that a more appropriate response might be to dismantle the privileges enjoyed by the married (some of which were breaking down of their own accord) and to work towards a society of independent individuals bound by freely chosen rather than institutionalised obligations.

Land law was viewed as an interesting alternative to family law because it treats everyone as individuals.

Sarah Adams Carter of Pembroke College Oxford looked at the attempts to prosecute the homosexual sado-masochist ring in *R v Brown* and the lack of legal mechanisms to deal with the situation. The case was examined with a view to establishing whether it was a truly political process and the question posed — when does state protection become state interference?

Ivana and Milada Bacik of Dublin Law School focussed on the legal demands of women in the context of changes to the law on rape in Ireland.

Barbara Ann Hocking of the Faculty of Law (Justice Studies) at QUT in Brisbane presented a paper on the many past and current uses as well as the possible legal potential of criminal conspiracy.

Another paper presented by Barbara Ann Hocking and written together with Lee Godden and Graeme Orr of the Faculty of Law at Griffith University focussed on the Australian guns buy-back scheme, raising a feminist perspective on the uses of public moneys, of special levies and of human rights and rights to compensation under the economic rationalism of the Howard Government.

In another Australian paper, Margaret Davies of Flinders University addressed 'Heroes and Others? Questions of Identity and Politics'. This paper indicated ways in which theories could be useful in:

- understanding the multi-dimensional nature of 'alternative' political formations and the tensions inherent in coalition politics; and
- analysing mainstream policy formation.

Les Moran focused on the law of Oscar Wilde, and the significance of the production of 'Oscar Wilde' as a story of law.

Larry Backer of the University of Tulsa looked at queering theory, speaking of the conceit of revolution in law. For Backer, queer theory 'is at its best when it is queering things by performing that most thankless of tasks — the interrogation of every reiteration of popular culture within dominant and subordinated groups'.

In the section on *Citizens and Others* Greta Bird and Mark McDonnell spoke of 'Muslims in the Dock', putting the Australian courts on trial. The paper interrogated the construction of Islam by the west and the impact of this on Australian criminal justice, focusing on Islam as a scapegoat.

Janice Gray of the University of New South Wales looked at the Australian High Court's decision in *Mabo*, asking whether the decision about radical title was a radical decision.

Bill Bowring of the School of Law, University of East London looked at minority rights and the problem of nationalism, critiquing theories of minority rights and citizenship, and insisting that law has a crucial role in achieving legitimation and empowerment, while arguing that existing instruments are unable to comprehend the aspirations of peoples such as the Crimean Tatars, or to provide a framework within which justice can be achieved and conflict avoided.

Barry Collins of the University of East London gave a paper called 'Where Have all the Canaries Gone?' This looked at fantasy, commitment and the Irish peace process, arguing that the breakdown of the peace process was inevitable, since the conflict was not adequately represented by the rhetoric of the process. By corresponding the enjoyment of National fantasy to the place of the Lacanian Real, another dimension to the conflict was proposed, one which might endeavour to have the peace process taken seriously.

Many other papers were, of course, prepared for and presented at the conference, and this is only a selection from those attended by the author. Mention must also be made of the fact that, for this academic, at least, being both asked about the need for and then provided with, child minding, let alone having the children running round people's feet at lunch time, means there were no critical legal responses from this reviewer!

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NATIVE TITLE

Co-existence of native title and pastoral leases

ANNEMARIE DEVEREUX examines the High Court decision in *Wik Peoples v Queensland.*

On 23 December 1996, the High Court by a 4-3 majority decided that pastoral leases granted under the *Land Act 1910* (Qld) and the *Land Act 1962-1974* (Qld) did not *necessarily* extinguish native title. Although the case involved a common law claim of 'Aboriginal title' (defined in similar terms to 'native title' under the *Native Title Act 1993* — the NTA), it has significant implications for the indigenous community, the resource industry and the management of the NTA. Given that pastoral leases affect approximately 42% of Australia (according to the Commonwealth's submission in Wik), the resolution of at least some of the more general principles concerning pastoral leases and native title is a welcome development.

The facts

The Wik Peoples instituted an action in the Federal Court after the *Mabo* decision but before the enactment of the NTA,[1] seeking a declaration of 'Aboriginal title' in particular land. The Thayorre Peoples cross-claimed for a similar declaration in respect of part of the lands claimed by the Wik Peoples. The Queensland Government and other respondents alleged that because of the granting of pastoral leases over