JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW

In this collection of essays, leading legal historians address significant topics in the history of judges and judging, with comparisons not only between British, American and Commonwealth experience, but also with the judiciary in civil law countries. It is not the law itself, but the process of law-making in courts, that is the focus of inquiry. Contributors describe and analyse aspects of judicial activity, in the widest possible legal and social contexts, across two millennia. The essays cover English common law, continental customary law and *ius commune*, and aspects of the common law system in the British Empire. The volume is innovative in its approach to legal history. None of the essays offers straight doctrinal exegesis; none takes refuge in old-fashioned judicial biography. The volume is a selection of the best papers from the 18th British Legal History Conference.

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JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES

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PREFACE

More than 200 legal historians, from every corner of the globe, met in Oxford at the Eighteenth British Legal History Conference in early July 2007 to hear and present papers on the history of 'judges and judging'. A selection of the papers presented at the conference has now been revised and edited to form the chapters of this volume. Perhaps the theme of the conference and of this publication needs some initial explanation. The legal realists of the 1920s and 1930s rightly questioned the pre-eminence given to the study of decision-making in the courts in American legal education, and similar ideas have entered British and Commonwealth legal education in the past generation; the utterances of judges are not taken as the sum of, or even the core of, the law. But this is hardly news for legal historians. They have long been effortless, even naively unselfconscious, realists, always concerned to understand the making of the law within the context of its time, with due attention to the society in which law is embedded and the shifting mentalities of professionals and other players in the legal system. Legal historians have not tended to regard law as the process of technocratic development in courts of timeless truths. The chapters of this book bring to bear legal historical analysis of the highest order to describe aspects of judicial activity, in the widest possible legal and social contexts, across two millennia. The essays cover English common law, the Continental customary law and *ius commune*, and aspects of the common law system in the British Empire. It is noteworthy that just as none of the authors have offered traditional doctrinal exegesis, so none have taken refuge in the conventional limits of judicial biography.

The opening chapter by Paul Brand uses a variety of original sources to shed new light on the early development of the English common law judicial system. He discusses the revolutionary change which took place in later twelfth-century England: the creation of a new type of royal justice sitting as part of a group of justices in new royal courts whose authority derived from a direct relationship to the king who appointed them and to whom they gave an oath of faithful service and who granted

them special authority to wield judicial power in each case where jurisdiction was exercised; who united in themselves the formerly separate roles of presiding in the court and making judgments there; and whose judgments were for the first time regularly recorded in writing. He then demonstrates, how over the course of the thirteenth century, the multiplication of available sources allows us to see in ever closer focus the ways in which judges judged in the new courts and their role in guiding the pleading of cases and in directing and questioning juries and in making judgments. He also shows how the new sources allow us to pierce the normal veil of collective judicial anonymity to glimpse the role of smaller groups of justices within courts and of the role of outsiders within the judicial process.

In his chapter David Seipp discusses the arguments about the nature of corporations made in a dozen reported cases heard between 1478 and 1482. He sees those arguments as belonging generically (in modern terms) to one of two camps: either a 'formalist' one (which sees corporations as wholly separate from the individuals who comprise them) or a 'realist' one (which pierces the veil of corporate identity to see and take account of the particular individuals who comprise them). He also looks at the possible intellectual roots of the 'formalist' position within theology and canon law and prior English politics and practice. He finds that individual serjeants and justices who participated in these cases were not, in general, consistent in the 'camp' to which they belonged from case to case, and notes that this suggests that neither group invested their own individual personalities or intellectual convictions in the performance of their professional duties.

Ian Williams's chapter looks at the development of a theory of precedent amongst English judges during the period from the sixteenth century up to the Civil War. He asks why judges by the mid seventeenth century had come to see reported case law as binding, whilst their predecessors a century earlier most emphatically did not. He suggests that the results of cases as shown on the record had long been regarded as having binding force, but not the reasoning by which judges had reached for those results. After all, reported *rationes* were often distorted or fabricated in contemporary or subsequent reporting. Matters changed as modern claims were brought in more informal guises, such as the actions on the case. Omnibus writs like these made the accompanying narrative of the claim into part of the court's reasons for giving or denying a remedy. This move to a freer narrative of facts helped the courts see the whole case as precedential, in contrast with the

older law where counsel and judges were busy in debating how the pleading of stylised facts activated a particular form of action.

John Langbein writes on the slow dethronement of the jury in the civil justice procedures of the English common law. Far too slow for Langbein, who argues that the Continental procedure using a fact-finding judge with power to interrogate witnesses yielded a far more rational and accurate system of adjudication, since fact-trying lies at the core of any legal process and skilled lawyers are likely to do a better job at it than random samples of laymen. He examines the self-informing juries of the medieval common law and the lay fact-triers guided by the rules of evidence and judicial direction of later periods, and finds that the imperfections of the jury created many distortions in the giving of justice, such as arcane pleading rules and too great an emphasis on documentary evidence, notably sealed deeds. Chancery procedure was only a temporary palliative as adversarial fact-proving soon took over in that forum as well. A long battle to confine the jury with guiding laws had to be joined across the nineteenth and early twentieth centuries, until judges finally took control of fact as well as law. With newly powerful judges, a powerful appellate process was now finally installed. Langbein's puzzle is to explain why the example of Continental procedure did not provide a short-cut for the English as they slowly evolved a modern civil process.

Rebecca Probert gives the history of an important legal-historical mistake. In 1811 Sir William Scott made the confident assertion as judge of the London Consistory Court that, prior to the Clandestine Marriages Act of 1753, it had been possible for parties to marry by informal words of present consent. Probert shows that clandestine marriage historically denoted not secret marriage but a marriage ceremony conducted before a celebrant who lacked full qualifications or who had not followed the correct canonical procedures. Probert traces the reasons for Scott's category mistake and how in later law this confusion of secrecy and validity distorted understanding of the nature of an act of marriage as a legal, a sacramental and a formal act. She also shows the crucial imperial dimensions of this mistake, as the law grappled with the application to a multi-faith empire of an antique marriage law based on the Anglican confession.

Michael Lobban paints on a broad canvas, interrogating the politics of the English judiciary in the high Victorian age, from the 1830s through to the 1880s. He shows how commercial pressures, the needs of litigants, and the Victorian yearning for rationalising reform, transformed the doctrines and institutions of the law and gave us many of the elements of today's

legal system. In a sophisticated treatment of the main judges, reformers and politicians of this era and the legal changes they worked through, Lobban suggests that politics played a role in judicial thinking, and that ideology often weighted *rationes* as much as it informed parliamentary statutes. But close attention to leading judges and their work suggests that the common law, even with statutory overlays, was becoming a technocratic exercise where strong political views were becoming largely irrelevant to the process of applying articulate legal doctrine to the facts of disputes. Lobban illustrates the complex dialectic of political values and judicial creativity by examining a wide gamut of legal problems, especially in the commercial economy.

Phil Handler's chapter suggests revisions to the view that English criminal justice moved across the nineteenth century from discretion to legal rigour. Despite the stream of modernising statutes formulated by utilitarian and humanitarian reformers, judges devoted to discretionary control of the criminal process were in fact highly successful in resisting the introduction of a rule-bound system. The application of the death penalty was successfully curbed despite strong support for this ultimate sanction amongst the judiciary, but strong discretion in prosecution, trial and sentencing continued outside the capital crimes. Handler uses evidence of how the judges engaged with Parliament and governmental commissions to show that the Victorian judiciary was a politically varied group, with Liberal and Conservative actors at both appellate and trial levels. What united them was the desire to maintain judicial freedom and power within the criminal justice system, and to that end the judges succeeded in colonising the legislative process and putting their stamp on many statutory enactments.

Chantal Stebbings peers under the Diceyan dogma of no special administrative courts in Britain, and demonstrates that in the tax field lay adjudicators appointed by the executive, whether amateur or professional, just about dominated the field. She investigates the specialist bureaucratic courts of excise and income tax appeals and the complex of appeal procedures, both legal and administrative, and shows how there was a strong impulse within government to resist full professional juridification of the tax assessment and appeal process. Partly this was to siphon off tax claims to specialist tribunals with strong expertise who could process the plethora of claims more surely and at less cost than conventional courts. Stebbings suggests that critics of administrative fiscal courts proved to be correct in their warnings that such adjudication could lack due independence from political and bureaucratic distortion, and that pragmatism sometimes triumphed over rule of law virtue.

The next group of chapters widens the geographical focus by looking at judges in classical Roman law, medieval Continental customary law and the later *ius commune*. Starting in an early period of classical Roman law, Ernest Metzger explains how the Roman procedure of trial before a lay judge endowed with fact-finding powers was regulated by quasi-delictual actions. These were claims that through incorrect use of powers something akin to a wrong had been committed which demanded a remedy. Metzger anatomises the Roman trial, showing how claimants sought a formula, joined issue, and then sought to transmogrify their claim into the remedial obligation specified in the formula. A judge who accepted a commission to test facts and decide the issue had a duty to do so properly, and if he mistook or fumbled or delayed then he was said to have 'made the cause his own', a form of bias or nullification of his role. Such a judge could be disciplined before a magistrate and sued personally to provide a surrogate remedy for the original claim. Using fresh archaeological evidence, Metzger suggests that these disciplinary actions were not a substitute process of appeal but a key means for magistrates to hold judges to their duty.

In his chapter Dirk Heirbaut looks at the makers and shapers of customary law in northern France, the Low Countries and Germany in the period from the twelfth to the early fourteenth century. He argues that in courts in these areas where there was normally a group of judges to make judgments it was the most expert member of this group who normally acted as the spokesman of the group in giving judgment but who had also normally played an important role in the prior debate which shaped the judgment agreed by the group. Evidence from the area around Lille *c.*1300 shows that these spokesmen were semi-professional legal experts, active also as legal advisers, presiding officers and as the lords in other courts; it also shows that the spokesmen kept their own brief unofficial reports of the cases in which they were involved. They were not university-educated lawyers nor were they influenced by the *ius commune*, but they were more than simply amateurs.

Ulrike Muessig's chapter provides a comparative overview of the 'superior courts' of early-modern France, England and the Holy Roman Empire, whose emergence can be viewed as part of the wider project of state-building in each of these political units. Despite the difficulties of comparison, she sees certain common themes emerging from the history of these courts: their encouragement of the development of professional lawyers and of law reporting and the tendency of some, if not all, of these courts over time to escape full monarchical control and indeed pose challenges to monarchical authority.

The functioning and jurisprudence of the eighteenth-century Supreme Court of Holland Zeeland are the concern of Boudewijn Sirks's chapter. His focus is on the unofficial notes of two leading judges of the court, Cornelis van Bijnkershoek and his son in law Willem Pauw, which were rediscovered in 1918 and published between 1923 and 2008. These cover 5,000 cases heard in the court between 1704 and 1787 and they show that judgments were reached in the court by majority vote but without members of the majority having to agree on the reasons for their decision. They also reveal that the university-educated judges of the court relied mainly on Roman law in making their judgments unless there was quite explicit local customary law to the contrary.

The final group of chapters, on legal themes from the British Empire, begins with Paul Halliday's study of the early-modern history of the writ of habeas corpus. Halliday concedes that more than most, he has to contend with a 'large presentist elephant in the room'. But his research was conceived and commenced well before the security crisis of 9/11 and the justice crisis of Guantanamo Bay. The technique of the paper is to reconstruct the intellectual parameters of the earlier habeas doctrine as 'mutual obligations binding subject to sovereign', with a strong emphasis on control of Crown powers rather than the rights of subjects. The 1679 Habeas Corpus Act is then re-characterised as no more than the codification of a vibrant practice of court control of the executive that was already in being. The chapter then examines in close detail little-known cases of prisoners of war and enemy aliens discovered in a plethora of primary sources, showing how key dimensions of the rule of law were developed by the judges during Britain's long imperial wars with its European rivals.

Martin Wiener shows how hard it could be for imperial judges to maintain the judicial rule of law in a colonial setting. He tells the story of how a Canadian barrister, Sir Henry Austin, was appointed as chief justice in the Bahamas in 1880, upsetting the local elites who wanted jobs for the boys. Austin tried to apply rule-of-law discipline to the colony, and tried two brothers for racially motivated and connected killings. The local whites angrily demanded the chief justice's recall, and the governor and law officers combined to force Austin out. When his successor as chief justice proved to be a zealous campaigner against local corruption he too was destroyed, partly through effective lobbying of influential politicians in England. Wiener wryly observes that in the law at least this was a case of the periphery controlling the centre.

Susan Priest narrates the extraordinary episode of the High Court of Australia's 'strike' of 1905, when the judges refused to hear cases in

protest against the Commonwealth Attorney-General's attempts to constrain the new court's costs. The judges of the High Court saw their circuits to the far-flung states of the newly founded federation of Australia as a basic principle of the court's work, and refused to accept the dictates of the executive as to how to conceive their jurisdiction and procedure. This squall can be seen as an important step in establishing the prestige and independence of the new court as a notable forum of the common law world.

The final chapter by David Williams tells of five judges in New Zealand who grappled with the definition of native title from the middle of the nineteenth century until the Great War. He argues that native title was not the common law doctrine invented or discovered in late twentieth-century courts; rather it was a dynamic doctrine of the mid eighteenth century, born of a mixture of American constitutional creativity, international law norms and British imperial policy. This meant that extinguishment of a common law native title was unknown in an earlier period. The law was really founded on a balance of politics, as expressed in legislation and treaties, and juridification of the native rights debate came much later. Whether Williams' careful historical analysis will shift the agonised modern native title discourse into new paths will have to be seen.

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