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A Revolution in Soviet Law?
The Union Struggle in South Africa
The Victims of FBI Frame Ups
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Cover photo: NUM rally, Soweto, March 1986 – IDAF

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AGM

The Society held its AGM on 3 March 1990. Although attendance was disappointing, a number of important resolutions were passed. The Society reaffirmed its belief in the 'right to silence' and called on the government to withdraw proposals to limit it. The Society has done a considerable amount of work on electronic tagging, monitoring its use in Tower Bridge Magistrates Court. It called on the government to abandon the scheme and to implement more constructive measures to reduce prison overcrowding. Resolutions on the Guildford Four and Birmingham Six cases were passed, as was a proposal to campaign to amend the Human Fertilisation and Embryology Bill. The Society committed itself to providing a forum for discussion of the issues of pornography and censorship. Two resolutions on mental health underlined our increasing work in this field. Internationally, the shoot to kill policy was condemned and the standards of the International Labour Organisation were endorsed. Other issues upon which policy was adopted were the Employment Bill 1989, South Africa, Sudan, the death penalty and Eastern Europe. The texts of all resolutions are available for inspection at the Haldane office.

The postal ballot to change the rules for AGM meetings and to institute standing orders produced an overwhelming majority in favour of change. These will now be incorporated in the rule-book which will be reprinted. The proposal to change the name of the Society was lost.

Executive Committee

The executive committee for the coming year comprises: Bill Bowring (chair), Keir Starmer (secretary), Kate Markus (vice-chair), Robin Oppenheim (treasurer), Heather Williams, John Wadhams, Katy Armstrong-Myers, Debbie Triplely, Sally Hettfield, Steve Crogan, Tony Metzer, Damian Brown, Clare Wade, David Geer and Pierre Mostyn.

NUM Inquiry

In early March the Haldane society was consulted by a five person subcommittee of the NUM National Executive about the appointment of an eminent QC to investigate allegations made by Central television and the Mirror Group of Newspapers concerning monies which allegedly came from Libya. After several meetings between representatives of the Society and the NUM subcommittee, Gavin Lightman QC was appointed.

Miscarriages of Justice Conference

This conference was held in York during the weekend of 28/29 April 1990. It was very successful and over 60 participants. Conference papers are available from Keir Starmer.

The 1990's

The executive committee is currently discussing various proposals about the role the Society in the 1990's. Any views on the subject will be gratefully received.

Finally the executive committee would like to express its thanks to Joanna Dodson who retired this year as chair of the Society for all her work in that role.
HALDANE IN THE HEADLINES

Despite the Haldane's long and often glorious history, the welfare of the Society has not generally been a matter of national public interest. On 19 March 1990 the Independent newspaper took steps to rectify this myopic view by devoting half of its leader column to advising the Society upon the NUM's request for help over the appointment of an eminent QC to investigate the Libyan money allegations. Correctly recognising its 'considerable moral authority' but 'less sure of our name' (the Haldane Society of Labour Lawyers), the Independent advised us that 'The NUM needs the Haldane Society but the Society has no need whatsoever of the NUM."

Although many members were touched by this concern for our political health, SL will not be devoting its columns to suggestions on how to improve the Independent and preliminary soundings indicate that Andreas Whitlam Smith is unlikely to be co-opted onto the executive committee.

Heather Williams

PTA REPEAL CAMPAIGN

On 27 March the first anniversary of the Prevention of Terrorism Act 1989, a campaign was launched calling for its repeal. The number of individuals and groups involved in this issue has grown steadily and now includes the Labour Party and all the main organisations of the Irish community. This is the first national campaign to draw them all under one umbrella. The breadth of support reflected at the House of Commons launch, chaired by Clare Short MP, with messages of support from Gerry Conlon of the Guildford Four and the Federation of Irish Societies, among others. The Haldane Society Northern Ireland sub-committee was represented and is participating in the campaign. All solicitors with experience in representing and advising those who fall foul of the Act are asked to forward their details to the campaign. For more information contact: Repeat the PTA Campaign, c/o Box 1346, London N22 4AT or telephone Fr Paddy Smyth on 081 963 8625 or Mary Connolly on 081 862 2942.

Piers Mostyn

KING SIZE BLINDER

Much work was done by the Haldane Society on the case of the Winchester Three. The Guardian printed our letter shortly before the appeal and I observed the hearing of the appeal on behalf of the Society. The Court of Appeal found that statements by Lord King during the trial in which he equated silence with guilt created a serious risk of prejudice to the fairness of the trial. The case is a glaring example of transgressions of justice that would result if the government’s proposals to limit the right to silence were carried into force and vindicates the campaign to retain the right to speak out.

Keir Starmer

BRANCHING OUT

Lawyers at Southampton University have become increasingly involved in political issues at both national and local levels. Unfortunately the Law Faculty's most recent contribution to student politics was to furnish the Union with its first Conservative President in living memory. Nevertheless, when the idea of establishing a branch of the Haldane Society in the University was raised the support and interest shown by students and members of staff was overwhelming.

By the next academic year the branch aims to have at least 30 active members of the student body. It will host regular public meeting on areas of current legal controversy. We are certain that an active branch of the Haldane Society in Southampton will provide the stimulus to enable socialist students to increase their awareness of politics and law. We are highly optimistic about the branch's potential and foresee possibilities.

David Toube and Debbie Johansen

The Haldane Society welcomes the formation of student branches. Any law students interested in following Southampton’s example should contact Keir Starmer (see the inside front cover SL.)

PUBLIC LAW INITIATIVE

Since the Public Law Project (see SL no.8) was launched in February it has been flooded with enquiries and support. The need for the Project is apparent from the number of requests for it to take up issues, and for information and advice. The Project will determine short and medium-term priorities, so that it can use its limited resources to best effect.

The Project has now received sufficient funds to advertise for two employees, and it has a project that will follow shortly. Money has been raised through the legal profession and a grant from the European Community. Long term funding has so far been agreed by the Joseph Rowntree Memorial Trust and by Sweet and Maxwell. A great deal more needs to be raised.

The Project aims to expand its membership to represent a wide range of organisations and potential users of services. It is also considering the options for development in Scotland and Northern Ireland.

We welcome any views about the Project, or other expressions of interest and will try to respond to all correspondents. Further information can be obtained by writing to the Public Law Project at the Institute of Advanced Legal Studies, University College London, WCl 5HB. If you would like either the general prospectus or the academic prospectus.

Kate Markus

IDAL: NO AGREEMENT ON CHANGE

Five members of the Society attended the thirteenth IDAL Congress and General Assembly which took place in Barcelona last month.

We took part in four commissions: international interdependence; consequences for the maintenance of peace; the right of peoples to development, the circumstances of its denial under the present international economic order; the right to a fair and just system of rules of law; the right of peoples to self-determination – human rights; implementation; and the administration of justice.

We also participated in three working groups on women's rights, trade union rights and the rights of the child.

Individual contributions to these commissions and working groups were interesting, but the theme of each was too broadly defined for any coherent discussion. More valuable were a number of fringe meetings with, among others, the Nicaraguan, Palestinian and Soviet delegations, which was informative and provided a forum for debate on more specific issues.

Disappointingly but not surprisingly the Congress was less well attended than it has been in the past. Table above shows the number of delegations from a number of European countries.

After recovering from the shock of learning that the Vice-president of both the USSR and the USA had been invited to attend the Congress, the IDAL Bureau met on 19 March to set up an ad hoc committee to formulate proposed amendments to the IDAL's constitution. This was in response to the financial difficulties the organisation now faces with the loss of funding from the Eastern European affiliating bodies, and the need for a more democratic structure. Unfortunately the General Assembly was unable to agree the proposed amendments and a further Bureau meeting on 24 March set up another committee charged with the same task. As a result the IDAL constitution will almost certainly remain unchanged until the next Congress.

The General Assembly did however manage to agree the passing of no fewer that 40 resolutions on as many different subjects in less than an hour; an enviable level of productivity the Haldane Society's AGM only achieves in its last five minutes.

Joanna Dodson

LEGAL OBSERVERS GROUP

LOG is a joint Haldane/NCCI initiative to provide observers for both union and general civil demonstrations/disseminations campaigns.

So far the group has been requested to attend both national and local anti-poll tax demonstrations and the anti-amendment campaign. We have also been requested to assist in the inquiry into the events of 31 March 1990.

The group has attracted a significant amount of media attention and it obviously has a function to perform in raising the Society's profile in both the media and larger labour movements. For details of meetings contact Julia Dick on 071 405 8826.

Dawson Brown

TANZANIA'S BOOK STARVATION

Tanzania, one of the world's poorest countries, is suffering an educational crisis. The phenomenal increase in secondary school literacy since independence in the early 60's – from less than 10% to 90% plus – efforts to maintain and increase educational opportunities have been beset by a struggling economy and the rigours of IMF loan conditions.

Progressive devaluation of the local currency, to increase Tanzania's competitiveness, has led to serious shortages of basic educational and training materials. In this environment, books are a luxury. Taking a nation's total income and dividing it by the number of books in it's libraries, Tanzania’s reading population is in the same order of magnitude as the countries in Eastern Europe.

In 1990, the year of Tanzania's 30th anniversary, the country's total book production is negligible. This is the result of a number of factors:

- the severe cut in government spending on the education sector
- the drastic reduction in secondary school enrollment
- the growing disparity between government and private sector book prices

.......

If you can help, whether with one book or a lorryload, please phone June Tweedie on 071 354 2351. We will arrange transportation to Tanzania; all we need from you are the books.
This article is impossible to write. Events are moving at breakneck speed, not just in Lithuania, the entire Soviet legal system, statute and procedure is undergoing complete replacement surgery. In this article I will attempt to illustrate by recent examples how law is central to the current changes, and how the debates about law carry with them profound ideological implications. The nature and future of socialism is in issue.

Is Gorbachev a Mafia Member?

In January 1990, in Moscow with the Haldane delegation, I attended a quite extraordinary public meeting – with difficulty, since the hall was full to bursting. The speakers were Gidyan and Ivanov, the two procurators who led the investigation into corruption in Uzbekistan. They have been separated from their posts amid allegations that they obtained confessions by unlawful means. Many defendants have been acquitted. However, their popularity is such that they were both elected deputies. They were heroes of the recent mass demonstrations in Moscow.

If they accuse the whole of the present Politburo of involvement in the ‘mafia’ – the organised crime of which the Brezhnev elite were the most visible manifestation. On another occasion, Gidyan announced that as a lawyer, I demand that criminal proceedings be issued against the President on the basis of Article 170, para 2. To the possibility of bringing the head of the General Secretary in clean, then he has nothing to be afraid of. The presidents of the USA, France, Latin America and others are subject to checks. And Ivanov said I can also confirm this fact, which is indisputable to us. No one else but Gorbachev is the chief pastor of the mafia in this country (Agaminos, the Sajudis paper, 28 February 1990). A substantial part of the popularity of Gidyan and Ivanov is due to their position in and appeal to the law.

Impeach the President?

Such allegations were very much in the air during the debate on the new post of President of the USSR. The draft law was introduced on 27 February 1990 by Deputy Kudryavtsev, who is also Director of the Institute of State and Law, and a member of the working party which prepared the draft. He said: ‘...above all, we proceeded from the fact that the draft law is one of the elements of the complex process of forming a socialist, law-governed state. The decisive step was taken when the new legislative bodies were established: the Congress of People’s Deputies and the USSR Supreme Soviet... although far from all laws have yet been adopted, this process is proceeding fairly successfully. Unfortunately, this cannot be said of the implementation of the laws.’

His working party was guided by three main requirements: first, to delimit the functions of party and state; second, to harmonise the activities of the new separated legislative, executive and judicial powers; and third, to achieve stability and to resolve extraordinary situations speedily. The USSR needed a sovereign and independent head of state which would be distinct from the functions of leader of parliament. (‘Parliament’ is the term now commonly used in the USSR to describe the legislative bodies).

The new law permits the President to postpone the signing of a law passed by the Supreme Soviet and to return it to them for reconsideration. If the law is confirmed, the President may dissolve the Supreme Soviet (point 16 of Article 197 (2)). In turn, the President may be dismissed by decision of the Congress for ‘violation of the USSR Constitution’ (Article 127(3)).

Capitalist Transformation?

On 12 March 1990, in the debate on the draft law, Deputy Afanasayev (Rector of the Moscow State Historical Archive Institute, and a leader of the Inter-Regional Group of Deputies and of the Democratic Platform which is effectively a separate party within the CPSU) said ‘...to look the truth in the face means first of all the need to reject the outdated communist idea... this is certainly not recognition of the necessity of or willingness to return to capitalism... The question of the presidency is being discussed in a period when there is a crisis in society, when the policy carried out by the present leadership is suffering a defeat. In these conditions a hope is returning that force will be used as a means for resolving problems... If our leader and founder (Lenin) created the foundations of anything, it is the elevation of the state policy of mass coercion and terror into a principle. And besides, he elevated lawlessness into a principle of state policy. This was carried out through the whole Stalinist period and created numerous victims, this went through the Brezhnev period when in a drunken stupor the national wealth was squandered wholesale and retail. And it is proposed that the same thing is to be continued according to tradition... Gorbachev cut Afanasayev’s speech short; there was quite a disturbance among the other deputies.

On 15 March 1990, in his acceptance speech, in which he also called for a ‘full bloomed domestic market’ and for the creation of commodity and stock markets, Gorbachev insisted: ‘Now, in general, do we see the role of President in the system of bodies of state power and administration? Above all, his most important task is to be guarantor of the irreversibility of perestroika, firmly and strictly to lead matters towards the formation of law-governed statehood, of a self-governing socialist society.’

The ‘Socialist Rule-of-Law State’

So what is the law-governed state? What is said to be socialist about the measures now being implemented? One place to look is the new draft CPSU Rules, published on 28 March 1990. The preamble reads: ‘The CPSU is a self-managing socio-political organisation, a voluntary association of like-minded communists. Built on the creative development of the ideas of Marx, Engels and Lenin and operating on the basis of a communist perspective, it sees as its goal the creation of humane democratic socialism in the country and the establishment of internationalism and common human values.’

Despite the repetition of ‘communist’, the key words here are internationalism, which indicates a wholly new attitude to social democracy, and common human values. The latter phrase (which encompasses non-violence, ecology, imperatives, justice, freedom etc.) has become the ideological basis of all the current changes, and differs sharply from conceptions of class struggle or the incompatibility of different social systems.

The starting-point was the 19th CPSU Conference in 1986 which for the first time decreed the ‘socialist rule-of-law state’, the unconditional supremacy of the law; a well-developed system of citizens’ rights and freedoms; and a mechanism for protecting those rights.

War Communism

To grasp what is so striking about the new formulation, it is essential to recall some historical background. Following the October 1917 Revolution, the Extraordinary 8th All-Russian Congress of Soviets (November 1918) adopted a resolution ‘On the Revolutionary Law’. But almost immediately the new Soviet Republic was wrecked by civil war and foreign intervention, and, in order to survive, was ruled by decree. This was the period of so-called ‘war communism’.

The economy collapsed, and the Soviet government introduced the new economic policy (NEP), in which foreign capital investment and private commerce were encouraged. A stable legal framework was required. On 22 May 1922 the Russian Federation enacted a decree on private property rights and on 1 January 1923 the Civil Code of the RSFSR, which drew on the German and Swiss Codes, came into force.

Formally the USSR has continued to the present day with an ostensibly civil law system. But when Stalin seized power in the late 1920s the NEP was disestablished in favour of ‘command-administrative’ methods of economic planning and the forced collectivisation of agriculture. Millions starved. Under Stalin and later under Brezhnev mass repression took place outside any framework of law; and civil and criminal laws were buried under a mass of administrative orders and decrees.

An Independent Judiciary?

It is not surprising, therefore, that arbitrary official power is seen as the main enemy of change. For example, the notorious telephone law, whereby judges were given ‘recommendations’ by the local authorities which elected them and to which they were accountable, brought the whole legal system into disrepute. One of the most important recent enactments was the Law on the Status of Judges in the USSR, adopted in August 1988, which seeks to enhance the authority of elected judges, and to prevent administrative bodies from influencing them. There is also a new Law on the Procedure of Appealing in Court Against the Unlawful Actions of Officials Infringing the Rights of Citizens – judicial review at all levels?

Looks Familiar

It is already possible for enterprises to go out of business; and there were mass political strikes in 1988/89. The Law on Ownership was adopted on 5 March 1990 and will come into force from 16 October 1990. According to the official justification it ‘recognises the diversity of the forms of ownership and creates conditions for their equal development, thus dismantling the monopoly on state property’. It allows citizens to own some means of production in order to conduct individual economic activity. There will be more private enterprise and increasingly, industrial disputes as in the West.

The Law on the Procedures for Settling Collective Labour Disputes (Conflicts) – the Law on Strikes – was
Lucy Anderson

Unisex Pensions and Insurance - Assessing the Risk

On the strength of present actuarial information an aver-
age woman will outlive an average man by about three
years. But this is based on when related to individual hu-
man beings; there is no such thing as an 'average' woman or
man. Nonetheless, the generalisation is accepted in the life
insurance and occupational pensions business as a legiti-
mate factor in assessing risk. Detailed actuarial tables,
based on statistical studies, are used in order to set con-
tributions and benefits levels. This article examines the
present law which allows this form of sex discrimination and
points to compelling reasons for reform - notably that the
social cost outweighs any actuarial usefulness. In addition,
1990, is likely to see potentially revolutionary develop-
ments in this area in the European Court of Justice (ECJ).

Gender Differentiation

The extent to which one sex or the other actually suffers a
detriment because of this practice is often unclear. So while
life assurance premiums for women are generally cheaper
than for men, they may pay more pension contributions
and/or get a lower rate of benefit on retirement. Some say
it is all 'swings and roundabouts'. In fact, other forms of sex
discrimination blur the picture and make it extremely
particularly unequal pension ages and survivor's benefits,
which are still permitted by both UK and European Com-
munity (EC) law. However, women are more likely to pay
more for less and this injustice is compounded by the fact
that schemes do not allow for career breaks to bring up
children. Since men are not encouraged to take such career
breaks they do not do so. It is consequently more difficult
for women to maintain the same level of pension entitle-
ment, especially when most women still earn substantially
less than most men and are more likely to work part-time.

The technical argument to justify such gender differen-
tiation is that it is a convenient way to reduce costs and
ensure 'equity' between different groups of individuals. It
is very unusual for schemes to be unisex on this issue,
whereas upon occasions smokers and non-smokers are
combined in one risk pool. Discrimination against non-
smokers is illegal. In addition, occupational, social group-
ing and geographical areas are generally igno-
nored when pricing life insurance and pension schemes,
although they are statistically significant.

Government Encouragement

The arguable inequity of using gender as the most impor-
tant risk factor is reinforced by the obvious fact that it is
impossible to isolate all non-genetic factors affecting risk.
However, this article is not concerned with the validity of
actuarial data concerning life expectancy. Such considera-
tions are eclipsed by the social necessity of eliminating a
pernicious form of sexism perpetuated by a male-dominated
industry for commercial reasons. This is not a matter of
tokenism - the living standard of individual women is di-
rectly at stake. The issues are particularly vital given the present
government's active encouragement to opt out of
state schemes and take out personal pensions and private
insurance instead.

Source for the Goose?

EC law is not concerned with personal pension plans or
insurance. However, the Sex Discrimination Act 1975
makes any difference in treatment on the grounds of sex
generally unlawful. But section 45 of the Act exempts differ-
tent treatment in annuities, life assurance and other
insurance matters based on risk assessment, where this is
by reference to actuarial data. The data must be from a
source on which it is reasonable to rely, and the treatment
must be reasonable in regard to the data and any other
relevant factors.

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Hannah van der Merve

At the Sharp End - Labour Law in South Africa

In 1988 Phumzani, a young organiser from the National Union of Mine Workers of South Africa took refuge late one night in the union's head office in Johannesburg. He had travelled all day and much of the previous night with only the clothes he was wearing and the money in his pockets.

The previous evening, working late in one of the union's regional offices in Namaqualand on the West Coast of South Africa in the Cape Province, he had witnessed a fellow union official being clubbed to death by attackers brandishing axes. Realising that the young organiser had seen them, the attackers had turned their attention to him. He escaped.

Seeking sanctuary he undertook the long journey to COSATU house, the office block in Johannesburg which housed not only the head office of the Congress of South African Trade Unions but also that of the Nation Union of Mine workers and the National Union of Metal workers - the two largest affiliates to COSATU. On his arrival, the organiser settled down to a night of rest after his ordeal. At four o'clock in the morning he was blasted from his sleep. A bomb had exploded in COSATU house, the building was ablaze and crumbling around him. Phumzani managed to flee to the open street. A few days later he returned to the regional office to carry on his work.

Two years later, the murder trial has only just been set down after police reluctantly bowed to pressure from the NUM and their attorneys to prosecute. The accused are members of Inkatha. Violence has raged between Inkatha and groups aligned to the Mass Democratic Movement and the United Democratic Front for many years (see SL No.8).

A Daily Struggle

Those responsible for bombing COSATU house have never been found. The police claimed the explosion was caused by explosives which the trade unionists had been storing in the lift from some future purpose. Independent experts confirmed COSATU's suspicions that the explosives used were of the type commonly employed by the South African police and military.

Despite the severity of individual instances of violence, a true picture of the repression of the South African mines can only be gained by looking at the day-to-day struggle facing black workers in South Africa.

Unemployment for black people is high. Matters are exacerbated by many black people being unskilled and poorly educated. Government figures reveal that the money spent to educate one white child would be used to educate six black children.

In the mines, much of the workforce is migrant labour. These workers come from Swaziland, Mozambique and in particular from the so-called homelands or bantustans where infertile and overcrowded lands often force the black population to travel far afield into South Africa to seek work.

Effective Recruitment

The workers are recruited on fixed term contracts usually for six to nine months. While working they are normally housed in the mining compounds. The accommodation consists of large single-sex dormitories which offer no comfort or privacy. The mines are usually located in isolated sites far from the nearest towns or villages. Security is intense, each mine being patrolled by the mine's own armed security police. It is in this environment that the NUM has had to organise and recruit. The union's 300,000 strong membership across the country is a tribute to the determination and courage of the very first activists in the mines and to their successors who still have to operate in a brutal and repressive climate.

In these circumstances effective recruitment has to be focused in the mining compound, either via recruiting facilities in the hostels or by a union office on site. Through militancy and determination, the NUM has managed to negotiate agreements with the Chamber of Mines (the mine owners' federation representing six main mining houses) allowing the union to establish offices in mining compounds. Much of the litigation in which the union office is involved arises from the interpretation of this agreement. For example, a company at some mines was to grant office facilities but to restrict their use to certain times when it was virtually impossible for the workers to visit. A dispute would then arise with the union challenging (successfully) the mine owner's claim to be following the letter of the agreement, on the ground that any interpretation of the agreement must be reasonable and that an interpretation which renders the entitlement to office facilities virtually worthless must be unreasonable.
No Official Recognition

It is notable that relations between the NUM and the Chamber of Mines are generally governed by private agreements such as this access agreement. The reason for this is largely historical. Up until 1979, trade unions open to black members enjoyed no statutory recognition. In 1979 following the report of the Wierban Commission, the labour relations statutes were deregulated. The aim was to institutionalise black militancy and to direct its energies into collective bargaining forums instead of wildcat strik-es. However by this time, a pattern of unofficial recognition and negotiation between mine owners and mine workers had developed. This pattern continued after 1979 through force of habit, a reflection of the NUM's strength and a desire on both sides to avoid the administrative and financial burdens of court proceedings.

Compulsory Conciliation

However, statutory law does now have an effect on relations between the NUM and the mining houses, particularly in the light of the amendments made in 1988 to the South African Labour Relations Act of 1956.

There are two basic tenets of South African Labour legislation. The first is that conciliation and bargaining are the solution to all industrial ills. After a dispute has been declared both parties are obliged to go through compulsory conciliation forums before resorting to either industrial action (for an economic dispute) or court proceedings for disputes usually relating to individual grievances. Either party will be barred from going to court if the statutory conciliation forums have not first been exhausted and an agreement reached.

The second basic tenet is that (since 1979) the courts have had a broad equitable jurisdiction to determine that an act or omission by the union or members is an unfair labour practice, where the conduct is unfair and is detrimental to good industrial relations between the parties.

Unfair labour practice determinations are the most frequent subject of labour law litigation. Claims of unfair labour practices have included a complaint over minerswearinumberT-shirts bearing slogans such as 'Organise or die' which management deemed to be detrimental to good industrial relations. On the other side, unions have claimed that laborious procedures adopted by mineowners to determine who is an NUM member (for 'check-off' purposes) have been abused in order to intimidate workers.

Urgent Relief

The most dramatic effect of the 1988 amendments was to extend the unfair labour practice concept to encompass industrial action, which previously had been specifically excluded. The amendments provided a mechanism by which 'urgent interim relief' could be sought to restrain an unfair labour practice. This relief can be compared to the interim injunctions available in this country. It has been far more accessible to employers than to workers. Frequently, the mine management would go to court as soon as any unballoted industrial action had commenced (pro-strike ballota being a statutory requirement) or as soon as balloted industrial action had commenced without statutory conciliation procedures having been exhausted. The mineowners could establish a right to relief since the amended Labour Relations Act clearly states that industrial action in breach of statute is an unfair labour practice. Details of misleading of estimated profit losses would always satisfy the requirements of urgency. However, it was far more difficult for the NUM to establish 'urgency' to the court's satisfaction, although in labour relations matters a legal victory is often phrastic unless gained expeditiously.

Scurrilous Gossip

A common example arose when miners were retrenching (or making redundant) large numbers of workers. Frequently, the mine management would breach either statutory or agreed retrenchment procedures. The NUM would move to the industrial court for an unfair labour practice determina-

Debbi King and David Geer

Skating Bears in a Circus

A group of Haldane Society members visited Moscow and Leningrad in January. Apart from the excellent opportunity to visit the cities and some to meet old friends, there was a busy programme of meetings with Soviet lawyers.

In Leningrad we visited a group of trainee prosecutors. We had a wide ranging discussion on diverse topics including a defendant's right of access to a lawyer from arrest (a new departure in the USSR) and the proposed denationalisation of being black in South Africa are only compounded by their union activity. In the mines workers underground are

subject to arbitrary beatings by white supervisors and well documented strike breaking methods have included trying to force workers underground at gun point. In the two weeks leading up to the general election in September 1989, eleven of the NUM's regional offices were raided by state police and two thirds of the regional staff were arrested, some under the notorious section 29 of the Internal Security Act which denies prisoners the right of access to an attorney.

There are also more humourous examples of union-bashing, such as leaflets which are air-dropped on the mining compounds from unidentified helicopters. The leaflets are entitled NUM Titties' and often relay scurrilous gossip about leading NUM figures and their associations with Winnie Mandela. The content of the leaflets tends to denigrate the association, but they serve as an illustration of the variety of methods to which some South African organisations are prepared to resort to discredit the unions.

The Future Challenge

The most severe repression in the mines arises not from trade union law as much as from institutionalised racism affecting every aspect of workers' lives from wages to training, accommodation, sanitation and union facilities. However, this is the one area in which the NUM may now be able to mount creative legal challenges. Racial discrimination at work has now been declared an unfair labour practice. Endless racist incidents have been relayed to the Chamber of Mines for its attention. The usual response is to argue that privileges to white minorities are bestowed not on racial grounds but by virtue of seniority. The concept of racial discrimination in South African Labour Law needs to follow that adopted in England and the United States by extending direct racial discrimination.

It will be for the NUM and other COSATU affiliated unions to monitor future legislative developments even more vigorously than before. Black workers in South Africa have not struggled for generations to have the police and courts to the rights of workers. It is significant that the Chamber of Mines is an equal opportunity employer. It has been a great issue that the chamber has not been able to achieve adequate remedy and so has the Chamber of Mines.

I left South Africa before the implementation of the radical changes introduced by F.W. de Klerk, namely the unbanning of the ANC and the release of the political prisoners. It remains to be seen whether liberalism will improve conditions for miners and/ or for the owners of their union. Certainly no beneficial effects have been felt as yet. Indeed many fear more repressive trade union legislation will be enacted as a strategic counterweight to political liberalism.

The Most Progressive Reform

The USSR has no specific laws on sexual harassment. General labour law is supposed to prevent its occurrence. Having listened to our account of a Scottish sexual harassment case, Proctor, the Soviet lawyers seemed bemused but interested that we felt there was a need for specific legislation to counteract this problem. There are no laws on paternal rights but maternity leave is more generous. The Institute's lawyers were shocked by the UK's archaic abortion laws. In the USSR abortion was considered a medical, not a legal right.

The USSR signed the Vienna Declaration on Human Rights in 1989. Domestic legislation will be needed to implement it. Freedom of speech, conscience, movement and the right to distribute information should be guaranteed. There is a committee to supervise the fulfillment of the Vienna document. This is felt to be the most progressive reform that has happened under perestroika.

So Emotional

On of the most interesting meetings was at the Moscow College of Advocacy. The College maintains professional standards amongst advocates. Women represented 53% of college members. College representatives felt that the involvement of women in the law had led to the court process becoming 'more emotional'.

This session revealed the limits of glasnost. The College questioned why there were so few prosecutions against perpetrators of racial violence. Some had been charged and convicted but there was no further legal implementation. As in the UK, lawyers are not held in high esteem by the Soviet public. The public image of lawyers was that they were puppets of the State; 'well trained, like skating bears in a circus'.

Potential emigres should note there are only 1,200 attorneys in Moscow, all union members. There is a shortage of lawyers in the USSR, which could cause problems if the 'law governed state' is to become a reality.
Everybody connected with the law in the United Kingdom knows that it is a myth that judges do not make law. But in a conservative and long-established system there was until the present century very little room for movement or growth at the instance of the judges. What changed the situation was not a sudden flood of judicial creativity but the plethora of major changes. In Britain these provoked a systematic and radical judicial response. The brilliance of the response has been that by and large it has not only respected but has actually derived protection from the myth that judges do not make law.

When in 1945 a Labour government, including a substantial left wing, was swept into power with a massive majority, many conservative people in Britain — which included practically the whole of the judiciary — genuinely thought the end had come for civilization as they knew it. This impression was fed by a whole series of changes more than an acceleration of the 19th-century drive to systematise and centralise under official control the principal functions and enterprises of an advanced industrial economy. There seemed to traditionalists to be nothing of consensus or bipartisan policies in the nationalisation of industries and the establishment of the welfare state. It looked and felt like the arrival of an alien socialist creed. It taught that democracy had put the commanding heights of power within the reach of the masses.

The judges had not foreseen their centuries-old power to control the acts and omissions of inferior courts, and in 1952 they had been encouraged by statutory bodies. The case in which they did so is introduced to law students for the principle to be extracted from it, but its significance lies equally in its facts. It concerned the compensation payable to the secretary of a hospital board on the absorption of his job into the National Health Service and it also concerned an adversarial bureaucracy. The court made a mistake but asserted that the court was powerless to correct it. Nothing could have been better calculated to make the court find a way of intervening, and it did so by applying the old prerogative doctrine introduced by a former Chief Justice 2 had called it, of the centralising state.

A Place of Terror

Ironically, one of the biggest obstacles to the development of this doctrine in the years that followed was the conserva-
tism of the legal profession, a product both of traditionalism and of the Bar's hostility to academic or even intellectual ap-
proaches to law. Although in 1947 it had been made possible to sue the Crown in private law proceedings, it took many years for practising lawyers to realise that a major new weapon not dependent on private law rights was at their disposal. Characteristically, it was almost entirely in the field of planning and property law that use was initially made of the right to challenge the procedures of the state either locally or centrally. 4 The doctrines of natural justice were separately developed during the 1950s and 1960s in a succession of private law cases brought by members against trade unions for unfair expulsion or removal from office. The great landmark case of Judge v Baldwin 5 was fought procedurally as a public law claim, in parallel with the trade union case, but while its starting point was unfair dismissal by an official body, its culmination was the first great assertion of judicial control of official decision-making in the modern British state. Led by Lord Reid, the Law Lords stamped on the local state's claim to inviolability in wrongdoing and began to cut down the doctrinal thickets which had till then made judicial review of administrative action a place of terror for practicing lawyers.

The Last Stronghold

It was from the mid-1960s, with a new Labour government in office, that the courts set about expanding and consoli-
dating their powers to control local and executive govern-
ment, this was encouraged by lawyers who had woken up to the existence of these powers and were offering the courts interesting cases in growing numbers. In 1967 a Divisional Court of which the Chief Justice and Lord Diplock (then a member of the Court of Appeal) were members took the bold and unexpected step of holding that judicial review govern-
ment, domestic as at least, of the prerogative power of the Crown. 6 It is relevant to note that for nearly 20 years thereafter the judiciary, and hence most lawyers and academics, treated this case as marginal deci-
ision. It was only when the major case concerning the supposed use of prerogative powers to ban trade union membership at the government's principal intelligence-
gathering establishment 7 reached the House of Lords that it was at last proudly acknowledged that in Ex parte Lain the courts had long before breached the final stronghold of government outside the Parliament chamber itself, sweeping the last disputed prize of the constitutional conflict of the seventeenth century away from the Crown and its ministers, who had thought it theirs to keep, and into the hands of the judges.

The judgment of the judges had destroyed most of the refugee governments in non-justiciability. Not only was there to be no automatic exclusion of judicial review even if some other channel of recourse was available; 8 even Parliament's explicit attempt to exclude it by privative or exclusionary clauses founded on the assertion that judi-
cial control of process was greater than statutory protection of the community, Parliament itself could not readily take
away from judges and hand to administrators the power to interpret and declare law.

Judicial Creativity

Since then the judges, in a series of politically sensitive cases 9, have established tight judicial controls over elected local authorities, marginalising electoral mandates in fav-
our of strict judicial interpretation of statutory powers and duties. The point at which the judges' intervention has swept into private law has been an administrative or judicial act, it simply confirms that municipal socialism is a threat to the rule of law — one of the very premises from which the modern growth of judicial review originates. On this footing there is no serious risk of legal inconsistency: a single principle of public law is applied to all local authorities, even though it tends to be treated as administratively significant only in all but the most extreme cases. It was only when the process was safely established that the judges felt able to admit that it had been their own conclusion. This had been the case since 1965, when Lord Diplock, who had uttered a syllable without some carefully thought-out pur-
pose, went out of his way to say this: "The rules as to "judicial review" for the purpose of applying for pre-employment orders, like most of English public law, are not to be found in any statute. They are made by judges, by judges they can be altered; there are no ones who have been over the years the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and within the law. The activities of private citizens are controlled by governmental authorities, that have been taking place, sometimes slowly, sometimes swiftly, since the Second World War. These changes have been particularly rapid since World War II. 10"

The passage is worth re-reading. Diplock uses the doctrines of standing as an illustration of the genie of the bottle. "Finally acknowledging the importance of judicial creativity, he envisages not a fixed system but a future of more creativity. And he abscises beyond the public, economic and ultimately constitutional changes taking place in Britain. His analysis is the thesis of this article.

No Bureaucies

In fact, standing is not simply a slim peg on which to hang a large proposition. The restrictive character of standing in private law had meant that only the Attorney-General of this country in the name of the government, could sue bringing of proceedings on an issue of significance to the public in which the plaintiff had no special personal stake. This had been vigorously reaffirmed two years earlier, to the surprise of some, by a House of Lords containing a former law officer of the Crown, in a decision 11 which wisely overrode short-term political sympathy in favour of constitutional rigour, preserving the public oversight and control of private litigation on public issues. But in public law the judges have made the doors far wider, and the doorkeeper is not the Attorney-General but the judge to whom application is made for leave to apply for judicial review. This has given rise to a flood of applications. A user-friendly guide through it have come litigants like the public moralist Raymond Blackburn MP, 12 criticising the Commissioner of Metropolitan Police for not deploying enough officers to combat the trade in pornography. It is legitimate to wonder whether the doors would have welcomed equally a politi-

criticising the expertise of force by police officers in a current industrial dispute. But it is a matter of record now that, however tenuously, a charitable public interest group has been able to invoke a systematic misuse of power by a government department which had withheld modest pay-
ments due to a large number of poor people who could not be expected to bring their own proceedings. 13

A Long List of Casualties

So it is no longer heretical either to suggest that English judges make law or, more contentiously, that they do so at times as a conscious response to political developments. What is more both dangerous to articulate and more diffi-
cult to identify is what their objectives are in this process. From the examples given above it is apparent that there is no single crude causation that can be made of these objectives. Law continues to grow on a case-by-case basis, which tends at least to divert if not to obstruct considered strategie development. There is, therefore, often a single equa-
tion of conservative judges with conservative lawmaking. Indeed the radicalism of modern political conservatism in Britain has in many respects overtaken that of the judici-
ary. One judge with almost unrivalled experience of constitutional law has commented extra-judicially 17 on the new tendency of government to ignore doubts about constitutional propriety in its administrative measures; and the casually list of Mrs Thatcher's ministers since 1979 in judicial review has been considerable. Willingly or not, the judges have in some degree become conservatives of accepted norms of administrative and constitutional behaviour in central government.

Constitutional Crisis

But in local government the imperatives have been much clearer and stronger. The rise and entrenchment of conser-
vatism as the dominant politics of national life has been accompanied by an unprecedented political pressure for sometimes radical left-wing administrations at local level in the great conurbations. These have come into legal as well as political conflict with central government, and adjudication on-chal-
15. R v Secretary of State for Social Services, ex parte Child Poverty Action Group (unreported, 30th July 1984). Woolf J, on appeal the point was left open (The Times, 8th August 1984).
17. Hugh Young in The Guardian, 9th March 1988. The final product appears to have been released. This is not a shower, garnishing on how to avoid judicial review.
19. R v Secretary of State for Social Services, ex parte Child Poverty Action Group (unreported, 30th July 1984). Woolf J, on appeal the point was left open (The Times, 8th August 1984).
21. The late Ruy P. Newton, co-founder of the Black Panther Party, was a major target of COINTELPRO. Up until his death in August 1989, a total of 42 different prosecutions had been brought against him including three trials on one murder charge. Despite this he was only ever convicted of illegal possession of a handgun. The FBI is alleged to have had over a million documents on Newton alone.
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32. A major target.
Debbie Weich

Sentencing Reforms – Will the Punishments Fit the Crimes?

The crisis afflicting Her Majesty’s prisons has forced the government to reassess the function of custody in our criminal justice system. This exercise has yielded some constructive recommendations in the recent White Paper, Crime, Justice and Protecting the Public: Proposals for Legislation (February 1990, Cm 965, HMSO). However, the proposals are marred by fear of appearing ‘soft’ on crime. As a result there are reactionary recommendations for violent offenders, and ill-thought out views on the role of the probation service.

The common theme of the proposals is the principle of proportionality; the aim of sentencing is to ensure offenders get their ‘just deserts’. The severity of the penalty should be directly related to the seriousness of the offence. This is to be achieved on the one hand by shorter prison sentences and an increased use of non-custodial sentences for property offenders, and on the other hand, by longer terms of imprisonment for violent and sex offenders.

Soft Options

The proposals in the White Paper attempt to encourage the sentence to take community penalties more seriously. Probation, community service and curfew orders are to be used as graduated restrictions on liberty (each step must be justified in terms of the seriousness of the offence), culminating in custody as the severest form of restraint. Reasons for the imposition of a custodial sentence (except in respect of offences triable only on indictment) will have to be given, and a social inquiry report obtained.

Proposed inducements for the sentencer to impose community penalties include making a probation order a ‘sentence’ so that it can be combined with fines; introducing a combined order – probation coupled with community service; and a new curfew and education order. In the event the tagging experiments are successful. Attendance at day centres for up to 60 days will remain a possible condition of probation orders, but they will be renamed probation centres.

This increased flexibility may well encourage sentencers to make more use of non-custodial alternatives. There is, however, a danger of non-custodial penalties becoming so demanding as to be oppressive. If they are made more arduous, more offenders may be imprisoned for failing to complete the order successfully. This can only be avoided if sentencers genuinely adopt the concept of ‘graduated restrictions on liberty’, and radically alter their view that anything other than custody is a soft option.

Protective sentencing is wrong in principle, since by definition it constitutes punishing someone for something they have not done. 19

Irony of Incarceration

The White Paper rightly draws attention to the bad conditions and overcrowding in prisons. Ex-convicts tend to be intensely bitter towards society and better educated in the art of crime thanks to their fellow inmates. The irony of locking people up as a solution to the crime problem is captured in the Justice report, Justice in Prison (cited in Bricks of Shame, V Stern 1987): ‘Condemned for infringing the law, the prisoner finds himself in a society ruled not by law but by arbitrary power. It is small wonder if at the time of his release the contempt for law, justice and the rights of others is greater than it was before he was in prison.’

The flaw in the policy of differential treatment for violent and non-violent offenders is that the same argu-

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4. US v L Peltier Cirt No 77 – 3003 Rose J page 12564
ments apply equally to the sentencing of violent offenders. It is precisely because they pertain to violent offenders that a means of dealing with them other than by incarceration must be found. Motivations towards violence may differ, but the resulting behaviour is the same. Many violent crimes stem from alcohol abuse: probations with a condition of treatment is generally the appropriate punishment. Frustration and anger arising out of poverty, unemployment and bad housing also breed violence. Incarceration simply exacerbates these problems, and the brutal prison environment is unlikely to have a pacifying influence. A community service order, providing an outlet for anger in manual labour and training to improve an offender's life would be a much more positive and constructive approach.

Furthermore prison sentences for violent and sex offenders are inconsistent with the principle of proportionality. Non-violent offenders are to be brought out of the prison system or at least placed, for shorter periods. Proportionality would be maintained if sentences for violent offenders were also reduced.

**False Positives**

The extended sentence is to be replaced by a power to pass a longer sentence than is justified by the seriousness of the offence 'if this is necessary to protect the public from serious harm'. This is unsatisfactory. Denial of seriousness is notoriously difficult to predict. It will inevitably lead to people being locked up who would not have offended if they had acted against, the will be under supervision for the third quarter of their sentence and subject to recall for reoffending. They will be under supervision for the third quarter of their sentence and subject to recall for reoffending. The parole proposals include a power for the Home Secretary to delegate the final decision to the parole board — we are told the Home Secretary's present intention is to retain control of decisions regarding prisoners sentenced from 1984. The introduction of a one-stop system of parole is a welcome one; it is unfortunate that the Home Secretary needs the feel the need to retain control at all.

The proposed statutory criteria for parole are predictably vague. The decision is to be based primarily on risk of reoffending, which is contrary to the recommendations of making specific predictions. The unit system to be introduced with regard to fines is a welcome proposal. It links fines more closely with ability to pay. The parole board should have the power to order the opposite to take place, but financial penalties are likely to be imposed with no custodial penalties such as community service, or advice from a probation officer on debt management.

**Parents On Trial**

Juvenile courts are to be renamed youth courts. For children aged 10-15, the procedure is to be changed to reflect the parents' attendance unless it is unreasonable to do so. Also for this age group, fines are to be assessed according to the parents' income and means. It is a cruel injustice that the court should be making a decision about a child's upbringing but the parents have no say. The measures are likely to have precisely the opposite effect to that which is intended. Parents' authority over their children and children's respect for their parents', will be undermined if the period of sentence is successfully completed.

The basis for section 38 commitments for sentence to the Crown Court without a finding of guilt, are to be undermined. Parents who are found to be under influence of illegal, will be publicly blamed for the child's behaviour in court. The shift in responsibility for the child's criminal behaviour will do nothing to teach the child to face his or her crimes. There is a serious danger that reoffending will be considered allowing the community penalties are not suitable. They should normally be combined with financial penalties so that the offender does not appear to be punished if the period of sentence is successfully completed.

**Ashley Underwood**

**Homeless People Batted About Like Shuttlecocks**

Part III of the Housing Act 1985 gives the homeless a series of rights which, cumulatively, should operate so as to provide a pathway or refuge for those whom Parliament feels should be protected. In short, they must be in priority need and unintentionally homeless.

Given the context, the criteria must be based on the housing authority to which she applies, unless that authority decides that she has no local connection but does have a local connection with another authority, and further decides to refer her or her to that other authority. In those circumstances the latter (the 'receiving authority') is offered an alternative to the former only if it can dispute the local connection findings, either before a statutory tribunal or the Divisional Court.

What if the receiving authority has previously entered an application for housing by the applicant which it has rejected on the grounds that she was intentionally homeless? Under Schedule 5 of the Housing Act 1985 Schedule 5 to the Housing Act 1985 (as inserted by the Housing Act 1985) the Court of Appeal held that the receiving authority could not challenge the referring authority's finding on an instruction. The Court found this 'lamentable' and expressed the hope that Parliament would revise it. It decided not to.

**Unfair and Undemocratic**

In Slough the Court of Appeal drew some comfort from its view that it must be rare when a housing authority finds itself in this position. Unhappily that is not so. An applicant rejected by one authority will obviously be tempted to try another authority.

Given that many authorities in London at least, provide temporary accommodation for applicants outside the borough while they are deciding on their application, the obvious next step for the rejected applicant is to apply to the authority where she is actually being put up. Such an authority, knowing the consequences of finding the applicant unintentionally homeless will be that it can refer them elsewhere because of the lack of a local connection is likely, mistakenly, to say that the applicant has made a decision to go elsewhere. When the applicant has made a local connection, it is almost bound to come up with the authority to whom the first application was made.

The conflict then arises. The applicant has properly made use of the right to make further applications. The receiving authority has made a finding of intention which has not been challenged as being unreasonable or otherwise unlawful. The referring authority has made a contrary decision which may be unimpeachable in public law terms, and it discretion. What of the receiving authority, at the expense of the latter. Not only is that unfair and undemocratic, it defies the presumed intention of Parliament in the 1985 Act that housing authorities are given wide discretion within their area as to how to operate the Act.

**A Game of Badminton**

This anomaly leads to resentment and increasingly, to expensive and complex litigation. The courts are anxious to ensure that the finding of intention made by the referring borough was not arbitrary and that the decision to refer was reached fairly. That may provide lucrative work for the lawyers involved, but it diverts money which could be far better spent on proper provision for housing. Furthermore it creates uncertainty for applicants, whose situation was described by Lord Denning MR as that of a shuttlecock. Not only are applicants uncertain who will house them; if the receiving authority obtains an order quashing the referring authority's decision as to unintentional homelessness, no one will.

If it is accepted that, as Lord Justice Watkins put it in a recent case, there ought to be 'a reconsideration of provisions which needlessly set two local authorities on a collision course', there are two realistic alternatives. I ignore the only human course, that sufficient housing stock be made available, because it obviously will not be, in the foreseeable future. Firstly, applicants can be allowed to continue 'forum shopping', and to make successive applications to different authorities, but no authority should be allowed to make a referral under the local connections provision to an authority which has previously found the applicant intentionally homeless.

Secondly, successive applications could simply be ruled out. If at first sight that seems harsh, let it be remembered that the law is supposed to provide some certainty and it is supposed, in the case of the 1985 Act, to devolve responsibility to local authorities. Successive applications directly challenge the exercise of that responsibility.

**FAIRER ALTERNATIVES**

Both alternatives would operate unfairly if the first authority acted unlawfully when it found the applicant intentionally homeless, but , the applicant could then seek judicial review. It would be essential to make an allowance for a change in circumstances within either alternative. Plainly if an applicant finds settled housing after being rejected by one authority, leaves it through no fault of their own, and then seeks housing from another authority, the earlier application and finding should be disregarded. Otherwise, either alternative would be fairer than the present system. If both are unacceptable, is it too much to ask that Parliament does something about the scandalous and degrading lack of housing instead?
MY LEARNED FRIENDS: AN INSIDER'S VIEW OF THE JEFFREY ARCHER CASE AND OTHER NOTORIOUS LIBEL ACTIONS

Adam Raphael, W H Allen, £11.95

The first legislative measure concerning defamation in England was the 1276 Statute of Westminster (or Statute of Magna Carta). Imprisonment in goal or in the pillory was amongst the more liberal of its sanctions, which also included束cropping, nose-slicing, the branding of the forehead and hanging, drawing and quartering.

On the evidence of this new book, the distinguished journalist Adam Raphael might, in an earlier age, have been a prime candidate for such rough justice. It is his almost proud boast that he has been both a plaintiff and a defendant in libel trials, though it is possibly for details of his role as witness that this book will be most eagerly sought out, for Raphael played a key role in the Jeffrey Archer affair.

This role led to him being condemned by Stewart Sten, the editor of the Mail on Sunday, as a betrayer of sources. Raphael admits that in writing the book he was motivated largely by the need to finance his own libel action against the newspaper; but the book also explains how Raphael came to give evidence against Archer, his former friend.

Raphael says that he was at the outset an unwilling participant who was soon forced to make the choice between dishonour and criminal sanction. Whether you accept that this decision was as distasteful as Raphael claims may depend less upon how you feel about civil disobedience than upon how you feel about Jeffrey Archer.

Raphael writes lucidly and with a clear appreciation of what will interest the general reader but, even when dealing with technical matters, his touch remains sure. There are neat summaries of recent actions involving Derek Jameson, Charlotte Cornwell and Michael Mesher, and an analysis of the case of the fles which may or may not have irritated the Thatchers in a Blackpool hotel bedroom. By this stage, however, it becomes difficult to dispel the suspicion that the book's main purpose has been exhausted in its early chapters, and that most of what remains, though no doubt intriguing, is little more than filler: more prurience than jurisprudence.

The book does, however, serve as a graphic illustration of the horrendous costs which can be sustained by even a successfully libel litigant, and it is almost worth its cover price solely for Tom Wolfe's suggestion that 'in a civil case a Bronx jury is simply a vehicle for redistributing wealth. Reflections on the question of damages figure prominently in the book's final section, which is a useful summary of current reform proposals.

However, it is left to a Mr Brett to make the first of only two comments about the availability of legal aid in defamation cases. Mr Brett is solicitor to Times Newspapers, and it is hardly surprising to find that his fondness for a swift, fixed-damages arbitration system leads him to conclude that 'the answer to the defamatory conundrum is not to waste more public money through legal aid funding of this archaic and enormously expensive gledi(E)rial ritual'.

It is a shame that this question is not given more space. There can be few people who have ever studied our present system who have not found themselves nodding sagely at the words of Robert Maxwell: 'Seeking redress for libel is open only to those who can afford it'. Those who do not have resources of their own or the backing of their employers have to grin and bear any assassination of their character.

David Hewitt

APPLICATION REFUSED – EMPLOYMENT VETTING BY THE STATE

Ian Linn
The Civil Liberties Trust 1990 £3.95

People are often denied jobs because of their character, beliefs, affiliations or proclivities. Our law gives employers complete freedom to turn down applicants for good, bad or no reason – except on grounds of race or sex. The latest Employment Bill will also outlaw non-recruitment on the ground of union membership, but this is unlikely to hamper the activities of independent bodies like the Economic League, whose secret vetting of defence sector job applicants was commented on in a Liberty publication last year (The Economic League: The Silent McCarthyism by Hollingworth and Tremayne).

Society cannot impose wholesale controls on recruitment. But if government is going to prevent certain people holding certain positions in government, it is not necessarily unreasonable to hold their ability to do the job, then, this book argues, it is not too much to ask that those turned down should be told what has happened, how the decision is reached and that they can appeal against it.

The author accepts that some vetting is necessary. He measures our security vetting procedures against the test adopted by a Canadian Royal Commission in 1981: they should be 'sensitive to the requirements of individual justice and fair treatment' and concludes that they fail to pass this test.

Linn tells us that at least 60,000 jobs require positive vetting clearance, in government departments, British Telecom and the BBC. Negative vetting differs in that the individual is not normally told that the vetting is happening. An estimated 750,000 to one million people are subject to negative vetting, in defence contracting and telecommunications as well as the public sector.

The history of vetting, and the procedures followed, are explained. We find that negative vetting in relation to defence contractors' employees is carried out by a unit called MI5, which keeps its own files and cross-checks with other divisions of MI5 and with Special Branch files to see if anything is known about the subject. The MI5 officer responsible then makes an assessment based on four categories from 'A' (complete security clearance) to 'D' (not recommended for sensitive work).

The assessment is passed to the MOD's Defence Security Division which then decides whether the subject should have access to classified information. A similar procedure is followed for applicants to sensitive civil service posts. The subject is not told about any of this and cannot check the accuracy of the information used.

Positive vetting, on the other hand, is carried out every five years and consists of a security questionnaire, scrutiny of files, and a 'field investigation' comprising extensive interviews with the subject and character referees. An average of about 14 interviews per positive vet is conducted by officers who are virtually all male ex-police or service officers in their 50s and 60s. Every detail of the subject's way of life is considered potentially relevant, from politics to religion to hobbies to overseas connections to sexuality and lifestyle. None of the resulting material is shown to the subject.

The thrust of the author's criticism is that the 'culture of secrecy' (see Hilary Kitchin's article in SL No 5) on the Security Service Bill) endemic in our vetting procedures goes further than necessary to protect the security of the realm and creates the risk that suitable candidates are excluded from participation in government activities on illegitimate grounds.

The book also shows that positive vetting tends to confuse the personnel function of determining suitability for a job with the security function of vetting. Linn quotes a 1963 letter from the Cabinet Office to the First Division Association arguing that membership of CND could put a 'strain upon the loyalties of persons with access to classified information, given the nuclear threat, cold war policies and the Irish question'.

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Tim Kerr
BLACK MASK LOOKS BACK

I've been reading and rereading the classics. Those pre-war thrillers that inspired our generation of writers of detective fiction.

Eric Ambler has recently returned to live in his native London after many years abroad. He comes from a working class family, was a communist sympathiser and wrote many books over a long career. I decided to read his best known book *The Mask of Dimitrios* because I had missed it in my years of thriller reading. A search of all the local secondhand bookshops turned up a rather stilted copy in the library. First published in 1939, the style seems rather stilted and old fashioned, with a lot of untransliterated French which is rather flatting but unhelpful to ignorant types like me. The plot is contrived but very exciting at the end. Some of the action takes place in Sofia and there are remarkable descriptions of Italy in the 1930s which seem most relevant at this point in European history. I have so little knowledge of Eastern Europe between the wars that I don't know if Ambler is using facts or creating fiction. Readers please help. If anyone can verify that the International Macedonian Revolutionary Organisation (IMRO) was a going concern in the 1920s a small prize will come your way. And did you know that there were at that time roughly 27 independent states in Europe. Each has an army and an airforce and most has some sort of navy as well. For its own security each... must know what each corresponding force in each of the other 26 countries is doing... That means spies, armies of them. Pre-war Sofia sounds a jailhouse with shops crammed with food and lots of night clubs.

Ambler's politics are clear and his morality strong throughout. The thriller genre can be seen as a way of examining the enigma of evil; Ambler wonders if a person who is simply evil exists. Today I suppose we would say he is describing a psychopath. Europe was of course in a terrible state when Ambler wrote this book — the logic of Michaelangelo's David, Beethoven's quartets and Einstein's physics had been replaced by that of the Stock Exchange Year Book and Hitler's Mein Kampf.

Dashiell Hammett is a completely different sort of writer. We know he was a man of strong radical convictions. He even went to prison for refusing to name names before the Un-American Activities Committee. But you'd never know it from reading *The Thin Man*. The main pleasure of this book is reading about a decadent prohibition era lifestyle which contrasts with our clean living current culture values. The hero Nick Charles, marries Nora, a young heiress, quite his job as a detective and spends his days having a good time and managing her money. While they are jet-setting around in a hotel in New York in order to avoid their families, old clients reappear and he gets drawn into a murder hunt. Nick and Nora move in a world of room service, speakeasies where gangsters mix with socialites, waking up in the noon, nobody much in the way of breakfast, mixing cocktails, and taxis. Personally, I think it sounds like a lot of fun.

The Thin Man is a tremendous entertainment; sophisticated and witty with a clever fast moving plot, bright dialogue and funny characters. It's a classic which remains a model of the genre.

James M Cain's novels have been obscured by their brilliant movie versions. I happened to catch some of *Double Indemnity* on television in the early hours of the morning, keeping my insomnia baby company. Edward G Robinson as the dogged ulcer ridden insurance inspector was perfect. But Cain is an important American writer and deserves a wide audience — his books are superb. I don't know anything about his politics or personal circumstances but he always writes about ordinary people trying to make it in a culture offering tantalising riches just out of reach. No wonder they turn to blackmail, murder, incest and worse. The hero of *The Postman Always Rings Twice* is a drifter thrown up by the Depression. We see it all from his point of view — all authority is alien to him. He feels used by his own lawyer even when he gets him off. The story is so gripping, the atmosphere so tense that I won't disclose any of it. Apparently it inspired Camus to write *L'Étranger*, and was tried for obscenity in Boston. The style is elegant and spare. Most modern detective fiction is too wordy, a lot of prose is needed to establish character and plot. Only Ernest Leonora comes near to those masters of the genre.

In an earlier column I quoted a description of a medieval Chinese inquest. Here is Cain's description of one in California in about 1934. 'The coroner was back of a table, with some kind of secretary guy beside him. Off to one side were a half dozen guys that acted pretty sore, with cops standing guard over them. They were the jury. There was a bunch of other people, with cops pushing them around the place where they ought to stand. The undertaker was tip-toeing around, and every now and then he would shave a chair under somebody. Off to one side, on a table was something under a sheet.

The Mask of Dimitrios, by Eric Ambler, Fontana, £2.95
The Thin Man, by Dashiell Hammett, Penguin, £3.50
The Postman Always Rings Twice, and Double Indemnity, by James M Cain are contained in The Five Great Novels of J M Cain, Picador, £5.95

Black Mask is Beth Prince and she would like suggestions for books to review and answers to her competition.

 PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN.

Mick Ryan and Tony Ward
Open University Press 1989

Have recent events at Strangeways made it less likely that in the near future we will all be invited to buy shares in British Prisons PLC? In the short term the answer is almost certainly 'yes'. But in the longer term the government are returning to wind blowing through the penal system, that I had missed the most disturbing feature of privatisation. The economics of private sector involvement in building and running prisons only make sense in the context of an expanding prison population. No private prison company wishing to attract investors would want to involve itself with a government intent on reducing the prison population.

Ward and Ryan are surely right in stressing that the very different history and structure of the British prison system means that the American model of privatisation is
that offered by private or community agencies. They also reject the monarchic argument which opposes private prisons on the basis that people are imprisoned by Her Majesty's courts and the task of holding them cannot be delegated to some other non-state agency for fear of undermining the essence of the liberal democratic state. They rest their opposition to private prisons on the ground that as imprisonment involves the organised use of force the consequent need for accountability and scrutiny should mean that the idea of private control becomes unacceptable or meaningless. Certainly the debate about how and when to end the Strangeways disturbances demonstrates the undesirability of leaving such decisions to private agencies.

The Woolf Inquiry into the prison system is likely to lead to significant changes in penal practice over the next decade. As I indicated at the outset, the very nature of the prison crisis will undoubtedly provide the Right with material to argue for greater private sector involvement as the solution. Ward and Ryan's impressive book does an excellent debunking job on the myths of the American private prison miracle and offers some important ideas on how a proper balance might be struck in the future between state and private involvement in the penal system.

Tim Owen

**MANCHESTER BRANCH**

The **MANCHESTER BRANCH** of the Haldane Society meets on the 2nd Wednesday of every month at 6.30pm in the Manchester Town Hall, Albert Square, Manchester.

Contact the delegate for further details:
Anthony Coombes
o/c John Pickering (Solicitors),
Old Exchange Building, 6 St. Anne's Passage,
29-31 King Street, Manchester.
Tel: 061 834 1251

**NATIONAL POLL TAX DEMONSTRATION – SATURDAY 31 MARCH 1990**

**LEGAL OBSERVERS GROUP**

In order to assist the reports of the Haldane Society's observers who were present at the events on Saturday 31 March it would be appreciated if everyone who was present at the march, the rally and the aftermath could send written notes on their view of events and any incidents that they witnessed. These will, of course, be treated with the utmost confidence. The contact is Steve Gibbons: 071 226 4424 (h), 071 250 8434 (w). Reports can be sent to 706 Aubert Park, Highbury, N5 1TS.

**DELEGATION TO IRELAND**

Following Kader Asmal's call for British lawyers to play a more active role in highlighting human rights abuses in Northern Ireland, a Haldane delegation to Belfast and Dublin is proposed for November this year. Exact details of the visit will be finalised over the coming months. The aim is for a balanced group including all wings of the legal profession and those with both more and less legal experience. Any Haldane member interested in participating please write to the Northern Ireland subcommittee at the Haldane office.

**LIBEL READING**

The Morning Star is looking for lawyers willing to provide libel reading services on a voluntary basis. If you are interested please contact Kate Markus, 96 Chichele Road, London NW2
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