LAW AND DEMOCRACY

Haldane Society goes to South Africa
Kader Asmal on radical legal change in the new South Africa

Bosnian war crimes tribunals
IADL Congress report
Refugees and national security
Transforming UK labour law
CONTENTS

Insight

XIV Congress of the IADL
Bill Bowring reports on the Congress of the International Association of Democratic Lawyers

Editorial

Like a storm over the Veld
Kader Asmal looks to the future for progressive lawyers and radical legal change in the new South Africa

The future of the Haldane Society
Kate Markus and Rakesh Patel put forward some probing questions as to the steps needed to build a thriving progressive legal organisation

Towards a new labour law
Carolyn Jones examines far-reaching proposals to transform the UK framework of labour law

The left and judicial review
Lee Bridges urges caution on those who see judicial review as a panacea to society’s ills

Refugees and national security
Pierre Machiavel looks at the exclusion 'terrorists' from asylum protection - but, as he points out, one person's terrorist is another's freedom fighter

The war crimes tribunals
Bill Bowring considers the issues for socialists arising from the Bosnian war crimes tribunals

Is there a stranger in the house?
Stephen Knafler provides an overview of the rights of asylum seekers to shelter

Book Reviews

SOCIALLAWYER

ISSUE 27 WINTER 1996

HALDANE SOCIETY OF SOCIALIST LAWYERS

The Haldane Society was founded in 1930. It is an organisation which provides a forum for the discussion and analysis of law and the legal system both nationally and internationally, from a socialist perspective. It is independent of any political party. Its membership consists of individuals who are lawyers, academics or students and legal workers, and it also has trade union and labour movement affiliates.

PRESIDENT:
John Watts-Mills QC

VICE PRESIDENTS:
Kader Asmal, Jack Gaster, Tony Gifford QC, Tess Gill, Helena Kennedy QC, Michael Mansfield QC, Dr. Paul O'Higgins, Abbie Sachs, Michael Sorrell, David Turner-Samuels, Professor Lord Wedderburn QC.

CHAIR:
Kate Markus

SECRETARY:
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EXECUTIVE COMMITTEE:
Bill Bowring, Damian Brown, Colette Chesters; Steve Cragg, Nadine Finch, Mark Henderson, Philippa Kaufmann; Cath Casserly, Catrin Lewis; Kate Markus; Nathaniel Matthews; Rakesh Patel; Madeleine Rees; Keir Starmer; Nick Toms; Sasha Whitworth

REGIONAL CONTACTS:
West Midlands - Brian Nott, Flat 2, 40 Chancery Lane, Moseley, Birmingham, B13 9DJ.
Manchester - Neil Usher, Kenworthy Buildings, 83 Bridge Street, Manchester M3.

HALDANE SUBCOMMITTEES:

Employment - Meets at the Haldane Office on the third Tuesday of the month. Contact Michael Ford. Tel: 0171-404 1313.

International - Meets at the Haldane Office on the second Tuesday of the month. Contact Katie Wood on: 0181-460 8251.

Lesbian and Gay - Convenor Tracey Payne, tel: 0171-583 8233.

Women - Bethan Harris - 0171-333 4341.

NOTICE OF HALDANE SOCIETY ANNUAL GENERAL MEETING

The Haldane AGM will be held on:
11th January 1997
SOAS Lecture theatre (nearest tube Russell Square)
2.00 p.m. - 5.00 p.m

Any member intending to propose any motion at or otherwise bring any matter before the AGM must serve upon the Secretary (Phillipa Kaufmann) written notice of such motion or other matter and the text thereof, not less than 6 weeks before the AGM (i.e. by Saturday 30th November).

Address for sending notices: c/o Doughty Street Chambers, 11 Doughty Street, London, WC1 N 2PG.
Challenges for Law and Lawyers in the Next Millennium: Democracy in Domestic and International Law

IDBLX CONGRESS

CAPETOWN, SOUTH AFRICA
31 MARCH - 6 APRIL 1996

This conference was organised by the International Association of Democratic Lawyers (IADL) in conjunction with the International Forum for Human Rights Law, and celebrated IADL's 50th anniversary (it was founded in 1946), as well as two years of a Free South Africa. The conference gathered in some 60 international election observers in the aftermath of Nelson Mandela's election and Dutch Prime Minister Vink's delegation of the Preparatory Commission. IADL members from 74 countries, and IADL's Women's Committee, took part in these workshops. The conference was attended by 743 delegates, from some 33 countries (Africa: Sudan, Somalia, South Korea, Senegal, Sierra, Benin, Namibia, Mozambique, Europe: UK, Belgium, France, Germany, Spain, Bulgaria, Yugoslavia, Russia: Asia: Korea, Japan, India, Pakistan, Middle East: Morocco, Algeria, Tunisia, Libya, Egypt, Israel, Palestine, Americas: USA, Jamaica, Cuba, Brazil, Argentina, Martinique).

The UK group, most of whom were Haldane members, was the largest. 45-strong, including (Chair: Peter Mansell, Keir Starmer, Richard Blaydon, Kevin Stephenson, Peter Hattersley, Patrick Waller, Thomas Beale, Peter Twaddle from Nottingham University, Brian LEC, and Bill Bowring), QC's (Ingrid Grinberg, Joanne Donath, and Robert Potts-Potts), senior solicitors (Michael Elman, Louise Christian), and other solicitors and barristers, including Peter Herbert, chair of the Society of Lawyers. The next largest groups were from Japan and Germany. The new conference, which was attended by 743 delegates, included all its status members of their delegation.

Conference on Refugees Rights

The Human Rights Law Centre at the University of Nottingham is holding a conference entitled Refugee Rights and Realities - approaches to law and policy reforms. On 30 November 1995 at the University of Nottingham. Speakers will include Nick Baker QC, Richard Bramhall, and Sally Bateman. The conference will examine changing definitions, perceptions and practices concerning refugees in the world today.

Employment law subcommittee expands its work

The Haldane Society Employment Law subcommittee has, for the past year introduced a discussion element into its monthly business meetings. Individuals from within and outside the Committee have delivered papers on numerous subjects, including the future of European labour law, industrial tribunal reform, trade union liability for industrial action, new directions for health and safety law and the link between labour rights and international trade.

These meetings have been such a success that the subcommittee has decided to publish a series of briefing papers arising from the monthly meetings. The aim of the briefing papers is to provide information to the labour movement at large on specific subjects.

The first of the series was published in September 1996 and dealt with section 8 of the Immigration and Asylum Act 1996. This provides forces employers to check on the immigration status of their employees.

Copies of the briefing paper and further information about the subcommittee are available from Michael Ford, Doig Street Chambers, London, Tel: 0171-403 1314.

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Enquiries and requests for registration forms should be directed to the Conference Secretary, Human Rights Law Centre, Department of Law, University of Nottingham, University Park, Nottingham, NG7 2RD, Tel: 0115 951 5649 Fax: 0115 951 3569. Email: Patrick. Twaddle@ntu.ac.uk

No means No - Update from English Collective of Prostitutes

Readers of our last issue will be familiar with the private prosecution for rape successfully brought by two prostitutes after the CPS refused to act. In his appeal letters for Christopher Davis argued that the prosecution was an abuse of process as the CPS had dropped the case, and that the trial judge's warnings to the jury not to let personal prejudices towards the victims' profession affect their views on their credibility had biased against the defence.

The Law Court of Appeal rejected the appeal in favour of what the unobserved observer may seem dangerously common sense. Lord Bingham quoted commentaries that you cannot identify people as worthy or unworthy of belief because of being a prostitute or otherwise but that you have to judge people as individuals. The judges realised that prostitutes are entitled to try to no end and to be judged by the court. Unfortunately this principle was not yet adopted by the CPS, or by the OCHR which still compensates compensation awards to prostitutes on the basis of their 'character and conduct'.

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International subcommittee meetings

The international subcommittees of the Haldane Society are holding the following two meetings:

EDITORIAL

Pessimism, existentialism or even (one shudders to think) self-analysis may suit
but now and then they come knocking like
unwelcome guests.

However, on the other hand is society's forte. It is time we think for "Socialist Lawyer" to take
them by the hand, invite them in, sit them down
and indulge in a long dark tea party of the
soul.
As we approach our AGM, which will be
held on 11 January 1997 (see page 2 for
details), it cannot be said that this has been an
uneventful year for the Haldane Soci-
y, or for socialist lawyers everywhere.

The Haldane Educational Trust, with which
many Haldane members are involved, has
got up and running, and its series of edu-
cational seminars appear to have been both
remunerative and stimulating. A series of
monthly seminars on current legal is-
ues was held last year by the Haldane Soci-
y, attracting speakers from as far away
as the United States, and periodic semi-
nars have continued. Bill Bowring describes
the more salubrious aspects of the Soci-
y's participation in the IADL congress in
South Africa. This sudden conflation of
energy provides welcome signs of life in
the Society, and perhaps of the legal body
too.

And yet, over an ink cup of tea, the
article by Kate Markus and Rakesh Patel
on the direction of social law confirms snar-
ing doubt about the health of the patient.
This year we were able to hire a worker -
for the first time in history - but sadly not
for long. Drumming up attendance at meet-
ings and seminars is giving organizers the
stage-fright, and the Immigration Subcom-
mittee has once again gracefully put its legs in
the air and crooked. Are we in danger of
haemorrhaging again?

Anyone working in or around the law will
have been horrified by the Hammer hor-
or show of the current Government legal
campaign against persons from abroad. This
time it is the asylum seeker (the former
good guy of immigration law) who is cor-
nered by Messrs Howard, Lilley and Her
Government.

Peter Lilley has at times had an opponent
in the opposite corner in the figure of cer-
tain figures of Appeal. In Secretary of State for Social Security ex

parle Re B & J CWI the rather sinister if only
named Social Security (Welfare Provisions Abolition)
Miscellaneous Amendment Regulations 1996
were knocked for a loop. Lord Justice Brown
marshalled some heroic jurisprudence in doing
so, and stated in his judgment that "regula-
tions now in force (are) so uncompromisingly
draconian that they may indeed be ultra vires."
He also noted that our Hammer goblin's regu-
lations "necessarily contemplate for some a
life so destitute that to my mind no civilised
nation can tolerate it." "LA Law" eat your heart
out folks, this is what being a lawyer should be
all about.

Needless to say, this collective effort of legal
muscle and social concern was steamrollered
by a schedule to the 1996 Asylum and Immig-
ation Act 1996, where a perfectly binding
draconian measure was restored en bloc. One
suspects that this time it is the executive and
not the judiciary who are not of this world. Or
maybe, as lawyers, it is the other way round;
check out Lee Bridges' cautionary tale about
judicial review.

Outbursts of civility do seem to happen now
and then; the jury which agreed that to smash
up a jet fighter was crime prevention (or some-
thing) showed admirable common sense. And
the McLibel 2's saga is a delightful stake
through the heart of the steak.

It is right to say that defensiveness is not the
answer. In deed, perhaps it is a corollary of the
fundamental nature of this Government's
attitude to British social lawyers that pro-
gressive lawyers have the opportunity to
demand a more, not less, radical agenda. Caro-
lynn Jones' article on a call for a new labour
law describes just such a challenge posed by
the Institute of Employment Rights. All too often
however the social construction
crew and their night of the living dead
have their way as usual. In
this unusual political world in which we
live there is more, not less, need for radical
lawyers and radical views on legal practice. The
time is here for commitment to rebuilind
and reinvigorating the Haldane Society. Meet the
challenge.

To end on a macabre note, the Ripper slashes
another Welfare State lady, the Red Flag is bled
by Blair hovers blindly in the
wings (but which wing?). More tea Count?

THE FUTURE OF HALDANE SOCIETY

The Haldane Society has been in existence for almost 70 years, attracting many thousands of
lawyers, students, academics and trades unionists to its membership and contributing to working
class struggles and the pursuit of socialism. The role of socialist lawyers in supporting the
labour movement has never, until recently, been in question.

Kate Markus & Rakesh Patel

Labour movement by the bulk of the Society’s membership has

The last 5 years has seen the rise of the right, the strength-
ing of the global economy, the weakening of the trade
union movement, the degeneration of the Labour Party, and the
collapse of the Communist Party. As a result of this marked shift
to the Right, few socialists have a solid political base from
which to develop their activities. The Haldane Society, like the Left in
general, has not been immune to the effects of the political shift
to the Right.

We believe that there must be a full and frank debate about
the future of the Society. This is not because we doubt the
importance of the Society. Far from it. It is because we believe
that in the current political climate the Haldane Society is
more important than ever but also very vulnerable. If it is to
survive as an effective body which helps to move the struggles
of the working class forward, then the causes of this vulnerability
must be understood and tackled.

The bleak scenario that we have sketched has a number of
negative consequences for the Haldane Society.

Single-issue campaigns

First, many turn to single issue organisations and campaigns
through which to carry out their political commitments. Few of
those organisations are actually or expressly socialist. However,
many socialist lawyers find that they are able to conduct effective
campaigns through those organisations and so have little time or
motivation for movement in a broad-based socialist organisa-
tion such as the Haldane Society.

Influencing rules by working on single issues and classical legal
strategies, such as test cases, the courts and lobbying will have little
social effect until social power relations are themselves changed.
To help bring about a fundamental change for the better, we
need to look at wider social issues and have a broader socialist
base.

Human rights do not equal socialism

Second, left wing lawyers tend to equate the pursuit of human
rights with the pursuit of socialism. Those who devote large
parts of their professional activities to developing the use of the
ECHR or other international human rights instruments are not
pursuing agendas that are socialist in themselves.

Of course many of the rights that are the subject of such
actions will be ones that are an integral part of socialist values.
But the legal activities are no more socialist than the opportu-
nist who like many other lawyers has forgotten the clients and
lost touch with the more appropriate tools to defend and
advance their rights, individually and collectively, and to
challenge the power of the state.

It is sometimes easy to forget that we work within a profession
and legal system which in itself is inaccessible to a large section
of the population. Lawyers, whether right wing or left wing, are
socially and politically isolated and often their close ties to the
official legal system distances them from the very people who
they are fighting for and figure from the pursuit of real socialist
ideas.

It is the content of the clients' struggles and claims, not the
legal issues or forums involved, that characterises lawyers' work
politically. The move away from the collective struggles of the

Kate Markus & Rakesh Patel

movement by the bulk of the Society’s membership has

Third, the more that socialist lawyers believe in their legal
activities as being of political value and in themselves, the
easier it is to justify avoidance of political commitments outside
of their professional careers. Career first. In the Haldane Society
this can mean that our activities are hindered and jeop-
dardised simply through lack of person-power.

Times have changed. Fifteen or twenty years ago, socialist
lawyers could fulfi all their political leanings as well as build suc-
cessful careers by lending their skills to the labour movement.

The high levels of left activism meant that there was no end of
confrontations between working class and state which required
the services of committed socialist lawyers. That is not the case
now. Socialist lawyers cannot in the courts but must move into other arenas if they are to give meaning to
their political beliefs.

Keeping in touch with reality

It is inevitable that lawyers in general, and barristers in par-
icular, who work in a fairly rarefied atmosphere of chambers,
low offices and courts, will lose touch with the reality of the lives
and politics of the majority of people. The system and the nature of
our profession requires clients to surrender passively to their
lawyers, and this cannot be compatible with a socialist agenda
and political activism.

If members are not involved in organisations and activities out-
side of their professional lives, they can have very little com-
prehension of the world around them. How then can we hope to
involve ourselves effectively in campaigns about improving peo-
ples lives or challenging the political systems that oppress and
repress?

"There are disheartening levels of disinterest in some of our major campaigns and paucity
responses to appeals for much-needed funds." The problems that the Haldane Society faces has led many long-standing and valued members to turn away from the Soci-
ety in all but subscription (if that). We sometimes receive criti-
cisms from these members, but more commonly are simply ig-
nored by them. There are disheartening levels of disinterest in some of our major campaigns and paucity responses to appeals for much-needed funds.

That the problems facing the Society are symptomatic of the general political malaise in which we find ourselves, and cannot all be blamed on the current members or Executive Committee. If members believe that the Society can and should play an important role, they must contribute what they can, in political, moral and financial support.

Socialist Lawyer/Winter 1996
LIKE A STORM OVER THE VELD

South Africa has seen astonishing change over the last decade. In an article adapted from his speech to the IADL congress, Haldane Vice President Kader Asmal - now a Minister in the South African Government - examines the future for progressive lawyers and legal methods.


Kader Asmal

L eft us recall the powerful, if simple words of Nobel laureate in waiting, Wally Serote, uttered at the height of oppression in 1971: "I do not know where I’ve been. But I’m here. I know I am coming. I do not know where I have been. But, brothers, I come like a storm over the veld."

Let us, then, also remember those, in South Africa and elsewhere, who, worked and fell, and in the great cause of our liberation. Let us also remember those who managed to use the law, despite apartheid, to challenge repression while at the same time not giving legitimacy to an evil regime. Let us remember those who provided the inspiration, the finance and the expertise from beyond South Africa’s borders in this great cause. The South African struggle brought about what is most ennobling in the profession of law. I hope that the presence of the IADL here, at this particular place, enmoldes the profession further.

The Indivisibility of International Human Rights

The IADL structure is not accidental. With its international umbrellas organisation both nourishing and being nourished by alliances, it is a tool for the institutional embodiment of an important truth about international law. At Princeton University by its Law School, the IADL has pointed out, systems of international obligation only resonate in the real lives of people if domestic legal systems are responsive to these international norms.

Under apartheid, South Africa’s local lawlessness, internal repression, cross-border aggression and international parish status were all of the same cloth. Conversely, in the new country, international law is explicitly part of the constitutional interpretation of domestic laws. Multilateral institutions in which nation states co-operate remove an essential ingredient of conflict across the world. And yet, in domestic and international politics alike, an ideological assault continues on the idea of governance. The domestic political rhetoric that bashes “big government” finds a global echo in the assaults on international institutions (apart from transnational corporations, which continue to prosper) and in the wealthy countries’ push pro quo attitudes to the funding of organisations like the United Nations. In domestic and international politics alike, vast increases in the power of private self-interested institutions coincide with a political agenda that would strip the origins of governance of the tools they need to be effective. Yet the result of this strategy — the deterritorialisation of power — leads directly to warfaredom rather than stability.

What kind of governance?

Even the most strident advocates of small government tend to stop short of dismantling, for instance, the police force. Indeed, they tend to advocate its expansion as well as the expansion of defense spending. It is always noteworthy to me how the small government argument is used up as the big government brigade, which you add up the sum total of their plans.

In any case, the real contest is never really between governance and its opposite. There is no alternative to governance. Rather, the only real question is: What kind of governance?

It is clear that the market can never be the perfect regulator of human needs and interactions. Therefore, the collapse of governance — the exact opposite of over-government — is today’s most critical problem in many parts of the post-colonial world. In many parts of the world, good governance has given way to tyranny, which has been called an “anarchic implosion of criminal violence.” Powerlessness, and the lack of capacity to govern, stalls parts of the world, many of them once deemed stable. The real problem for progressives is how to build human governance as a guarantor of social stability and social change — not how to dismantle governance for the benefit of self-interested and powerful private actors.

The great challenge facing lawyers is the insertion of minimum rights in a manner which does not leave them vulnerable to the whims and fancies of judges and courts, in other words, the constitutionalisation of minimum human rights. And human rights must include, but not be restricted to, social and economic rights. The protection of political rights as a prerequisite for the demand for, and achievement of, political rights is not a guarantee of social and economic rights — which must find embodiment in the Constitution, whatever rearguard actions are fought against this. There can be no doubt that the Constitution applies horizontally.

The challenge facing lawyers, and international institutions such as IADL, is to be systematic and not for those with journalism or publishing skills (as has happened too often in the past) in their response to the abuse of such human rights.

The Continuing Relevance of International NGOs

International organisations will not long remain a force for change, however, if they are effective only for sale to the highest bidder. The risk that domestic political and regulatory institutions may be ‘captured’ by powerful domestic interests has its echo internationally, where those with the purse-strings often expect to hold the whip hand. To avoid this it is necessary to mobilise, as IADL has so effectively mobilised down the years, to speak truth against power and corruption — influences which, while always present, are capable of regulation and are sometimes vulnerable to reason and action. It is then that in the end mobilised the international national community and vanquished apartheid.

The power of social forces has always been the power of ideas, the power of advocacy to inform and convince; the power of simple decency. It is only through efforts such as yours that the integrity of international institutions will be kept safe from the blandishments of those who would suggest a dictatorship of money.

IADL played a major role in the battle to ensure that apartheid was recognised for what it was — a crime against humanity. Because of the efforts of IADL and others, apartheid was repeatedly certified such a crime by the international community. Nothing better illustrates the indispensability of domestic and international politics than that achievement, which galvanised an international sanctions campaign on the back of local outrage everywhere, and the spread domestic political change on its way here in South Africa.

What is equally interesting is that this very issue remains part of South Africa’s domestic politics even today. The old apologists for apartheid have put on a refreshed guise. Many of those who opposed sanctions against apartheid now openly oppose the

GET INvOLVED ... GET AcTIVE

The Haldane Society of Socialist Lawyers needs the involvement of as many members as is possible if it is to continue to pursue campaigns for radical legal change. All of the Society’s subcommittees are open to any member and the Society is always happy to have members start new subject based or regional subcommittees. With a number of new members we will have space reserved for articles and letters responding to the arguments put forward by Kate Markos and Rakesh Patel. We look forward to your views. Get in touch with the Haldane office at Haldane Office, 2021

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Truth and Reconciliation Commission which is designed to facilitate public acknowledgement of the sins of the past.

Some of these opponents enjoy the hallmarked closets of our world renowned suburbs. They represent themselves both as academics and political commentators. The danger is that this split personality can end in them being scholars of nothing and commentaries of a discredited order. One such has recently written that "liberals who reject the Commission do so because they differ about the means, not the end."

This is precisely what this alleged division between means and ends, the more one finds not merely a procedural difference about how to change things, but actually the difference in the nature of the old South Africa and the nature of the necessary changes in the new country. We find relative discomfort with the new order and relative comfort with the old. This is a false choice in the 1994 election.

The IADL, which fielded an election observer mission of more than seventyfive highly respected lawyers from thirteen countries, knows that the truth was different. Moreover, while exercising themselves to find alleged legitimacy problems with the 1994 election, such people had no such samples with the 1992 all-white referendum. Indeed, the academic/commentator in question wrote at the time that then President de Klerk was to "honour bound" to return to the all-white electorate if he failed to gain acceptance for a "power sharing" constitution - a noblegovernment constitution - at the CODESA negotiations. The elevation of the white electorate leaves the liberal flip slop in a powerful way.

Predictably, such attempts to talk down the vastness of recent South Africa's possibilities met with an attempt to rehabilitate apartheid past. This double-agenda represents two sides of the same coin. Thus it is argued that apartheid, while bad, was a little like a jilted and chaste woman against human rights. The argument is that the entire idea that apartheid was a crime against humanity was merely a figment of cold war propaganda and that the struggle of civilisation for its own purpose as to the characterisation of apartheid as a crime against humanity was simply "criminalising" the free world.

The sole evidence produced for this proposition is the vote of two western countries on particular UN motions, thus selectively ignoring the recorded contrary conclusions of those same countries on other occasions.

Apartheid and Civilisation

But we should not wholly reduce this debate to a pedantic scarring around the issues who said what when. Instead, we should engage the debate at its most meaningful level: the "academic/commentator" simply assumes, without the burden of actual thought, that the alleged "western" view of apartheid (which, remember, he anyway mischaracterised) links between development and apartheid.

The claim that apartheid and civilisation were of the same camp is grotesque, but it is not new. This claim was in fact always the central plank of apartheid's own international propagandists. "We are the bearers of the values that made the West great. We are Europe in Africa," said apartheid's finance minister, Dr Dietrichs, in December 1962.

Eurocentric commentators - those uneasy in Africa, feeling themselves besieged by barbarity; people we might more aptly call Europhobes - are in the world the two problems of global power and powerlessness, of global wealth and dispossession, analogous to South African domestic politics of policing and oppression under apartheid, without the latter aspect of the inevitability of domestic politics and international affairs.

It is thus no accident that it was Cuban blood that was split in Angola in the struggle against apartheid. There is such a category of conflict among the wretched of the earth: and concerning it: this group is not merely "based on eccentric notions of race solidarity," as some leading Eurocentric parliamentarians would have it. Rather, it is the shared exercise of enlightened self-interest. As the US Congress cuts aid to South Africa, Cuban doctors are flocking to rural areas of the country, offering their life-saving skills for a pittance.

Thus, no less than other government policy flows from apartheid. The democratic institutions must be enfranchised to give the black and white people a real say in affairs. The country's domestic policy are also best placed to influence its foreign policy. The division here is that we genuinely enable the broad base of the population to influence the nature of our global politics, the good effects of that transformation will spill also into our international involvements.

"In whole areas of South African life, the challenge of generating progressive legal and policy solutions has become urgent since for the first time there is a government that wants to implement these ideas. This profound change challenges progressive campaigners to rethink the scope of their activities: there is an enlarged playing field on which we now must keep our eyes on several balls at the same time."

In facing these new challenges of government, the progressive lawyer in South Africa must ensure that old orthodoxies do not blind us to new challenges. Do not misunderstand me. I do not mean to counsel those tatty forms of "pragmatism" that amount merely to moral and political abdication. We must not be so revisionist that we abandon the central ethics of our long-standing world view. Rather, in the familiar radical tradition, we must identify points of reconciliation in the armour of our opponents and we must continually drive new wedges into the old and tired moral monolith of apartheid.

The Need for a New Strategic Lens

My favourite example is that of anti-trust policy. Since when, we might ask, do socialists advocate competition? We know that the rhetoric of competition is often, for instance, misused at the cost of the consumer's lack of power to influence market outcomes.

As a US President said earlier this century, if there are none in a country big enough to rule it, they will. If we will not tolerate political despots, neither should we put up with an autocrat of trade. Nobody must be bigger than the national interest.

"Since when, we might ask, do socialists advocate competition?"

Yet South Africa's progressive legal institution has been largely silent on such matters. We still often view the world through a narrow and tired vision of what counts as human rights law. The valuable - indeed indispensable - energy that South Africa's progressive lawyers have expended on the Truth and Reconciliation Commission must continue unabated if we are to achieve the goal of taking the full measure of the crime of apartheid. Yet a sole focus on such traditional "human rights" issues is no longer enough. It is a narrow approach that underestimates the real scope of human rights activism under a government that wants to respond to a humane agenda: issues such as property rights, land restitution, water tariffs, electricity regulation are all today's South African human rights matters.

We cannot, as progressive lawyers, allow the war and well of governance to bypass us. This would allow our opponents to recapture governance by default. So I propose the challenge: the revival of the old cross-border collaboration that we put in place against apartheid; except that now it must take place on a whole range of issues where South Africa is looking to international models in order to solve local problems.

International Agenda-Setting

If we acquire ourselves well in this new set of domestic challenges in South Africa, if we really manage these tasks of controlling international legal activism, then the benefits will amount to a two-way process. International law will gain stature by the extent to which domestic courts invoke it in their daily activities.

International organisations like IADL, because of their growing ability to influence policy debates in member countries, will also have more stature internationally. There would then be a counterweight to the run-amuck impunity that private sector multinationals now enjoy. There would be an end to that free ride; and the world would really be a better place.

"We must not indulge in what the French call the "treason of silence""

We must be fearless and even-handed in our pursuit of justice. We must not overlook the misadventures of our friends and allies, however just and honourable their cause. This must be rigorously observed - and indeed is being observed - in the pursuit of truth and reconciliation in South Africa. And it must be rigorously so in the pursuit of justice.

Selective justice suffices the most respected cause. We can be progressive without closing our eyes to lapses close to home, however painful this might be. We must not indulge in what the French call the "treason of silence".

We must administer the appropriate discipline without fear or favour. The stability of our new-democracy in South Africa depends on a deepening respect, among all people, for the law. Those who cynically break the law, or use it to crush opponents, are threatening the democratic national interest and the very fabric of society. With Edmund Burke, even if we must differ with him in other respects, we must recognize that "People crushed by law have no hope but from power. If laws are their enemies, they will be enemies to laws". Law must offer a fulfilled life for all South Africans. It must never be abused again.
TOWARDS A NEW LABOUR LAW

The Institute of Employment Rights have published a report, Working Life - a new perspective on labour law, which constitutes the widest review of employment law for decades. Carolyn Jones, Director of the Institute, explains the proposals arising from the review

Carolyn Jones

On 2 September 1996 the Institute of Employment Rights published its report, Working Life - a new perspective on labour law. Building on the interim report just the Jill published in October 1995, the report builds a radical new framework for labour law in Britain, designed to reverse the damaging policies pursued by governments for the last 17 years. The Institute for Employment Rights describes the "Labour Movement" and as such is generously funded by trade unions which also helped to underwrite the costs of the current project. The report notes the wide range of issues, reflecting a concern expressed in just the Jill that we should seek to build a new settlement for labour law in Britain in a manner which would promote economic efficiency, and would at the same time comply with international labour standards to which Britain is a party, including the ILO Conventions as well as the Council of Europe's Social Charter. The re-regulation of the labour market in this way would meet the growing feeling that economic success can only be secured by a high-paid and highly productive workforce in which high wages are maintained on quality rather than poverty wages.

Although international labour standards help to set the boundaries within which economic growth can be achieved, it is important to have a specific agenda for reform which relates directly to the modern nature of employment law, and in any particular community or State. It is necessary also to have some vision of the functions, purposes and potential of labour law, not only as an instrument for regulating the workplace, but as an instrument (along with other areas of the law and other instruments of public policy) for promoting equality of opportunity, social justice, workplace democracy, the civil rights of employees, and fairness at work, in the widest sense of that word.

A New Framework for Employment Law

The need for a new conceptual framework for the classification and control of employment relationships lies at heart of the Institute's proposals. The contract of employment must be replaced and there is a need for a new legal base which is built on the notion of an employment contract which would not only protect the rights of the employee but also impose obligations on the employer such as the right of the employee to the respect of the dignity of the individual and the right to autonomy at work. These are the principles which, together with the fundamental goals already identified, should guide courts and judges in the interpretation of labour standards, instead of the traditional notions of the common law which speak a language of worker obedience and fidelity.

The protection of labour law should apply to all workers, particularly the most vulnerable sections of the labour force. Therefore, the law must not be imposed personally to execute work and is economically dependent on the business of the other should receive employment rights. Special rules are required for it does not in the case of those whose status is uncertain. This would be wide enough to include many workers who are currently excluded from labour protection. However, this work not to have a contract of service, such as homeworkers and casual workers.

New procedures are necessary to ensure that workers are adequately protected by adequate terms and conditions. If the principle of freedom of association is to be realised, then it should be clear that steps should be taken to reverse the decline in the number of workers covered by collective agreements since 1980. Whereas at one time a collective agreement was seen as a mechanism to protect by collective agreements, by 1995 this had fallen to less than 10 per cent of the UK workforce. And although in the same period, the decline in the number of workers covered by collective agreements is by no means universal and some 13 industries have increased their membership, it is clear that regulatory legislation can make a difference.

An important aspect of the Institute's proposals that initiatives would be introduced to reverse the trend towards decentralisation and to seek to extend the regulatory effects of collective agreements. A number of options are available for this purpose including the TGWU's important initiative for Minimum Standards Agreements, the ambitious use of the Labour Party's proposed Low Pay Commission, and the re-emphasis on national industry-wage bargaining in the public sector, extended perhaps to selected industries in the private sector and perhaps in particular areas of activities. Above all, however, is the case for a much more radical option based on the creation of Sectoral Employment Commissions to establish on a bipartisan basis working conditions industry-by-industry.

Trade union organisation and recognition

It might be speculated that a higher level of sectoral regulation would serve to encourage a trade union presence by employers seeking flexibility in the implementation of agreements concluded at the sectoral level. This, however, is not to deny the need for a strong and effective framework of legislation designed to promote trade union recognition. There are a number of measures which could usefully be introduced to help trade union organisation and recognition efforts at the level of the enterprise. First, there are the trade union membership rights of individual workers who should have the widest protection from discrimination or disadvantage. Secondly, there are trade union organisation rights in the sense that the union should have rights of access to premises and to hold meetings with workers in any premises which are being used for work at the same time, whether at break, on the premises of the workplace, and on reinstatement.

There is a need to deepen the protection of the legislation but also to broaden it to include other irrational grounds of prejudice, discrimination, disadvantage, and in particular, where it has been affected the rights of workers to members individually and collectively at the workplace, and to have recognition rights on behalf of the workforce as a whole, depending on its level of support.

A new basis for the right to strike

Although the subject is politically controversial, no review of labour law can ignore the importance of the right to strike. Protected by freedom of association law as well as by the constitutions of a number of States, this fundamental human right has been subjected to extraordinary erosion in Britain since 1980 with a long series of attacks ultimately to bring the unions to stay within the law. The Institute proposes that like much of the rest of British labour law the legal framework should be reviewed and the procedures should not to have a contract of service, such as homeworkers and casual workers.

New procedures are necessary to ensure that workers are not only equity between the sexes, but equity on racial grounds as well. It would be possible to develop the law to enable a broad range of social security or equal treatment provisions to address any problems which a reference to it might yield.

Job Security and the Resolution of Disputes

Regulatory legislation thus has an important role to play in promoting social justice, civil liberties in the workplace, and equality of opportunity. But as also indicated it has an important role to play in promoting fairness at work. Yet if this is to be a reality for all workers it is clear that there is also a need for a number of fairly radical revisions of the current unfair dismissal law, which was first introduced in 1979. Such an approach is an unfortunate case for the development of the law of the workplace which presently allows a large number of particularly vulnerable workers because they are not 'employees' to have protection against unfair dismissal conditions for the law. If the view is taken that no employer should be permitted to treat a worker unfairly, then these conditions should be removed from the ground on which a worker can be dismissed and extend the procedural protection before dismissal takes place.

But it is not only the substantive law which is in need of surgery. So too is the law relating to remedies, with a greater emphasis being placed on reinstatement and the removal of limits on the amounts of compensation which may be awarded by the tribunals. And if the promise of cheap, speedy and accessible justice is to be realised, there is a need also for a reform of the way in which workplace disputes are dealt with in the legal system generally. So far as unfair dismissal is concerned there is a strong case for removing the prohibition on strikes in dispute remedies, with some cases (such as those relating to misconduct and incapacity) being dealt with by a new office of Labour Adjudicator, with hearings at speed, and with the employer being able to quickly after the dismissal has taken place. There would still be a role for a more formal body -a Labour Court -to deal with more difficult cases, such as strikes for dismissal for a much expanded framework of inadmissible reasons.

Conclusion

It is impossible in this short article to do justice to the many and detailed proposals to be found in the Institute's document. They provide the basis for a radical employment law and a most comprehensive one. It is true that many people will lament the role of law in industrial relations. But while that is perfectly understandable given the British tradition, the reality is that it would be impossible to avoid the outcome in the workplace, even were it desirable to do so. There are a number of reasons for this, not the least of which is the desirability in principle of legislation preventing and promoting trade unions from hostile employers on the one hand, and legislation preventing equal and equal opportunities on the other.

After 17 years of Conservative government Britain now has a comprehensive labour code, which extends in three major statutes to more than 400 pages. But it is a labour code with huge gaps (minimum wages, working time, trade union recognition), inadequate and minimal standards (unfair dismissal), and coercive and restrictive rather than liberating provisions (industrial action and trade union recognition) as well.

The need is not to despair about the existence of a labour code, but to seek to transform it as a source of empowerment rather than control of people. The way to promote social justice and to ensure that trade unions occupy positions of influence, rather than be isolated into a long period, is for the Labour Party to introduce the Institute of Employment Rights. The need to be adopted, a significant step would be taken in these directions, with the result that legal regulation of the workplace would increasingly become much less impor-

Socialist Lawyer/Winter 1996 - 12 -

Socialist Lawyer/Winter 1996 - 13 -
Lee Bridges warns that not all solutions are in the hands of the lawyers. Progressive lawyers must strike a balance between defending the territory gained by previous judicial reviews and pursuing radical change outside the court room.

W ith the exception of at least one prominent Queen’s Counsel, the process of judicial review has become widely celebrated by the Left in British politics over recent years. In the words of the press release for the Harriet Harman meeting, when I first delivered the paper on which this article is based, it is “frequently called in aid of ordinary people who have been unable to challenge decisions in the administrative and administrative processes. They feel their rights, needs and opinions are being ignored, perhaps because a public decision-maker prefers to know of no strength of more powerful financial and political concerns.”

Judicial review - the story so far

More generally, the growth of judicial review since the late 1970’s is often celebrated as a bastion for protecting the rights of the individuals, and even of groups, against the overreaching and frequently arbitrary power of an increasingly centralised state. My concern here is that the repertoire of judicial review is lacking both in historical perspective and a sense of political reality. Judicial review does have an important and fundamental part to play in protecting the individual rights. However, there is no inherently left wing or right wing characteristic to the concept; we would do well to remember that some of the most significant advances made in this respect have come from the initiatives of those who can only be described as among the “powerful financial and political” forces in British society under the Thatcher and post-Thatcher Conservative governments. A prime example (although not directly related to the issue of judicial review) is the Sunday Times’ legal victory a couple of years ago over Derbyshire County Council, in which the priciple was established that public bodies cannot sue for libel. The Derbyshire case was a victory for freedom of the press, and one which has clear benefits for left-wing journalists and the media. And yet the right, it was a victory which probably would not have come about had it not been for the financial and political interests behind it.

“The primary target of judicial review was local and not central government?”

Nor should we have any illusions that the significance for the left of judicial review will diminish under a Labour government, or that it will just be the right who will wish to exploit its full potential in order to retain the so-called “ Blair revolution.” One can have little confidence that a Labour government will even begin to tackle the fundamental social and economic injustices in society which create the need for judicial review in fields such as immigration, housing and education. Somehow, I do not think that bodies such as the Immigration or Housing Law Practitioners’ Associations need contemplate their demise under a Labour government. So much for the future - what of the lack of historical perspective on judicial review? For many of us, including myself, political action is among so much of Left thinking on the subject? Someone, someday, will write a truly political history of the development of judicial review in the wake of the 1945 Labour Government and pose the question of how this far this debate between was a reaction to a phenomenon or a reaction from the collective nature which legislation and government activity took in the post-war period. However, if I confine myself to the 1970’s in a few of the two most controversial cases, the GCHQ and Fare’s cases, we in the Home, the Lords upheld the Government’s right to curtal the rights of trade un-离子isions on grounds of national security, the latter two cases a bloc the democratically elected Greater London Council in its programme of subsidies for public transport. The latter case had an immediate impact in “legalising” the whole conduct of local government, with what amounted to key political judges - how much subsidy can we pay to public transport, what sort of rates would be “effectively transferred through out the council chamber” and into that of the local government QC. More broadly, the Fair’s case contributed to and judicial review as a significant shift of power from local government to the central state.

Judicial review - a defensive device

Nor was this true of just one case. The statistics on judicial review through to the end of the 1980’s show two things. Firstly, the primary target of judicial review was local and not central government. Secondly, the judges grew increasingly protective of government, at least insofar as they granted or (more often) refused leave. Nor do I believe that this position has fundamentally changed, despite several “liberal” appointments or promotions within the judiciary over recent years or the highly published recent victories against Michael Howard, Peter Lilley, and other ministers and departments. Indeed, while some of these cases have brought significant advances, in others the “victory” has been temporary. Michael Howard will still in the end get his Criminal Injuries Compensation scheme, albeit by going through Parliament rather than the exercise of his prerogative power; in-country asylum seekers have once again lost the right to Income Support, despite the temporary relief in their spectacular victory in the Court of Appeal.

“Judicial review can serve to delay, to make those in power think again about their actions or to proceed in a different line towards their objectives, but very rarely it is an adequate substitute for political action.”

These cases illustrate for me one of the key lessons for the left about judicial review. Beyond its role in protecting and sometimes enhancing individual rights, judicial review is primarily a defensive device which can serve to delay, to make those in power think again about their actions or to proceed in a different line towards its objectives, but very rarely is it an adequate substitute for political action. I would like to remember John Griffith's book “The Politics of the judiciary” this may seem odd hat. After all, the judiciary are part of the establishment and law is basically a conservative force in society so that the left should be wary of too close a reliance on it. But it is a truth worth repeating in a climate where general disillusionment with politics has created a vacuum which can be filled by those ill disposed towards the existing system.

Nor is this surprising, since there is a sense in which politics, right up to and including Parliament itself, have become bankrupt. There is a certain lack of reality to the current debate that it raging between the judiciary and the government over judicial review, which is something of a phoney war. Indeed, one suspects that the government’s approach to recent defeats at the hands of the courts is directed to a wider political agenda. When Sir Richard Scott answered that "complicity/covers-up" questions are inevitable he deliberately asked whether the judges were in fact the fall-guys on a wider political canvas.

“Here is the sort of account of the 1970’s that I have in mind”

On the one hand politicians complain that by expanding the scope and content of judicial review the judges are challenging the rights of Parliament. The judges might retort that they are upholding those rights against the executive. What no one seems to ask is whether Parliament as an institution in its present form is worth upholding. On this I agree with Lord Irwin in his recent ALBA lecture, when he pointed out that the growth of judicial review was to the “democratic deficit”, the wan of Parliament rather than the judiciary to the executive.

This is the real issue of the separation of powers, that between Parliament on the one hand, and the executive and the judiciary on the other. In one sense, constitutional reform directed at widening the influence of the judiciary, whether through stronger powers of judicial review or through a Bill of Rights, or even through devolution, the alteration or abolition of the House of Lords, or changing the electoral system is all tinkering at the margins of the central issue. What really needs changing is what the House of Commons and the way in which it structures and conducts itself.

This takes us so far beyond the focus of this discussion, judicial review and how the Left should respond to it. In many ways we must continue as we have done, using it to defend the disadvantaged against the ravages of government policy at vari- ous levels, perhaps even more so under a Labour government. The main difference now is that for the first time in the history of judicial review a Labour government QC. Here I would draw attention to the recent Law Commission proposals (now endorsed by the Woor Report on civil justice) on procedures surrounding applications for leave, which could have the effect of swelling the judicial discretion and the scope for re- spondents to manipulate the leave process to the disadvantage of the applicants.

“I often wonder how civil servants react to the Treasury Solicitors’ guide to the principles of judicial review. I suspect that they are still left scratching their heads as to what it all means in terms of their everyday decision-making.”

Even more devastating would be any attempt by this or the next government to implement the proposals put forward in the recent Legal Aid White Paper to increase legal aid contributions, extend them beyond the centre and to cover full legal aid rather than to remove the current protection to legally aid clients from paying the other side’s costs. Any of these proposals would dra- matically limit the ability of any party to judicial review - taken together they would spell the end of the civil legal aid scheme as we know it.

But in using and defending judicial review we must be realis- tic. It has an important role in playing to individual rights, and can serve as a defensive tool creating a space in which collectively objectives can be pursued by other means. But it is no substitute for political solutions.

The first question we should ask when advising someone on judicial review is how they intend to fit it into a wider political strategy. Nor am I convinced that judicial review has contributed as much as it is often claimed towards improving the quality and accountability of public decision-making. In part its reflectiveness in this respect is related to its uncertain, arbitrary character. Research indicates on judicial review how widely judges vary in decision making in granting leave. And, as advisors will know, the process is very uncertain. Indeed, one suspects that lawyers advising Michael Howard face the same dilemma.

“In this context one hopes that in seeking to defend judicial review as an institution we will not be caught up in defending the judiciary as it is presently constituted”

This raises the question of how far the unpredictability of judicial review and its seemingly arbitrary nature is a function of its being wholly judge made. Legal commentators often cele- brate its “open textured jurisprudence” but automatically an essay so open textured can hardly serve as guidelines for policy, or for bureaucratic decision making across a wide expanse of the machinery of government. I often wonder how civil servants react to “The Judge Over Your Shoulder”, the Treasury Solicitors’ guide to the principles of judicial review. I suspect that they are still left scratching their heads as to what it all means in terms of their everyday decision-making.

In this context one hopes that in seeking to defend judicial review as an institution we will not be caught up in defending the judiciary as it is presently constituted, or its judicially guided discretion. Developing the right form of public law indeed, to the extent that the rather crude attacks on judicial review and the judges that we have seen over the past year have struck a wider, populist chord, would have missed this as simply the product of a manipulative and manipulated press.

It may also stem from the fact that the judges and public lawyers more generally have failed to achieve a wider political and public legitimacy for the principals that they have so adroitly been developing. How can we give those principles a wider currency? I doubt that this can be done by leaving it to the judges themselves operating within the confines of judicial review. Rather, we need a much wider debate on the principles of public decision making in our society. In this respect the Noain Commission may provide a lead, through its constituent terms for too narrow and of the estab- lishment to do the job. Is this a job for a Royal Commission, or for a People’s Tribunal?”

Lee Bridges
REFUGEES AND NATIONAL SECURITY

The UK Government is taking the lead in calling for counter 'terrorism' measures which will effectively curtail the right of many asylum seekers from being granted asylum in this country.

Pierre Makhlof

The propaganda describing the overwhelming majority of asylum seekers as 'bogus', and therefore, economic refugees, has been successful for the Government. There is now a concerted attempt to 'regulate' refugees so that their rights should be entitled to asylum protection. Furthermore, the Government is also introducing policies which undermine the right of refugees to do simple things like travel. In 1995 the P8 group of nations (the G7 nations plus Russia) agreed a Joint Declaration in Ottawa to combat international terrorism. The UK has, in effect, been given a 'Centre of Excellence' exchange knowledge in combating terrorism, and a review of counter-terrorism legislation and frontier controls. The UK further noted that it was 'not just about those engaged in terrorist activities but about other political activists who promoted unconstitutional change or destroyed the good relations of the UK with other Governments.'

In late June 1996 the Foreign Secretary, Malcolm Rifkind, announced (prior to a visit to Saudi Arabia) that the UK would seek to define terrorism in accordance with the basis that his precedent had been successful. He suggested that this could be done through a United Nations General Assembly resolution. The amendment would be aimed at curtailing the rights of asylum seekers to engage in the activities of political groups, which involve violence or whose actions damage the UK's relations with other States. Michael Howard, announced 'Political asylum should not be as abused as a shelter for those engaged in terrorism' and that those engaged in such activities would be refused protection in the UK.

Defining terrorism - Howard's way

Michael Howard announced that the UK would be calling for a new United Nations Convention which would declare planning, financing, and incitement to terrorism as contrary to 'the principles of the United Nations'. This would allow the UK to refuse asylum to individuals who, on the grounds of race, political or other grounds are refused asylum in the UK. The House of Lords (22 May 1996) judgement makes an assessment of a direct link between an asylum seeker's activities and a definition of terrorism. In that case the Lords agreed that 'T' should be excluded from the protection of the United Nations Convention on the grounds that he had no intention of returning to the order that the UK had, in his opinion, supported. His activities were related to the political objectives of a political group and his activities were already taken into account.

Mr T - political crime and political object

Present attempts to exclude refugees on the grounds quoted above may fall at the appeal stages. In the case of 'T' the House of Lords (22 May 1996) judgement makes an assessment of a direct link between an asylum seeker's activities and a definition of terrorism. In that case the Lords agreed that 'T' should be excluded from the protection of the United Nations Convention on the grounds of who he was. Mr T was seeking to travel to a war zone and the political object which Mr T was seeking to achieve was too remote. The judgement raises a number of issues that need to be understood in light of the provisions made in the UNHCR's Handbook for Interpreting the Convention and its Administrative and Home Secretary, Michael Howard. He announced that the UK Government should change laws to extend the law of criminal conspiracy to introduce an offence to engage in conspiracy with others, or indeed others, to commit terrorist offences abroad. These moves should be viewed in relation to the Government's present approach to refugees.

There has been a significant increase in Home Office decisions refusing asylum on the grounds of the Secretary of State's view of certain organisations as being terrorist. Hence in a recent refusal (referred to by Turkey) the Secretary of State notes "the fact that the PKK is an organisation that has admitted that it has used, and intends to continue using, violence to achieve its ends. It is clear that the PKK and other terrorist groups are an ongoing threat to Turkey and the stability of the Middle East. The PKK is an organisation that is a terrorist organisation and is a genuine threat to the international community." Authorities have given the PKK a direct link with violence and extremism has been made.

The Government has to date been able to exclude from protection refugees in certain cases. The Government has the power to refuse the protection of persons found to be eligible for asylum. The Government has however been able to refuse the protection of persons found to be liable to violence, war, or serious non-political crimes. Those found to be a risk to the "national security" are issued with orders for deportation under separate legal provisions under the 1971 Immigration Act. The latter cases remain difficult to assess given that the specific reasons as to why an individual is risk to national security are not disclosed. However, the present moves to introduce a United Nations resolution or Convention aims to extend the grounds upon which the government can refuse the protection of an individual. It is important to note that the Government's stance is that an individual may not be personally responsible for a crime but because the asylum applicant is supportive of an organisation whose activities contravene international law then the individual is a terrorist. If that assessment which seems to be intended is the extent to which an individual's support effects the UK's national security, then it is not only conveniently ignores an individual's responsibility for a particular act, but allows the Government to ensure that its primary interests are taken into account while ignoring the central human rights considerations which are at stake.

It also seems that the reasons used by the UK government to deny or deport asylum is because of, or related to, the UK's national security grounds. It is really coincidental that these individuals, Turks, Kurds, and Sikhs, all come from states which either have very close economic, military, or political links with the UK or whose regional interests serve those of the UK. The general view gener- ated by the refusal to admit to several principles is that nothing is being done to secure that asylum seekers receive protection. The refusal to protect the individual is therefore not unknown to anyone.

What is national security?

A 1995 notice issued to a national security detainee stated that the decision was made "in the interests of national security" and for other reasons of a political nature, namely the interests of public order and the UK's international and domestic stance against the use of violence and terrorism for political ends. The protection from persecution is being denied to those whose presence in the UK is not conducive to the Government's stance that no violence should be used to try to achieve political ends. There is no suggestion that such individuals have to be directly involved in terrorist related activities.

The Government's refusal to take into account that national security detainees have no right to the evidence held against them, no right to appeal against a refusal of asylum or in relation to deportation decisions that affect them, no right to representation by a solicitor or by the Secretary of State's self-appointed independent advisory panel (whom recommendations can in any case be ignored by the Secretary of State). If the Government's present policies may also be intended to exclude large numbers of asylum applicants while avoiding the negative publicity created by the presence of these "asylum seekers" the UK's national security.

"If these policies existed at the time of the apartheid regime in South Africa we would be witnessing the deportation of supporters of the outlawed ANC"

So what is the meaning of 'national security'? What are the specific reasons of a 'political nature' identified in national security deportations? The implications for refugees of the Government's national security approach are profound. The Government's stance is that asylum seekers have no right to the evidence held against them, no right to appeal against a refusal of asylum or in relation to deportation decisions that affect them, no right to representation by a solicitor or by the Secretary of State's self-appointed independent advisory panel (whom recommendations can in any case be ignored by the Secretary of State). If the Government's present policies may also be intended to exclude large numbers of asylum applicants while avoiding the negative publicity created by the presence of these "asylum seekers" the UK's national security.

Perhaps this allows us to understand which refugee groups will be most vulnerable in the short-term to air increased use of expulsion orders. It is not just people who are asylum seekers supporting organisations using violence, and an increased use of "reasons of national security" for enforcing deportations under the 1971 Immigration Act.

Supporters of the PKK are being excluded from refugee protection while others have been detained and served with orders for their deportation "for reasons of national security". Supporters of other non-militant Turkmens have also been refused asylum and excluded from protection because their organisations support violence. Members of the Sikh community have been in prison for several deportation national security grounds. It is really coincidental that these individuals, Turks, Kurds, and Sikhs, all come from states which either have very close economic, military, or political links with the UK or whose regional interests serve those of the UK. The general view being gener- ated by the refusal to admit to several principles is that nothing is being done to secure that asylum seekers receive protection. The refusal to protect the individual is therefore not unknown to anyone.

Developments over the next few months need to be closely monitored because of the implications for refugees and asylum rights in general. Lord Justice Lloyd was shortly to produce a report on 'terrorism'. It will be interesting to see to what extent the report upholds the international law and the attempts at redeeming the United Nations Convention relating the Status of Refugees.
The War Crimes Tribunal's Ultimate Justice: For or Miscarriage in the Making?

Bill Bowring

The International Tribunal for the Prosecution of War Crimes, established by the United Nations Security Council Resolution 827 of 1993, was the first international criminal court for war crimes and crimes against humanity. The tribunal was established to try war criminals, including Bosnian Serb warlord Ratko Mladić, for offenses committed during the Bosnian War.

In July 1998, the tribunal began trials for war crimes in the former Yugoslavia. The trials were held in The Hague and are still ongoing. The tribunal has issued several important decisions, including the decision in the case of Ratko Mladić, which is currently being appealed.

The tribunal has faced criticism for its slow pace and lack of resources. Some have argued that the tribunal is not effective in bringing criminals to justice.

The tribunal's decisions have been controversial, and some have argued that the tribunal is not effective in bringing criminals to justice. However, the tribunal has also been praised for its role in holding war criminals accountable.

The tribunal's work is ongoing, and its impact on justice and accountability is still being felt. The tribunal's decisions will have a lasting impact on international law and the role of international criminal courts in the future.

There is no provision for crimes against the peace

The Statute of the ICTY does not specifically mention crimes against the peace. However, the ICTY has jurisdiction over such crimes, as the ICTY is a court that has been established by the UN Security Council to try war criminals.

The ICTY has jurisdiction over crimes against the peace, such as crimes against humanity, war crimes, and crimes against international law. The ICTY has jurisdiction over crimes against the peace because it is a court that has been established by the UN Security Council to try war criminals.

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IS THERE A STRANGER IN THE HOUSE?

Stephen Knafler looks back on developments in homelessness law, which have left asylum seekers in danger of destitution - despite last-minute challenges attacking the powers of ministers

The purpose of this article is simply to present recent developments in the responses of the judiciary to executive and legislative determination to deprive in-country asylum seekers pursuing appeals, food and shelter.

In R v Hillingdon London Borough Council ex parte Streeting (1980) 1 WLR 1425 the Court of Appeal held that housing authorities may deport all persons lawfully present in the United Kingdom if they were homeless and otherwise qualified under Part III of the Housing Act 1985. There was, however, no duty to house entrants lawfully present in the United Kingdom. As Lord Denning put it:

"Of course if he is an illegal entrant - if he enters unlawfully without leave - or he over stays his leave and remains here unlawfully - the housing authority are under no duty whatever to him. Even though he is homeless here - even though he has no home elsewhere nevertheless he cannot take any advantage of the Acts. As soon as such legality appears, the housing authority, of course, has to report his case to the immigration authorities. This will exclude many foreigners."

The Court of Appeal decided the case of R v Secretary of State for the Environment ex parte London Borough of Tower Hamlets (1983) 25 HLR 524 on the basis that the above older dicta was correct. Sir Thomas Bingham MR accepted that the result could not be achieved by any process of construction of the Housing Act 1985 or of the Immigration Act 1971:

"It can only, I think, be the inference, derived from common sense and fortified by the Immigration Rules and [Streeting's] case that Parliament can not have intended to require housing authorities to house those who enter the country unlawfully."

The Court of Appeal then turned the screw by holding that housing authorities were entitled, indeed obliged, to inquire into the immigration status of an applicant for housing assistance. The judgments drew attention in particular to cases in which persons might have entered illegally by obtaining leave to enter by deceit e.g. by a false statement as to the availability of accommodation or funds.

The Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 removed entitlement to state benefits, including income support ('urgent cases' payments) and housing benefits, from asylum seekers who did not apply for asylum on arrival or whose applications were refused even though they go on to appeal.

In R v Secretary of State for Social Security ex parte the London Borough of Hammersmith & Fulham (Unreported CO/5159/95), linked with proceedings brought by the City of Westminster, local authorities sought judicial review of the 1996 Regulations on the limited basis that they were caused extra expense thereby. The reason was, inter alia, that because Part III of the 1985 Act had changed, local authorities remained liable to house asylum seekers who were in 'priority need' under section 59 of the Act e.g. because they had dependent children living with them. Given that such asylum seekers would not be able to pay for their accommodation, having no access to income support and housing benefit, the local authorities were facing substantial additional expenditure. That litigation was settled on the basis that central government paid the local authorities affected additional funds pending enactment if what is now Section 9 of the Asylum and Immigration Act 1996, which will exclude from assistance under Part III of the 1985 Act European Union nationals in breach of residence directive, those who fall the habitual resi-
dence test, those not permitted recourse to public funds and those in breach of the immigration laws.

"Given that such asylum seekers would not be able to pay for their accommodation, hav-
ing no access to income support and housing benefits, the local authorities were facing sub-
stantial additional expenditure."

In R v Secretary of State for the Home Department ex parte Vithal and Do Amar (1996) the Times 1 May 1996, the applicant argued that Article 8 of the Treaty of Rome as amended by the Maastricht Treaty conferred a free-standing right of residence in other European Union countries. The court rejected the argu-
ment that European Union citizens had any right to enter or remain in the United Kingdom otherwise than in the pursuit of economic activity. It was not accordingly unlawful for the Secretary of State to regulate so as to prevent such persons obtaining welfare benefits, as he did in the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1995. If v Westminster City Council ex parte Castelli and Tristan Garcia (1996) 26 HLR 6 I 6 concerned European Union nation-
als who entered the United Kingdom lawfully in order to pursue economic activities. However, as a result of being HIV positive, they were no longer pursuing or actively seeking to pursue any kind of economic activity and were accordingly no longer enti-
titled under the Immigration (European Economic Area) Order 1994 to remain in the United Kingdom, nor were they obliged to seek leave to remain in the United Kingdom once their eco-
nomic function ceased. Their presence in the United Kingdom could not be regarded as being 'unlawful' as it did not involve the commis-
sion of a criminal offence or a breach of any immigration laws. They were accordingly 'persons' for the purposes of the 1985 Act and could be owed duties thereunder if they other-
wise qualified.

A little light relief from Hackney

Some relative light relief was provided by the case of Akintolue v Hackney London Borough Council [1996] EGC 73. Mr Akintolue was a secure tenant of the London Borough of Hack-
ney. He was arrested by the police and taken into custody as an 'overstay'. He was detained for a few days then granted bail. On return home he discovered that Hackney had changed the locks. The council had not rejected the tenant's application for an injunction to be re-admitted, apparently on the ground that the tenancy was void because the tenant was not lawfully in the United Kingdom. The Court of Appeal allowed the tenant's appeal. He had not made any misrepresentations to obtain the tenancy. The illegality of his presence in the United Kingdom was no sufficient in itself to vitiate the tenancy contract in any way or to permit the sum-
mary eviction.

As Simon Brown LJ observed in the JCWI case, primary legis-
lation alone was capable of achieving "for some a firm destiny that to my mind no civilised nation can tolerate it". Parliament duly obliged, with section 1 I of the Asylum and Immigration Act 1996, Section 11 and Schedule I of the 1996 Act reverse the Court of Appeal's decision in the JCWI case and effectively re-

For good measure, section 9 of the Asylum and Immigration Act 1996 and regulations made thereunder (the Housing Ac-
 commodation and Homlessness (Persons Subject to Immigration Control) Order 1996) reverses the Court of Appeal's deci-
sion in the Kihara case. As from 19 August 1996, local housing authorities became obliged to treat, inter alia, in-country asylum seekers as 'not eligible' for public housing even if they were homeless.

On 23 August 1996, Canneth J rejected the argument that those who applied for public housing before 19 August 1996 remained entitled to have their applications determined as if section 9 had not been enacted: R v Secretary of State for the Environment ex parte Shelter & Refugee Council (Unreported).

"Even though he is homeless here - even though he has no home elsewhere... he cannot take any advantage of the Acts."

Over the last few weeks leave and interim relief has however been granted in a number of cases in which destitute in-country asylum seekers have claimed to be in need of "care and attention" within the meaning of section 2 I of the National Assistance Act 1948. Section 2 I of the 1948 Act and the Approvals and Direc-
tions made by the Secretary of State set out at Appendix I to the Department of Health Circular LAC(93)10 require local authori-
ties to provide 'residential accommodation' for all those who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.

With residential accommodation comes, under paragraph 4 of the Approvals and Directions, hoist, hygiene medical care and other personal necessaries. A set of 4 felt cases was heard on 12 and 13 September 1996 and judgment has been reserved until October 8.
BOOK REVIEWS

Sentencing: Theory, Law and Practice : Nigel Walker & Nicola Padfield;
Butterworths £28.95

The second edition of this volume is long overdue. Since 1985 when it was first published the Criminal Justice Acts of 1991 and 1993 and the Criminal Justice and Public Order Act 1994 have erupted in the landscape of criminal law and penology like turbulent volcanoes, and the topography of the law has changed significantly.

What is refreshing about this book is that it manages to combine academic investigations into sentencing practice with clear point by point analysis of the existing law, embracing thus a wider theoretical overview of the area with ease of reference for the practitioner. The impression that emerges after reading the book is that we still have some way to go in terms of research before the individual discretion of the sentence can be framed in an overall pattern which can be predicted, but here and there fragments emerge. A useful and thoughtful volume which will help both the Legal Aid Practitioner and the graduate student.

Nathaniel Mathews

An Atlas of Industrial Protest In Britain, 1750-1990: A Charlesworth et al;
Macmillan £12.99

This excellent book should be a "must" for all literate British socialists, but it is addressed to a limited audience; to academics, teachers, students and others with a specialised interest in the area. It should thus be of interest to socialist lawyers or historians. However, it may well prove too inaccessible to ordinary working class people. This is a pity as the book combines a host of fascinating detail with a larger picture of the working class struggle, with all its ingenuity, inventiveness, courage and resilience. It enables the reader to recapture what is all too often a lost tradition of the first proletariat, which together with the Paris Commune of 1871 inspired much of Marx and Engels' analysis of the agents of and the route to socialism.

The book is also a record of the vicious response of a ruling class when it feels the need to repress, terrorise and extract vengeance. Any workers or socialists engaged in struggle can learn from this book the history of which they are a part, often in relation to occurrences in the same place up top two centuries ago, and recognise in their own methods and tactics of organisation and struggle those of their predecessors in the fight.

For lawyers the connection between the objectives of working class political and industrial struggle on the one hand and the oppressiveness and local enforcement of the law on the other is set in a well drawn framework, which shows how epiphenomenal the law is. Struggle by workers can and did offset, avoid and circumnavigate the law.

From the London sailors' strike of 1768, when "these Englishmen were the immediate sons of Jamaica, or African blacks or Asiatic Mulatoes, or of Muscovites born in the distant provinces of Siberia" to the unofficial dock strikes under the 1945-51 Labour governments, when trade with the old empire was grievously interrupted, the ghost of imperialism hovers.

Less successful, as the authors acknowledge, is the recording and reporting of women's struggles. The strike at the Bryant and May factory, East London, in July 1888 is the principal protest dealt with in this context.

One marvellous map of the Luddite disturbances in Lancashire and Cheshire in 1812 list the actions engaged in: attacks on machinery, workshops and factories; forced collections of food and provisions; food riots; attacks on the homes and persons of manufacturers; robbery or burglary; political riots and movement of crowds. Actions such as this prefigure the miners' strikes and the Russian revolution.

My own journeys throughout this country have, I now learn, been conducted in working class history which lies thick on the ground. For that, the authors have my thanks. What they should now do is to turn this 241 page, densely written text at 5.4p per page into a shorter workers' guide to the local history of industrial struggle, and have it sponsored, subsidised and sold by the trade unions and the WEA.

This reader learnt much about worker's history, and more about his lack of knowledge. The local May Day histories of 1890 and 1892, one of which moved Engels to identify Karl's daughter Laura the unmistakable voice of the English proletariat, prompted this reader to resume his own research. Tony Blair and his cabinet may sweat at night for fear of this voice shouting again, as it surely will, to scatter the ashes of Margaret Thatcher's legacy.

John Whitfield

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