STOP THE CONDEM CUTS
Fight to save legal aid

Inside:
BLOODY SUNDAY INQUIRY
Tony Gifford QC

DEATH OF IAN TOMLINSON:
WHEN THE STATE KILLS
Liz Davies

plus much more
The Haldane Society was founded in 1930. It provides a forum for the discussion and analysis of law and the legal system, both nationally and internationally, from a socialist perspective. It holds frequent public meetings and conducts educational programmes. The Haldane Society is independent of any political party. Membership comprises lawyers, academics, students and legal workers as well as trade union and labour movement affiliates.

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Danger: welfare state under attack

We seem to be facing the most ideological Conservative Government since Thatcher. It’s a Government of the rich for the rich. The rest of us are all about to suffer. The figures are stark: £4 billion cut from the welfare state means subjecting people already classified as incapable of working to more demeaning and intrusive tests and forcing them back to work. New Labour failed in its goal to abolish child poverty by 2010; now the Coalition Government will increase child poverty. The harsh financial climate is accompanied by classic Big Brother scapegoating. As the public is exhorted to grass up benefit cheats, who account for less than one percent of the welfare budget, rich people’s tax evasion is unchecked. Cuts to HM Revenue and Customs jobs means more undetected tax evasion.

Public sector workers face a two year pay freeze, equivalent to a pay cut, and assaults on their pensions, working conditions and of course their jobs. Despite the Tories having said that the NHS would be ring-fenced, it is still required to make ‘efficiency savings’ of £20 billion. Front-line doctors and nurses will lose their jobs and there will be no new investment in the NHS. The NHS is already crippled by the exorbitant interest payments required under PFI schemes imposed on it by New Labour. Operations are to be reduced – so we will return to lengthy waiting-lists – and expensive treatment for those who are terminally ill or have serious conditions is to be cut.

Education Secretary Michael Gove is trying to reverse school building plans. Expect larger classes, more stressed teachers and fewer teaching materials. London Underground’s proposed savings abolish 800 jobs, with a knock-on effect for public safety.

£6 billion could be saved by scrapping the replacement of Trident but this right-wing Government, lobbied by the military and arms companies, won’t hear of it.

The Ministry of Justice has to find £2 billion – roughly the same amount as the whole of the legal aid budget. Kenneth Clarke wants to close courts, so more jobs will be lost. The right-wing press routinely rails against the length of time it takes for cases to come to Court – expect much longer delays with fewer Courts to hear the trials. He’s made it clear that legal aid will not be protected. The surprising silver lining might be an attempt to send fewer people to jail although whether Clarke would be able to convince his Cabinet colleagues of that liberal position remains to be seen.

As lawyers, we have a responsibility to defend public spending on the administration of justice (Courts) and legal aid. But we also live in society. We use the NHS, and the state education system. We’ve claimed benefits in our time, have friends who claim benefit and many of our clients are on benefit. We use public transport. We don’t want our air to become more polluted, our fuel and food prices to rise.

The Haldane Society together with Young Legal Aid Lawyers is working hard to put together a ‘Commission of Inquiry for the Case for Legal Aid’ early next year. We will present testimony from those who have used legal aid and those to whom it was denied, along with practitioners and campaigning organisations. We’re also working with the Alliance for Legal Aid and Unite the Union to ‘save legal aid now.’ We support the Public and Commercial Services Union (PCS) and the other public sector unions in their campaigns against job losses, pay cuts and assaults on terms and conditions in the public sector.

Under New Labour, shamefully the gap between rich and poor rose, not fell. It looks set to rise faster and faster under this Coalition Government. The government may get a shock. The rich can’t buy themselves out of society for ever. Even gated communities can’t escape air pollution. The rich may never be homeless, but they still have to step over people sleeping rough.

The Haldane Society stands shoulder to shoulder with the trade unions and campaigning organisations against these vicious public sector cuts. We’ll be on the demonstrations and on the picket lines. Defending the right to legal aid is part of that struggle.

Liz Davies, chair of the Haldane Society of Socialist Lawyers

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Prime Minister David Cameron – his Coalition with the Lib Dems wants to batter the public sector.
‘That man Griffith’

Professor JAG Griffith died on 8th May 2010, aged 91. His influential book *The Politics of the Judiciary*, first published in 1977, was required reading for many of us studying politics or law in the late 1970s or early 1980s.

Griffith’s point was simple: most judges are drawn from the upper or upper-middle class, are overwhelmingly white or male, educated at public school and often Oxford and thus share common values with each other and indeed with the ruling class, since they come from it. Consequently, it is not surprising that they side with the ruling class on property rights, fail to understand women’s rights, or what it is like to be discriminated against. Whilst there may be more women and black judges today – in those days there was one woman in the Court of Appeal – and whilst judges’ backgrounds may be more diverse, the point still rings true. By the time a judge is appointed to the High Court Bench, however his or her background, any claim to be working-class has been long lost.

Griffith might have looked at the make-up of the coalition Government – white, public school and Oxford to a man and woman – and say that it proved his point. The common backgrounds shared by Clegg and Cameron easily overcome the different political allegiances.

Commentators didn’t like the book. Lord Denning called him ‘that man Griffith’. A review in the *Times Literary Supplement* asserted that Griffith ‘ends up aligned with the Baader-Meinhof gang in believing that every criminal trial is categorically unjust’. Griffith seems to have thrived on the notoriety. In 1984, he stood as the anti-establishment and no-hope candidate against the Marchioness of Anglesey for Chancellorship of Manchester University. He won.

Griffith’s academic career was almost exclusively at the LSE. He arrived there as an undergraduate and left as a leading professor of public law. He was both an outstanding lawyer and, in the best tradition of the LSE, a nonconformist who acted as counsel for students charged with disciplinary offences during the protests in the 1960s. He had written *Principles of Administrative Law* in 1952 with Harry Street and continued to publish on administrative and constitutional law throughout his academic career.

The presence of liberal judges didn’t change his mind. In his retirement he wrote on both Laws LJ and Sedley LJ – judges who are at opposite ends of the political spectrum but both believe in judge-made law.

I met Professor Griffith in his retirement, when he was a door tenant at my chambers. In his 80s, he was witty, acerbic about New Labour, full of fun and an enjoyment of life.

Liz Davies
Paris conference engages democratic lawyers in fight for human rights

The Haldane Society joined democratic lawyers and peace activists from around the world in attending the International Association of Democratic Lawyers’ two day conference in Paris in June 2010 to commemorate the 60th Anniversary of the Stockholm Appeal against Nuclear Weapons.

The Conference noted that the United States and Russia, instead of negotiating disarmament in good faith under the Non-Proliferation Treaty, have resorted to bilateral treaties which merely limit the number of nuclear weapons they possess and fail to rule out first-strike use of nuclear weapons in response to non-nuclear attacks or capabilities.

IADL supports UN General Assembly Resolution 1653, which determined in 1961 that the use of nuclear weapons is a crime against humanity and a violation of the UN Charter. Article 26 of the UN Charter requires the Security Council to formulate a program of general and complete disarmament aimed at establishing and maintaining international peace and security with the least possible expenditure of human and economic resources on armaments.

In this time of environmental and economic crisis, it is imperative that the Security Council assume its responsibility under the Charter.

IADL Bureau members held two days of discussions in Paris to review ongoing campaigns and issues requiring urgent action. The Israeli Defence Force’s illegal assault on the Gaza Aid Flotilla was high on the agenda. Almost 3.5 million dollars worth of property has been seized by the IDF and UK solicitors Hickman and Rose are working with the Palestinian Committee on Human Rights to coordinate actions to recover the property. IADL pledged to help identify lawyers willing to assist.

IADL condemned attacks on lawyers at the International Criminal Tribunal for Rwanda (ICTR). Strong action by human rights organisations following Rwanda’s arrest and charging of IADL member Peter Erlinder resulted in the ICTR issuing a note verbale, in which it reaffirmed that lawyers have immunity for statements made in defence of their clients. Erlinder was subsequently released, though charges have still not been dropped. IADL’s statement on Erlinder has been supported by 22 national and international organisations and more signatures are being collected. Thousands of letters have been sent to the Security Council and the ICTR about this matter.

Oppression in the Philippines continues, with 43 health workers abducted in an illegal raid by police and military forces on 6th February 2010. IADL agreed to take the initiative in sending an open letter to the newly elected President of the Philippines and to draft an amicus brief to the Philippines Supreme Court in support of the 43. Haldane members are joining other IADL affiliates to support human rights in the Philippines by attending the Coalition of Lawyers of the Asian Pacific in the Philippines in September 2010.

The earthquake which devastated Haiti in January 2010 left at least 250,000 dead, 300,000 wounded and 1.5 million displaced. IADL strongly supports the demand that the French Government should reimburse the massive and unconscionable debt which it imposed on Haiti. IADL also calls on other international institutions to write off all other foreign debt which cripples the already stricken country, resulting in massive denial of economic, social and political rights.

Among many other important human rights issues in which IADL is actively engaged, the Bureau reaffirmed support for the two Greenpeace activists in Japan who were awaiting judgement in a case which threatens the ability of NGOs to perform one of their most important functions; that of exposing governmental and corporate corruption. The Haldane Society has already called for the dismissal of all charges against the Tokyo Two and the UN High Commissioner for Human Rights has expressed her strong concern about the implications of this case for human rights in Japan.

Richard Harvey
Solace Women’s Aid appeals refusal of renewal of family legal aid contract

In a recent interview for the Law Society Gazette, the Chief Executive of the Legal Services Commission (LSC), Carolyn Downs, commented that the outcome of the family law tendering process, which saw the number of service providers slashed by some 46 percent, had been ‘unintended’. One such ‘unintended’ victim of the tendering process is the domestic violence charity for whom I work as a paralegal: the Legal Service of Solace Women’s Aid, which is a not-for-profit legal-aid funded practice. Solace is run by women, for women, yet ironically it is our unique status that caused us to lose our tender application. We do not work with children, therefore do not have a Children Panel member, and consequently we did not score the points in this criterion necessary to secure us a contract.

Solace has lodged an appeal. As we made our submissions in respect of the appeal, it offered time to reflect on why it is that Solace’s work is uniquely effective, and therefore a vital weapon in fighting for the welfare of this particularly vulnerable group in society. A weapon which, instead of being withdrawn from the LSC’s armoury, should be hailed as its munition of choice. Solace run seven women’s refuges across North London. We have specialist support and outreach services for women from the Bangladeshi and Irish communities, where domestic violence is stubbornly entrenched. We have a counselling service, an emergency advice line, and parenting programmes for traumatised mothers and traumatised children.

In typical LSC fashion the appeal process is being handled equally as inefficiently as was the tendering process. The time limit in which to lodge the appeal was strictly confined to a week. Yet the LSC have been considerably more generous in setting their own deadlines: they have none whatsoever and cannot even promise that our appeal will be considered in a month. Having submitted our appeal on 12th August 2010 Solace finds itself mid-way through September 2010 without a decision and in limbo. There is no indication as to whether or not come October 2010, when the new legal aid contracts were due to become active, we will be able to provide the critical service that is relied on by hundreds of vulnerable women.

At the time of writing, The Law Society had succeeded in their application for an expedited hearing to dispute the LSC’s decision of the tendering process for family legal aid contracts. In granting the application, the High Court listed a hearing for 21st September 2010. It is expected that judgment be delivered on 24th September 2010. This has in turn led to The Law Society and the LSC provisionally agreeing to a one month extension of the current unified civil contract so that those currently in place will now expire at midnight on 14th November 2010.

Carolyn Down’s comment about the ‘unintended’ consequences of this tendering process is extremely frightening given the devastating impact it has had on legal aid practices like Solace. If we do not win our appeal we will not exist. If we do not exist then a huge number of women will not have access to a service that provides specialist, holistic and truly effective domestic violence support. ‘Unintentional’ outcomes such as this simply do not occur when planning and decision making has been as rigorous and strategic as it should be. What Ms Down’s comment reveals is that the LSC have behaved in precisely the opposite manner; designing a crude tendering process and unequivocally failing in their...
Meeting slams Britain’s record on detention: May adds another six months

The public meeting organised by CAMPACC and the Haldane Society, ‘No to 28-day pre-charge detention – No to punishment without trial – No to the politics of fear’, attracted a capacity audience on Tuesday 13th July 2010 to Committee Room 4 at the House of Lords.

The speakers were highly qualified and complemented each other splendidly: Isabella Sankey, Policy Director at Liberty; solicitor Imran Khan; Jeremy Corbyn MP; Hicham Yezza, Editor of Ceasefire Magazine; and Anne Gray, of CAMPACC. Hicham Yezza had been unjustly detained for six days. He recently won his case against the Home Office’s attempts to deport him.

John McDonnell MP, leader of the Labour Representation Committee, was also present. Britain holds a disgraceful record with regard to detention without charge in ‘terrorist cases’. As Isabella Sankey pointed out, the maximum period of detention without a judicial hearing, even in terrorist cases, is two days in the USA, 12 days in Australia, six days in France, two days in Germany, four days in Italy, five days in Spain, two days in South Africa and seven and a half days in Turkey.

When detention for seven days was introduced under the Prevention of Terrorism Act 1974, Britain was condemned by the European Court of Human Rights in the case of Brogan v UK. As Jeremy Corbyn reminded us, 90 percent of those detained, suspects because they were Irish, were released without charge.

The Terrorism Act 2000 extended the period to 14 days. When the period was extended under the Terrorism Act 2006, neither the Government nor the police gave any credible grounds for requiring a longer period. Corbyn emphasised that it was very hard for the MPs on the left who were forced to vote for 28 days in order to defeat 90 days. If they had abstained, the result would have been 60 days.

Yet for even those suspected of the most serious crimes – including murder, manslaughter and rape – the maximum period of detention without charge is 96 hours. Imran Khan emphasised the fact that with intelligence-led policing the authorities in fact have everything by the time of arrest. To hold a suspect for longer simply adds to the pressure they are under and adds to the mental susceptibility of suspects. In any event, in what respect does the word ‘terrorist’ add to murder, even mass murder, to justify 25 additional days without charge?

The meeting was timely. The following day, the Home Secretary, Theresa May, persuaded MPs to approve a six month extension to the 28 day period, pending the review of anti-terror legislation to be overseen by the former DPP, Lord Macdonald. According to her, since July 2006, 11 people had been held for more than 14 days, eight were charged with terrorist-related offences, and four were found guilty. Of those, six had been held for between 27 and 28 days, three were charged with terrorist-related offences, and two were found guilty. The Tory rebel David Davis pointed out that in one case five people who were held for the maximum 28 days were found to be innocent – ‘a recruiting sergeant for terrorism’.

Theresa May’s proposal was approved by 354 votes to 47. To its shame, the Labour Party’s position was to abstain: of course, it was responsible for this and other shameful measures. Three of the 47 opponents were Tories, and the others included Corbyn and McDonnell.

22: Justice Secretary, Kenneth Clarke, outlines proposed changes to allow the Director of Public Prosecutions to veto arrest warrants issued for suspected war criminals in the UK.

25: The coalition Government scraps plans to grant pre-charge anonymity to men accused of rape following opposition from Labour and female Tory MPs. The Government says it will now attempt to negotiate with the Press Complaints Commission to ask newspapers not to report suspects’ names.

 Pictures: Jess Hurd / reportdigital.co.uk

Claire Mawer, paralegal at Solace Women’s Aid

Theresa May, the Home Secretary
News & Comment

WikiLeaks shows the importance of full disclosure

The publication last month of over 79,000 records containing intelligence and incident reports by the on-line whistleblower WikiLeaks has provoked furious debate about whether the disclosure of sensitive material should be an exception to the principle of free speech when there are potential repercussions for national security.

The reports show that thousands of Afghani citizens have been killed in incidents and operations that went unreported elsewhere. The Pentagon has condemned WikiLeaks’ founder Julian Assange for releasing the material, claiming that he has put the lives of thousands of US military personnel and Afghani citizens at risk. This claim is strongly refuted by Assange. He has been treated as a pariah by Governments worldwide but as a champion of free speech by campaigners. There is no doubt that the WikiLeaks incident has brought into focus the role of whistleblowers and their disclosures within democratic society.

Throughout history, the disclosure of material that challenges the state hegemony has played a vital role in holding Governments and world leaders to account. Few can forget Mordechai Vanunu’s revelation of Israel’s nuclear programme, or the price he has paid for his exposure. Where would the debate about the UK’s complicity in US terrorist torture programme be without Reprieve’s constant legal offensive for publication of government documents concerning the treatment of British nationals in Guantanamo Bay? From Watergate to Iran-Contra, the rule of law depends on individuals being prepared to serve a higher purpose and bring to light abuses of power.

The WikiLeaks incident could be precedent setting in more than one way. Barack Obama’s first judicial appointment to the Supreme Court, Sonia Sotomayor, has indicated the US Congress is already proposing legislation dealing with the tension between free speech and national security and that this legislation would doubtless end up before the Court. Haldane members may hold out little hope that the US Supreme Court will strike the right balance between accountability and vested interests but anyone committed to the operation of the rule of law within a democratic society should defend the principle of full disclosure at all costs.

Anna Morris

End Agamez’s prosecution

Haldane Chair Liz Davies has written to the Colombian Ambassador expressing outrage at the ongoing detention of Carmelo Agamez Berrio, a human rights defender imprisoned by the Colombian authorities since November 2008.

Prior to his arrest Agamez, leader of the human rights group Movement for Victims of State Crimes (MOVICE) in the Sucre province, had repeatedly denounced the violence of right-wing paramilitaries and played a significant role in efforts to expose those Colombian politicians supporting them. MOVICE was instrumental in organising the Citizen Hearings for Truth, which led to the arrest of various politicians and paramilitaries on charges of human rights violations and corruption. In recent years Agamez has received multiple threats from paramilitaries and appeared on a paramilitary ‘death list’ in 2006, causing him to be granted security measures from the Inter-American Commission on Human Rights (IACHR).

Agamez’s arrest took place shortly after he publicly denounced several cases of official corruption. He was charged with ‘conspiracy to commit a crime’ with paramilitary forces, following an allegation that he had participated in a paramilitary meeting on an unspecified date in 2002. However, the prosecutor’s decision to charge was heavily based on the uncorroborated accounts of two discredited witnesses, one of which was subsequently detained after Agamez exposed alleged links to paramilitary groups. Another witness recanted her testimony after Agamez’s arrest, stating that the prosecutor had induced her to falsely impugn Agamez.

The decision to prosecute Agamez has been the subject of intense legal scrutiny. After six months of detention, a Colombian Court found that Agamez’s right to due process had been breached on a number of counts. Two months later the Prosecutor General initiated a criminal investigation against the prosecutor, Mr Rodolfo

August

2: Osman Rasual, a 27-year-old Iraqi Kurd asylum seeker, jumps to his death from a block of flats in Nottingham after being told that he would no longer receive legal aid to pursue his application for leave to remain in the UK.

3: It is revealed that the Home Secretary and Equalities Minister, Theresa May, wrote to the Chancellor, George Osborne, warning him that cuts in the budget could widen inequality in Britain and ran a ‘real risk’ of breaking the law.

5: Gay rights campaigners in America celebrated as the Supreme Court ruled as unconstitutional California’s ban on same-sex marriage. Supporters of the ban said they would appeal the decision to override ‘Proposition 8.’
Martínez Mendoza, in Agamez’s case for alleged corruption in the ‘baseless’ judicial process. Agamez appealed the decision to prosecute but, after waiting seven months for a result, the Vice Attorney General has, without any new evidence, taken the astonishing decision to take the case to trial.

Given his strident opposition to paramilitary groups it is highly implausible that Agamez is a paramilitary member. Further, the Colombian state has been repeatedly criticised by organisations including the UN and Amnesty International for the culture of impunity within which the paramilitaries are permitted to operate. Indeed, senior paramilitary members have publicly confessed to massacring thousands of innocent civilians without being convicted. Conversely hundreds of human rights defenders and trade unionists are languishing in appalling conditions in Colombian prisons for political reasons.

Like so many other political prisoners currently being held, the charges against Carmelo Agamez appear to have been brought on the basis of inherently flawed, unreliable and, at least in part, fabricated evidence. His detention seems little more than yet another attempt to silence those brave enough to speak out against the Colombian regime.

If you would like to support Carmelo Agamez please write to the Colombian Ambassador. For more information about his case, and the human rights conflict in Colombia, please visit Justice for Colombia at www.justiceforcolombia.org

Kat Craig

**Tribunal victory**

After 20 days of evidence and in a judgment 120 pages in length, the Employment Tribunal in Newcastle ruled in July 2010 that sacked mental health nurse and Unison activist Yunus Bakhsh had been unfairly dismissed.

At the heart of Bakhsh’s case were a series of allegations about his employer, the Northumberland Tyne & Wear NHS Foundation Trust, and his union (see Socialist Lawyer 52, June 2009). In respect of the Trust, the Tribunal found that the dismissal had been motivated by Bakhsh’s trade union activities. These activities included leaking news to the press in 2006, just days before his suspension, that the Trust had decided to make cuts to the food budgets for patients while at the same time the directors of the Trust had been awarded pay rises of up to 36 percent. The dismissal was blamed squarely on Elizabeth Latham, the Trust’s Director of Workforce and Organisational Development. Also named in the judgment was Elizabeth Twist of Unison.

The Tribunal expressed its surprise at the way in which Ms Twist dealt with the news of the dismissal of one of her most active branch secretaries: by thanking Ms Latham for the news and putting the phone down without saying anything more. As regards Bakhsh’s allegations that the union had colluded in the dismissal, the Tribunal describes itself as ‘left wondering’ but not ‘convinced’.

Dave Renton

**10:** The Ministry of Justice announces it is to make a £2bn cut in its £9bn annual budget. Unions fear 15,000 jobs could go. The Public and Commercial Services Union said this implied job cuts on an unprecedented scale.

**12:** The four police officers accused of a ‘serious, gratuitous and prolonged’ attack on terrorism suspect Babar Ahmad discover they will stand trial. The CPS confirmed that there was sufficient evidence and it was in the public interest to charge the officers.

**17:** A survey by Resolution, the family lawyers’ association, finds that 90% of family lawyers say they believe access to justice is gravely threatened following the changes to the tendering process for civil legal aid work.

**18:** A rise is reported in the number of people seeking legal advice as to whether they have a claim for unfair dismissal. Contact Law, a service which refers legal queries to solicitors in the UK, reporting a 15% increase in the number of people seeking employment-related legal advice in July.

**19:** The Trial of Guantanamo Bay’s youngest inmate, Omar Khadr begins. Khadr was 15 when he was captured by US forces in 2002. Children’s campaigners have criticised the Obama administration over Khadr’s age.

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Kat Craig

**Colombia: May Day march in 2007 in Bogotá**

**Pictures:** Justice for Colombia www.justiceforcolombia.org

Dave Renton
Bail bid for detainees

One of the most shameful aspects of the asylum and immigration system in the UK is the extensive use of detention. People fleeing torture and other forms of persecution, children and claimants experiencing mental illness, are just some of the 30,000 people currently being held in the British archipelago of detention centres dotted around the UK.

Although provisions for the widespread use of detention of non-UK nationals go back to the Immigration Act 1971, it is only in recent years that the practice has become particularly widespread. A recent report by Bail for Immigration Detainees (BID), entitled A nice judge on a good day: immigration bail and the right to liberty, highlights some of the most egregious aspects of the detention of asylum seekers and other non-UK nationals.

At the launch of the report in Parliament on 14th July 2010, one of the major issues raised by speakers, including Baroness Kennedy QC and Alison Harvey of the Immigration Law Practitioners’ Association, was the continuing scandal of the detention of children. One of the pledges of the new Government is to end the detention of children, although this has yet to happen. The Deputy Leader of the Liberal Democrats, Simon Hughes MP, told the launch meeting that the pledge would definitely be honoured. The question was only of how this would be done. A leaked document from the Home Office obtained by Socialist Worker in August 2010 suggests that the Con-Dem Government’s cynical solution will be increased deportations of children.

The title of BID’s report is a quote from the partner of an immigration detainee. It points up one of the main concerns of the report. The capriciousness of decisions by immigration judges in bail hearings has led to a lack of consistency and other legal safeguards in governing the process. Some of the most shocking aspects of A nice judge on a good day are the descriptions of immigration judges’ behaviour during bail hearings. A key determining factor in the outcome of an application for bail is legal representation or, as is increasingly likely, the lack of it for claimants. BID’s research found that where the claimant was represented, bail was granted in almost 50% of cases. For those without legal representation that figure fell to just under 14%.

The long process of attrition in legal aid has hit asylum seekers particularly hard. The latest and perhaps most devastating result of recent changes to legal aid has been the closure in June 2010 of Refugee & Migrant Justice (RMJ). RMJ was forced into administration due to the decision by the Legal Services Commission to change the way it funds legal aid. Casework is now funded only on completion which in the case of asylum and immigration cases can take up to two years or more. Despite calls from, amongst others, the Archbishop of Canterbury to give RMJ a temporary reprieve, the Ministry of Justice has allowed RMJ to fold, leaving over 10,000 cases pending.

As dire as things appear for asylum seekers, recent developments give some hope. A spreading hunger strike among detainees in Yarl’s Wood and Campsfield detention centres is leading to growing awareness and outrage over the treatment of asylum seekers and others being held within the system. The commission of enquiry into the effects of legal aid cuts to be organised early next year by The Haldane Society and Young Legal Aid Lawyers is garnering increasing support. The need for a campaign for the right to legal representation in general and for justice for asylum seekers in particular is there.

Simon Behrman

August

19: Liberty warns the Con-Dem coalition that their plans to overhaul counter-terrorism powers might tacitly sanction torture and lead to the banning of political and religious groups. Liberty reiterates calls for the use of intercept evidence and more appropriate surveillance powers.

22: The Foreign Office comes under criticism as it is revealed that its budget for human rights monitoring around the world will be cut by £560,000 a year. William Hague confirmed that the ministry was looking at ways of making the human rights report more cost effective.

25: Barry George, the man acquitted of the murder of television presenter Jill Dando, has received permission from the High Court to challenge an earlier decision that he was not entitled to compensation. George spent eight years in prison before his acquittal.

September

1: The former head of Haringey Social Services Sharon Shoesmith is given leave to appeal over her failed attempt to reverse her sacking following the ‘Baby P’ affair. A judge criticised the then children’s secretary Ed Balls and upheld only a small proportion of his claim for costs in the case.

9: Human rights campaigner Peter Tatchell decides not to attempt a citizen’s arrest of the Pope when he visits Britain later this month. Tatchell had wanted to see the Pope arrested for what he believed were systemic cover-ups in the Catholic church concerning child abuse.
Clarke steps into Justice job – beware liberal pose

On his own admission, Kenneth Clarke was slightly surprised to return to ministerial office as Lord Chancellor and Secretary of State for Justice. Long regarded as one of the Tory party’s ‘big beasts’, he was originally brought back to the opposition front bench to beef up David Cameron’s fledgling economic team alongside the then Shadow Chancellor George Osborne. Instead of being appointed Business Secretary as anticipated however he found himself resuming many of the responsibilities he once held as Home Secretary back in the early 1990s. This may explain why he was relatively slow off the mark compared to other members of the coalition Government. When he did make his first ministerial speech however it was to characteristically pugnacious effect. Speaking at King’s College’s Centre for Crime and Justice Studies, he effectively resiled from the mantra that ‘prison works’ so infamously declared by Michael Howard who succeeded him at the Home Office in 1992. He noted that the prison population, which stood at 44,628 when he held the post, had risen to ‘an astonishing’ 85,000 and commented that:

‘In our worst prisons it produces tougher criminals. Many a man has gone into prison without a drug problem and come out drug dependent and petty prisoners can meet up with some new hardened criminal friends.’

Not surprisingly Clarke’s declaration was met with howls of derision from the right wing of his own party including from Howard who responded that he was ‘not convinced by his speech’ and suggested that on his watch, crime went down as the prison population went up.

Sadly, but perhaps predictably, the criticism was no less vocal from the Opposition front bench. New Labour spent 13 years desperately trying to outflank the Tories by demonstrating how tough it would be on crime whilst proving rather less committed to tackling the causes as Tony Blair had promised when he was Opposition leader. Jack Straw, the last Labour Justice Secretary, rushed into print to denounce Clarke’s announcement. Writing in the Daily Mail, the house newspaper of conservative middle England, Straw declared the Government’s ‘new liberal approach to crime’ worthy of Monty Python. Instead, he argued, David Cameron had been right during his years in opposition to criticise Labour for not being tough enough.

On the surface there then would appear to be something of a dilemma for left leaning practitioners and activists wishing to intervene in this debate. It is rather novel to find a Tory Justice minister adopting an apparently more progressive position than Labour. The reality is, of course, that, Clarke’s personal views notwithstanding, the Government’s policy is fundamentally driven by the determination to make drastic public spending cuts. Clarke highlighted the fact that at £8,000 per annum it costs more to keep someone in prison than it does to send a boy to Eton.

In addition, he inherited from his predecessor an alleged £4 billion prison building programme. It is these spiralling costs rather than any Damascene conversion that will ultimately determine the Government’s criminal justice policy. It is worth noting that in the same speech in which he floated these tentative proposals, Clarke reinforced the need for swingeing cuts in legal aid. The inevitable outcome of this is that poorer people will be denied a fair hearing.

Whatever the outcome, the challenge for advocates and activists will be to demand fully funded access to legal advice for all and real, thoroughgoing support and rehabilitation for offenders.

Brian Richardson

12: Britain’s Government and military leaders had ‘absolutely no idea’ what to do in the aftermath of the invasion of Iraq, says Colonel Tim Collins who said the Chilcot inquiry into the war should recommend action to end the culture of ‘obsequiousness’ among senior military officers that led to them telling politicians what they wanted to hear.

13: Three former Labour MPs – David Chaytor, Elliot Morley and Jim Devine – accused of fiddling their expenses, will go to the Supreme Court next month to argue that the criminal courts do not have the jurisdiction to hear their cases. They say they should be protected from prosecution by parliamentary privilege.

14: A major review of how the police handle rape cases has been shelved amid efforts by the Government to save money. The £441,000 study by HM Inspectorate of Constabulary had been prompted by a series of high-profile blunders by detectives. The Home Office insisted funding for the probe was withdrawn in June because it would merely have ‘duplicated’ other reviews by Lady Stern and Sara Payne.

16: The head of MI5, Jonathan Evans, warns that Britain faces a growing threat of terrorist attacks from UK residents trained in Somalia and from dissident Irish republicans, and, in the Security Service’s view the government must maintain special control orders for terror suspects in its forthcoming review of anti-terror laws.
President Barack Obama has so far been a massive disappointment to the billions across the US and the world who cheered his election. Marjorie Cohn looks at his choice for a new Supreme Court justice.

For the past five years, the United States Supreme Court, under the leadership of Chief Justice John Roberts, has worked systematically to undo much of the progress we have achieved here in the US, especially in the areas of affirmative action, criminal justice, workers’ rights and limiting corporate power. The Court held that corporations have rights like persons and therefore can give unlimited contributions to political campaigns, which will mean increased corporate influence in government. Furthermore, people can now be criminally charged with providing material support to terrorists for writing an amicus brief. That trend may well accelerate with Elena Kagan replacing Justice John Paul Stevens. The selection of a Supreme Court Justice is one of the most important decisions a President can make.

Instead of celebrating those progressive achievements, Obama bought into the rhetoric of right-wingers, who label any judge whose rulings they don’t like an ‘activist’. Obama said that during the 1960s and 1970s, ‘liberals were guilty’ of the ‘error’ of being activist judges. But when, as a senator, he cast his vote against the confirmation of Roberts to be Chief Justice, Obama had said, ‘[Roberts] has far more often used his formidable skills on behalf of the strong and in opposition to the weak’.

Unfortunately, President Obama has continued to assert many of Bush’s policies in his ‘war on terror’. Bush had claimed nearly unbridled Presidential power to hold non-citizens indefinitely without a hearing and to deny them due process. On three occasions, a closely divided Supreme Court put the brakes on this executive overreaching. Stevens played a critical role in each of those decisions, in which the Court held that prisoners at Guantánamo have access to American courts to challenge their detention, and that Bush’s military commissions violated the Geneva Conventions and the US Uniform Code of Military Justice.

Kagan, a former paid advisor to Goldman Sachs, does not have Stevens’ strong progressive voice. She has been a loyal foot soldier in Obama’s fight against terrorism and there is little reason to believe she will not continue to do so. During her confirmation hearing for Solicitor General, Kagan agreed with Republican Senator Lindsey Graham that the President can hold suspected terrorists indefinitely during wartime, and the entire world is a battlefield.

While Bush was shredding the US Constitution with his unprecedented assertions of executive power, law professors throughout the country voiced strong objections. But then, Professor Elena Kagan remained silent.

As Solicitor General, Kagan wrote in a brief that the ‘state secrets privilege’ is grounded in the Constitution, even though the Supreme
Court has never said that. The Obama White House, like the Bush administration, is asserting this privilege to prevent people, who the CIA sent to other countries to be tortured and those challenging Bush’s secret spying programme, from litigating their cases in court.

Obama had a golden opportunity to appoint a formidable progressive justice who could take on the conservative radical right-wingers on the Court – John Roberts, Samuel Alito, Antonin Scalia, and Clarence Thomas – who rule consistently against equality and in favour of corporate power. The Court is delicately balanced with the four conservatives on one side and four ‘liberals’ – Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan – on the other. Justice Anthony Kennedy is the swing voter and Roberts has masterfully convinced Kennedy to side with the conservatives in many cases.

In a recent landmark ruling, a federal district court judge ruled that Proposition 8, a California voter initiative that outlaws same-sex marriage, is unconstitutional. If this case reaches the US Supreme Court, it will likely fall to Kennedy to decide whether he wishes to be on the right side of history by affirming the trial judge’s ruling. Kennedy authored a decision in 2003 which overturned Texas’ anti-sodomy law, and another in 1996 which struck down Colorado’s anti-gay ballot initiative. But Kennedy joined with the four conservative justices in overruling the trial judge’s decision to broadcast the Prop 8 trial, although this may reflect Kennedy’s views about the effect of televising trials rather than the way he feels about same-sex marriage.

Another significant issue that will invariably come before the Supreme Court is immigrants’ rights. A law enacted recently in Arizona – called SB 1070 – required law enforcement officers to stop everyone whom they have ‘reasonable suspicion’ to believe is an undocumented immigrant and arrest them if they fail to produce their papers. The bill did not prohibit police from relying on race or ethnicity in deciding who to stop. Officers would not often have detained Irish or German immigrants to check their documents. A federal judge in Arizona blocked enforcement of many of the most egregious sections of SB 1070. This is a case that could well end up in the US Supreme Court.

When drafting the Constitution, the Founding Fathers included three separate co-equal branches of government – the legislative, the executive and the judicial – to check and balance each other so that none would become too powerful. The important role the Supreme Court played in checking some of the executive’s worst excesses by Bush may diminish as the Roberts Court proceeds with Kagan instead of Stevens, and Kennedy moves to the right in several areas. The Court will likely permit a larger role for religion in public life and curtail abortion rights.

Marjorie Cohn is a professor at Thomas Jefferson School of Law, San Diego, California where she teaches criminal law and procedure, evidence, and international human rights law. She is the immediate past president of the National Lawyers Guild and is the deputy secretary general of the International Association of Democratic Lawyers. See www.marjoriecohn.com
The first thing to say about the Bloody Sunday Inquiry is that it was worth every pound and day spent on it. You cannot put a price on peace and justice. The Inquiry has helped the peace process in Ireland and delivered a large measure of justice to those whose lives were...
Once the Inquiry was set up, it had to be thorough, given the shameful precedent of Lord Widgery, who refused to hear hundreds of witnesses whose statements had been gathered by the Northern Ireland Civil Rights Association (NICRA). Even the wounded were ignored by Widgery in his haste to strike a blow in the propaganda war. Being thorough meant hearing from the thousands of people who had witnessed the events – civil rights marchers, journalists, soldiers and police – and the hundreds involved in the planning, army commanders, intelligence officers, politicians and civil servants in both Belfast and London. Hearing from witnesses meant allowing them to be questioned by the interested parties. The right to ask direct questions was vital. It enabled the families to see their legal teams challenging the witnesses and it helped the Inquiry to discover the truth. I deplore attempts at recent inquiries to water down the interested parties’ rights to directly challenge witnesses with whom they disagree.

Lord Saville’s first achievement was his insistence on thoroughness and openness. By the time the last witness was called, no one could doubt that he had gone beyond the call of duty in holding the most complete investigation possible. On several occasions his commitment to openness brought him into conflict with his judicial brethren in London. His ruling that the soldiers should be named was quashed, as was his ruling that the soldiers should come to Derry to give their evidence. His first response to the latter ruling was that soldiers’ evidence should be taken by video link. The families were summoned, and we made urgent submissions that persuaded the inquiry to move its whole operation to London. The families were able to come to London to listen, and the principle of open justice was maintained.

Even so, the families were apprehensive on 15th June 2010 when the report was finally published. It was a moment of intense emotion when I could embrace the brothers and sister of Jim Wray and say ‘Jim was murdered – it’s official.’ The Inquiry’s second achievement was the clarity with which it declared, not only that every man shot and wounded was innocent, but that the soldiers shot without justification and then tried to cover their actions with lies.

The devastating findings were dressed in unprecedented emotive and legally precise language:

‘We are sure that these soldiers fired either in the belief that no one in the areas towards which they respectively fired was posing a threat of causing death or serious injury, or not caring whether or not anyone there was posing such a threat.’ (Report, 3.99)

‘We reject each of these claims [that they fired at people who were armed] as knowingly untrue.’ (Report, 3.102)

When the details were analysed in the main body of the report, the conclusions were even more compelling. Jim Wray had been shot once as he fled across Glenfada Park, and again when he was lying wounded on the ground. The Inquiry found that both he and William McKinney were ‘specifically targeted, as there appear to have been few people near them at the time.’ (Report, 112.56) ‘As to the second shot that in our view hit Jim Wray as he lay on the ground, we consider that this must have been deliberately fired at him. He was on his own. There is nothing to suggest that he could have been hit by mistake or by accident. No one could have believed that Jim Wray was posing a threat of causing death or serious injury; no one admitted firing at a man on the ground; and no one suggested that there was or could have been any real or imagined justification for shooting a man in this position.’ (Report, 112.57)

These conclusions, and the speech of the Prime Minister, David Cameron, in which he accepted the conclusions and apologised to the families, led to an outburst of joy, relief and thankfulness that the campaign had realised its goals after being waged for so long. There was a real sense of closure.

The Inquiry concluded that murder was committed and no credible defence is available. It also found that the soldiers perjured themselves and perverted the course of justice. The families believe that the report should be studied by the Director of Public Prosecutions (DPP) of Northern Ireland for prosecutions to be considered. The problem with prosecutions is that the evidence to support the charges is voluminous, and all the key witnesses would have to be called again before a criminal court. Several trials would be required as the action took place in different sectors. If convictions are obtained, the sentences would be reduced under the provisions of the Good Friday Agreement. I anticipate that the DPP will find reasons not to prosecute.

However, after all the euphoria dies down, there are deeper issues to be faced. Who sent the 1st Battalion of the Parachute Regiment (1 PARA) into the Bogside, and why? For Saville, the buck stops with Colonel Wilford, the commanding officer of 1 PARA. He failed to comply with his orders, failed to inform his senior officer that the situation had changed, and sent his men into a dangerous area where innocent people would be at risk. Saville’s overall assessment is that these failures by Colonel Wilford, followed by ‘a serious and widespread loss of fire discipline among the soldiers of Support Company’, caused the tragedy of Bloody Sunday. (Report, 5.4)

On this analysis, everyone else emerges without blame. General Ford was the Commander of Land Forces in Northern Ireland. A few weeks earlier, Ford had recommended a plan to shoot selected ringleaders of the rioters in Derry. He decided on the deployment of 1 PARA, ‘a force with a reputation for using excessive physical violence.’ (Report, 4.8) He made a special trip to Derry to be a spectator of the events. But Saville finds that ‘he neither knew nor had reason to know at any stage that his decision would or was likely to result in soldiers firing unjustifiably on that day.’ (Report, 4.12)

Edward Heath, who was Prime Minister at the time, and the generals and politicians in London were completely exonerated. The use of unwarranted lethal force against nationalists on the occasion of the march was ‘neither contemplated nor foreseen by the UK Government’. (Report, 4.4) The proposition that the UK Government sanctioned a tough approach to the Derry march, recklessly disregarding the dangers, in order to please those Protestants who believed the marchers were the enemy, was rejected as unsustainable.

Jim Wray’s father had refused to be repre-
sented before Baron Widgery, telling him that ‘the British Government should be under investigation equally with the British Army at this Tribunal.’ So our team took a particular responsibility to probe what the UK Government knew and what it did in the period before Bloody Sunday. We insisted that the Inquiry obtain Cabinet documents, including minutes of meetings and briefings. What we found, even in the material put on record, was deeply disturbing.

Mr Heath was a hands-on leader when it came to Northern Ireland. He chaired the Cabinet committee GEN 47, which met every week to review the political and military situation. On 27th January 1972, three days before Bloody Sunday, Heath was recorded as saying at the GEN 47 that he approved the military dispositions for the march, and said that NICRA was being taken over by Irish Republican Army (IRA) and ‘hooligans’. His hostility towards the civil rights marchers was palpable. On the same day the Joint Security Committee meeting in Belfast noted that General Tuzo, the most senior officer in Northern Ireland, forecasted that the blocking of the Derry march might end in rioting ‘and even a shooting war’. Heath was being briefed by Sir Burke Trend, one of his most senior advisers, that the ban on marches was being openly defied: ‘are we able – and prepared – to deal with that situation?’ This should be ‘explored urgently with Mr Faulkner during his visit to London’. Brian Faulkner, the Northern Ireland Prime Minister, met with Heath on the evening of the same 27th January. The only written evidence put before the Inquiry about that meeting was a typed up ‘Note for the Record’, which mentions the ‘civil disobedients’ who would be marching in Derry, but says nothing about the military plans.

In all this activity there was not a shred of concern for, or understanding of, the thousands of civil rights supporters who were due to march in Derry against the policy of internment without trial. On the contrary, they were regarded as lawbreakers, the allies of the enemy, the IRA. Sir Burke Trend’s briefing to Heath says the marchers had until that point been dealt with ‘using kid gloves’. In the light of all this evidence, it was more than reasonable of us to put the case that the decision to take off the kid gloves had been authorised at the highest level, and that Faulkner had been given the assurances he needed to satisfy his own supporters, who were clamouring for action against the marchers.

All these points were brushed aside by the Inquiry. In seeking to reduce the impact of Sir Burke Trend’s advice, they said, in true ‘Yes, Prime Minister’ style: ‘The role of the Secretary to the Cabinet and his Cabinet Office colleagues in relation to the Prime Minister...was not to advise him...Their role was to provide a steering brief to assist the Prime Minister to guide the discussion, and to facilitate the task of establishing, if possible, a consensus at the conclusion of the discussion.’ (Report, 9.469)

I believe it to be a major flaw in the Bloody Sunday Report that it failed to deal with the responsibility of those in the political and military hierarchy, but was content to blame only the paratroopers and their commanding officer. The truth is that the soldiers did not go off on a frolic of their own. They did what they were ordered to do, and those orders came from a high level. General Carver, the Chief of the General Staff who briefed the GEN 47, said in an interview in 1998: ‘It was agreed in the British Government, I mean it was agreed that something had got to be done.’ One of the sad consequences of the delays that beset the Inquiry was that General Carver died before he could tell the Tribunal exactly what he meant.

The Report and evidence is available on the website: www.bloody-sunday-inquiry.org

Lord Gifford QC, a Vice-President of the Haldane Society, was leading counsel for the family of Jim Wray before the Bloody Sunday Inquiry. Richard Harvey was junior counsel in the case.
Wrongful conviction of Greenpe
At the request of Greenpeace International, I travelled to Tokyo in 2009 to assist in the defence of anti-whaling activists Junichi Sato and Toru Suzuki. Acting on information from a whistleblower, the two had exposed the blackmarket trade in whale meat in the course of a Greenpeace investigation into Japanese so-called ‘scientific’ whaling. Crewmembers of a taxpayer-funded whaling ship were illegally selling the priciest cuts of whale meat.

Junichi and Toru intercepted a box of whale meat in a storage depot in the port of Aomori. They presented their findings at a press conference, delivered the box to the prosecutor’s office in Tokyo and offered the judicial authorities their cooperation to further uncover the smuggling ring. Instead of investigating these blackmarket activities, the Public Prosecutor dropped the investigation and arrested Junichi and Toru.

The ‘Tokyo Two’ were convicted of theft and trespass on 5th September 2010, and sentenced to one year, suspended for three years. Greenpeace rightly describes this result as wholly disproportionate and unjust, and they will appeal.

But it was not just the ‘Tokyo Two’ who were on trial. Also on trial was the right of any member of civil society in Japan to expose corporate or governmental corruption. In the words of defence expert witness, Dr. Dirk Voorhoof, professor of media law at the University of Ghent and the University of Copenhagen: “This trial is a landmark in Japan due to the political character of the case and the controversial nature of what they exposed, but it is also important globally from a human rights perspective, as before the activists were even charged they were held for an arbitrarily long period of time, denied access to lawyers, were harshly interrogated, and were otherwise treated in a manner disproportionate to their alleged crimes.”

The UN Working Group on Arbitrary Detention concluded on 1st September 2009 that the detention of Sato and Suzuki was unjustified and contrary to the International Covenant on Civil and Political Rights, especially Article 19 of this Covenant guaranteeing the right to express, impart, receive and seek information. Japan is a party to this treaty.

The Haldane Society joined other international human rights groups in condemning the prosecution, as the ‘Tokyo Two’ clearly had no intention to steal whale meat, but rather, in the public interest, to expose unlawful practices in the Japanese whaling programme. Under international human rights law, peaceful protest by NGOs, investigative reporting by journalists and others, whistle-blowing and participation in public debate on matters of interest for society should be guaranteed and protected by public authorities.

Debate on matters of public interest must be pluralistic and not dominated by governments or powerful economic elites. A modern democracy needs input from civil society since media and NGOs have a vital role to play as the vanguard against tyranny. They require a high level of protection. The ‘Tokyo Two’ case is about much more than illegal whaling and embezzlement. It put on trial Japan’s rights to freedom of expression, to gather news, to freedom of information, the role of NGOs in public debate, the independence of the judiciary and the transparency of public policy. At heart, it is about the question whether or not Japan wishes to travel down the road towards a sustainable society and a transparent and pluralistic democracy.

The Aomori District Court has answered all these questions in the negative. But in the international court of public opinion, the ‘Tokyo Two’ were found not guilty long ago. By the principled way in which they have fought their case, Greenpeace’s activists have turned Japan’s normally establishment-oriented media completely around. When they were arrested over two years ago, the media all wanted to know why the ‘Tokyo Two’ refused to apologise for their conduct. Today, the press is demanding that the prosecutor explain why he has failed to investigate the misconduct that Greenpeace exposed.


Richard Harvey is a barrister at Garden Court Chambers and a member of the Haldane’s Executive Committee.
WHEN THE STATE KILLS

The Crown Prosecution Service has ruled that no police officers are to be charged over the death of newspaper seller Ian Tomlinson at last year’s G20 protests in the City of London. The CPS reported its decision on the fifth anniversary of the shooting of another innocent man, Jean Charles de Menezes, at Stockwell tube station in 2005. Liz Davies looks at the two cases.
AN INNOCENT MAN
MURDERED BY
POLICE BRUTALITY
JUSTICE FOR
IAN TOMLINSON
R.I.P.
On that day, PC Simon Harwood wore full riot gear, wielded a long baton, held a shield, had a balaclava over his face and a helmet on, and his police identification number was obscured.

Ian Tomlinson was wearing two sweatshirts and had his hands in his pockets. PC Harwood struck Tomlinson from behind, on the back of his leg, and then pushed him over so that he fell face-first onto the ground. Tomlinson was helped up by a demonstrator, said something to the police and started to walk on, but shortly afterwards collapsed and died.

Imagine if the roles were reversed. If Tomlinson had struck a police officer and then pushed him over, he would have been arrested on the spot and charged with a serious offence.

It is worth remembering the obfuscations that the police and other state authorities immediately engaged in after Tomlinson died. On the night of Tomlinson’s death the Met issued an official statement. It did not say anything about Tomlinson having any contact with police officers. It stated that police officers and ambulance crews had tried to save his life after he had collapsed and that their efforts were marred by demonstrators throwing bottles.

The next day Dr Freddy Patel was commissioned by the coroner, Professor Paul Matthews, to carry out a post-mortem. Dr Patel advised that Tomlinson had died from a heart attack. The coroner refused a request from the Independent Police Complaints Commission (IPCC) to attend the post-mortem and is said not to have told the Tomlinson family when and where the post-mortem was to take place, nor to have advised them that they or a representative could attend.

By 7th April 2009 witnesses had come forward giving accounts of PC Harwood attacking Tomlinson. Crucially, an amateur photographer had sent the now-notorious footage of the assault to The Guardian which published it on its website. Two days later The Guardian published another video showing Tomlinson collapsing. Contrary to the Met’s official statement, police officers can be seen pushing away demonstrators who are trying to help Tomlinson. There is no barrage of missiles as had been claimed by the police.

Shortly afterwards the Tomlinson family were able to obtain a second autopsy by Dr Nat Carey. He concluded, as did a third pathologist, that Tomlinson had died as a result of serious internal bleeding, presumably caused by the attack. Dr Carey has said, ‘He sustained quite a large area of bruising. Such injuries are consistent with a baton strike’. Dr Carey and the third pathologist had to rely on Dr Patel’s records of the first post-mortem and both of them condemned those records as inadequate.

All this information was known by the IPCC, the police, the family and their legal representative and, most importantly, by the Crown Prosecution Service (CPS) by the end of April 2009. The CPS then took another fifteen months to decide that it would not prosecute PC Harwood.

When the Director of Public Prosecutions (DPP) announced that manslaughter charges would not be brought, he also said that there could be no charge of common assault because that lesser charge had to be brought within six months of the offence, i.e. by 1st October 2009, and the CPS had not met that deadline.

The DPP’s decision does not stand up, except when put in the context of the history of cover-ups ever since Tomlinson died.

The decision not to bring manslaughter charges is said to have been because the medical evidence as to the cause of death is not conclusive. The short answer to that is ‘let the jury decide’.

There are two pathologists who do attribute the cause of the death to injuries from the assault. One pathologist, Dr Patel, thinks Tomlinson died from a heart attack. At the time of the DPP’s decision, Dr Patel was suspended from the Home Office’s approval list of pathologists awaiting disciplinary proceedings from the General Medical Council. Since then, he has been found guilty by the GMC of conducting two post-mortems in circumstances that amounted to misconduct and suspended from practice for two months. Which of these three
Having excluded the possibility of manslaughter, the DPP jumped straight to the alternative summary-only offence of common assault. It seems extraordinary that the DPP considered a charge of common assault might be appropriate. But if it was, why didn’t it lay the charge during the six-month period just in case?

More importantly, what about the intermediate offences? There is no time limit to grievous bodily harm (GBH) or actual bodily harm (ABH) and PC Harwood would have had the right to be tried by a jury. It’s certainly Dr Carey’s view that the injuries were consistent with ABH.

In July 2010 it was announced that PC Harwood will now face gross misconduct charges and a disciplinary hearing, and the Tomlinson family have called for those proceedings to be held in public.

The parallels with the shooting of Jean-Charles de Menezes are all too many. In both cases, the police lied – blaming de Menezes for suspicious behaviour, blaming the demonstrators for impeding medical assistance. In both cases the police sought to delay an investigation by the IPCC. In both cases the CPS decided not to prosecute. In short, in both cases all the arms of the state – the police, the CPS, the coroners – have obfuscated and, in the case of the police, have told downright lies.

In the case of de Menezes there is one silver lining. Two juries had the opportunity to scrutinise the evidence and both disbelieved the police. One jury convicted the Met of health and safety violations – the inquest jury rejected the police evidence that they had shouted warnings and rejected the argument that the shooting was lawful. De Menezes shows us that, while official agencies are keen to protect the police, the truth comes out when ordinary people get the chance to decide.

The Tomlinson family and their lawyers are now left in the invidious position that the Lawrences, the de Menezes family and others have all been through. But they shouldn’t have been left in this position by the state. A bereaved family has enough to cope with, dealing with loss and grief. Nobody wants to be in the extraordinary position of having to employ cutting-edge legal tactics that might take years and years in order to get to the truth. That should have been the job of the CPS, and the DPP’s decision has failed the Tomlinson family.

The Tomlinson family has launched a fighting fund. Further information and details of how to donate are at www.iantomlinsonfamily.campaign.org.uk.

Liz Davies is chair of the Haldane Society. This is an edited version of an article which previously appeared in The Morning Star.
Frances Webber was called to the Bar in 1978. She undertook her first six months of pupillage with Michael Mansfield at Cloisters before joining Garden Court in 1979. Amongst other publications, Frances co-edited Macdonald’s Immigration Law and Practice (5th edition, 2001, 6th edition, 2005). Immigration law was at the heart of Frances’ practice for more than 20 years.

What are you currently doing?
I want to do more work in Colombia. Partly because of my love for South America but also because of my great admiration for the human rights lawyers in Colombia. They and trade union members really do put their lives on the line. I’m currently doing voluntary work of one and a half days a week for the Institute of Race Relations and some training for Warwick University and Birkbeck University. I’m also planning on writing a book on the treatment of refugees in the legal system, particularly the process by which the focus has been on keeping people out and criminalising asylum seekers. I’m aiming to get this out at the end of next year.

How have things changed for women since you came to the bar?
Things were primitive when I started. Women were present but on men’s terms. During my first week at the Council of Legal Education in 1976 I attended a lecture. There were 400 students in the hall and the lecturser was talking about women as ‘fifi with the mink coat’ and ‘silly old cow’. When I asked why he had to refer to women in this way. The entire lecture hall, save for one person, erupted against me – including women. At college, criminal law lecturers had an unhealthy interest in rape cases and burglary with intent to rape.

In practice, women were only really expected to practice in family law. I wanted to do immigration, it was political law. I was pushed however into family – which I did for five years. Immigration and housing were simply considered to be too hard for women. The only way I managed to break through into immigration law was to stay around chambers in August when all the more senior practitioners were away.

Why immigration law?
I came to immigration law through the anti-racist movement in the 1960s and 1970s. This was the era of ‘Paki Bashing’, Enoch Powell and virginity testing. It was an intensely political time and so was the debate over immigration. In the late 1960s, before I was at the Bar, I was working as a secretary in the Institute of Race Relations – where I got to know Ian MacDonald. He was the main immigration lawyer.
How has immigration law changed?
Immigration law is still intensely political, for example, deportation and national security. Now asylum is the political ‘hot potato’ and has been since the 1990s. More recently there has been a greater move towards immigration and national security. The political football of the 1960s and 1970s was not asylum seekers. Asylum seekers started to come in the 1980s – before that, refugees were not entering as refugees. East African Asians, for example, were entering as either some sort of British Citizen or economic migrants. It was just easier then to come in as an economic migrant. If you came as a refugee you cut off links with your country. In the 1970s there were even resettlement programmes for some immigrants, such as the Chileans.

Then there was the Single European Act 1986, opening the borders for European member states. The result was that there was a massive emphasis all over Europe on closing external borders to prevent non-Europeans from entering. The immigrants after this time came as asylum seekers and were, in the main, working class – in contrast to the immigrants in the 1970s.

The difference with the ‘newer immigrants’ was mainly that of class – the refugees in more recent years were working class and you had large groups of uneducated people.

How were immigrants affected by the Immigration Act 1973
Immigration of the 1960s and 1970s was Commonwealth immigration and immigration of settlement. People came into the UK with the view that they would stay and settle. They could vote and often had English as a language – albeit not their first language.

At that time, the immigrant’s struggle was to be accepted. To be allowed to settle. Out of this grew the movement that ‘black’ was a political colour – a combined struggle by black and Asian people to be accepted. There was unity to this extent.

But this sort of immigration stopped in 1973 when the Immigration Act 1971 came into force. This stopped Commonwealth immigration being the primary immigration and was the beginning of European Union immigration. So, when asylum seekers then started coming into the UK, they were divided by many factors – language being one. They were totally fragmented and formed into little groups. But they were also very suspicious of each other. For example, the Kurds were worried about other Kurds or Turks who were informers etc.

Asylum seekers’ entitlement to stay, unlike the earlier immigrants who entered to settle, was entirely precarious. They would try to keep clean and, if refused asylum, would go underground. They didn’t have the same cohesion that existed with the settled communities. The result was that the settled communities took on this anti-asylum attitude, ‘pull the ladder up.’ Minorities turning on minorities. Immigration controls then got tougher and since the 1990s different governments have deliberately worked to marginalise asylum seekers and to quarantine them from society.

Diane Abbott asked David Blunkett in Parliament why he was introducing accommodation centres for immigrants in the middle of nowhere. He said it was important to stop people putting down roots and forming communities... it was important to avoid this if you wanted to get rid of people.

Why do you think it is so difficult for politicians to support asylum seekers?
This is a question I often ask myself. In opposition they always do. As soon as they are in Government they completely turn. It’s all to do with calming voter’s fears. Labour is totally schizophrenic in this regard. They have amnesties that they completely refuse to call amnesties, although of course, I accept it’s as much to do with bureaucratic nightmares rather than good will.

The right wing press is massive in mischief making and hatred stirring the whole time. Not a single front bench Labour politician was prepared to say that the right wing press were racist or providing a total distortion of the truth. Most Labour politicians paid ‘lip service’ to the contribution of migrants claiming that their policies were to keep a control on immigration and that they had nothing to do with racism.
Labour have been as bad, if not worse, than the other parties on immigration. They were the ones who passed the Commonwealth and Immigration Act 1968, removing from UK Colony Citizens the right to enter the UK. I don’t believe Gordon Brown is a racist but he was a coward in Government. Tony Blair and Jack Straw were very disappointing. They were totally complicit in out-sourced torture. Jack Straw, in particular, has been a disappointment. He set up the MacPherson Inquiry about institutional racism in the Metropolitan Police and we had high hopes.

What do you see as the future for Legal Aid?
Legal Aid, quite simply, has been demolished – under the previous Government and the coalition. The coalition has shown their approach and attitude towards legal aid when they trumped the collective shoulder of the [organisation] Refugee and Migrant Justice leaving thousands of people, including 900 children, with no legal representation. The coalition Government merely shrugged its shoulders, despite the fact that it was the failure of the Legal Services Commission to pay them that led to their collapse. Refusal to help, even though it was the Government’s fault, demonstrated that they are happy to leave asylum seekers with no legal representation at all. Even before the demise of Refugee and Migrant Justice, many asylum seekers couldn’t get any sort of representation. It is, therefore, the lowest of the low in terms of priorities for this Government.

Why is it so difficult to get people to recognise the importance of Legal Aid?
It’s a class thing. The Tories are interested in privatisation and although Labour is also, it’s not to the same extent. Labour is conflicted. They have a history of creating the welfare state and are, to an extent, ideologically in favour of it, whilst they are also keen on cuts.

The Tories are keen on cuts and have no ideological connection to the welfare state. Legal Aid is just one area of the welfare state that is dying and will continue to do so under the current coalition. In the future, people will have to take out insurance in possession actions, employment, etc. That’s what this Government is about, replacing public with the private.

With the Legal Aid cuts, is a new junior barrister realistically able to be a human rights barrister?
You cannot call yourself a human rights barrister if you represent the Home Office or the Government generally. It is, for me, a contradiction in terms. It’s still possible to work for the more vulnerable in society so long as you keep more than ‘one string to your bow’. You must have a desire to do justice to those with no voice. Once you no longer want to do this or are simply not able, for whatever reason, then, for me, it’s a question of leaving the Bar. You do not cross the picket line.

What do you think is the most significant legislative change that you have seen?
That’s a difficult question. The abolition of
the right to silence was a hugely significant one. We need to preserve the cornerstone of British justice. I used to say that if they ever did that I would leave the Bar, I didn’t though. The Human Rights Act 1998 itself is also highly significant. In terms of immigration law, it’s just impossible to say. Since 1971 there has been a blizzard of legislation, particularly in the last ten years. All of these Acts reduces one’s rights somehow; they create more crime and give immigration officers all the powers and no accountability with it. They have created a layer of immigration police – imposing duties upon so many people to police and report on illegal immigrants.

What’s your most significant case?
An important one for me was R v Uxbridge MC ex p Adimi [1999] WLR, INLR. The Court held that there was no form of protection for those who had entered unlawfully until this time and that this was unlawful – a breach of Article 31 of the Refugee Convention stated that those who entered unlawfully shouldn’t be penalised so long as they present themselves to the authorities. This forced the Government to legislate to protect that group of people.

“It was a great experience being involved in the attempt to extradite the Chilean dictator Pinochet, although I don’t feel I played a major role”

R v Secretary of State for the Home Department ex p Shab [1999] WLR (HL), was a ground breaking case that said that women were a social group and could be refugees on the sole basis that their Governments would not protect them against domestic violence.

Of course it was a great experience being involved in R v Bartle ex p Augusto Pinochet Ugarte [1999] WLR (HL), although I don’t feel I played a major role.

Most memorable client?
I still often wonder about a Russian client. He was a soldier forced to go to Afghanistan. His experience there was dreadful. He then acted against Russians in Chechnya because he didn’t agree with what they were doing. He was caught and sent to prison in Russia where he was forced to become a drug addict. By the time he reached the UK, he was a wreck. I represented him in a deportation appeal, which we won. But he was so destroyed and raw that I felt that what I was doing was tiny compared to what he needed. When I met these clients who were so damaged, I would often feel ashamed about how we would treat them here.
In 1970 there arose, phoenix-like, from a converted butcher’s shop in the Golborne Road a Law Centre to combat three dragons. 1. Police corruption and violence; 2. Vicious and violent landlords; and 3. Exploitative employers.

At that time there was no representation available at police stations except for the rich or the heavy villains. The Law Centre had a policy of not acting for ‘villains’. Beatings and framings were regular occurrences with some police, who conducted their own cases, taking bribes for bail for example. I would suddenly say to a client, ‘So how much did you pay him?’ to which the reply, in a high pitched voice, would be ‘How did you know? – 200 nicker.’

In most poor areas in 1970 there were no solicitors. Clients had to travel many miles to find one. This is a situation sadly now being repeated thanks to the incessant cut backs to legal aid.

Where advice was sought as to housing issues, we would find that landlords would regularly misinform the courts that an eviction summons had been served when they had not. Landlords’ rent collectors used Alsatian dogs. Tenants lived in fear and squalor with holes in the roof and in their pockets.

Employers were able to trick and sack innocent employees without legal advice and very often with total indifference.

The opening of the Law Centre was opposed by many private lawyers frightened of losing clients. They soon discovered that making people aware of their rights actually meant more work and dropped their opposition.

I was one of the solicitors who went regularly to police stations. The police officers’ faces were not a pretty sight as they saw me advancing on their police station in the middle of the night. Obstruction, threats, lies and obfuscations were the norm. So too were the bruises on my clients, with reluctant police doctors noting injuries and my pointing these out to glowering Stipendiary Magistrates the next morning. By comparison, the BBC’s Life on Mars portrays a mild portrayal of such conduct.

Residents around Notting Dale, a Notting Hill converted butcher’s shop in the Golborne Road a Law Centre to combat three dragons. 1. Police corruption and violence; 2. Vicious and violent landlords; and 3. Exploitative employers.

The first civil case conducted by the Law Centre: was a mild portrayal of such conduct.

Gradually Law Centres and private practice exposed the worst excesses of police practice and after a Royal Commission, at which we gave evidence, PACE was passed and solicitors were paid to attend police stations. The pendulum swung to the Defence. The CPS came into existence and corruption and beatings were substantially reduced.

Under New Labour and now most probably under the Con-Dem coalition, the pendulum has swung back to the police. Lawyers, who may soon not be paid to attend police stations on non-paid to attend police stations, are already reporting greater arrogance and tougher behaviour from the police.

The first civil case conducted by the Law Centre was an application by a black woman tenant to set judgment aside on the grounds of non-service. The judge’s first and second questions were:

‘How long have you been in this country and are you on Social Security?’

As we and other Law Centres developed our expertise we took more and more employees successfully to the tribunals, in many cases obtaining maximum damages.

So beginning with me, my articled clerk James Saunders and a secretary/receptionist we have seen Law Centres grow and spread across the country with Law Centres in Scotland, Wales, Northern Ireland, the Republic of Ireland, the Continent, South Africa and Australia. However, with the vicious and unnecessary cuts this Government is about to unleash I wonder if we will survive. I fear that after the millions we have represented have benefited, future millions will be sacked, evicted and imprisoned without help.

There are now many innocent people in prison, including the mentally ill, because they were not represented as legal aid was refused. We are returning not just to a pre-PACE era but to a pre-war era.

Peter Kandler is a solicitor and one of the original founders of the pioneering North Kensington Law Centre. His firm Peter Kandler & Co is based in Golborne Road, London where he continues to provide representation to North Kensington’s diverse local community.
The Supreme Court’s decision in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31 is a landmark development in human rights jurisprudence. More importantly it is a lifeline for refugees facing persecution for reason of sexuality. The Home Office had argued that the majority of gay asylum seekers could and should return to their country of origin to live ‘discreetly’ so as to avoid persecution. The Court of Appeal had upheld this view. When HT instructed Russell Blakely of Wilson Solicitors LLP to represent him, he was in immigration detention facing imminent removal to Cameroon. That he is gay was not in doubt, nor was the fact that he had been brutally assaulted by a mob after he was seen kissing a man in his garden. The Home Office simply said this was all the more reason why he wouldn’t be so ‘indiscreet’ again, and the Tribunal had agreed.

Overturining the Court of Appeal, the Supreme Court rubbished this argument. Lord Rodger laid out the new test for deciding a gay asylum claim. It can be summarised as follows:

Firstly, is the appellant gay, or someone who would be treated as gay by potential persecutors in his or her home country?

Secondly, is there evidence that someone who lived an openly gay life would be at risk of persecution, not just discrimination, in that country?

Thirdly, how would the appellant actually live if returned? If he or she would live openly, then he or she must be a refugee. But if he or she would live ‘discreetly’, a fourth question arises, which is why will he or she do so and exercise ‘discretion’? If it is simply to avoid social humiliation, family shame, or a degree of material discrimination, then the claim will fail. But if a fear of persecution plays any material part in the decision to live secretly, then the appellant is a refugee. As Lord Rodger says, ‘[t]o reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution’.

In practice, if you can satisfy points one and two, an appeal will almost certainly succeed. Anyone who faces persecution in their home country for any particular activity – political, religious, sexual – is unlikely to return home and cease that activity for reasons other than a fear of persecution. Political dissidents have never been told to return home and pretend to support the regime. Religious minorities have never been deported and expected to convert to whatever the dominant sect may be. So this decision simply recognises that sexual freedom should be protected in the same way. In this regard, the rationale holds great promise for developments in other areas of asylum law. For example, the struggle over whether or not women are a ‘particular social group’ where forced marriage is concerned should be helped, as should the argument that gendered domes-

‘Discretion test’ redundant after asylum seeker’s ruling

by Bernard Keenan
sexual freedom.

In just a few weeks since the decision, the Home Office seem to be following the judgement with an unusual degree of diligence. An active review is now taking place of outstanding asylum claimants. One client of our firm has been selectively interrogated. Recently, an asylum interviewing officer asked a client about the most explicit details of her sexual practices. It was unnecessary and inappropriate, but her frank and open answers almost certainly led to her being granted asylum on application. Before the Supreme Court decision in HJ & HT, the Home Office and immigration judges could fudge the issue of whether or not an appellant is actually gay, by saying that whether or not he or she really is, he or she can still be discreet on return. No more. The first part of Lord Rodger’s test requires a decision on sexual orientation – actual or perceived – and so sexuality itself is now the key area of contention in LGBT asylum appeals.

This leads to broader questions of what sexuality actually is, and how it can be demonstrated. The tabloid press ran riot with the paragraph in HJ & HT that makes reference to gay men enjoying Kylie Minogue concerts and cocktails. It was an absurd reaction; the broader point in that unfortunate paragraph is that sexuality is irreducible to any one set of objective criteria or stereotypes. Nor is it a matter of a particular sex act. Nor is it something that can be medicalised, with recognisable symptoms seen as deviating from the implied norm of heterosexuality.

In Michel Foucault’s History of Sexuality, Foucault traces how the very concept of ‘sexuality’ evolved as a result of the reconfiguration of power around knowledge of the body and the psyche. The idea emerged in the 18th century and became an object of medical and indeed legal knowledge, seen as something dangerous and deviant within a person. In pre-modern times, sex acts themselves were the object of criminal censure, not the ‘homosexual’ person as a subject. The modern view of sexuality is thus a result of that development of power and, of course, resistance to it. HJ and HT should be noted by contemporary historians as being a key moment in the reconfiguration of power’s understanding of sexuality – throughout the judgement the law lords are generally careful to avoid the term ‘homosexual’, and the whole Kylie statement should be seen as a recognition of sexuality as an integral part of a person’s very being which must be protected.

Yet for many if not most LGBT asylum seekers, this particular history of sexuality does not reflect the culture in their home country – and certainly not the history of resistance and progressive victories in favour of LGBT rights. The task of the asylum lawyer is to construct the legal subject of the refugee before the court, to translate a person’s experience into legal form. Many LGBT asylum seekers come from cultures in which they have no gay-positive word to describe themselves. Some may never have had a sexual or romantic encounter. It is still all too easy for the Home Office to assert that a person is not gay because they don’t use the right words, don’t go out to nightclubs in Soho, or generally keep their sex lives secret from their friends. The implication is that here in the UK you have to live according to sexual norms of our permissive society to prove that you need protection. It remains to be seen how far the courts will go in understanding the fluidity and multiplicity that is human sexual desire, but with the discretion test happily consigned to legal history, this is the question that is now front and centre.

Bernard Keenan is an Immigration Law Caseworker at Wilson Solicitors LLP.
THE
In order to properly refer to the issue, there is at least one methodological point that must be clarified: the concept of ‘Peace’ must be taken and acknowledged as an ‘undetermined legal concept’. We all have a notion of it that is ‘correct’, in general terms, yet all definitions will always be insufficient.

We must be clear that ‘Peace’ is, unfortunately, one of those concepts whose evolution relies on its breaches or threats posed to it. Just as with any other human right. We might not know or be able to construct a complete definition of ‘Peace’ or the Right to Peace, but we all might be able to consciously acknowledge when a violation has occurred.

The following article seeks to set out the evolution of the Right to Peace in Costa Rica. This right has had two main stages of development, clearly defined by time and source, stages that are named as ‘creation’ and ‘application.’

The ‘creation’ stage depends basically on legal governmental documents that have grounded the legal framework for this right. These include:

- 1949 Costa Rican Constitution: Article 12 proscribes the army as a permanent institution;
- 1983 Perpetual, non-armed, ideologically active Neutrality Declaration of the Republic of Costa Rica; and
- Diverse international law, including the 1984 UN General Assembly Declaration on the Right to Peace, and the Tlatelolco Treaty, among others.

It is important to say that ‘Peace’ as a concept or as a Right is not defined in Costa Rica’s constitution. Not on its written constitution, nor in the non-written one. Costa Rica’s constitutional scheme recognizes the exist-
“We should push for the recognition of peace as a human right. This could be done through the application of the rules concerning the recognition of a customary rule of international law, as a rule of *ius cogens*”

The 'application' stage to incorporate the Right to Peace began in 1992 with a case introduced before the Constitutional Chamber of the Supreme Court, in which peace was included among a set of national values included within the spirit of the Constitution. The case was, however, not related to violations to the Right to Peace.

This 'application' stage continued in 2004 as the result of a case brought before the Constitutional Chamber against the President of Costa Rica and its Chancellor, due to the support given as pleni potentiaries to the illegal and immoral aggression of the US-UK-led ‘Coalition of the Willing’ against Iraq and its people.

The 'Iraqi War Case', as it is known in Costa Rica, led to several developments in the role of constitutional law within the democratic state. Firstly, the judgment reaffirmed and outlined the importance and applicability of international law as a source of domestic law, including the obligation to respect the UN Charter and its bodies’ resolutions.

Secondly, the 'untouchability' of Acts of State' was ripped away, by determining that every single act produced by an official authority must pass the constitutional check, even when these acts refer to political affairs. By saying this, the Court eliminated one of the last borders in democratic tyranny and gave back sense to the principle of constitutional supremacy, in which any act within a state must comply with constitutional norms, in which the Constitution is supreme.

Third, and to me the most important step forward, was the recognition of a 'customary rule of domestic law'. History and governmental acts were taken as opinio iuris sive necessitatis and repetition of acts within time, to demonstrate that Costa Rica had, indeed, created, by custom and will, a domestic rule recognising the right to peace.

Finally, the Chamber reached a conclusion which commanded the Government of Costa Rica to initiate procedures before the US Government in order to withdraw support from the invading coalition.

Despite all the innovations introduced in the judgment in the 'Iraqi War Case', the Right to Peace was still not recognised in Costa Rica at this stage. As any other human right, it takes insistence and exposure to get authorities to recognise what is a fact: we are entitled to live peacefully as a fundamental right.

This situation finally changed in 2008, as a result of the ‘Case concerning the Arms Decree’. This case was introduced before the Constitutional Chamber claiming that President Arias’s authorisation of 'extraction of thorium and uranium', manufacturing of 'nuclear reactors for all purposes' and 'elaboration of nuclear fuel' was against international law and against the Right to Peace.

A first major outcome of the case was that the Right to Peace was finally recognised in Costa Rica as a constitutional right with full enforceability against public authorities.

The Court found that the Costa Rican international standings concerning the Right to Peace compel the country to engage actively in its promotion. This represents a great development in taking the Right to Peace to be a domestic rule of customary law.

It is important to highlight that the Chamber recognises the difficulty of defining the right within rigid terms and states in a very clear way; we must go further.

The Court found the authorised activities mentioned above unconstitutional for the country, due to its Peace regulations. The Government of Costa Rica cannot engage or take part in any activity of stockpiling, storage, manufacture, transport, import or export of any item meant to be used for war purposes.

Finally, due to the connection of these activities with nuclear weapons, the customary principle of international law applies. The court linked environmental law with the Right to Peace, finding in international law another ground to bar the elaboration of weapons of mass destruction.

It is not an exaggeration to say that the reach and scope of the actions submitted before the Constitutional Chamber is outstanding, even surprising.

I believe we should push for the recognition of peace as a human right. This could be done through the application of the rules concerning the recognition of a customary rule of international law, as a rule of *ius cogens*. The reason is simple: modern warfare affects the whole world. The Hiroshima and Nagasaki bombings not only destroyed those cities and exterminated their people, but changed the whole world.

In 1983 the UN General Assembly adopted the Declaration on the Right of the Peoples to Peace, yet, up to this date, that resolution means nothing to governments around the world. Some people will raise the 'soft law' argument on establishing the degree of obligation of the Declaration. A law that allows a sovereign country to freely adopt a declaration that it has no intention to fulfill and respect is no law at all, not even soft.

Luis Roberto Zamora Bolaños is a lawyer from Heredia, Costa Rica. He has successfully promoted the Right to Peace, through litigation achieving its constitutional recognition in 2008. This is an edited version of the speech he delivered to the Paris conference on the 60th Anniversary of the Stockholm Appeal against Nuclear Weapons organised by the International Association of Democratic Lawyers in June 2010.
Stone champions left-leaning latino leaders

South of the Border (2010)
Directed by Oliver Stone.
Released by Dogwoof Films

That we had been drawn, both by a misapprehension of the local rhetoric and by the manipulation of our own rhetorical weaknesses, into a game we did not understand, a play of power in a political tropic alien to us, seemed apparent, and yet there we remained.

So wrote Joan Didion on US involvement in El Salvador’s brutal civil war in her 1983 book Salvador.

It was in El Salvador that Oliver Stone made his first foray into film making on Latin American politics. His 1986 film Salvador earned its lead, James Woods, an Oscar nomination. Salvador was independently made on a shoestring budget. Stone used his ‘guerrilla’ style of filmmaking on Salvador to convince the Salvadorean government to lend him army units to depict battle scenes in the film. The governing ARENA party, led by Roberto D’Aubisson, had instilled a regime of terror in El Salvador at the time through the use of assassinations, disappearances and death squads. Stone failed to let slip to the ARENA government that his film would be both a critique of US foreign policy in El Salvador and also broadly sympathetic in its depiction of the left-wing FMLN guerrillas.

Stone’s film making on Latin America was to take a long break until he filmed back-to-back interviews with Fidel Castro, Commandante (2003) and Looking for Fidel (2004). He has followed up on these films with South of the Border in which he interviews practically all of Latin America’s recent crop of left leaning leaders including Hugo Rafael Chávez Frias, the President of Venezuela. Like some form of latter day Ernest Hemingway, Stone jets off across the continent. On his travels he visits Chávez’s old family home in Venezuela and gasps for oxygen on the tarmac at the airport in La Paz. He travels on to Argentina to interview Cristina and Nestor Kirchner. Stone then heads to Paraguay where he chats with Fernando Lugano in the presidential palace of the country’s former dictator, General Stroessner, whose regime tortured Lugano.

Chávez and Stone himself are clearly the main protagonists of the film which was scripted by Tariq Ali. The film was partly shot by the documentary maker Albert Maysles who is perhaps best known for his work on the 1996 documentary When We Were Kings.

This is an unashamedly partisan documentary. Stone does not set out to criticise Chávez for seeking to shut down opposition media outlets, a common theme of the coverage of Venezuela in all sections of the European press. Attention is instead focussed on the imbalanced coverage given to Latin America by US 24-hour television news networks. There is an amusing if disturbing montage of clips of US television news pundits and political commentators seemingly queuing up to call Chávez ‘a dictator’.

Stone is clearly enamoured with Chávez whose energy he describes as akin to that of ‘a bull’. It is however the other interviews with politicians such as Paraguay’s President Fernando Lugano which prove to be more interesting. Lugano is a former liberation theology Bishop turned president. There is an equally insightful interview with Nestor Kirchner in which he talks to Stone about the 2003 Summit of the Americas held in Mar del Plata where the continent’s leaders took a collective stance against the neo-liberal economic policies touted by George Bush. Reference is made to the social movements throughout Latin America which have been crucial to propelling each of the leaders featured in this film into their positions of elected power.
Perhaps understandably, with a film of this length and ambition, more time could not be devoted to a look at each of these powerful grass roots movements.

Given Stone’s first film on Latin America cast a spotlight on El Salvador in the 1980s, it is a shame Stone was not able to include an interview with Mauricio Funes who was elected as FMLN’s candidate for President in 2009. He is El Salvador’s first elected left-of-centre President since the civil war came to an end and would undoubtedly have made for an intriguing interviewee. Despite this omission, South of the Border remains an engaging and provocative, if flawed, look at progressive politics across a rapidly changing continent.

Tim Potter

The Rule of Law, by Tom Bingham; Allen Lane, £20 hardback

‘Rule of Law vital to our rights

This book originates from Lord Bingham’s delivery of the annual Sir David Williams lecture in November 2006, hosted by the Centre for Public Law at the University of Cambridge. He chose ‘The Rule of Law’ as the title of that lecture because, although it is a phrase which is much heard in political and judicial fora, many would be hard pressed to give a concrete definition of the expression, a problem compounded by the fact that it is commonly used as no more than political rhetoric.

However, it is still an expression that is cited in many of the judgments of our higher courts, as well as featuring in international instruments under which the UK is bound and is now even codified in an Act of Parliament (the Constitutional Reform Act 2005) as an ‘existing constitutional principle’. A thorough discussion on the meaning of this much used but little understood expression therefore seems long overdue, and this book attempts this by expanding on the ideas put forward in Lord Bingham’s 2006 lecture.

Lord Bingham identifies eight principles which he argues are necessary elements of the Rule of Law. The principles that he propounds are not controversial and legal practitioners will be familiar with all of them (for example accessibility of the law, equality before the law and the right to a fair trial). Despite this, there are four reasons why I would recommend this book to all Socialist Lawyer readers.

Firstly, although each of the individual principles might be familiar, Lord Bingham’s analysis of each of them, and the risk to the Rule of Law and good governance if they are not upheld, is articulate and comprehensive. Even experienced lawyers will find the book engaging and beneficial.

Secondly, it is difficult to criticise or add to the eight principles suggested by Lord Bingham as amounting to the Rule of Law. This book is therefore a useful reference guide and is a valiant attempt at the proper investigation into what the Rule of Law demands from governments that Lord Bingham rightly believes has been missing.

Thirdly, Lord Bingham includes protection of fundamental human rights as one of his eight principles. In doing this he expressly rejects a ‘thin’ interpretation of the Rule of Law: that it offers procedural protection only and does not demand anything regarding the substance of the law. He argues that adherence to the Rule of Law must include the protection of what are now held to be essential rights and freedoms, and that to argue otherwise would be to strip this fundamental constitutional principle of most of its value. This is an argument that any progressive lawyer would be in total agreement with, and it is encouraging to hear it coming from one of the country’s most recognised judicial figures.

Finally, now free from any restrictive constitutional convention, Lord Bingham also appears to want to use this book to voice a few criticisms of the last Government’s record on upholding the Rule of Law. In the chapter where he argues that conformity to international law is an essential principle, he spends five pages arguing the illegality of the invasion of Iraq. His consideration of the interplay between terrorism and the Rule of Law criticises the policies adopted by the US and UK since 9/11 through which basic human rights have been attacked in the name of national security. The last chapter of the book, discussing whether the Rule of Law and Parliamentary Sovereignty are compatible, warns of the dangers of having an unrestrained Parliament that is able and seemingly willing to depart from principles fundamental to the Rule of Law.

These criticisms are a warning to the current government against making the same mistakes as its predecessor, and the book as a whole is a timely reminder to those in power that a modern democratic society must keep this ‘fundamental constitutional principle’ at the heart of government.

Michael Goold

Editor’s note: Since this review was written, Lord Tom Bingham died, on 11th September aged 76.
An angry indictment of New Labour


Traditionally, socialists had no faith in judges. Judges attacked the rights to strike (Taff Vale, Gouriet v UPOE), upheld the police (Lord Denning’s ‘an appalling vista’) and they routinely privileged property rights. The pioneering work by Professor JAG Griffith enlightened us that this was not a conspiracy; when the overwhelming majority of judges have had public school educations, are upper-class, white and male, they view the world through a particular prism reflective of their class. A strong Parliament democratically elected was many socialists’ preference. That preference took a big knock once New Labour was elected and even more so post-9/11. Even before 9/11, New Labour had passed the Terrorism Act 2000 and introduced ASBOs.

The post 9/11 roll-call is depressingly familiar to Socialist Lawyer readers: massive extension of police powers to stop and search, or to stop and account; use of s.44 of the Terrorism Act 2000 to designate the whole of London as a stop and search area; heavy-handed policing of legitimate protests; a surveillance society reminiscent of 1984; persecution of whistle-blowers such as Dr David Kelly (where the government also turned its fire on the whole of the BBC), the lesser-known Leo O’Connor and David Keogh (who had a document in which George Bush apparently discussed bombing Al-Jazeera) and even recipients normally protected by Parliamentary privilege as seen in the high-profile arrest of Damian Green MP. New Labour introduced indefinite detention, control orders, wanted 90 day and then 42 day detention without charge, created the offence of glorifying terrorism and criminalised whole communities by denying their right to support struggles elsewhere in the world. When even this battery of potential offences was not sufficient to justify a criminal charge, the Borders Agency stepped in and Hicham Yezza, the North West 12 and others were detained without charge for immigration reasons. The Civil Contingencies Act 2004 empowers the executive to prohibit freedom of movement, freedom to travel and freedom of assembly in emergencies: powers not yet used but on the statute books.

In disappointment, civil libertarians retreated to the Human Rights Act. Perhaps New Labour had, when it decided to bring ‘rights home’, inadvertently made a rod for its back. There are some glorious uses of the Human Rights Act by judges, none more so than in A v SSHD (2004) UKHL 56 when the House of Lords struck down indefinite detention of foreign nationals. The House of Lords applied the common law, ‘Freedom from arbitrary arrest and detention is a quintessentially British liberty’ (Lord Hoffmann), the Human Rights Act and discrimination principles, ‘if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners’ (Baroness Hale). Ewing calls A v SSHD ‘one of the most important public law decisions since Entick v Carrington in 1765.’ I would add another glorious use of the Human Rights Act was in R (Lambuela) v SSHD (2005) UKHL 66, when the House of Lords held that leaving people destitute, with no accommodation, no means of feeding themselves or washing themselves amounted to inhuman or degrading treatment. A third example, discussed by Ewing, is R (Laporte) v Gloucestershire Chief Constable [2006] UKHL 55.

However these cases are few and far between. Judges can’t be relied on to stand up for the rights of the individual – let alone social rights – against the government. The Human Rights Act has, ironically, made judges more deferential to Parliamentary sovereignty now that they have the power to declare Acts incompatible, see R v DPP ex parte Kebeline [2000] 2 AC 326, HL.

Despite the Human Rights Act, the House of Lords has essentially upheld the control order regime (Home Secretary v JJ [2007] UKHL 45, HL), permitted deportation to Algeria despite the risk of torture (RB and OO v Home Secretary [2009] UKHL 10, HL), upheld the government’s pursuit of whistle-blower David Shayler, decided that the police practice of ‘kettling’ is lawful (Austin v Metropolitan Police Commissioner [2009] UKHL 5, HL), permitted the retention of DNA samples taken from innocent people (R (S) v South Yorkshire Chief Constable [2004] UKHL 30, HL), and held that the use of s.44 and stop and search is lawful (R v Metropolitan Police Commissioner ex parte Gillan [2004] EWCA Civ 1067, CA). These last two decisions were overturned by the European Court of Human Rights and Austin is waiting to be heard in Strasbourg. When it comes to upholding property rights, one could point to the English judges’ insistence that individual rights are barely relevant to the right of a property-owner to obtain possession of his or her land, see Doherty v Birmingham City Council [2009] 1 AC 367, HL. Even in A, the judges relied as
much on common law and, importantly, on the discrimination against foreign nationals as on the Human Rights Act.

If we can’t trust the government, the judges or the Human Rights Act to protect us, who can we turn to? Most commentators don’t answer that question. Ewing is brave enough to try. He concludes that electoral reform – rendering Parliament more diverse – reform of Parliament and greater Parliamentary scrutiny is part of the answer. Social and economic rights contained in international Treaties, such as the International Labour Organization Convention and European Social Charter should become British law. I’m not sure if he thinks that the Human Rights Act is entirely useless. My view is that it is better to have it than not.

The meat of the book is Ewing’s angry indictment against both New Labour and the judges. Great to read a legal book with a bit of fury in it.

Liz Davies

Chilling reminder


This year saw the release of both stage and screen versions of a brilliant play entitled Sus, written back in 1979 by Barrie Keefe, who also scripted The Long Good Friday. Set on the night that Margaret Thatcher was elected prime minister, the play focuses on the interview of a man arrested on suspicion of murdering his wife. The broader context is the notorious ‘sus laws’ under which countless men disproportionately from Black communities were harassed, intimidated, arrested and criminalised by the police.

The DVD of the film has just been released, and while watching it one may wonder whether it really is simply a chilling reminder of a bygone age.

This is particularly the case given the announcement by the Home Secretary in July 2010 that the police could no longer use the controversial stop and search powers contained in section 44 of the Terrorism Act 2000. This followed the European Court of Human Rights ruling in Gillan and Quinton (See Socialist Lawyer, No 54) that the powers were drawn too broadly and amounted to a violation of civil liberties and the right to private life.

The ECtHR ruling is important in itself but there is also a wider implication. Longer term readers of this journal will recall that the indiscriminate and disproportionate use of stop and search was a critical concern of community activists who contributed to the Stephen Lawrence Inquiry in 1998. When he concluded his report in 1999, Sir William Macpherson identified this as one of the key reasons why he reluctantly acknowledged the existence of institutional racism in the police force.

The legislative outcome of Macpherson’s report was the Race Relations (Amendment) Act 2000, which required public bodies to address and seek to eradicate racism. Contrary to much of the press reporting, the police were not precluded from using stops and searches. They were however challenged to rely less upon arbitrary measures and more upon so called ‘intelligence led policing’. Despite this, the likes of the Police Federation and the then Metropolitan Police Commissioner, Paul Condon, fumbled against the recommendations. The proposals requiring justification for the stops were loudly denounced as a dangerous capitulation to the ‘race relations lobby’.

As Tony Blair himself said in the wake of 9/11, ‘the rules of the game have changed’. The attack on the World Trade Centre provided the justification for draconian new measures. The legislative response was the introduction of the Terrorism Act 2000 in which stop and searches could now be justified on the basis of a heightened terrorist threat. Significantly however, section 44 did not actually require a police officer to have a reasonable suspicion that the person being stopped actually was a terrorist.

The outcome of this on the streets was predictable and inevitable. Stop and searches using section 44 rocketed from 33,177 in 2004 to 117,200 in 2008 and inequality rising, a bad situation would not usually be engaged during the course of a short stop under sections 44 and 45 of the Act. Strasbourg overturned this decision by declaring that the powers conferred were ‘neither sufficiently circumscribed, nor subject to adequate legal safeguards against abuse’. The ECtHR ruling is therefore an important victory for advocates of civil liberties and Theresa May’s announcement represents a major climb down by the government.

Despite the demise of section 44, it is surely too early to consign ‘sus’ to the history books or TV screens. The police do retain a wide discretion to stop and search people. Amongst these are the controversial powers under section 60 of the Criminal Justice and Public Order Act 1994. These powers are frequently used to set up searches at train and underground stations and have recently been used in the policing of demonstrations.

Stereotypical attitudes continue to infect the ranks of the police. Meanwhile, disproportionate numbers of poor, working class and Black people find themselves excluded, from school, society more generally, and out on the streets. These are precisely the circumstances in which confrontational encounters with the police occur. In the current social and economic climate, with poverty, homelessness and inequality rising, a bad situation could become even worse.

Brian Richardson
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