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At last. An opposition

Did you have a flutter on Jeremy Corbyn? Unfortunately I did not. At first we could not conceive that he would ever find himself making an acceptance speech for the Labour leadership on 12th September. Jeremy’s election has been welcomed across the left in Britain and while Haldane is resolutely non-party political we are pleased that a politician we have long counted as a friend is now leading the Labour party. A socialist, peace activist, and internationalist heads the Labour party. Consider that for a moment. After he secured the nominations to take part in the contest, at their longest, the odds quoted on him prevailing reached 200-1. The odds on a swift resolution to the conflict in Syria look far longer at present.

David Cameron’s response to the refugee crisis has been abject. Despite pressure from across politics, it took the sight of the drowned and lifeless body of three-year-old Alan Kurdi to jolt Cameron into a response. He has since committed the UK to accepting 20,000 Syrian refugees by 2020. On even the most cursory examination it is a pledge which is predicated on the calculation that the Syrian conflict will be over long before that date. Moreover, it is a paltry figure which is dictated by Cameron’s fear of confrontation with the right of his own party.

By contrast, before his election as leader, Jeremy Corbyn denounced the government’s position saying the ‘response has been shameful. David Cameron must shoulder his responsibility and begin urgent talks with our European neighbours and the UN so that the UK takes its fair share of refugees. He should immediately bring together civil society and religious leaders, devolved administrations, councils and charities to properly plan and coordinate our humanitarian response. It is our duty as a signatory to the UN refugee convention, but also as human beings…’ It is refreshing to have an opposition truly worthy of the name and whose leader is a stranger to triangulation and the dog whistle politics which has for so long characterised debate in this country.

Jeremy is also unshakeable in his opposition to military intervention in Syria, recognising that the result would be deaths in far greater numbers than at present and an identical refugee crisis. The Government sought Parliament’s endorsement of military action in Syria in 2012 and was defeated. It has since transpired that Cameron, on the advice of the Attorney General, Jeremy Wright, ordered drone strikes in Raqqa, Syria whose purpose was to assassinate two British nationals thought to have left England in order to fight for Islamic State. Cameron will not reveal the legal advice upon which he relied. We are urged to trust him. Where have we heard that before? Again, Jeremy has said for months that there may be circumstances in which he would consider a military attack on Syria but he could not think what that contingency would be. He prefers, in similar vein to the refugee crisis, talks and negotiation with the regional powers and pressure being brought to bear on those to whom Britain supplies arms and who in turn fortify IS with artillery. History has surely vindicated him and his approach in past conflicts.

In his first week as leader Jeremy also addressed the Trades Union Congress. Previous Labour leaders have usually seen TUC conference as an opportunity to cast themselves at odds with the movement. Jeremy instead praised the trade union movement and pledged to fight the Tories’ Trade Union Bill currently before Parliament and which has passed its second reading. The bill is a partisan and sinister move against labour movement strength and the Labour party’s funding. The implications of the proposals are examined on page 12 by Haldane’s prominent employment and industrial relations experts Keith Ewing and John Hendy QC.

These assaults on our movement are only likely to intensify in the months ahead, if the first week of Jeremy’s leadership is an indication. The ridiculous spectacle of Michael Fallon MP telling the BBC that the Labour party under Jeremy posed a triple threat to security, economics, and families might have come from a lost Chris Morris script. Haldane will continue to work with Jeremy where our support is welcome and of value. As will we fight alongside comrades in the wider movement against this Tory government we had expected to be defeated in May. Back then the implications for the country of five more years of the Tories dismantling the welfare state looked ineluctable. At least now we have the chance of an opposition that will stand between the government and a fatal reimagining of the post-war settlement.

Russell Fraser, chair of the Haldane Society, chair@haldane.org

Socialist Lawyer October 2015
Criminalising protest in Ireland – the Jobstown 23

The dramatic dawn raids staged over 10 days in February against protesters in Ireland have had their outcome revealed. Twenty-three of those arrested for protesting against Deputy Prime Minister Joan Burton in Jobstown, Tallaght, Dublin in November of last year are to be charged with serious criminal offences including false imprisonment, criminal damage and violent disorder. We know this because Paul Reynolds, a crime correspondent with RTE (notoriously close to the Gardai), told us. Such a leak is not just unprecedented, it likely amounts to the criminal offence of interference with the administration of justice.

However, justice couldn’t be further from the minds of those pursuing the Jobstown 23. Just like in February, when the dawn raids struck fear into hundreds of people that they might be next to be arrested, the leak has all those who were previously arrested scared of further dawn raids and what might follow. It is a strategy to criminalise protest and to send a message from the establishment to criminalise protest and to send what might follow. It is a strategy scared of further dawn raids and who were previously arrested might be arrested, the leak has all those who were separate from the establishment parties and the rise of the radical left, in particular the Anti-Austerity Alliance (AAA). Those arrested and likely to be charged include myself, as a TD (MP) for the AAA, two AAA councilors (Mick Murphy and Kieran Mahon) and another AAA activist.

Setting aside the breathless reports that Joan Burton was ‘trapped in her car’, what actually happened on 15 November 2014? A protest happened. A largely spontaneous protest of a working class community that has taken the brunt of austerity, the worst parts of which are personally associated with Joan Burton – rent allowance cuts, cuts to child benefit, and cuts to lone parents’ allowance more recently. A community that had previously voted heavily for the Labour Party heard that Joan Burton was in the area and hundreds and hundreds gathered to express their anger, their sense of betrayal, and yes, for all the gnashing of teeth in sections of the media about the world, the political hatred of many towards a figure who symbolised both sell-out and austerity.

The car that Joan Burton was in was met with a sit-down protest as she left a graduation ceremony. That took place at the exact place that a food bank operates, on which growing numbers are forced to rely. It was a few minutes’ drive from a couple who were living in their car.

The eggs thrown by young people who were separate from the protest and the ‘solitary brick’ (which must be the most well publicised brick in the history of the world) that was thrown afterwards were deliberately conflated with the protest in order to try to paint the protest as something that it wasn’t. It was a sit-down protest and a slow-march in front of the Tánaiste’s car. Nothing that hasn’t happened many times before, and for which nobody has ever faced a dawn raid or potentially significant prison time!

At the time of the February arrests, any suggestion that this may be ‘political policing’ was met by eye-rolling from much of the media, which considered it a ridiculous and paranoid suggestion. Since then there has been repeated heavy-handed policing of water meter protests, including armed Gardai at a recent protest and a large number of arrests. There has been the unprecedented leaking of the charges. There have been sinister revelations about a secret police operation called ‘Operation Mizen’, which is reportedly a spying operation on water charges protesters, including me, directed by the Garda Commissioner’s husband. Now, there has been the unprecedented refusal of a collection permit to the AAA on the grounds that the money would be used to ‘encourage the commission of an unlawful act’. That is a decision made by the most senior Garda in the area, who undoubtedly had a key input into the Jobstown arrests. If this isn’t political policing, I’d hate to see what is.

Paul Murphy TD

July

6: The Court of Appeal held that the police have a positive duty to investigate even in cases of ill-treatment by private individuals under article 3 of ECHR. The case concerned a claim following police failings to investigate the claimants’ reports of rape and sexual assault by John Worboys, ‘the Black Cab Rapist.’

6: Lord Janner was ordered to appear in court to answer charges of sexual offences that allegedly took place between 1960 and 1980. An appeal by the victims overturned the decision of the Director of Public Prosecutions not to prosecute Lord Janner because of his ill-health.

9: More than 200 activists, lawyers and legal staff were arrested and detained by Chinese Security Services in a clampdown against Chinese human rights lawyers. At time of publishing more than 20 were still being held, some in undisclosed locations, in breach of Chinese and international law.

19: The High Court found that the exceptional case funding scheme for legal aid is unlawful. In his judgement, Mr Justice Collins said the scheme is failing to provide a safety net promised in Parliament.
The recently founded Legal Workers’ Trade Union (LWTU) aims to unionise the legal profession. The grassroots organisation is determined to improve the welfare, working conditions and worker participation of legal sector workers. A crucial priority is to overcome archaic divisions, to encourage barristers and solicitors to become part of an organisation that represents their interests equally.

On 27th May 2015 workers met for the first time to discuss unionising the legal sector. The discussion revealed the desperate and precarious conditions faced by many workers, whose employment rights are routinely breached and ignored. Subsequent meetings saw the LWTU turn to Unite the Union for support, and the two organisations are now working together to increase union presence in the legal sector. The need for a union is clear.

Disposable incomes continue to fall, affecting living standards and quality of life. A survey of Unite members showed 78% were forced to reduce their spending, two thirds have seen a fall in their disposable income, and one in four workers have had to borrow money from family and friends. The trend of declining income is particularly evident in the legal profession. Since 1997 the incomes of criminal legal aid lawyers have reduced significantly. Paralegals in legal aid firms can expect to start out on as little as £12,000 per annum (or £5.77 per hour) with an average annual wage of £18,461 (£8.88 per hour). Junior criminal barristers scrape by on as little as £12,000 while trainee solicitors are exploited in numerous ways, and working conditions of Legal Aid lawyers continue to degrade. Firms increasingly run on the goodwill of workers in order to operate.

As a profession, legal sector workers have struggled against the onslaught of government cuts and spiralling court fees. While other industries including education, transport and the medical profession retain trade union presence, the legal sector is represented by weak, under-funded, inexperienced and often undemocratic, representative bodies. This leaves legal sector worker with limited means with which to oppose cuts.

There are several approaches to unionising workplaces. It is usually advisable to speak with workplace colleagues about unionising and to develop informal staff associations.

The LWTU is currently mapping union members within the industry so that workers gain the support they need within their workplaces. The LWTU and Unite will shortly be organising a training session to equip workers with the knowledge and tools required to unionise the legal sector, one workplace at a time.

Legal sector workers and students of any sort, whether qualified, administrative or support staff, as well as those in training, can contact the LWTU about helping to unionise legal workplaces. The organisation can be reached on legaltradeunion@gmail.com

Partners and heads of chambers are excluded from membership by virtue of their position as employers. The LWTU nevertheless welcomes the input of anyone and everyone who shares the aim of fair and equal employment within and beyond the legal sector.

Subashini Nathan
Website: https://legaltradeunion.wordpress.com Twitter: @Legal_TU Email: legaltradeunion@gmail.com

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20: Criminal solicitors stopped taking on legal aid cases in protest against further cuts to legal aid funding. Criminal barristers voted overwhelmingly to join the action on the 20th July. Major delays were reported in courts across the country. The boycott was called off on 21st August amid discussions with Michael Gove, the new Justice Secretary.

29: The Supreme Court held that a blanket ban based on immigration status for student loans was disproportionate and could not be justified.

£13bn
Total amount UNCLAIMED in 2014 by people ENTITLED to benefits. Ten times the amount lost to benefit fraud

29: The Ministry of Defence breached Afghan Law and Article 5 of the ECHR by detaining an Afghan citizen for four months in excess of the 96 hours maximum detention period. The Court of Appeal decision in Mohammed and others v Secretary of the State for the Defence contributes to growing case law finding that international human rights law applies to UK armed forces personnel abroad.
Bloc party atmosphere

On 20th June, protesters marched from the Bank of England to Parliament Square as part of the ‘End Austerity Now’ demonstration.

It was organised by the People’s Assembly Against Austerity in protest against the ‘nasty, destructive cuts to the things ordinary people care about’. There was a remarkable diversity among the estimated 250,000 protestors but all shared a common grievance towards past Conservative policies and a dread of those to come. Legal aid lawyers, who have as good a reason as anyone to feel such grief and dread, marched as members of the ‘Justice Bloc’.

The Justice Bloc represented a cross-section of various groups committed to the preservation of legal aid. Its banners bore the exhortation to ‘Save Legal Aid’ alongside major non-governmental organisations, chambers, and firms that support access to justice. Those marching included lawyers and staff working in the legal aid sector as well as students who had come to fight for access to justice.

This is a fight in which much ground has already been lost. The annual budget for civil and criminal legal aid has been cut from £2bn in 2010 to less than £1.4bn in 2015 with further cuts now being proposed. For the cost of a rounding error in the NHS budget, the legal aid sector is being jeopardised in a way that is catastrophic for those in need of its services.

Cause for cheer was to be found in the firm resolve expressed by the Justice Bloc. ‘Legal aid has been dramatically reduced for criminal matters, family law disputes, immigration issues and other areas where the protection of human rights is at stake,’ said Lyndsey Sambrooks-Wright, a barrister who marched with the Justice Bloc. ‘The relative paucity of savings achieved suggests that this is predominantly an ideological attack,’ she continued, ‘and one which must be steadfastly opposed’.

An effective case for preserving legal aid has been made again and again. Nevertheless, legal aid all too rarely qualifies as one of the ‘things that ordinary people care about’. Misperceptions abound over the income of legal aid lawyers as well as the value of their work in helping such ‘ordinary people’ access justice. The result is that legal aid remains the forgotten pillar of the welfare state to an extent that is undeserved in a nation supposedly governed by the rule of law.

The Justice Bloc reminded those present that legal aid should be respected as an integral pillar of the welfare state. The true challenge, however, lies in reaching out to voters across the political spectrum and not just those who might march with the People’s Assembly. This relies on making a case that avoids reliance on emotive references to ‘nasty’ cuts and instead appeals to the practical concerns of all voters. Supporters of legal aid must consider how best to make this case so that ever more voters appreciate the practical if not ideological importance of preventing the inaccessibility of justice from becoming the new normal.

Christopher Sykes

August

1: The Modern Slavery Act came into force bringing into effect a number of measures designed to address trafficking and modern slavery. One measure will be to require corporations with a turnover of more than £36 million to disclose their international supply chains annually.

6: A nine-month pilot scheme forcing landlords to check the immigration status of all prospective tenants has been condemned as a failure and reportedly encouraged discrimination against non-British people. There are currently plans to extend the scheme nationwide.

10: A request to extradite the Rwandan intelligence chief, Karenzi Karake, to answer charges of war crimes in Spain was rejected by the UK High court.

12: Conditions at Yarl’s Wood Immigration detention centre are reported to have deteriorated dramatically. The Chief Inspector of Prisons criticised the centre where over half of the women held in detention feared for their safety.
News & Comment

Union lawyers from ten countries meet in Madrid

The Trade Union Bill introduced to Parliament on 15 July 2015 has rightly been described as the biggest crackdown on UK trade union rights in 30 years. On 6 August the government announced amendments that go further than the Tory manifesto commitments. It is now proposed in addition to ‘abolish the check off across all public sector organisations’, as part of ‘curtailing the public cost of ‘facility time’ subsidies.

According to the TUC submission to the International Labour Organisation, drafted by Professor Keith Ewing of the Institute of Employment Rights, the Bill contains proposals that will impose new restrictions on the right to organise, the right to facilities at the workplace, and the right to bargain collectively. It also introduces new restrictions on both the right to strike, and trade union political freedom, while exposing trade union administration to unprecedented levels of State supervision.

Liberty, Amnesty International and the British Institute of Human Rights have recently released a joint statement on the Bill. They say it: “would hamper people’s basic right to protest and shift even more power from the employee to the employer. The government’s plans to significantly restrict trade union rights represent a major attack on civil liberties in the UK. By placing more legal hurdles in the way of unions organising strike action, they will undermine ordinary people’s ability to organise together to protect their jobs, livelihoods and the quality of their working lives.”

This attack on working class self-organisation in the UK is part of a trend across Europe. The EU’s financial and economic crisis has been used to attack European collective labour law. Amendments to the Lisbon Treaty, changes in the EU’s economic governance and austerity measures have led to drastic national labour law reforms that undermine fundamental social rights.

Haldane is fighting this pernicious Bill, and is also linking up with our European comrades through the European Lawyers for Workers (ELW) – http://elw-network.eu – which was founded on 13 January 2013. Haldane Vice-President John Hendy QC is a member of its coordinating committee along with labour lawyers from Belgium, France, and Germany. It is a partner of the European Association for Lawyers for Democracy and World Human Rights (ELDH) – eldh-network.eu – of which Haldane was a founder member in 1993, which now has members in 18 European countries. Haldane’s Professor Bill Bowring is ELDH President.

On 17 October 2015, Madrid, at the Savia Solar, John Hendy QC will be one of the speakers at the European labour law conference “Under pressure of the Troika – the Impact on Collective Labour Rights”. Several members of Haldane’s Executive Committee will participate. The questions to be explored include:

• Collective rights of workers (trade union rights, collective bargaining, freedom of association, freedom of assembly)
• Demolition of collective labour rights
• Criminalization of social movements
• What’s happening in the EU and in the ILO
• Impact of the EU – US and Canada Trade agreements (TTIP, CETA)
• The relationship between collective and individual rights in this context.

The Conference is being organised by ELW, ELDH, and Haldane’s Spanish sister organisation Left-Wing Lawyers Forum – Democratic Lawyers Network of Spain (Foro de abogados/as de Izquierdas (FAIRAD). As well as John Hendy there will be two other speakers from the UK: Tonia Novitz (Professor of Labour Law, University of Bristol), who works with the International Trade Union Confederation (ITUC); and Dr Aristea Koukiadaki (Manchester University), who is one of the Transnational Trade Union Experts of the European Trade Union Institute (ETUI). Other speakers are from Belgium, France, Germany, Greece, Ireland, Italy, Portugal, Spain, and Sweden. The next issue of Socialist Lawyer will carry a full report.

Lawyers cannot be the vanguard of working class resistance, but they can provide invaluable expertise and support.

Bill Bowring

14: A woman was fined £330 for stealing Mars bars worth 75p after her benefits were sanctioned. This case is cited amongst others by the Howard League for Penal Reform as an example of the penalisation of the poor by the Criminal Court Charges which came into effect in April 2015.

20: The first trial under universal jurisdiction in Africa began in Senegal as Hissene Habré appeared at the Extraordinary African Chambers, a special court set up within the Senegalese court system by the African Union. The former leader of Chad, Habré is being charged with crimes against humanity, war crimes and torture.

28: After six years of waiting, the families of armed forces personnel who died in the Iraq war have threatened to take legal action if the Chilcot Report is not published by December 2015. Many expressed impatience after Sir John Chilcot refused to provide a timeline for the publication of the report.

£40bn
Projected LOSS to the British Government on the sales of shares in the Royal Bank of Scotland

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Blacklisting of construction workers: a legal black hole

"They were turning up to our meetings and spying on us" said Dave Smith, a blacklisted shop steward and co-author of 'Blacklisted'. Addressing a meeting organised by the Haldane Society, Smith explained how multinational construction companies had set up the highly secretive Consulting Association to spy on trade unionists and prevent them from finding work.

"When we’ve talked about blacklisting, people have told us we’re completely paranoid conspiracy theorists" Smith said. “But the ICO [Information Commissioner’s Office] did a raid in the midlands and found the files that the construction companies keep on the trade unions”.

Smith described how the top-secret corporate blacklist had operated. “It cost £2 to check; if your name came up [on the blacklist], you got sacked”. Smith went on to reveal that McAlpine had an invoice for blacklisting checks running to £28,000 for 2010 alone.

The audience heard how the blacklist was initiated and operated at companies’ highest levels. “The constitution [of the Consulting Association] stated that you could only attend a meeting if you were at director level” Smith said. “We’re not talking about rogue managers, but the directors of multinational companies”.

Addressing the same meeting, Assistant General Secretary of Unite the Union Gail Cartmail praised the impact of coordinated legal-political campaigning in forcing the construction firms to the negotiating table. But Cartmail also explained that the companies had refused to apologise to blacklisted workers. “One of Unite’s red lines was jobs for blacklisted workers. Not one of [the construction companies] responded to the invitation”.

John Hendy QC, the Vice President of the Haldane Society who has represented numerous blacklisted workers, also addressed the meeting. Hendy explained some of the obstacles that his legal team had encountered when challenging blacklisting through the courts. In Smith v Carillion the Court of Appeal had declined to use the common law to overcome the legal fiction of self-employed construction workers. “The common law is capable of expanding the notion of employment” Hendy suggested. “...[I]t seems to me that they haven’t risen to the challenge of what the lawyers call atypical forms of work”.

Hendy was also critical of the role of the European Union, which he described as “...going around Europe smashing up...
collective bargaining wherever they can. That is why when Syria came to power, the first thing they did was to restore industry-wide collective bargaining. Hendy was clear throughout on the need for greater collective bargaining in the UK backed by an effective right to strike.

All three panel members touched on the limitations of relying on the law alone to overcome the blacklist. “On our first day in court, Carillion lawyers handed in a statement admitting that they had blacklisted, admitting that the reason was that I was a trade union member, and admitting that the reason was concerns about health and safety. We still lost”, Smith said. “Because I was an agency worker and not directly employed, I was not covered by British employment law. The Court of Appeal keep saying ‘it’s a terrible injustice, but there’s no way that British employment law can help you win this fight’.”

Despite his first-hand knowledge of just how far wealthy business owners had gone to combat trade unions, and despite the relative silence within the mainstream media, Smith remained buoyant and ready to face the challenges ahead. “Trade unions succeed not with big offices, but with a network of local activists prepared to stand up for people in the workplace” he maintained. “They’re scared stiff of trade unions; they’re scared stiff of collective bargaining. As soon as we stick together collectively, we don’t have to put up with chudging asbos into a skip”.

Young Legal Aid Lawyers

This regular column is written by YLAL members. If you are interested in joining or supporting their work, please visit their website www.younglegalaidlawyers.org

What should we make of Jeremy Corbyn?

Speaking to the Times newspaper on September 17, Mark Fenhalls QC, the new chair of the Criminal Bar Association (CBA), welcomed the appointments of both Michael Gove as Lord Chancellor and Lord Falconer as his shadow counterpart. When asked about Jeremy Corbyn, the newly elected leader of the opposition, he is reported to have kept closer counsel, commenting only that “I do approve of his attitude to all forms of collective bargaining. As soon as we stick together collectively, with a network of local activists prepared to stand up for people in the workplace” he maintained. “They’re scared stiff of trade unions; they’re scared stiff of collective bargaining. As soon as we stick together collectively, we don’t have to put up with chudging asbos into a skip”.

Franck Magennis

Transforming Legal Aid

Sacrificing the quality of justice for all irrespective of means, represents a concession. The Conservatives’ agenda proposal, contained in the 2013 Transforming Legal Aid Consultation, had been to introduce a system of competitive tendering to the criminal legal aid market. Lawyers have always worried that competitive tendering is simply a euphemism for awarding contracts to those who would do the work cheapest. Sacrificing the quality of representation that our clients deserve in the name of efficiency. The Tories were persuaded to abandon this proposal, and the dual contracts now in the offing, are the result.

This idea of competitive tendering can be traced back to Lord Carter of Coles, and his infamous review of legal aid procurement, in 2005. It was on Lord Falconer’s watch that this review was completed. And it was during Lord Falconer’s tenure that the Department of Constitutional Affairs took the first tentative steps toward making competitive tendering a reality. These steps were, fortunately, disbanded quietly with the passage of time. But had they not been, the quality of criminal justice in this country might well have deteriorated irrevocably. I have no particular axe to grind for Lord Falconer. But, given this history, I find myself less sanguine then Mr Fenhalls about his appointment. Jeremy Corbyn, on the other hand, has form of a very different kind. In 2011 he provided an impassioned contribution to the Commission of Inquiry into legal aid established by the Haldane Society and the Young Legal Aid Lawyers. In 2011 and 2012, in the House of Commons, he consistently voted against the cuts contained in the Legal Aid Sentencing and Punishment of Offenders Act 2012, and in favour of amendments that would have preserved legal aid in social welfare cases and lessened the impact of the cuts on children. In June 2013 he spoke out against the proposals contained in the Transforming Legal Aid consultation, decrying the stereotype of ‘fat cat’ lawyers and the effect of the cuts on the ability of citizens to hold the state to account. Later that year it was Corbyn, this time in his role as a member of the Justice Select Committee, who had the integrity to call out Chris Grayling on his cuts to legal aid for prisoners, forcing the then-Lord Chancellor to accept that the cuts were driven by his ideology rather than any financial need. And in 2014 he numbered among those MPs who quite rightly voted against the introduction of a discriminatory residence test for legal aid.

Over the months since Corbyn first put himself forward as a leadership candidate, I have listened to very many fellow lawyers discussing his record as a Parliamentarian in disparaging terms and dismissing his prospects as leader. An element of this is to be expected. Corbyn holds views on many issues – EU membership, nuclear disarmament, and the legitimacy of the Royal Family to name but a few – which excite strong feeling across the population and are not uniformly held. But a belief in equality before the law, irrespective of nationality, populatity or bank balance should be an ideal that unites the legal profession. There are few politicians I can think of who have stood up for this ideal more consistently than Corbyn. Lawyers should at least give him a fair hearing.

Connor Johnson is the former co-chair of Young Legal Aid Lawyers and a barrister at Garden Court Chambers

Socialist Lawyer October 2015
The criminal lawyers’ direct action: view

The view from the firm

Solicitors of all ages, backgrounds and sensibilities at my firm share one dirty secret: we are all glad the action is over. We do know how devastating our second 8.75% fee cut is, and we are of course desperately worried that the new ‘two-tier’ contracting system will restrict access to justice by decimating criminal law firms. We wanted to take part in any action that might see these terrible plans reversed. And yet, when it was announced that the action was over, the mood of the firm was one of relief.

We were relieved because we wanted to start repairing the damage done to our relationships with clients; those with whom we had to have the difficult conversations. ‘We are not taking on any publicly-funded cases’, ‘I know we’ve represented you for years’, ‘of course we care about your case’. For the partners it may have been more about the bottom line (and we must have been losing a great deal of money) but for us it was about our work – the work that we love and want to get on with doing, for the clients who trust and depend on us.

Towards the end, it was becoming increasingly difficult to say to those clients that we were taking action in their interests and the interests of others who might require publicly-funded representation in the future. It was becoming difficult because we had no idea if our action was achieving anything.

Part of the problem was the constant in-fighting after every mistake made, and certainly there were mistakes: solicitors continuing with duty work at magistrates’ courts and police stations; the Criminal Bar Association (CBA) delaying joining in by getting itself confused over ‘surveys’ and ‘ballots’ announcing a reduction of the action the day before meeting with the Lord Chancellor to negotiate.

But the biggest issue for us was the lack of transparency in these matters. The inner circles of the solicitors’ representative bodies (LCCSA and CLSA) and the CBA were ‘in the know’. Everyone else was left guessing. What was discussed at the MOJ meetings? Was the Big Firms Group behind the change in tactic? Was the CBA invited to the meeting with Gove?

We knew that at least some of the answers coming from the representative bodies were spun, perhaps understandably, for the MOJ’s ears. Many of us felt uncomfortable with the bold declarations emanating from solicitors’ meetings, which did not always accurately reflect the views of those present.

So what were we to make of our representative bodies’ statement that the reduction of the action was a necessary and productive ‘change in tactics’; that talks with the MOJ and Michael Gove were ‘constructive’; that the cessation of the action was a ‘goodwill gesture’? It was difficult to conclude anything. And a month or so down the line, we are still very much in the dark.

The view from chambers

What a mess.

The bar votes for direct action with 96% in favour, and the vote is re-branded as a ‘survey’. The solicitors take action and the bar gazes at its navel. The bar (again!) votes for direct action while voting against the leadership candidate that supports it. The barristers’ action begins and the solicitors’ action is immediately watered-down. The leadership meets with the government and the bar doesn’t attend because of a ‘misunderstanding’. The strike starts to bite and it’s called off. Little wonder that the action ended with a hollow victory: a short suspension of the cut in fees, which can only ever benefit the small number of firms that may survive two-tier contacting.

September

12: Jeremy Corbyn won the leadership contest of the Labour Party in the first round with 69.3% of ballots. The leadership contest led to an unprecedented surge in membership and affiliated members. His first act as leader was to join the rally in London to support refugees.

21: In an interview with the Evening Standard Lord Sumption urged ‘patience’, suggesting that proactive steps to promote women could see the judiciary being ‘destroyed very easily’.

22: A domestic worker who was hired because she was ‘servile’ won a caste discrimination claim against her employer, who was paying her 11p an hour for an 18-hour day. The Employment Tribunal said the conditions of her work were ‘a clear violation of her dignity’.

October

7: The first preliminary hearings of the Undercover Policing Inquiry chaired by Pitchford LJ took place at the Royal Courts of Justice. The inquiry will hear from core participants, including blacklisted workers.
news from both sides of the profession

The action was characterised by chaos and despondency. It was half-cocked. That’s bound to happen when the leadership of a movement is so reluctantly dragged along by its membership. There were no rallying cries, no clear instructions from the leadership, just vague comforting words and pleas to give Gove a chance.

In chambers and advocates’ rooms was a sense of grievance that at various points the bar was doing all the heavy lifting, which was seen as especially unfair given that this is largely a ‘solicitors’ problem’. There are two misconceptions in that argument: the first is that two-tier is fatal to both sides of the profession; and the second is that an extent it served the bar right. If we had supported the solicitors when they first began to accept no new work – if we had given the government both barrels from the start – the action would have had a real impact before threats to firms’ cash flows forced them to amend their stance.

What happens after two-tier? For barristers it’s as if someone’s hit the reset button. The firms we rely upon on are gone. The ones that are left generally use their own employed advocates. True, there will always be a demand for the skill and extraordinary value for money that specialist criminal counsel offer, but who wants to be instructed (exclusively) by poor-quality litigation farms, where nothing’s been done and no one’s at the end of a phone?

Many of us know what it’s like when cases are under-prepared. How many of us, or of the next generation, will want to work in an environment where all the good firms are gone and – day after day – we receive our instructions from radically under-prepared cases?

The Haldane Society’s major event of 2015 is the upcoming International Women’s Conference. On Saturday 28th and Sunday 29th November radical women and allies from all over the world will come together at London South Bank University for discussion, debate and skills sharing. The conference is called ‘Women Fighting Back – International and Legal Perspectives’. Themes include violence against women, the role of women in peace processes, austerity, women in work, migrant women and climate change.

The aim of the conference is to bring a critical, leftwing and intersectional perspective to the women’s movement and to provide a forum for exchanging ideas and practical skills between lawyers, academics and activists to advance women’s campaigns and struggles.

A number of excellent speakers are already confirmed. Rashida Manjoo is the current UN Special Rapporteur on Violence against Women. Lilian Hofmeister is a Substitute Justice at the Austrian Constitutional Court. Wafa Kafarna is a Palestinian activist. Frances Webber is Vice-Chair of the Institute of Race Relations. Many others will give talks and participate in seminars and workshops over the weekend.

We really welcome anyone who’d like to share their experiences, insights and expertise. It also promises to be a fascinating event for anyone who wants to come and listen: to expand their knowledge and take new skills back to their work, campaigns or communities.

The conference is co-hosted by European Lawyers for Democracy and Human Rights and the International Association of Democratic Lawyers.

Early bird tickets are on sale now (available at www.haldane.org)!

Helping to organise this conference has also been a positive influence for many Haldane members and supporters. If you would like to learn more about the conference or would like to participate, please contact us at secretary@haldane.org.uk.

*What I'm proposing is a deal – the fewer people who claim asylum in Britain, the more generous we can be in helping the most vulnerable people in the world's most dangerous places.*

And my message to immigration campaigners and human rights lawyers is this – you can play your part in making this happen or you can try to frustrate it. But if you choose to frustrate it, you will have to live with the knowledge that you are depriving people in genuine need of the sanctuary our country can offer. Theresa May, Tory Party conference, 8th October

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Keith Ewing and John Hendy on the latest government legal attack on organised workers.

Stop the Trade Union Bill
Introduction
Described by Vince Cable as ideological and vindictive, the underlying purpose of the Trade Union Bill is to crush the remaining capacity of the unions to protect the interests of working class people in order to facilitate yet further transfers of wealth and income from them to the very rich.

The Bill has three particular features:

• The first is to single out public sector trade unionism for particular assault, as part of a strategy to suppress organised resistance to the destruction of public services and to eliminate any meaningful bargaining over pay or terms and conditions in the public sector, allowing the government to cut wages, pensions and staff.
• The second is to undermine collective bargaining by more restrictions on the lawful exercise of the right to strike. Without an effective right to strike, the right to collective bargaining is, of course, no more than a right to collective begging. So the Bill is intended to put yet further obstacles in the way of the only means that workers have to protect or improve the conditions of their working lives.
• The third is to silence the political voice of the organised working class, building on the Coalition’s Gagging Act in 2014, to ensure that unions have limited resources and opportunities available to offer political resistance to the government.

These measures – and the accompanying proposals for even more controls on picketing in particular – are not intended to extinguish trade unions altogether; that would be too bold a step. Instead the plan is for a living death by a thousand cuts.

The dramatic changes to the law on industrial action over the last 35 years have already helped to reduce the proportion of British...
workers covered by collective agreements: from 82% (then around the European average) in 1979 when Mrs Thatcher became prime minister, to about 20% today. The Tories intend to reduce that proportion to insignificance.

Each of the many changes introduced by the Bill is not to be assessed in isolation, but as a yet further limitation on top of the mass of legal restrictions inherited from the last Tory governments. The Labour governments from 1997 to 2010 changed nothing of significance in relation to trade union rights. As Tony Blair infamously promised on the eve of the 1997 election: under a Labour government ‘the changes that we do propose would leave British law the most restrictive on trade unions in the Western world.’

The result is that even before the burdens of the Bill are felt, current restrictions on trade union freedom are repeatedly condemned in international legal forums, such as the European Committee of Social Rights and the International Labour Organisation, for breaching international treaties ratified by the UK.

The Right to Organise in the Public Sector

The Bill is particularly aimed at trade unions in the public sector since it is there that collective bargaining is most widespread, trade unions are strong and the Tories particularly wish to destroy public services. The destruction of effective public sector trade unionism is also important for maintaining the Chancellor’s commitment to maintaining the 1% pay cap for public sector workers (other than MPs) in the face of rising inflation.

So in addition to the far-reaching restrictions on the right to strike, particular provisions in the Bill target workplace representation in the public sector:

• Public sector employers will have to provide information about the amount of facility time granted to trade union representatives (and the direct ‘cost’ of it – ignoring indirect benefits to the employer). This is an open invitation for the anti-union media to attack any public authority which abides by international law by respecting the rights of its workers to be represented by a trade union;

• The government will have power to impose limits on the amount and restrict the purposes of facility time. So, in the public sector, ministers will be able to rewrite legislation currently permitting time off for union duties and activities and will be able to ‘modify’ collective agreements. This is a breach of ILO Conventions 98 and 151;

• The Tories have also announced (after the Bill was published) that they will ‘abolish the check off across all public sector organisations’; again in breach of ILO Conventions 98 and 151.

The Right to Strike – Ballot Thresholds

The Bill contains an extensive range of measures restricting the freedom of unions to organise industrial action. We stress that this is in addition to the heavy burdens of existing legislation restricting the purposes for which industrial action may legitimately be called, and imposing complicated procedural requirements of ballots and notices, referred to by one High Court Judge as ‘the inordinate complexity of the statutory procedures’. It is the cumulative effect of all this which conflicts with Article 11 ECHR.

Under the Bill, industrial action will be lawful only if 50% of those eligible to vote do so, and if a majority of those voting support the action in question. In addition, in ‘important public services’ industrial action will be lawful only if supported by at least 40% of those eligible to vote. The sectors covered (both public and private, in fact) are: health services; education of those aged under 17; fire services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security.

These changes are almost certainly in breach of international legal obligations, notably ILO Convention 87.

Recent research by Darlington and Dobson (Institute of Employment Rights, forthcoming) has shown that:

Only 85 of the 158 strike ballots covered by the database reached the 50 per cent target, and the number of workers who failed to reach the target was completely disproportionate to those that did – while 444,000 workers could have taken strike action because they had a turnout rate of over 50 per cent, 3.3 million workers would have been prevented from going on strike. Even if you take out the large-scale 2011 public sector strikes, it still means 880,000 workers would, under the proposed legislation, no longer have been able to go on strike.

So the Bill’s changes will heavily impact the right of workers to strike, especially in the public sector where protest strikes are often
large scale and cover a multitude of workplaces and employers.

No doubt after the Bill becomes law turnouts will increase. Unions will campaign harder and the message will be well understood by members that those who do not bother to vote will be counted as voters against. Whether this will be sufficient to overcome the new hurdles, given that industrial action ballots are denied the obvious means to make them effective such as secure and secret workplace voting or by internet, remains to be seen.

The Right to Strike – Raising the Hurdles

Under the existing 'detailed and complicated way in which strike action is procedurally circumscribed by the ballot provisions' (as a Court of Appeal judge put it), trade unions are required to give various complex notices to the employer in order to achieve legal protection to organise industrial action.

The Bill adds to these extensive obligations in five different ways:

- The ballot paper will have to contain additional information, including:
  - a ‘reasonably detailed indication of the matters in issue in the trade dispute to which the proposed industrial action relates’;
  - if the ballot is for action short of a strike, the nature of the action must be specified; and
  - the dates of the proposed action;
- The notice of the ballot result given to members will have to include information about whether the 50% voter participation was met, and whether the 40% voter support threshold was met (where it applies);
- The union’s annual report to the Certification Officer must give details of all industrial action;
- The union will have to give 14 rather than 7 days’ notice to the employer before taking industrial action;
- A ballot mandate will be valid for only four months.

These further restrictions have no legitimate purpose; they are simply further traps and hurdles to give grounds to claim injunctions to prevent industrial action or to claim damages after the event.

This is clear because the incidence of industrial action is not a major issue. The average number of working days lost in the UK is around the average for EU and OECD countries. In the week the Bill was published the Office of National Statistics commented: ‘There has been a significant decline in the number of strikes since 1995 compared with the previous years. Though volatile, the number of working days lost has remained broadly the same over this period. […] The strike rate in the last 10 years is generally lower than in previous decades’.

Agency Workers as Strike-breakers

The Tories plan to revoke the regulation which bars agency workers from being used as strike-breakers. Employers will be permitted to use agency workers indefinitely, and there is no guarantee that workers on strike will ever get their jobs back.

This is a clear breach of ILO Convention 87, and has rightly been strongly condemned by the TUC. Writing in 2012, the ILO Committee of Experts said that ‘Provisions allowing employers to dismiss strikers or replace them temporarily or for an indefinite period are a serious impediment to the exercise of the right to strike, particularly where striking workers are not able in law to return to their employment at the end of the dispute’.

Yet this is precisely what the government now plans for the United Kingdom. This will be a strategically important power of employers, especially if employers are permitted to use agency workers to both replace AND undercut those on strike.

It will also be important in the context of industrial action short of a strike, where workers may refuse to take on additional duties or boycott others. English contract law has long permitted the employer, in these situations, to hire agency workers and to send workers home until they are prepared to do what they are told. This is not just a licence for strike-breaking – it is a licence for bullying and autocratic management.

Picketing and ‘Leverage’

In addition to the existing, vast (and highly effective) array of civil and criminal law on picketing, the Bill introduces yet further restrictions. This is notwithstanding that the Association of Chief Police Officers told the Carr review (on picketing): ‘In general the legislative framework is seen by the police as broadly fit for purpose and the range of criminal offences available to the police is sufficient to deal with the situations encountered’.

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Yet the Bill proposes that a union will lose protection for peaceful picketing (and will therefore be liable to injunctions not to picket or claims for damages after the event) unless:

- The union appoints a picket supervisor;
- The supervisor is familiar with the Code of Practice on picketing;
- The supervisor has taken reasonable steps to tell the police his/her name, where the picketing will take place, how s/he may be contacted;
- The supervisor has a letter of authorisation from the union;
- The supervisor shows the letter to the police or ‘any other person who reasonably asks to see it’;
- The supervisor wears a badge or armband readily identifying him/her as such.

The government has also ‘consulted’ on further proposals. Fourteen days before industrial action starts, unions will be required to give the following information to the employer, the police and the Certification Officer:

- Specify when the union intends to hold a protest or picket;
- Where it will be;
- How many people it will involve;
- Confirmation that people have been informed of the strategy;
- Whether there will be loudspeakers, props, banners etc;
- Whether it will be using social media, specifically Facebook, Twitter, blogs, setting up websites and what those blogs and websites will set out;
- Whether other unions are involved and the steps to liaise with those unions;
- That the union has informed members of the relevant laws.

Any change made by the union to these plans is also to be published.

These far-reaching powers have been widely condemned on civil liberties grounds and all those concerned with the right to protest should watch out, for if the government impose such restrictions on trade unions then it is certain that similar requirements will be imposed more widely.

Further restrictions on pickets and protests away from the workplace will be introduced as the Bill goes through Parliament aimed at the industrial dispute ‘leverage’ campaigns successfully conducted by unions such as the GMB and Unite (called ‘leverage’ by the latter).

An Attack on Political Freedom

The Trade Union Bill is about eliminating trade union political influence. The aim is to reduce the income available to trade unions for political purposes. The importance of political action by trade unions is acknowledged by the ECtHR, which recognised in ASLEF v United Kingdom that:

‘Historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with strongly held views on social and political issues’.

It is offensive that democratic members’ organisations like trade unions, dedicated to the defence and advancement of members’ economic and social interests, should be restricted in using their funds for political purposes to those ends. Nonetheless, in the UK, trade union political activity has been subjected to tight legal restraints since 1913: a resolution adopting statutorily defined political objects must be approved by secret ballot every ten years, money for those objects kept in a separate political fund, members free to opt-out of payment into that fund.

The Bill harks back to the punishments imposed on unions after the 1926 General Strike, which included the requirement that union members opt-in to the political fund if they wished to contribute. This reversal of the previous rule continued until 1946. Under the new Bill trade unions will have three months to ensure that existing members opt-in. If they do not, members’ obligations to pay the political levy will lapse. Members who have opted-in may opt-out at any time, effective within one month. A member’s opt-in notice will lapse after five years, and will have to be renewed.

Unions are democratic organisations in which the decision of a majority on any lawful matter binds the minority. By individualising this aspect of trade union democracy, the Bill breaches trade union autonomy, and undermines the principle of solidarity fundamental to effective trade unionism. This is not compatible with the right of trade unions to draw up their own rules free from state interference, as required by ILO Convention 87, art 3.

Frances O’Grady claims that Downing Street did not meet the TUC to discuss the Bill.
Transforming the Role of the Certification Officer

Thus the Trade Union Bill compromises three core labour rights: the right to organise, the right to bargain, and the right to strike. These restrictions are compounded by new powers to be given to the Certification Officer (CO), the ‘trade union regulator’ appointed by the government to issue certificates of independence and deal with complaints from members about breach of union rules.

That role will be dramatically transformed. Most striking is a new power to initiate action against a trade union even though there has not been a complaint by a member. This applies specifically in relation to trade union elections, trade union political funds, and trade union amalgamations.

As a matter of constitutional principle this is an extraordinary proposal since trade unions are not public bodies and exercise no public function. Nor do they provide services to or invest funds of members of the public. The most extraordinary feature, though, lies in the combination of powers which enable the CO (on behalf of the State) to:

- make a complaint against a trade union;
- investigate that complaint;
- hear and make a decision on the very matter about which s/he has brought the complaint; and
- use other new powers to impose a fine on the trade union s/he has investigated and upon which s/he has decided.

The CO has new powers to conduct investigations – or to delegate investigations to outside bodies such as the big accountancy firms. The CO will be able to require production of any document held at any level and in any form by the union. The CO will be able to act on information from third parties, which no doubt a hostile media will be enthusiastic to provide, as well, of course, as employers (who will risk no legal costs in raising a complaint in this way) and disgruntled members of the public, MPs and others.

And, to rub salt in the wound, the CO is to be given the power to impose a levy on trade unions to make them pay for running his or her office. S/he is to be funded by the very organisations he or she is to investigate. Whoever holds this office in the future will be seen as little more than the ideological pit-bull of Tory ministers. Thus the government will diminish a hitherto highly respected position.

Conclusion

In launching the biggest assault against free trade unionism for a generation, the Tories have revealed high levels of legal and economic illiteracy. As to the former, the distinguished judge, Lord Bingham, said in 2006 that:

‘The existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations. I do not think this proposition is contentious’.

This proposition applies to ILO Conventions ratified by the United Kingdom as to all other ratified treaties. The ILO Conventions relevant here were ratified by both Labour and Conservative governments. Indeed it was the government of Mrs Thatcher that ratified ILO Convention 151.

As to economic illiteracy, the consensus of economic thought today (including IMF researchers) is that the destruction of collective bargaining is both bad for the economy directly and is a significant contributor to the growth of inequality which creates its own misery. The diminution of trade unions’ industrial power may appear attractive to right wing backbench Tories but it is, in effect, shooting the economy in the foot.

Collective bargaining is also essential for the achievement of justice at work. In the absence of collective bargaining, the outcome of the conflicting interests of employer and workers simply reflects the inherent imbalance in power between the worker and the employer.

Widespread collective bargaining was the technique nearly universally adopted throughout the Western World in the 1930s after the crash of 1929 and the following Depression – and it worked over the next 50 years. It still works in the strong and efficient economies of Germany and Scandinavia.

The government’s proposals ignore these truths; the Trade Union Bill is not only ‘not fit for purpose’, ideological and vindictive, it is also wholly irrational in design and delivery.

Professor Keith Ewing is professor of public law at King’s College London. John Hendy QC is a vice-president of the Haldane Society.
Alzamos las manos

Alzamos las manos no en súplica
sino desesperación, en rabia, en demanda,
en protesta contra las manos sangrientas
de los criminales y del gobierno
imposible distinguir los unos del otro.
“Ya estoy cansado de tantos regaños,”
dijo el procurador. Pues cánsese más,
Sr. Procurador que queremos
a nuestros hijos, nuestros del pueblo
que vivos se los llevaron
y vivos los queremos.
Seguiremos alzando las manos
con el “43” ya un lema de la injusticia
que sufrimos y ya no es tolerable
que suframos más.

Mientras tanto el presidente
visita los EE. UU. para discutir
la seguridad y la economía.
¿Seguridad y economía de quien?
¿Pedir más armas para el crimen
y la represión? ¿Seguridad de los ricos?
¿Asegurarles ganancias a costo nuestro?
¿Entregar la economía a empresas extranjeras
del “libre comercio”? No nos confundan
con banderas ya manchadas, sucias de injuria.
Cansados estamos nosotros y alzamos las manos
clamando como la Llorona por nuestros hijos
que vivos se los llevaron y vivos los queremos.

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On 26th September 2014 43 students
from Ayotzinapa Rural Teachers College
in Guerrero, Mexico were kidnapped on
their way to a protest. Police officers are
suspected to have colluded with local
crime syndicates to execute the students.

We Raise Our Hands

We raise our hands not in supplication
but desperation, rage, demand,
protest against the bloody hands
of the criminals & the government
impossible to distinguish the ones from the other.
“I am tired of so many scoldings,”
said the prosecutor. Well, be more tired yet,
Mr. Prosecutor for we want
our children, ours of the people
that alive were taken
& live we want them back.
We will go on raising our hands
with the “43” now a motto of the injustice
that we suffer & is no longer tolerable
that we suffer any longer.

Meanwhile the president
visits the U. S. of A. to discuss
security & the economy.
Whose security & economy?
Ask for more weapons for crime
& repression? The security of the rich?
Assuring them profits at our cost?
Surrender the economy to foreign enterprises
of “Free trade”? Do not confuse us
with flags now stained, dirtied with outrage.
Tired are we & we raise our hands
crying like la Lorna for our children
who alive were taken & alive we want them back.

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In the village of Rosia Montana, located in the mountains of Transylvania, a new sort of vampire is trying to drain the blood of Romania’s people. A Canadian mining company, Gabriel Resources, is claiming billions of dollars in a secret tribunal because Romania’s parliament and court system have decided that Gabriel can’t create Europe’s largest gold mine.

Mining in mineral-rich Rosia Montana ended in 2006 when Romania joined the European Union. For years Gabriel Resources have been trying to open a new mine but local communities, united under the Save Rosia Montana campaign, have fought back on social, environmental, economic and cultural grounds. The project was expected to release over 300 tonnes of gold and 1500 tonnes of silver. But in the process, it would create a cyanide lake, blast away four mountain tops and relocate thousands of people from their homes.

Many Romanian institutions including the Romanian Geological Institute and Romanian Academy have spoken against the project and its methods, as the mine threatens some of the best-preserved Roman mining galleries in Europe.

In 2013 Gabriel Resources attempted to pressure Romania’s government to approve the mine by passing a law to declare their mine to be of overriding national interest. But this backfired, triggering protests which spread into Bucharest and attracted the interest of international solidarity groups. The campaign remains the biggest social mobilisation in Romania since the fall of communism in 1989.

The parliament rejected the change in mining laws, and since that time the country’s courts have not given the project a vital environmental permit that it requires to proceed.

But that’s not the end of the story, because in an era of globalised investment rules multinational corporations have gained new international legal avenues that allow them to seek redress in secret tribunals, without appeal, which are not available to ordinary people.

Gabriel Resources can make use of a number of bilateral investment treaties which incorporate so-called Investor State Dispute Settlement (ISDS) mechanisms. Under ISDS a company can claim compensation for decisions that it believes are ‘unfair’ under the terms of the treaty, for instance if a foreign company has received treatment less than that which would have been accorded to a domestic company (fair and equitable treatment).

Gabriel Resources is now seeking just such redress. It is making use of two bilateral investment treaties (BIT), one of which is the UK-Romania BIT, on the basis that Gabriel owns a shell company based in Jersey. In other words, it doesn’t matter whether a company is really ‘based’ in the country that signed the treaty or whether it pays taxes. Indeed, investigative journalists have suggested a number of alleged illegibilities associated with Gabriel’s actions in winning its Rosia contract in the first place. The company has been under investigation in Romania in connection with tax evasion and money laundering.

An ISDS panel can meet anywhere – and there is a major arbitration centre in London – but the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) is often chosen, and that is where Gabriel launched its case. The details aren’t yet known, but in an interview the CEO of Gabriel Resources has suggested that he would seek compensation of up to $4 billion if the mine were not to go ahead, despite having spent only a fraction of this amount developing its plans.

The Romania case is far from a one off. Canada is another developed country that has been regularly affected by the ISDS mechanism in NATO (North America Free Trade Agreement). In March Canada was successfully sued under an ISDS for turning down the creation of a 152-hectare basalt quarry by US corporation Bilcon in Nova Scotia.

The quarry was planned in a key breeding area for endangered species, including rare whales, and communities argued that the
quarry would have caused significant environmental damage. Following a campaign, an environmental review found that the quarry clashed with ‘community core values’. Bilcon argued that even seeking an environmental review was wrong, and is now claiming $300 million in compensation. If it succeeds it will become just one more case Canada has lost for trying to protect environmental standards.

There are a few points to note in the Bilcon case, which is not at all unusual in ISDS cases more generally, but are always denied by western politicians keen to promote investment treaties. First, it did not amount to a breach of contract or to discrimination in favour of domestic capital. Second, the case did challenge Canada’s ability to make decisions based on environmental protection. Indeed, a dissenting arbitrator from the decision, Donald McRae, warned: “A chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages … [the ruling] will be seen as a remarkable step backwards in environmental protection … [and] a significant intrusion into domestic jurisdiction.”

Proponents of ISDS will tell you that this mechanism has been around since the 1950s, so this is all just a lot of fuss whipped up by campaigners. Indeed bilateral investment treaties have been around for a long time and there are now hundreds of them. One reason they have become so controversial recently is that the majority of such treaties have, up until now, existed between developed and developing countries – as a consequence developed countries have rarely been on the receiving end of ISDS cases.

Another whole legal industry has rapidly grown around these mechanisms, and as a result ‘unfairness’ has come to be defined very broadly indeed. A major clause of investment agreements used to bring cases is now ‘indirect expropriation’ of a company’s assets, which has essentially come to mean any government decision that interferes with ‘expected’ profits of a company.

That’s how cases are currently in process against Uruguay and Australia for putting large health warnings on cigarettes and for putting cigarettes in plain packaging respectively. Tobacco giant Philip Morris argues that this is ‘indirect expropriation’ – essentially robbing the conglomerate of the profits it could have expected at the time it first began operating in the country.

There are dozens of such cases. Argentina has been successfully sued for trying to regulate water prices in the middle of an economic meltdown. Egypt is being sued for raising the minimum wage of public sector workers. Poland and Norway were successfully sued for re-nationalising part of their health services. Mexico was sued for levying a sugar tax. Canada was sued for insisting that a proportion of the profits from offshore drilling be reinvested in the local community. Ecuador was sued for fining oil multinational Chevron for dumping toxic waste in the Amazon. Germany was sued for phasing out nuclear energy. And on and on.

This is lucrative business for the law firms involved, and for the highly paid arbitrators – a fact that campaigners suggest gives an added incentive to keep the system growing. This has become so profitable that there is a new interest in insuring or sponsoring ISDS cases, with financial clout disincentivising companies from settling in a case so they can pick off the super-profits at the end.

Such actions also affect a government’s willingness to regulate. Senior barrister Toby Landau has said “as a practitioner I can tell you that there are states who are now seeking advice from counsel in advance of promulgating particular policies in order to know whether or not there is a risk of an investor-state claim”. We’ve seen it in practice – when energy company Vattenfall sued Hamburg for trying to improve environmental standards on a coal plant the result was Hamburg rescinding the regulation. ISDS is a great way to bully states.

A final reason why all of this is big news now is that the ISDS system is about to explode, especially in Europe and North America. A series of new trade agreements are being negotiated, which will extend investor rights to hundreds of thousands of companies. The treaties are:

- **CETA** – the Comprehensive Economic & Trade Agreement – between the EU and Canada
- **TTIP** – the Transatlantic Trade & Investment Partnership – between the EU and the US
- **TPP** – the Trans-Pacific Partnership – between the US, Japan, Australia and a number of other Pacific countries.

These treaties are part of a ‘new generation’ of trade agreements, which often focus very little on trade in goods and services but on investor ‘rights’. At their heart they contain ISDS mechanisms to enforce these ‘rights’. The British government is in the front line of promoting these investor ‘rights’, even as it tries to quash attempts to give those same corporations binding human rights responsibilities at the UN.

No wonder, then, that the treaties have caused controversy. In a recent EU consultation on TTIP, a record-breaking 150,000 people responded, the vast majority saying they opposed ISDS in any form (even though they weren’t asked that question explicitly). A recent EU-wide petition on TTIP and CETA has garnered over 2.5 million signatures from across the EU, in total opposition to these trade agreements. In the European Parliament the social democrat group has been completely divided by the campaign. Developing countries from Indonesia to South Africa to Ecuador have thrown further fuel on the flames by beginning to rip up their investment agreements, citing ISDS as a ‘trade obstacle’, and where the only international actors with enforceable ‘rights’ are multinational companies.

We need to stop it in its tracks.

Nick Dearden is director of Global Justice Now.
Archaic, irrational, and incomplete – employment law needs an Law Commission review

Mike Hughes argues that it is time to sort out the legislative spaghetti relating to the relationship between bosses, workers and the state.

The law of the contract of employment – which is the lynchpin of employment law – is archaic, irrational and incomplete. That results in injustice for workers and job seekers as large employers successfully evade their legal responsibilities to the people who work for them. In the near future employment rights, and with them employment law itself, could all but disappear as industries fall to casualisation.

There are two main bodies of law that regulate the relationships between employers and workers. The first governs the health, safety and welfare of workers. The second governs the contractual terms and conditions of those in work, and to a limited extent it also provides some protection for those seeking employment through equality legislation.

There is much that needs to be done to protect the health, safety and welfare of the UK workforce, but the incoherence of the employment contract is more fundamental. As a body of law it has grown piecemeal. Progressive legislation, such as the right to collective bargaining, has been followed by regressive restrictions. This should not come as a surprise: the relationship between employee, employer and state has been at the heart of the political debate for more than a century and a half in the UK.

But it has created the sort of legislative tangle from which emerge anomalies, injustices and conflicts with common law. Untangling this sort legislative spaghetti has been an important role for the law commissions that have been established in many common law countries. It is time for the UK Law Commission to review employment law.

I have watched this tangle grow over the course of my working life, which began in the NHS during the grim dying days of the Callaghan Government. I watched this confusion grow at first hand, but not as a lawyer or paralegal. I saw and experienced the incoherence of employment law as a shop steward and lay official in the NHS, then as a middle manager in charge of equality and positive action programmes.

From the late eighties I was also an author investigating, writing about and campaigning against blacklisting by the shadowy Economic League.

That campaign was a success. The League folded, though almost to the last they
were processing all job applications at Ford and McDonalds, and applications for just about every construction job in the country. When the government changed anti-blacklisting regulations were brought in and the Data Protection Act was extended and applied to paper records. But blacklisting continued and – thanks to a new British standard for employment vetting – it was professionalised.

**Sloped playing field**

There are a number of problems with employment law, but from my experience, there are the two key factors:

- The law fails to indentify the employment relationship

- The only partially protects workers and job seekers from unreasonable management.

The first of those problems means that there are particular and extraordinary features of an employment contract that mean they cannot be treated like any ordinary contract, entered into voluntarily by two equal and honourable parties. The second of those problems leaves all job seekers vulnerable to prejudiced, unfair and irrational employment practices, which includes allowing untrue and defamatory comments to influence decisions.

As far as job seekers are concerned: UK society deliberately makes it very difficult for those who don’t work and aren’t self-sufficient. For jobseekers the playing field is sloped, the wind blows and the ball always bounces in favour of the employer. The advantage is amplified when employers act in concert through blacklisting, vetting, informal or even formal referencing. If you fall out with one boss you fall out with all of them, and the consequences for you and your family can be devastating.

For those in an employment relationship: workers have rights that would not apply to bills of lading in 18th century commercial shipping (on which some of the key principles of employment law seem to be based). These rights include certain acts like shipping (on which some of the key bills of lading in 18th century commercial shipping). These rights include certain acts like

- The construction industry has conspired to use this particular catastrophic flaw in the law to re-casualise the industry. They are not the only employers who use agencies as the employment equivalent of tax havens, to sort out many other problems with employment law too.

Recruitment should be on the basis of genuine occupational criteria. If that were the case blacklisting and discrimination would not require further tortuous legislation. Employers could stop looking for loopholes because there are none in a general duty.

Protected groups would have nothing to fear from a general duty of fairness. Discrimination, directly or indirectly, on the grounds of protected characteristics would continue to carry a particular sanction. But more importantly, taking positive action to recruit fairly from protected groups would change from being a reluctantly-enabled possibility to a positive responsibility under a duty of fairness.

We can be certain that if this problem is not resolved soon, and unequivocally, agency working will increasingly become the norm and employment law will become increasingly irrelevant.

A Law Commission Review might not be every socialist's preferred option for progressive legislation on employment rights but at the moment it would be faster, more effective and more sustainable than piecemeal primary legislation when a more sympathetic government is elected.
Susan (not her real name) is one of my clients. The Home Office let her stay in the UK because she has a British daughter. She is a single mother. She works as much as she can on a zero-hours contract with a very low income. But because the Home Office imposed a “no recourse to public funds” condition on her visa, she cannot claim government support or benefits to help her.

She pays someone she knows to let her live in a room. She and her daughter live in this room together. There is damp and mould on the walls. Her daughter sleeps, eats, plays and does her homework in the same room. They have tried to move elsewhere but no one wants to rent a room to them.

Their story is not unusual. And it seems set to become even more common.

The UK government plans to remove the right to rent from migrants who do not have the right to reside in the UK. Landlords will have the right to evict migrants if their right to reside runs out during their tenancy. There are lots of problems with this.

It seems to be a result of panic. The government introduced a pilot programme in the West Midlands to see how making landlords carry out immigration checks would work in practice. The official evaluation report has not yet been produced. So the government has gone to the trouble of gathering evidence for this policy, but then not waited to consider the results before deciding to go ahead.

Why have they done this? Immigration is in the headlines. We had heard about “swarms” of migrants in Calais trying to come to the UK. We had also heard about “marauding” migrants threatening our standard of living. Not to mention the British tourists whose holidays have been disturbed by the migrants.

The government plans to give property owners the right to remove the right to rent of migrants. Usman Sheikh shows that this is unlikely to be unworkable and will lead to more discrimination and exploitation.
whether on the motorway in the UK or on the beach in Europe.
And of course it was the summer holiday, ministers and officials aren’t at their desks. How to stop the negative publicity?
Announce a new policy!
But the government’s plan is not a very good response to the problems in Calais. Many of the migrants there are from countries like Afghanistan, Eritrea and Somalia. These are all very dangerous countries.
If they arrive in the UK it is likely that they will have good claims for asylum. Many of them will obtain refugee status. So they will have the right to reside and to rent private property. So to the extent that the government’s plan was aimed at the migrants in Calais, in many cases it will have no effect on them at all.
The government may say that it will not consider their asylum claims and will send them back to other EU countries for this. But first, an EU country will have to take responsibility for them. Often there is no evidence of the countries through which they have travelled. In the absence of this, it is very unlikely that any other EU country will take responsibility for them.
If they do, there will often be a long legal challenge. The migrants will have to live somewhere during this process. It will often take too long to justify keeping them in a detention centre.
The legal challenge may be successful. The courts have already ruled that removals to Greece are unlawful. There are numerous challenges to removals to other countries such as Italy, Hungary, Bulgaria and France.
Regardless of any of this, if the government is to be able to remove migrants to other EU countries the UK will have to be in the EU. If it leaves, which is not unlikely, in principle it will have to consider the asylum claims of all the migrants that arrive.
Is the government’s plan workable? Probably not.
Lawyers often say immigration status is complicated. For example, a migrant’s ID card may show that their visa expiry date is in the past. But if they submitted an application to the Home Office before that and there is no final decision on the application, they will still have the right to reside in the UK. This could go on for years while the Home Office and the courts consider their case.
Many migrants in this situation already have problems finding work. Employers often think it is too much trouble for them. It is not hard to see that landlords and estate agents may take the same approach.
The Home Office say that they will tell landlords if the migrant has the right to reside. With the greatest of respect, it is hard to imagine them regularly getting this right. After all, through Capita, they have repeatedly contacted British citizens to tell them that they have no right to reside in the UK and should leave.

The government’s plan looks likely to encourage racial discrimination.
Given how complicated immigration law is, landlords will often be worried about making a mistake and then being fined or imprisoned.
Many will think: better to err on the safe side, and refuse anyone with unclear immigration status or indeed anyone from abroad at all.

Apparently, in the West Midlands pilot, even British citizens without passports were refused tenancies. Some of those people may find accommodation elsewhere. But it will often be worse accommodation provided by unscrupulous landlords.
I know an Indian man who came to Britain in the 1960s. Back then he used to charge other Asian migrants to sleep in the corridors of his property.
He told me he had to do this. British people often refused to let Asians stay in their properties. Sometimes they put up signs saying “no Blacks, no dogs, no Irish”. Asian people came to him as they needed somewhere to sleep.
You might not accept his self-justification. But like yesterday’s overt racism, today’s more subtle racism will push migrants to sub-standard accommodation.
If a landlord does evict a migrant from their property the government will often simply have to accommodate them elsewhere. It seems that the government plans to increase public spending on housing for migrants at a time when they are apparently trying to cut public spending as much as possible. This is surprising, to put it mildly.
They may say that they will detain and remove migrants without permission to be in the UK who are evicted. But many will claim asylum. The government has recently suspended its entire scheme for detaining asylum seekers because of major problems with that system, so the government will have to give accommodation to many of these migrants.

Some evicted migrants will not come to the government’s attention. Indeed, the likelihood of this happening shows a glaring problem with the government’s plan. They will identify a migrant without the right to reside only to then leave them to disappear, rather than removing them from the UK. As some have already said,
Socialist treatment. They will be unable to challenge ill-treatment. They will not go to the police for fear of punishment. They will not even be able to find a lawyer to help them. They will not have enough energy to work. The government plan seems to have the intention or effect of continuing this move from immigration control to migrant exploitation.

The evicted migrants will often slip away to other, often worse, accommodation. They will continue to work, often paid less than the minimum wage and treated badly by their employers. The government plans to start seizing their money soon as the proceeds of crime. This will all have a disturbing result.

Rightly, people often criticise the use of the terms “illegal immigrants” or even “illegals”. This is based on principle. If you commit a crime, you commit an illegal act. You yourself are not illegal. You are punished for your act. You are not punished for your self.

Yet the cumulative effect of these government policies, which I call ‘immigration interference’, is precisely that it is the very self of the migrant that is punished. Migrants in this situation will be deprived of rights at home, at work, at the bank, at the hospital, at college. They will see all of society against them. They will be surrounded by ‘everyday borders’.

They will be punished at every waking moment – with every breath. Their punishment will be slow and enduring. They will watch the damp spread across their room. They will develop health problems as a result. They will not be able to obtain medical help. They will not have enough energy to work.

With heavy cuts to legal aid, they will not even be able to find a lawyer to help them. They will not go to the police for fear of removal. They will be unable to challenge ill-treatment. They will to a great extent be outside the law. They will indeed be ‘illegals’. They will themselves be illegal. So we will soon have the dystopian situation that our language has long implied.

Some people may say this is simply the result of a successful policy. That this will deter other migrants from staying in the UK without permission.

However, the point is precisely that this does not seem part of a system of immigration control, but migrant exploitation. The aim, it seems, is not to remove from the UK migrants without permission to be here.

Instead, the government seems happy to leave large numbers of such people in the UK to do often crucal jobs – perhaps as builders, or nannies or cleaners.

The government knows that they will keep coming due to their economic circumstances and that they will be able to do little or nothing to challenge their ill treatment.

This is exploitation. The government may point out that they plan to punish landlords who rent property to migrants without immigration permission to be here. That they will do this precisely to stop exploitation.

Of course, we will have to wait and see. But similar powers already exist to punish employers. The government has recently announced that it will use these powers later this year.

But there seems little reason to believe them now when they have used these powers so rarely in the past. And by giving notice now, they are letting employers fire people before any government checks begin. Once the checks are over, they can go back to hiring whoever they like.

So just as these powers are often used against employees, not employers, it seems likely that the new powers will be used against tenants, not landlords. Against the weak, not the strong. This is normally called bullying.

So across the board, from migrants without permission to be here, to migrants with permission and even to some British citizens, it seems likely that the government’s plan will make it harder for people to have a place to call home.

What will be the result? One day when she grows up, Susan’s daughter may tell us all.

Usman Sheikh is a lawyer living in London. He set up and runs Ansar, a law firm that helps migrants in London. This article was originally published by Open Democracy and is reproduced with their kind permission.

“I know a British woman who used to work in the café of a famous London theatre. She said all the staff in the café were white Europeans. All the workers in the kitchen were black Africans.
Clearly the people running the café wanted cheap labour in the kitchen. But they guessed their (almost all white) customers did not want to see black faces. They would rather they would just disappear.”

Above: In August 2015, at Calais in France, West African migrants attend a Christian service in a makeshift church at the refugee camp known as ‘The Jungle’.

Previous pages: Migrants try to jump onto railway trucks at the Calais Eurostar terminal, August 2015.
In August 2015 a thousand people rallied at Yarl’s Wood Immigration Removal Centre to protest against the immigration detention system and, as Antonia Bright points out, they were from both sides of the walls.

The call to end detention has grown a great deal since 18 months ago, when Movement for Justice began organising protests at detention centres. There have been demonstrations at detention centres before but the series led by MFJ are the first where former detainees and people under threat of detention have been so prominent as leaders and organisers. Speakers have frequently been people who have been released – sometimes only days before – speaking for friends still inside. Those inside have spoken out by phone and by shouting back from the courtyards and windows. These demonstrations have grown in size and presented a powerful challenge to the system of detention, and have led to court decisions that edge toward limiting the power of the Home Office.

On 8th August hundreds marched down the bridle path that winds around perimeter fences, and as we approached the building we could already hear the chants of women inside. Detainees normally look out over an empty field, rarely seeing a single person pass by. But as soon as we reached the building there were already hundreds of detainees crowded up against the windows ready to be seen and heard, and to tell their experience to anyone who could listen.

Women and men in Yarl’s Wood joined the protest. Detainees had placards ready, handmade with any materials they could lay hands on – cardboard, cut-up clothes hung on sticks – made in advance to wave from the windows to express to the world outside their truth, their feelings and their demands as people incarcerated without trial under all kinds of circumstances. ‘We want to live life’, ‘pregnant women held’, and of course ‘FREEDOM’.

This demonstration was one of a number that have broken through the isolation and separation of the detainees inside. For them detention is otherwise a place of fear, insecurity and limbo, where you can lose a sense of who you are. Inside Yarl’s Wood the vast majority of detainees are women. MFJ calls for the closure of all detention centres; Yarl’s Wood is at the forefront of the detention system because of the importance of the consistent struggle and organising by the women inside, and because of its size and importance as a former Detained Fast Track centre.

Life in detention is very difficult. So many ex-detainees have described it as being worse than prison. To assert any rights or deal with the harassment and anxiety of detention is an hour-by-hour struggle. How does a detainee trust anyone? How does a person resist the pressure to give up? How does a detained fight for medical attention or proper food if they are already living in a cage, treated like an unwanted animal? There has to be hope and proof that you are not alone, and that comes from the people around you. Detainees have repeatedly organised together to call in ambulances and fight for fair treatment for the sick. It is a collective fight.

Often one of the first struggles detainees have is with their own lawyer. Dealing with cases means finding good legal advice. The first thing MFJ looks for is a lawyer who least believes in the law – immigration is about politics and business. We need those who...
are most ready to listen to their clients and to work with the client’s supporters. We try to find a lawyer who listens without fostering a relationship that makes the client less of a fighter, weaker, meek, or grateful and unquestioning.

One of the biggest problems to overcome on arrival in the country is the illusion of Britain as a fair and safe country. To discover the truth is to experience an utter betrayal that turns the world upside-down. The law falls short on the promise of refuge. It expects people to fit into its narrow confines, rather than trying to make the law fit reality.

Each case may be different but it does not follow that they should be fought one-by-one. Each of us is stronger individually when we understand and make our fight collectively, with a political method. We all need the people around us to be positively fighting, and they need us to do the same.

Each victory is a step forward for a movement. The MFJ group in Yarl’s Wood have been addressing this by writing messages like ‘FREEDOM’ on their clothes. This has become a means of uniting together along shared demands and desires. It is essential to let the truth pour out, in word and in deed.

Just as the argument that Detained Fast Track is a miscarriage of justice has been made in court, the detainees have been giving the same verdict, repeatedly and with growing support and attention. The least cynical person in any immigration tribunal is likely to be the asylum seeker or migrant.

Yarl’s Wood has been the subject of criticism from many sources including the most recent report from Her Majesty’s Inspectorate of Prisons, which attacked the lack of time limit on detention and deteriorating healthcare, and described inappropriate sexual behaviour by guards as an ‘ever present risk’. Several MPs called for the closure of Yarl’s Wood in the recent parliamentary debate on 10th September – the first time Parliament had debated detention despite its huge growth since the Blair government.

In detention what happens to one affects all. Following the mass protest on 6th June when a few hundred marched to the windows, MFJ received this message from a detainee:

“The protesting was amazing, I enjoyed every single moment. That was the time to let that anger out and put forward the craving for freedom. Yarl’s Wood is such a confinement and a depressing place that detainees were hoping that protesters would break the gate so we could all escape, some even had their bags ready just in case. I am sure what we did will not be a waste. Thanks to everyone for such a great day.” Marina – Yarls Wood detainee, 6th June 2015

What makes our demonstrations successful? We remind the people who most need to fight of the feeling they had when they were like the people at the borders – when they made the decision and did everything they could to seize their freedom. Join us at the next Yarl’s Wood protest, 7th November 2015, and visit the MFJ Facebook page to find out more.

Antonia Bright is co-ordinator of Movement For Justice.
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Greenpeace’s intrepid climbers often scale stomach-churning heights to make their point. In January 2014 they hung a banner outside the Mumbai headquarters of Essar, the Indian fossil fuel giant incorporated in the UK. In doing so, they roused the wrath not only of the power company but also that of the powers that be.

Eighteen months later, Greenpeace India were hanging banners outside their own offices in protest against the government’s attacks on NGOs generally and its efforts to brand Greenpeace as anti-national and shut them down completely.

In a Guardian article headed ‘India’s war on Greenpeace’ (11th August 2015) Samanth Subramanian noted:

Since May last year, when the Bharatiya Janata Party (BJP) swept to victory in the general election, Prime Minister Narendra Modi’s administration has cancelled the licences of nearly 9,000 NGOs receiving some measure of foreign funding, on the grounds that they filed their accounts irregularly. Other NGOs—including the Ford Foundation—were placed on a watchlist, so that every bit of money they received from overseas needed first to be cleared by the home ministry.

Even in what Subramanian calls ‘the hothouse of hostility’ of today’s India, ‘no organisation has been lavished with as much unwelcome attention as Greenpeace’ which started in June 2014, weeks after the BJP took power, when a ‘secret’ report by India’s Intelligence Bureau (IB) was leaked to the press. The IB accused Greenpeace and other NGOs of causing a 2-3 per cent decline in India’s GDP by protesting against mining projects, power plants and genetically modified food. No figures were provided to back up this claim. But the implication was clear. It wasn’t a question of differences over sustainable development on the one hand and rapacious exploitation on the other; if NGOs receive any of their funds from abroad then they must be working as agents of foreign governments or businesses to undermine India’s economy.

In July 2014 the Ministry of Home Affairs (MHA) blocked GP India from receiving overseas funding and launched an investigation of its accounts. The NGO noted that international law guarantees the right of NGOs to access funding, whether from domestic, foreign or international sources (see Art.13, UN Declaration on Human Rights Defenders, GA Res. 53/144). Greenpeace took the MHA to the Delhi High Court where, six months later, the Court ordered the government to unfreeze the accounts and held that:

‘The petitioner’s disagreement with the policies of the Government of India, could not, per se be construed as actions which are detrimental to national interest. Non-Governmental Organizations often take positions, which are contrary to the policies formulated by the Government of the day. That by itself [...] cannot be used to portray petitioner’s action as being detrimental to national interest’.

Just days before that judgement was given, the government stopped a GP India activist from travelling to London to talk to an informal group of British MPs about a planned strip-mining project by Essar Energy, an Indian fossil fuel giant incorporated in the UK. Priya Pillai had worked for years with forest dwellers opposed to the project and the government claimed her motive for travel was to carry out ‘a campaign against the Government of India in order to impact India’s image abroad at a time when India is looking forward to foreign direct investments in India’s infrastructure and manufacturing sector’. They said MPs would use her ‘to rate India at a low level, leaving India open to a potential sanction regime’, which would have ‘a global cascading effect and serve only the foreign policy interests of a foreign nation [...] that is sufficient material to indicate that [Ms. Pillai’s] intended action was prejudicial to national interest’.

The Delhi High Court firmly rejected as absurd the idea that one NGO activist, speaking to an informal group of British MPs, could cause the entire international community to pass economic sanctions against India. Instead, Justice Rajiv Shakdher warned that: ‘[b]elligerence of views on nationalism can often lead to jingoism’. Upholding Ms Pillai’s right to travel, he said that if the government’s view were accepted it would give arbitrary power to the executive, ‘which could, based on its subjective view, portray any activity as anti-national’. In a masterpiece of judicial litotes, he concluded: ‘[s]uch a situation, in a truly democratic country, which is governed by rule of law, is best avoided’.

Priya Pillai’s right to travel was upheld by the court, and GP India’s long fight to protect ancient forests was vindicated when the Ministry for the Environment issued its advice that the Mahan region is an ‘inviolable forest area’ and the Ministry for Coal and Mines blocked Essar’s proposed mining project there.

GP India generates two-thirds of its funding from domestic donors, so when the MHA had failed in January 2015 to stop overseas funding, GP International in Amsterdam sent three tranches of money to help GP India. The first two were duly credited but the third never showed up. GP India’s bank said it had received an instruction from the ‘regulatory authority’. The bank refused to provide copies of the instruction or to name the authority. So on 8th April 2015, GP India wrote to the MHA. On 9th April, the MHA ordered GP India to show cause why its right to receive funds under the Foreign Contributions Regulation Act (FCRA) should not be cancelled. The MHA not only suspended GP India’s FCRA registration accounts but froze all its bank accounts, both foreign and domestic.

So it was back to court again. Again GP India prevailed, securing an interim stay of the MHA’s order and access to enough of its funds to continue to function pending a final ruling. Then the next hammer blow fell. GP India is registered in the State of Tamil Nadu at Chennai (formerly Madras). The very day after the Delhi High Court stayed the MHA’s order, the Registrar of Societies in Tamil Nadu telephoned to announce his intention to conduct an immediate inspection of all of GP India’s files for all of the 13 years since GP India had first registered. The Registrar’s inspector seemed generally content with what she found on file. But
Within two weeks the Registrar himself ordered GP India to show cause why its registration should not be cancelled—which would force the organisation to wind up its affairs permanently.

The MHA is also targeting the Ford Foundation and other NGOs in what amounts to a chilling effect on all of Indian civil society. Over 180 civil society representatives have written to the MHA that: ‘[t]he government’s attempts to browbeat civil society will not make the issues of social and environmental injustice disappear. We assert that as long as these issues remain unresolved, civil society actors will continue to do all that is necessary towards a just and sustainable society’. The MHA continued its war of attrition. In September, the day before the Delhi High Court hearings were to resume, the MHA issued an order cancelling the registration altogether, thus making moot any further hearing on its suspension. Not daunted, GP India went to court again, this time choosing Chennai as its forum due to the cost and inconvenience of sending staff and records to Delhi each time the MHA tried to shut it down.

The Chennai High Court stayed the cancellation of the FCRA registration. As we go to press, the Chennai High Court is dealing with two GP India cases: against the MHA as well as the Tamil Nadu Registrar. GP India asserts both have acted ultra vires and unconstitutionally. These two cases may soon be joined by a third, since income tax officials have suddenly issued huge demands, disallowing deductions always accepted as legitimate in the past.

The attacks on GP India by the MHA, the Registrar and the Income Tax Assessor all repeat in almost identical language the secret report of the Investigation Bureau that began the war on Greenpeace in June 2014. The government still refuses to publish the report or evidence to back it up. Greenpeace has won every time its cases are presented before India’s independent judiciary.

But these relentless attacks have taken a toll. Earlier this year GP India failed to deal with internal complaints of serious sexual harassment. These failures led to two of its most senior staff resigning amid a morale crisis. Professional external advisors are helping GP India to rebuild trust, establishing effective complaints procedures. New interim executive director Vinuta Gopal told the Guardian: ‘Greenpeace certainly has to reinvent itself [...] Merely hanging off a building or a power plant isn’t going to make a difference. It has to be arguments that people believe in, investigations, exposés. Ultimately, it’s going to be the power of the people that brings about change, not a small group saying: “This is the way things should be”’. Delhi has worse air pollution than Beijing and in September 2015, Greenpeace sent an open letter to Prime Minister Modi: ‘We congratulate you on setting new and ambitious renewable energy targets for India, and urge a focus on decentralised renewable energy as the fastest, most cost-effective way to tackle India’s energy poverty challenge’. Noting the role civil society can play towards achieving those goals, GP meanwhile asked him to ‘take note of the campaign of intimidation that the Indian Ministry of Home Affairs is currently engaged in against Greenpeace India and other legitimate NGOs’.

In June 2015, the UN Special Rapporteur on Freedom of Assembly and Association drew the General Assembly’s attention to the killing and jailing of environmental defenders in India (see A/HRC/29/25/para. 42) and he criticised governments that ‘place restrictions on access to foreign funding to curtail the activities of associations engaged in environmental protection work’. He specifically condemned the Indian Government for blocking GP India’s overseas funding (see A/HRC/29/25/para. 62).

While the government blocks overseas funds to Greenpeace, it actively encourages overseas funding to environmental despoilers and polluters... £600,000 of Greenpeace India’s annual budget was coming from overseas. By comparison, Essar planned to invest over £400m in two coal-fired power plants in Mahan.

Flexing its economic muscle in what can only be seen as an act of malice against Greenpeace for its successful Mahan campaign, Essar recently filed a criminal defamation suit against the legal director of Greenpeace International, the former Executive Director of Greenpeace India and Priya Pillai. GP India has filed a constitutional challenge in India’s Supreme Court, which has stayed Essar’s case pending consideration of a number of other challenges to India’s Victorian era law.

Time, and the courts, will tell whether wealthy and powerful corporations like Essar, will be allowed to stifle freedom of expression and association of public interest organisations like Greenpeace, by the use or threat SLAPP (Strategic Litigation Against Public Participation) suits which can result in multi-million pound verdicts with costs and up to two years imprisonment upon conviction.

Time will also tell whether the Indian government will continue its war against Greenpeace or instead recognise the shared interest of civil society in achieving the sustainable development goals the government claims to support.

Until then Greenpeace India continues to believe you can’t muzzle dissent in a democracy and, in the words of Rabindranath Tagore: ‘Where the mind is without fear and the head is held high Where words come out from the depth of truth Where the mind is led forward by thee Into ever widening thought and action Into that heaven of freedom, my father Let my country awake’

Extract from Where the mind is without fear by Rabindranath Tagore, Nobel Laureate.

Richard Harvey, chairperson of Garden Court International, currently works as a consultant to Greenpeace International, where he advises on human rights and other issues affecting Greenpeace India.
‘Carry on, just don’t get caught’

Lethal Allies: British Collusion in Ireland Anne Cadwallader Mercier Press, 2013

That was the British Government’s message to the head of Northern Ireland’s Special Branch, approving the protecting and directing of loyalist paramilitaries’ terror campaigns of the 1970s and 1980s. ‘Move on, don’t ask for the truth, forget about the past’. That, in essence, is today’s British Government’s message to the families of hundreds of women, children and men who were in no way connected with paramilitary activities but were victims of a concerted campaign of over 120 state-sponsored sectarian murders.

Anne Cadwallader, a veteran journalist and commentator on the North, joined the Pat Finucane Centre as a caseworker five years ago. Her book Lethal Allies: British Collusion in Ireland is the product of the PFC’s 15 years of painstaking research into over 120 killings in the small ‘Triangle of Death’ centred mainly on Armagh and South Tyrone.

Only one of those victims was an active republican, while at least 65 separate families lost loved ones in attacks attributed to the ‘Glenanne Gang’ and their associates between 1972 and 1977. Active members of that gang included both former and serving soldiers and police officers.

Anne condemns ‘the abject and inexcusable failure of the British and Irish states to abide by their own democratic principles and to vindicate the rights of their citizens, thereby prolonging the conflict’. Thence prolonging the conflict. There, in part, lies the rub. Like Bloody Sunday, state-sponsored murder of ordinary nationalists on their streets, at their homes, in their pubs and on their farms operated as a form of “collective punishment” of the entire Catholic community irrespective of their views on republicanism. It alienated whole groups from those sworn to protect them.

 Bloody Sunday, although clearly planned in advance, erupted over a few hours in one city on one day in 1972. The Glenanne Gang operated for throughout mid-Ulster for over five years. Cadwallader notes that David Cameron rightly apologised for Bloody Sunday and Hillsborough. However, given that this gang, sponsored by Britain’s security forces, was responsible for almost eight times the number of deaths inflicted on 30 January in Derry and even more than died at Hillsborough, the government’s total silence in the face of this uncontroversed evidence is indefensible.

The evidence points to collusion at the highest level in failing and refusing to do justice, implicating senior politicians, police chiefs, the former DPP’s office, and the judiciary. Lord Chief Justice Lowry shamelessly described police officers who carried out this campaign of terror as acting ‘either wrongly or emotionally from the same powerful motives, in one case the mortal danger of their service and in the other the feeling that more than police work was required to rid the land of the pestilence which has been in existence’. Those were his words as he passed suspended prison sentences in 1980 on four officers who mounted a nailbomb and gun attack on a busy country pub in 1976 with clear intent to murder. He expressly differentiated them from terrorists who ‘attack the very fabric of society’, calling them ‘misguided but above all unfortunate men’.

If those men were indeed motivated to ‘rid the land of the pestilence’ of the IRA they were indeed misguided for, as Anne Cadwallader notes: “almost the entire IRA leadership escaped the conflict very much alive’ and, ‘far from bleeding support away from militant republicanism, collusion fed the conflict’. Which, as she says, begs the question ‘why?’.

Westminster has sought, in her words, ‘to portray itself internationally as an honest broker between two rival, incomprehensible and irrational religious tribes’. But the overwhelming majority of those targeted by this sectarian gang ‘were progressing economically, socially and politically… a new generation of Catholics’. The motive was not to take out the IRA but, as John Newsinger has written in British Counter-Insurgency: from Palestine to Northern Ireland: ‘The Protestant murder gangs helped wear the Catholic working class down’.

Father Denis Faul, a vocal opponent of the IRA, accused the government at the time of teaching “a deadly lesson to the people—that power came out of the barrel of a gun, that the ballot box is powerless against force, that police and army can betray their trust and not be the impartial servants of the government and people, that the judiciary can fail to oppose tyranny and protect life’.

Some readers may be tempted to say: ‘what’s new?’. After all, the Pat Finucane Centre itself is named for our colleague, assassinated by agents of the British security forces over 35 years ago and his family’s campaign for justice continues unrequited to this day.

Are we in danger of becoming inured to successive revelations of this nature? That is clearly what the government hopes. But this superbly written account fearlessly names names. An appendix lists 22
former members of the security forces as members of the gang. A few were convicted of murder; others, despite very strong evidence against them, received only minor convictions. Many more were protected by their superiors and escaped justice.

Naming names is a publisher’s nightmare. So, prior to publication, Anne voluntarily submitted the manuscript to Northern Ireland Secretary of State, Theresa Villiers for review. No security-related concerns were raised. Four times the PFC has requested meetings with the NIO to discuss the issues raised by the book. Four times they have been turned down. And there hasn’t been the faintest whiff of a libel suit from those named.

The Historical Enquiries Team (HET), set up to review these and other killings, had almost completed its review of the killings by the Glenanne Gang by 2010. It reported ‘Indisputable evidence of security forces’ involvement with loyalist paramilitary murderers [that] should have rung alarm bells all the way to the top of Government. Nothing was done, the murderous cycle continued’. And then the HET was disbanded. The PSNI has refused to complete the review.

So Lethal Allies is now an official exhibit in judicial review proceedings brought on behalf of the victims in the Belfast High Court before Mr Justice Seamus Treacey QC. The judge himself described the book’s revelations in it as “deeply disturbing”.

Disturbing too was the claim by counsel for the Chief Constable that there was ‘no utility’ in completing the report and that doing so would ‘produce nothing new’. In court a spreadsheet was handed to Treacey J by counsel for the PSNI. It listed members of the security forces who were either convicted or suspected of offences carried out by the gang. The list ran to five pages.

The case is adjourned pending the Supreme Court’s judgement on yet another refusal by the government to conduct an inquiry or proper investigation, this time into a 1948 massacre of 24 unarmed men by British soldiers during the Malayan ‘Emergency’: Chong Nyok Khey & Others v Secretary of State for Foreign & Commonwealth Affairs, UKSC 2014/0203. (See Slaughter and Deception at Batang Kali, Ian Ward and Norma Gilfor). A particular feature of the Glenanne Gang is that they were not only controlled by puppet-masters in the security services; in this case, the security forces were both pulling the strings and pulling the triggers. Anne Cadwallader’s conclusion sums up what the present government, like its predecessors, refuses to recognise: ‘It is easy for those who have not suffered bereavement and injustice to lecture those who have, about ‘moving on’. Easy and insulting. Moving on is impossible when the truth lies buried in a barren field in Armagh without a headstone. Clichés are not enough for families who were not only bereaved but also ignored.

For practitioners, textbooks on administrative law is a bit of a crowded market. Well-established titles (De Smith on Judicial Review) rub shoulders with newcomers promising ‘practical guides’. This textbook is, as its title suggests, a practical guide rather than an academic discourse on administrative law, although it contains a useful brief history of the development of judicial review and the basic principles (illegality, irrationality and procedural impropriety) formulated by Lord Diplock in the GCHQ case (Council of Civil Service Unions v Minister for the Civil Service). It usefully breaks each of those principles down into a number of sub-headings: irrationality is broken down into Wednesbury unreasonableness, proportionality, and bad faith/improper motive. Each category helpfully ends with a list of recent cases on the point. In keeping with the rapid development of judicial review over the last 30 years, since Lord Diplock, the authors discuss additional public law grounds of challenge: breach of rights and freedoms protected by the Human Rights Act, by common law and by European Union law. There are very practical chapters on remedies, delay, procedural details and a useful chapter on tribunals which concludes with a helpful diagram showing the destination of appeals from the different specific first-tier tribunals. There is also a very welcome discussion of the use of alternative dispute resolution, specifically mediation, in the context of public law disputes.

However, I was concerned about some of the details. The passages on costs referred to the Access to Justice Act 1999 rather than Legal Aid Sentencing and Punishment of Offenders Act 2012, despite the latter coming into force in April 2013. The terminology is out of date (“public funding” used rather than “legal aid”). And the useful discussion of principles to be applied where a judicial review claim is discontinued without agreement as to costs concludes with the 2001 case of R (Boxall) v Waltham Forest LBC, rather than the more up-to-date authority of R (MI) v Croydon LBC decided in 2012 (the latter case appears in the specific chapter on housing, but not in the more general commentary on costs). Neither is there any mention in the text on costs of the Administrative Court Office’s Guidance on how parties should assist the court when applications for costs are made following settlement of judicial review claims: guidance that came into force on 1 December 2013, although it does appear in the appendix. There is no discussion of the restrictions on recovering legal aid costs if permission is refused, a measure that came into force first in April 2014 although it has been through several formulations since, as a result of judicial review challenges.

There are 12 chapters on specific areas of law. I read two of them: community care and housing. The chapter on housing was up-to-date and comprehensive as far as the law in England was concerned. There was no mention of the differences in Welsh housing law, differences which are more profound since April 2015 when Housing (Wales) Act 2014, Part 2, on homelessness came into force. I was surprised that the chapter on community care failed to mention the Care Act 2014, which came into force on 1 April 2015 given that its details were well-known to practitioners at the date of 1 December 2014, when the book was due to be published. Most of the contents of the community care chapter are now out of date.

Overall, the general chapters contain very useful aide-memoires on the general principles and recent cases applying those principles. However, my concerns about the community care chapter are profound, and I cannot judge whether there are similar omissions with the other specialist chapters. I should declare an interest, as I am published by the same publisher.

Richard Harvey

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