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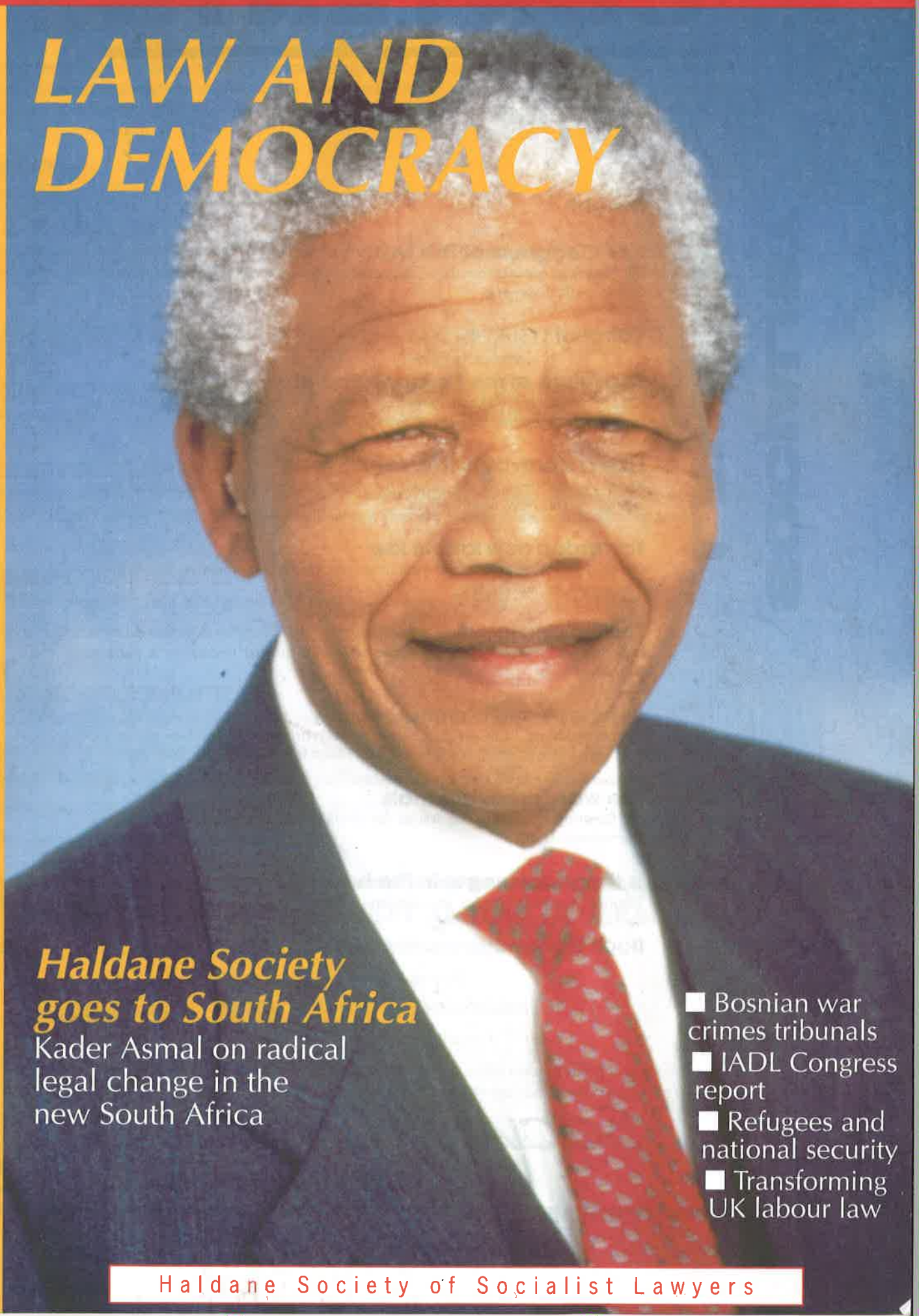

LAW AND DEMOCRACY

Haldane Society goes to South Africa

Kader Asmal on radical legal change in the new South Africa

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

Haldane Society of Socialist Lawyers

CONTENTS

SOCIALIST LAWYER

Socialist Lawyer

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SOCIALIST LAWYER
ISSUE 27 WINTER 1996

HALDANE SOCIETY OF SOCIALIST LAYWERS

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

NOTICE OF HALDANE SOCIETY ANNUAL GENERAL MEETING

The Haldane AGM will be held on:

11th January 1997

SOAS Lecture theatre (nearest tube Russell Square)

2.00 p.m. - 5.00 p.m

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

Address for sending notices: c/o Doughty Street Chambers, 11 Doughty Street, London, WC1N 2PG.

INSIGHT

Researching Police Actions - request to lawyers for information

As a result of the increase in civil actions against the police, in August 1994 the Metropolitan Police Commissioner made a policy decision to defend actions in preference to settling. Earlier this year juries awarded plaintiffs six figure sums in several cases and the Commissioner is currently appealing 10 awards totalling over £1.3 Million. The first appeals are listed for 8 December 1996.

Graham Smith, who is researching a Ph.D thesis on police actions at University College London, has undertaken a research project for solicitors defending these awards. The immediate aim is to account for as much as possible of the Met's annual figures on awards and settlements, running at approximately £1.5 million. In the longer term it is hoped that a more accurate list of awards/settlements will be available to practitioners nationwide.

The basic information required is - Plaintiff's solicitors; date of award/settlement; court and case reference; amount of award/ settlement; amounts of compensatory/exemplary damages; causes of action; nature of injuries; length of false imprisonment; summary/indictable charges; time waiting for completion of criminal proceedings; whether complaint proceeded with; amount paid into court before trial; police station involved.

For further information please contact Graham Smith at D.I.S, Box 7459, London N16 6QQ. Tel/fax 0181-806 4952.

Draconian Changes to Child Support Regulations

The coming into effect of the Child Support (Miscellaneous Amendments) Regulations 1996 on 7 October is another example of this Government pursuing policy regardless of the fallibility of its instruments of administration. In May 1996 the Child Poverty Action Group criticised the Government for the fact that 400,000 applications were still outstanding- many for more than a year, when in the same period 27,000 families on benefits were penalised by deductions for non co-operation.

The Government's response has been to introduce more stringent penalties for those who do not assist the Child Support Agency in tracking down absent parents. Previously the Agency could order a deduction of £9.58 per week for 6 months form the income support of parents failing to c-operate, followed by £4.79 for 52 weeks. As of 7 October the sum of £19.16 per week will be deducted for 3 years, with the option of a further renewal thereafter. Naturally the vast majority of those who suffer as a result of these regulations will be children living in families where those deductions are made. As this beefing up of punitive powers is unlikely to accelerate the processing of the majority of applications to the Agency it would seem, once again, that the Agency's main concern is really the reduction of Welfare payments.

No means No - Update from English Collective of Prostitutes

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

The Court of Appeal rejected approach in favour of what the unschooled observer may seem dangerously like common sense. Lord Justice Staughton commented that you cannot classify people as worthy or unworthy of belief because of being a prostitute or otherwise but that you have to judge people as individuals. The judges reaffirmed that prostitutes are entitled to say no and to be protected by the court. Unfortunately this view does not yet appear to be shared by the CPS, or by the CICB which still reduces compensation awards to prostitutes on the basis of their 'character and conduct'.

Conference on Refugee Rights

The Human Rights Law Centre at the University of Nottingham are holding a conference entitled Refugee Rights and Realities - approaches to law and policy reform, on 30 November 1996 at the University of Nottingham.

Speakers will include Nick Blake QC, Richard Plender QC, Glyn Ford MEP, Professor Guy S. Goodwin-Gill and Patricia Hyndman. The conference will examine changing definitions, perceptions and strategies concerning refugees in the world today.

Enquiries and requests for registration forms should be directed to Frances Nicholson, Department of Law , University of Nottingham, NG7 2RD. Tel: 0115 951 5694. Fax: 0115 951 5696. Email: Patrick.Twomey@nottingham.ac.uk

Employment law subcommittee expands its work

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

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

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

Copies of the briefing paper and further information about the subcommittee are both available from Michael Ford, Doughty Street Chambers, London . Tel: 0171-404 1313.

The Employment Law Subcommittee meets at the Haldane office on the third Tuesday of every month. New members are welcome.

Papers from the Committee's 1994 conference have been recently published in a book format. 'The Future of Labour Law', edited by Aileen McColgan, is published by Mansell.

International subcommittee meetings

The International subcommittee of the Haldane Society are holding the two following meetings:

Tuesday 12 November 1996 - Kathleen Barry from the Coalition against Trafficking in Women will speak at 7pm in the Haldane Office.

Tuesday 10 December 1996 - Madelaine Rees will speak at 7pm on the work of the International Forum for Women's Human Rights.

IADL XIV CONGRESS

"CHALLENGES FOR LAW AND LAWYERS IN THE NEXT MILLENNIUM: DEMOCRACY IN DOMESTIC AND INTERNATIONAL LAW"

CAPETOWN, SOUTH AFRICA

31 MARCH - 6 APRIL 1996

This Conference was organised by the International Association of Democratic Lawyers (IADL); it was the XIV Congress of the IADL, and celebrated IADL's 50th anniversary (it was founded in 1946), as well as two years of a free South Africa (the IADL organised a delegation of some 60 international election observers in the 1994 elections). Bill Bowring was a member of the Preparatory Commission.

The Conference attracted about 260 participants from some 33 countries (Africa: Sudan, Somalia, Kenya, South Africa, Senegal, Benin, Namibia, Mozambique; Europe: UK, Belgium, France, Germany, Spain, Bulgaria, Yugoslavia, Russia; Asia: Japan, Korea, India, Pakistan; Middle East: Morocco, Algeria, Tunisia, Libya, Egypt, Palestine, Israel; Americas: USA, Jamaica, Cuba, Brazil, Argentina, Martinique).

The UK group, most of whom were Haldane members, was the largest, 45-strong, including several EC members (Kate Markus, Keir Starmer, Richard Bielby, Steve Cragg, Debbie Trippley, Catrin Lewis, Phillippa Kaufman), academics (Kwame Akuffo from Thames Valley, Patrick Twomey from Nottingham, Anne Singleton from UCL, and Bill Bowring), QCs (Helen Grindrod, Joanna Dodson, Stephen Solley, John Platts-Mills), senior solicitors (Michael Ellman, Louise Christian), and other solicitors and barristers, including Peter Herbert, chair of the Society of Black Lawyers. The next largest groups were from Japan, USA, and India. This was a conference which sought to bring together theory and practice.

The Conference opened on Monday 1 April with a splendid gathering in the Capetown Parliament Building. Speakers included South African Justice Minister Dullah Omar; Kader Asmal, the Water and Forestry Minister and former Professor of Human Rights Law at Trinity College Dublin; Constitutional Court Judge Albie Sachs; and IADL veterans such as Jamal Al-Sourani of Palestine (he is Secretary-General of both the Union of Palestinian Lawyers, and of the PLO), Joë Nordmann of France, and John Platts-Mills Q.C. (90 this October). Justice Corbett, President of the Supreme Court, was also present. Kader Asmal gave a particularly fine presentation on the detail of the fourth refined draft of the New Constitution, now nearing agreement.

On Tuesday 2 April the Conference was honoured by a visit from President Nelson Mandela. Together with other members of the IADL Bureau, Bill Bowring met him briefly. Mandela told the Conference that if he had not been invited, he would have invited himself. He gave a fine presentation, commenting on the fact that law schools were established in Africa long before their counterparts in Europe, and were based on linking law to social progress. He highlighted three significant aspects of the Working Draft Constitution: first, promoting and entrenching a human rights culture, particularly gender equality; second, the right to legal representation and legal aid; and third, the set of supporting structures, including the Office of Public Protector, the Human Rights Commission, and the Truth and Reconciliation Commission. But above all he stressed the need for a real change in the circumstances in which ordinary people live.

The main work of the Conference took place in five Commissions. Despite disorganisation, and some inappropriate chairing, these produced some valuable work. The first, on "Rights to Economic and Social Development", was chaired by Jitendra Sharma, Senior Advocate at the Indian Supreme Court. It heard presentations by Prof Chapeau of Cuba, Profs Rajland, Farinati and Mackinson of Argentina, Prof Eric Sirotkin of the USA, Ann Pettifor of the UK, Monique Picard-Weyl of France, William Waterman of the US, and Prof Snejana Natcheva of Bulgaria. Commission II was concerned with "International Remedies for Violations of Human Rights and the Duty of Solidarity". It was chaired by Doris Brin Walker of the USA, and heard papers by Jamal Sourani of Palestine, Mr Justice Suresh Desai of South Africa, Prof Nelly Minyersky of Argentina, Patrick Twomey of Nottingham University (on "Both Stranger and Fiction: Redefining the Refugee in International Law"), and Daniel Stranga of Argentina.

Commission III, on "International Interdependence" was chaired by Dr. Bilal Hasan Minto of Pakistan, and heard papers by Prof Nario Tanaka of Japan, by Bill Bowring (on "France, Polynesia, Nuclear Testing, the World Court: Law and the Public Conscience"), by Jitendra Sharma of India on the NPT, and by others. Commission IV, on "International Crimes", was chaired by John Platts-Mills. It heard papers by Arthur Heitzer and Prof Anne Fagan Ginger of the USA, and Charles Mirega of Kenya and John Philpot of Canada on the Rwanda War Crimes Tribunal.

Commission V, on "The Administration of Justice" was chaired by Prof. Jose Felipe Ledur of Brazil. It heard papers by Dr Celsa Pico Lorenzo of Catalonia, Prof Shanara Gilbert of CUNY (on "Equal Justice or Substantial Justice: The Crisis of Provision of Criminal Defence for the Indigent Accused in the United States"), Prof. Adjoa Aiyetoro, Director of the National Conference of Black Lawyers, Prof. Niloufer Bhagwat of India (on "The Criminalisation of Political Expression as a Means of Political Control"), and Jane Winter, Director of British Irish Rights Watch (on "Intimidation of Defence Lawyers in Northern Ireland"). I also addressed a special meeting on Libya and the Lockerbie affair; and some 40 participants attended a meeting on Women and Violence.

Tragically, three participants died in a car crash on the Tuesday night. They were Prof Haywood Burns, former Dean of CUNY Law School, and a pioneer of clinical legal education; Prof Shanara Gilbert, also of CUNY; and Felicia Roberts, a human rights activist in South Africa. They had all been together in the elections in Mafeking, Felicia as head of the local Independent Electoral Commission, and the other two, who were also leading members of the National Conference of Black Lawyers in the USA, as members of the IADL observer mission. Their loss caused great sadness. Memorial meetings for them were attended by Ministers Dullah Omar and Kader Asmal, and by many other South Africans. All participants committed themselves to carrying on the work of those who had died.

On the final two days, the IADL held its General Assembly. This had two main functions. The first was to approve a new Constitution. Haldane succeeded in inserting a requirement that membership of the Bureau reflect a gender balance as well as geographical distribution, and this was to apply at once. Senior officers are to serve for a maximum of two four-year terms. Other changes were uncontroversial. Unfortunately, a "slate" proposed by a Nominations Commission of the outgoing Bureau was elected by means which were not democratic at all, and did not reflect the new gender requirement.

The following were elected. Presidents Emeritus are Nelson Mandela and Joë Nordmann. Amar Bentoumi, former Justice Minister of Algeria, was elected President. Jitendra Sharma of India was elected Secretary-General, with Prof. Lydia Santos of Catalonia as Joint Secretary-General. The headquarters of the IADL will move from Brussels to Barcelona. Bill Bowring was elected Treasurer.

The Bureau includes Lennox Hinds (US Black Lawyers), Doris Brin Walker (USA), Farouk Abu Eissa (Egypt), Osamu Niikura (Japan), Vincent Saldhana (South Africa), a Namibian representative, Beinusz Szmukler (Argentina, Association of American Jurists), Bilal Minto (Pakistan), Gueorgui Petkanov (Bulgaria) and Igor Blishchenko (Russia). New affiliations were accepted from, among others, the Society of Black Lawyers (UK), and the Association of Martiniquan Lawyers.

An important early task for the Bureau will be the formulation, pursuant to the Constitution, of rules for the election of the next Bureau. These rules must ensure that the Bureau is genuinely elected from the General Assembly, and that there is a requirement for prior nomination to give an opportunity for discussion. In addition, Bilal Minto of Pakistan has prepared a paper, which has been circulated for international discussion, on the difficult but vital question of the subscription fees to be paid both by national associations and individuals. The papers given at the Conference will be published in the USA, for circulation world-wide.

There will be a meeting of the IADL Bureau in Paris on 19-20 October 1996. The next public IADL events will be Conferences on International Terrorism, and on the Effects of International Sanctions. Both will be held in Moscow within the next year.

EDITORIAL

Pessimism, existentialism or even (one shudders to think) self analysis may suck, but now and then they come knocking like unwelcome relatives. Gothic horror on the other hand is society's forte. It is time we think for "Socialist Lawyer" to take them by the hand, invite them in, sit them down and indulge in a long dark tea party of the soul.

As we approach our AGM, which will be held on 11 January 1997 (see page 2 for details), it cannot be said that this has been an uneventful year for the Haldane Society, or for socialist lawyers everywhere. The Haldane Educational Trust, with which many Haldane members are involved, has got up and running, and its series of educational seminars appear to have been both remunerative and well attended. A series of monthly seminars on current legal issues was held last year by the Haldane Society, attracting speakers from as far away as the United States, and periodic seminars have continued. Bill Bowring describes the more salubrious aspects of the Society's participation in the IADL congress in South Africa. This sudden conflagration of energy provides welcome signs of life in the Society, and perhaps of the legal body politic.

And yet, over an inky cup of tea, the article by Kate Markus and Rakesh Patel on the direction of socialist law confirms sneaking doubt about the health of the patient. This year we were able to hire a worker - for the first time in history - but sadly not for long. Drumming up attendance at meetings and seminars is giving organizers the staggers, and the Immigration subcommittee has once again gracefully put its legs in the air and croaked. Are we in danger of haemorrhaging again?

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

Peter Lilley has at times had an opponent in the opposite corner in the figure of certain occasional Lord Justices of Appeal. In Secretary of State for Social Security ex parte Re B & JCWI the rather sinister if drily named Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 (known to its chums as the "let's stop those foreigners from pinching our benefits" rules) were knocked for a loop. Lord Justice Brown marshalled some heroic jurisprudence in doing so, and stated in his judgment that "regulations now in force (are) so uncompromisingly draconian that they may indeed be ultra vires."

He also noted that our Hammer goblin's regulations "necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it." "LA Law" eat your heart out folks, this is what being a lawyer should be all about.

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

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

It is right to say that defeatism is not the answer. In deed, perhaps it is a corollary of the fundamental nature of this Government's changes to British social legislation that progressive lawyers have the opportunity to demand a more, not a less, radical agenda. Carolyn Jones's article on a call for a new labour law describes just such a challenge posed by the Institute of Employment Rights.

All too often however the zombie construction crew and their night of the living dead have their way as usual.

In this unusual political world in which we live there is more, not less, need for radical lawyers and radical views on legal practice. The time is here for commitment to rebuilding and reinvigorating the Haldane Society. Meet the challenge.

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

THE FUTURE OF HALDANE SOCIETY

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

Kate Markus & Rakesh Patel

The last 15 years has seen the rise of the right, the strengthening of the global market economy, the weakening of the trade union movement, the degeneration of the Labour Party, and the collapse of the Communist Party. As a result of the marked shift to the Right, few socialists have a solid political base from which to develop their activities. The Haldane Society, like the Left in general, has not been immune to the effects of the political shift to the right.

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

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

Single-issue campaigns

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

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

Human rights do not equal socialism

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

Of course many of the rights that are the subject of such actions will be ones that are an integral part of socialist values. But the legal activities are no more socialist than the opportunism that any socialist lawyer has ever had to exercise in helping their clients to find and use the most appropriate tools to defend and advance their rights, individually and collectively, and to challenge the power of capitalism.

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

It is the content of the clients' struggles and claims, not the legal issues or forums involved, that characterises lawyers' work politically. The move away from the collective struggles of the labour movement by the bulk of the Society's membership has deprived the work of the Haldane Society of much of its real political substance and meaning.

Careerism

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

Times have changed. Fifteen or twenty years ago, socialist lawyers could fulfil all their political leanings as well as build successful careers by lending their skills to the labour movement. The high levels of left activism meant that there was no end of confrontations between working class and state which required the services of committed socialist lawyers. That is not the case now. Socialist lawyers cannot concentrate solely on the courts but must move into other arenas if they are to give meaning to their political beliefs.

Keeping in touch with reality

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

If members are not involved in organisations and activities outside of their professional lives, they can have no real comprehension of the world around them. How then can we hope to involve ourselves effectively in campaigns about improving peoples' lives and challenging the political systems that oppress and repress?

"There are disheartening levels of disinterest in some of our major campaigns and paltry responses to appeals for much-needed funds."

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

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

What the Haldane Society can do

As we have said, we believe that the Haldane Society is as important as ever. The problems that we have highlighted are not inherent in the Society but are features and symptoms of the general condition of the Left. It is vital that the Society tackles these and many other questions and issues that we are sure that members will identify. The Law and Democracy" Conference in October is an important overture, but work must not stop there.

The Society must also consider practical steps that can be taken to build itself as an effective socialist body. Here we offer a few suggestions. We hope that members will make many more.

Services to members

Levels of activity through our subcommittees are, with some exceptions, at a very low level. This is not surprising where there are other organisations prominently involved in particular campaigns that are of interest to our members.

The Society must identify what it can do that is unique, as a socialist organisation, that is not offered by other national campaigns. For instance, in the field of immigration we should be developing proposals for a just immigration policy which is based on a socialist programme of government. This can then inform any immigration campaigns and activities in which members of the Haldane Society are involved, whether they be conducted from within the Society or elsewhere. Similar steps could be taken in every area of our work.

Working with the community

The Haldane Society should develop much closer links with community organisations. This could be done by working with lawyers involved in the community, for instance law centres. Projects could be developed to provide legal resources to community campaigns. We should encourage people from local campaigns to become involved in the activities of the Society.

Responsibilities of lawyers to the public

An issue that cries out to socialist lawyers is that of access to justice for working class people. Yet the Society has never sustained and developed a socialist policy on the future of legal services. We do not understand the reasons for this. We need to develop a new less detached and more political concept of legal aid and legal services which will bring us closer to our clients and remove us from a system of rules which is used by the state to its own advantage. With the legal aid scheme and the civil justice system under intense review, the time is now ripe for the Society to take up these questions.

A bright future

Our intention in raising these questions is to stir members into involvement in the debate and thorough analysis which is needed to ensure that the Society can play its vital role in the future. If members agree with us as to the importance of the Society, then they cannot in conscience ignore these issues.

After the Law and Democracy" Conference, we will be taking forward many of the agenda issues by providing opportunities for further analysis, work with other organisations, and practical campaigns of the Society.

We will also continue to provide opportunities to debate the role of the Haldane Society.

Any contributions to the debate by readers will be most welcome.

GET INVOLVED ... GET ACTIVE

The Haldane Society of Socialist Lawyers needs the involvement of as many members as is possible if it is to continue to pursue campaigns for radical legal change. All of the Society's subcommittees are open to any member and the Society is always happy to have members start new subject-based or regional subcommittees. For those with journalistic or publishing skills, the Socialist Lawyer collective is always looking for new blood. Forthcoming issues of Socialist Lawyer will have space reserved for articles and letters responding to the arguments put forward by Kate Markus and Rakesh Patel. We look forward to your views. Get in touch with the Haldane office at Haldane Office, 20/21 Tooks Court, London EC4A 1LB and get involved.

LIKE A STORM OVER THE VELD

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

Kader Asmal

Let us recall the powerful, if simple words of Nobel laureate-in-waiting, Wally Serote, uttered at the height of oppression in 1971, before Soweto burst over the land: "I do not know where I've been, But brother, I know I am coming. I do not know where I have been, But, brother, I come like a storm over the veld."

Let us, then, also remember those, in South Africa and elsewhere, who worked, and fell, in the great cause of our liberation. Let us also remember those who managed to use the law, despite apartheid, to challenge repression while at the same time not giving legitimacy to an evil regime. Let us remember those who provided the inspiration, the finance and the expertise from beyond South Africa's borders in this great cause.

The South African struggle brought out what is most ennobling in the profession of law. I hope that the presence of the IADL here, at this particular place, ennobles the profession further.

The Indivisibility of International Human Rights

The IADL structure is not accidental. With its international umbrella organisation both nourishing and being nourished by affiliated local branches, it is the institutional embodiment of an important truth about international law. As Princeton University's Professor Richard Falk has pointed out, systems of international obligation only resonate in the real lives of people if domestic legal systems are responsive to these international norms. Under apartheid, South Africa's local lawlessness, internal repression, cross-border aggression and international pariah status were all of the same cloth. Conversely, in the new country, international law is explicitly part of the constitutional interpretation of domestic laws.

Multilateral institutions in which nation states co-operate remain an essential ingredient of social progress across the world. And yet, in domestic and international politics alike, an ideological assault continues on the idea of governance. The domestic political rhetoric that bashes "big government" finds a global echo in the assaults on international institutions (apart from transnational corporations, which continue to prosper) and in the wealthy countries' quid pro quo attitudes to the funding of organisations like the United Nations. In domestic and international politics alike, vast increases in the power of private self-interested institutions coincide with a political agenda that would strip the organs of governance of the tools they need to be effective. Yet the result of this strategy — unfettered private power — leads directly to warlordism rather than stability.

What kind of governance?

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

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

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

The great challenge facing lawyers is the insertion of minimum rights in a manner which does not leave them vulnerable to the whims and fancies of judges and courts, in other words, the constitutionalisation of minimum human rights.

And human rights must include, but not be restricted to, social and economic rights. The protection of political rights as a prerequisite for the demand for, and achievement of, political rights is not a guarantee of social and economic rights - which must find embodiment in the Constitution, whatever rearguard actions are fought against this. There can be no doubt that the Constitution applies horizontally. The question is to what extent this is so.

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

The Continuing Relevance of International NGOs

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

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

IADL played a major role in the battle to ensure that apartheid was recognised for what it was: a crime against humanity. Because of the efforts of IADL and others, apartheid was repeatedly certified such a crime by the international community.

Nothing better illustrates the indivisibility of domestic and international politics than that achievement, which galvanised an international sanctions campaign on the back of local outrage everywhere in the world; and which sped domestic political change on its way here in South Africa.

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

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

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

This is prattle, not analysis. The more one probes this alleged distinction between means and ends, the more one finds not merely a procedural difference about how to change things, but actually a substantive difference over the nature of the old South Africa and the nature of the necessary changes in the new country. We find relative discomfort with the new order and relative comfort with the old. Thus there is a dismissal of the historic 1994 election as "more a ritual to end apartheid than anything else"; problems are seen about the "democratic legitimacy" of the 1994 election; it is described as a mere battle for turf.

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

Predictably, such attempts to talk down the vastness of recent South African achievements is coupled with an attempt to rehabilitate the apartheid past. This double-agenda represents two sides of the same coin. Thus it is argued that apartheid, while a bad thing, was not so bad as to amount to a crime against humanity. The argument is that the entire idea that apartheid was a crime against humanity was merely a figment of cold war propaganda, conjured up by the communist bloc for its own purpose; that the characterisation of apartheid as a crime against humanity was a claim rejected by the civilised or "freedom-loving" world. The sole evidence produced for this proposition is the vote of two western countries on particular UN motions, thus selectively ignoring the recorded contrary conclusions of those same countries on other occasions.

Apartheid and Civilisation

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

The claim that apartheid and civilisation were of the same camp is grotesque, but it is not new. This claim was in fact always a central plank of apartheid's own international propaganda. "We are the bearers of the values that made the West great. We are Europe in Africa," said apartheid's Finance Minister, Dr Diedrichs, in December 1967.

Eurocentric commentators — those uneasy in Africa, feeling themselves besieged by barbarity; people we might more aptly call Eurotic — seem to forget that there are problems of global power and powerlessness, of global wealth and dispossession, analogous to South African domestic politics of looting and oppression under apartheid. This is another aspect of the indivisibility of domestic politics and international affairs.

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

Foreign policy, no less that other government policy flows from domestic institutions. Those who are best placed to influence a state's domestic policy are also best placed to influence its foreign policy. The lesson here is that if we genuinely enable the broad populace to reshape the central institutions of our domestic politics, the good effects of that transformation will spill also into our international involvements.

"In whole areas of South African life, the challenge of generating progressive legal and policy solutions has become urgent since for the first time there is a government that wants to implement these ideas"

The countries of "the West" are not today immune for this general truth — that foreign policy is driven by strong domestic constituencies - nor were they immune from it during the apartheid years. Many lobbies impact on the policies of all governments, including Western governments. And not all lobbyists are civilised. Elements within Western countries that backed policies of collaboration and "constructive engagement" with apartheid represented only one voice of the West, and this voice did not automatically remain "civilised" by mere virtue of being Western. One cannot recall too often Ghandi's comment upon arrival in London to negotiate the future of India. Asked by a reporter what he thought of Western civilisation, Ghandi replied: "It would be a good idea."

There are and always have been civilised strands to Western politics; but the struggle of civilisation against the forces of violence and greed is everywhere, including in the West, a ceaseless one in which there can be real setbacks. The Western world's civilised best-self emerged at those times when its anti-aparthied constituencies gained the upper hand, when international opposition to, and sanctions against, apartheid gathered momentum.

The "West" is no more a monolith than is South Africa; the "West" contains forces of barbarism as well as of civilisation, as does South Africa, including the new South Africa. The democratic political process is exactly the means through which the balance of forces shifts between these poles (and others), at least in systems, unlike apartheid, where genuine politics is permitted. So there are no inherently "civilised" countries; only civilised and uncivilised politics.

Progressive Lawyers in the New South Africa.

Sadly one can often say of lawyers what F Scott Fitzgerald said of his lunatic wife - that she was "tragically brilliant on all things except those of actual importance." South Africa has always had - and still does - its share of irrelevant legal pendants, imagining angels on the heads of needles while letting devils slink by. These were the fitting scriveners of apartheid, a system which, as one scholar has recently put it, law degenerated to the pursuit of violence by other means. But there has always also been a vibrant practice of human rights legal idealism in South Africa; it is a tradition whose time has come. We must not squander this opportunity through lassitude or organisational disarray.

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

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

The Need for a New Strategic Lens.

My favourite example is that of anti-trust policy. Since when, we might ask, do socialists advocate competition? We know that the rhetoric of competition is often, for instance, misused as part of capitalist's assault on labour. But we must take a close look. What, we might ask is the root cause of the risks that I have outlined above - the risk that powerful domestic constituencies may capture legal and regulatory institutions of the new democracy? The short answer is: concentrated economic power.

As a US President said earlier this century, if there are men in a country big enough to rule it, they will. If we will not tolerate a political despot, neither should we put up with an autocrat of trade. Nobody must be bigger than the national interest.

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

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

We cannot, as progressive lawyers, allow the warp and weft of governance to bypass us. This would allow our opponents to recapture governance by default.

So I propose a challenge: the revival of the old cross-border collaboration that we put in place against apartheid; except that now it must take place on a whole range of issues where South Africa is looking to international models in order to solve local problems.

International Agenda-Setting.

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

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

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

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

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

We must administer the appropriate discipline without fear or favour. The stability of our new-won democracy in South Africa depends on a deepening respect, among all people, for the law. Those who cynically break the law, or use it to crush opponents, are threatening the democratic national interest and the very fabric of society. With Edmund Burke, even if we must differ with him in other respects, we must recognise that "People crushed by law have no hope but from power. If laws are their enemies, they will be enemies to laws".

Law must offer a fulfilled life for all South Africans. It must never be abused again.

TOWARDS A NEW LABOUR LAW

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

Carolyn Jones

On 2 September 1996 the Institute of Employment Rights published its report, Working life - a new perspective on labour law. Building on the interim report Just the Job? published in October 1995, this proposes a radical new framework for labour law in Britain, designed to reverse the damaging policies pursued by governments for the last 17 years. The Institute for Employment Rights is a "think tank for the labour movement" and as such is generously funded by trade unions which also helped to underwrite the costs of the current project.

The report, some 350 pages long, covers a wide range of issues, reflecting a concern expressed in Just the Job? that we should seek to build a new settlement for labour law in Britain in a manner which would promote economic efficiency, and would at the same time comply with international labour standards to which Britain is a party, including the ILO Conventions as well as the Council of Europe's Social Charter. The re-regulation of the labour market in this way would meet the growing feeling that economic success can only be secured by a highly-paid and highly-motivated labour force in which businesses compete on quality rather than poverty wages.

Although international labour standards help to set the boundaries within which policy must be developed, it is important to have a specific agenda for reform which relates directly to the moment of the labour movement in any particular community or State. It is necessary also to have some vision of the functions, purposes and potential of labour law, not only as an instrument for regulating the workplace, but as an instrument (along with other areas of the law and other instruments of public policy) for promoting equality of opportunity, social justice, workplace democracy, the protection of workers' civil liberties, and fairness at work, in the widest sense of that term.

A New Framework for Employment Law

The need for a new conceptual framework for the classification of the employment relationship lies at heart of the Institute's proposals. The contract of employment must be replaced and there is a need for a new legal base which is built on the notion of an 'employment relationship' - which would not carry with it the baggage of the common law, but would be underpinned by principles such as the right to equality of treatment, the right to the dignity of the individual and the right to autonomy at work. These are the principles which, together with the fundamental goals already identified, should guide courts and judges in the interpretation of labour standards, instead of the traditional notions of the common law which speak a language of worker obedience and fidelity.

The protection of labour law should apply to all workers, particularly the most vulnerable sections of the labour force. Therefore it is proposed that anyone who undertakes personally to execute work another and is economically dependant on the business of the other should receive employment rights. Special rules should be introduced to ensure that it does in the case of those whose status is uncertain. This would be wide enough to include many workers who are currently excluded from labour law protection because they are deemed not to have a contract of service, such as homeworkers and casual workers.

New procedures are necessary to ensure that workers are adequately protected by adequate terms and conditions if the commitment to social justice is to be realised. Here it is proposed that steps should be taken to reverse the decline in the number of workers covered by collective agreements since 1980. Whereas at one time over 80% of British workers were protected by collective agreements, by 1995 this had fallen to less than half. And although other countries had seen some decline in the same period, the decline the number of workers covered by the results of collective bargaining is by no means universal and indeed the British experience is without parallel. It is proposed that initiatives would be introduced to reverse the trend towards decentralisation and to seek to extend the regulatory effects of collective agreements. A number of options are available for this purpose including the TGWU's important initiative for Minimum Standards Agreements, the ambitious use of the Labour Party's proposed Low Pay Commission, and the re-emphasis on national industry-wide bargaining in the public sector, extended perhaps to selected industries in the private sector including in particular the privatised utilities. Above all, however, there is a case for a much more radical option based on the creation of Sectoral Employment Commissions to establish on a bipartite basis working conditions industry by industry.

Trade union organisation and recognition

It might be speculated that a higher level of sectoral regulation would serve to encourage a trade union presence by employers seeking flexibility in the implementation of agreements concluded at the sectoral level. This, however, is not to deny the need for a strong and effective framework of legislation designed to promote trade union recognition. There are a number of measures which could usefully be introduced to help trade union organisation and recognition efforts at the level of the enterprise. First, there are the trade union membership rights of individual workers who should have the widest protection from discrimination or disadvantage. Secondly, there are trade union organisation rights in the sense that the union should have rights of access to premises and to hold meetings with workers in any premises where it has members. Thirdly, there are trade union representation and recognition rights in the sense that a union should have the right to represent its members individually and collectively at the workplace, and should have consultation and negotiation rights on behalf of the workforce as a whole, depending on its level of support.

A new basis for the right to strike

Although the subject is politically controversial, no review of labour law can ignore the importance of the right to strike. Protected by international labour law as well as by the constitutions of a number of States, this fundamental human right has been subjected to extraordinary erosion in Britain since 1980 with a number of restrictions making it virtually impossible for trade unions to stay within the law. The Institute proposes that like much of the rest of British labour law the legal framework should be recast and that the existing structure should be rebuilt on a fair and balanced legal framework which explicitly recognises the right of workers to take part in a strike, and the right of a trade union to organise a strike (or other industrial action) without fear of legal sanction. It does not follow from this of course that the right to strike should be unlimited. But clearly any limitations which are imposed should be in accordance with international standards and should be justifiable on grounds of principle rather than expediency. There would therefore be no justification for a total ban on secondary and solidarity action, If a pre-strike obligation to ballot is to be retained - about which the arguments of principle are fairly evenly divided - the duty to hold a ballot should be one which is owed to and enforced by the members of the union. In any event it is questionable whether a pre-strike ballot should be required in all circumstances, such as industrial action initiated by an imposed change in working conditions or the victimisation of a trade union official.

The need to rebuild collective bargaining machinery does not preclude the need for regulatory legislation to set down minimum standards in legislation to apply to all workers. There is a compelling case for legislation to establish a minimum wage, to regulate working time, and to make better provision for worker health and safety. Britain is one of the few countries in Europe without a minimum wage, while the need for the regulation of working time is long overdue with the first ILO Convention establishing the eight hour day having been made (with the support of the then British government) as long ago as 1919. Although measures will eventually have to be taken to implement the EU Working Time Directive, it is important that an incoming government does not do so on the minimalist terms possible.

But although wages, working time, and a safe working environment are the core issues in terms of promoting social justice through legislation, it is clear that regulatory legislation has other roles to play in terms, for example of protecting workers' civil liberties on the one hand, and fairness at work on the other. So far as the former is concerned, the areas which require intervention include the use and storage of personal data, electronic surveillance, and whistleblowing. So far as the latter is concerned the need is to ensure that workers have an opportunity to pursue grievances at work and effective remedies when confronted with the imposition of unfair disciplinary penalties or where subjected to a unilateral change to working conditions.

Equal Opportunities

One area where regulatory legislation has a particularly important role to play in conjunction with collective bargaining is equal opportunities. Historically public policy has been based on an anti discrimination strategy, designed to ensure that people were not denied opportunities on the grounds of race or sex.

There is a need to deepen the protection of the legislation but also to broaden it to include other irrational grounds of prejudice and discrimination. But there is also a need to develop new strategies to remove barriers to effective labour market participation on the one hand and to promote 'fair participation' at the workplace. The former can be achieved by measures such as family friendly employment strategies with a secure legal base, while the latter would be helped (for example) by a statutory requirement for equal opportunities forums in every workplace.

Standing apart from all of this is the question of pay which invites special measures if the gender and racial pay gaps are to be closed. Clearly a major step in this direction would be taken by the introduction of a statutory minimum wage.

There is also strong evidence to believe that more centralised collective bargaining arrangements of the type described above would have a positive impact in this area. Otherwise, however, there is a strong case for reviving a role for the Central Arbitration Committee with a view to its being empowered to deal with references alleging that a collective agreement or an employer's pay structure fail to meet the requirements of pay equity (in terms of pay for work of equal value), to be defined to include not only equity between the sexes, but equity on racial grounds as well. It would be necessary to give the CAC wide powers to address any problems which a reference to it might yield.

Job Security and the Resolution of Disputes

Regulatory legislation thus has an important role to play in promoting social justice, civil liberties in the workplace, and equality of opportunity. But as also indicated it has an important role to play in promoting fairness at work. Yet if this is to be a reality for all workers it is clear that there is also a need for a number of fairly radical revisions of the current unfair dismissal legislation, which was first introduced in 1971. There is an unanswerable case for broadening the protection which presently excludes a large number of particularly vulnerable workers because they are not 'employees', or because they fail to meet the qualifying conditions for protection. If the view is taken that no employer should be permitted to treat a worker unfairly, then these conditions should be removed, and steps should be taken to restrict the grounds for which a worker can be dismissed and extend the procedural protection before dismissal takes place.

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

Conclusion

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

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

The need is not to despair about the existence of a labour code, but to seek to transform it as a source of empowerment rather than control of people of work, in order to promote social justice and to ensure that trade unions occupy positions of influence. If the ideas contained in the report from the Institute of Employment Rights were to be adopted, a significant step would be taken in these directions, with the result that legal regulation of the workplace would increasingly become much less important in the years to come.

THE LEFT AND JUDICIAL REVIEW

Lee Bridges warns that not all solutions are in the hands of the lawyers. Progressive lawyers must strike a balance between defending the territory gained by previous judicial reviews and pursing radical change outside the court room

Lee Bridges

With the exception of at least one prominent Queen's Counsel the process of judicial review has become widely celebrated by the Left in British politics over recent years. In the words of the press release for the Haldane public meeting, where I first delivered the paper which forms the basis of this article, it is "frequently called in aid of ordinary people who have been unable to influence the established democratic and administrative processes. They feel their rights, needs and opinions are being ignored, perhaps because a public decision-maker prefers to bow to the strength of more powerful financial and political concerns."

Judicial review - the story so far

More generally, the growth of judicial review since the late 1970's is often celebrated as a bastion for protecting the rights of the individuals, and even of groups, against the overreaching and frequently arbitrary power of an increasingly centralised state.

My contention is that much of this celebratory talk about judicial review is lacking both in historical perspective and a sense of political reality. Judicial review does have an important and fundamental part to play, both legally and politically, in the protection of individual rights. However, there is no inherently left wing or right wing characteristic to the concept; we would do well to remember that some of the most significant advances made in this respect have come from the initiatives of those who can only be described as among the "powerful financial and political" forces in British society under the Thatcher and post-Thatcher Conservative governments.

A prime example (although not directly related to the issue of judicial review) is the Sunday Times' legal victory a couple of years ago over Derbyshire County Council, in which the principle was established that public bodies cannot sue for libel. The Derbyshire case was a victory for freedom of the press, and one which has clear benefits for left-wing newspapers and journalists, but also for those on the right. It was a victory which probably would not have come about had it not been for the financial and political interests behind it.

"the primary target of judicial review was local and not central government"

Nor should we have any illusions that the significance for the left of judicial review will diminish under a Labour government, or that it will just be the right who will wish to exploit its full potential in order to rein in the so-called "Blair revolution." One can have little confidence that a Labour government will even begin to tackle the fundamental social and economic imbalances in society which create the need for judicial review in fields such as immigration, housing and education. Somehow, I do not think that bodies such as the Immigration or Housing Law Practitioners' Associations need contemplate their demise under a Labour government.

So much for the future - what of the lack of historical perspective on judicial review which I detect among so much of Left thinking on the subject? Someone, someday, will write a truly political history of the development of judicial review in the wake of the 1945 Labour Government and pose the question of how far this judge made jurisdiction was a reaction not just to a general growth in government (as the Master of the Rolls claimed in a radio interview earlier this year) but more specifically to the collectivist nature which legislation and government activity took in the post-war period. However, if I confine myself to the 1980's two of the most significant and well known judicial reviews were the GCHQ and Fare's Fare cases. In one, the House of Lords upheld the Government's right to curtail the rights of trade unionists on grounds of national security, and in the other they blocked the democratically elected Greater London Council in its programme of subsidies for public transport. The latter case had an immediate impact in "legalising" the whole conduct of local government, with what amounted to key political judgements - how much subsidy can we pay to public transport, what sort of rates would be lawful - effectively transferred out of the council chamber and into that of the local government QC. More broadly, the Fares Fair case contributed and lent judicial weight to a significant shift of power from local government to the central state.

Judicial review - a defensive device

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

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

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

Nor is this surprising, since there is a sense in which politics, right up to and including Parliament itself, have become bankrupt. There is a certain lack of reality to the current debate that is raging between the judiciary and the government over judicial review, which is something of a phoney war. Indeed, one suspects that much of the government's reaction to recent defeats at the hands of the courts is directed to a wider political agenda. When Sir Richard Scott answered that "conspiracy/cover-up" question (so obviously a plant) in a recent press conference I asked myself whether the judges were in fact the fall-guys on a wider political canvas.

"What no one seems to ask is whether Parliament as an institution in its present form is worth upholding."

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

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

This takes us some way beyond the focus of this discussion, judicial review and how the Left should respond to it. In many ways we must continue as we have done, using it to defend the disadvantaged against the ravages of government policy at various levels, perhaps even more so under a Labour government. This in turn will mean defending the institution of judicial review from attacks on it, and from attempts from any quarter to limit its scope and restrict public access to it.

Here I would draw attention to the recent Law Commission proposals (now endorsed by the Woolf Report on civil justice) on procedures surrounding applications for leave, which could have the effect of widening judicial discretion and the scope for respondents to manipulate the leave process to the disadvantage of the applicants.

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

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

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

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

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

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

In this context one hopes that in seeking to defend judicial review as an institution we will not be caught up in defending the judiciary as it is presently constituted, or its jealously guarded discretion in developing the jurisprudence of public law. Indeed, to the extent that the rather crude attacks on judicial review and the judges that we have seen over the past year have struck a wider, populist chord, we should not dismiss this as simply the product of a manipulative and manipulated press.

It may also stem from the fact that the judges and public lawyers more generally have failed to achieve a wider political and public legitimacy for the principals that they have so assiduously been developing. How can we give those principles a wider currency? I doubt that this can be done by leaving it to the judges themselves operating within the confines of judicial review. Rather, we need a much wider debate on the principles of public decision making in our society.

In this respect the Nolan Commission may provide a lead, although its constitution seems far too narrow and of the establishment to do the job. Is this a job for a Royal Commission? Or for a People's Tribunal?

REFUGEES AND NATIONAL SECURITY

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

Pierre Makhlouf

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

In late June 1996 the Foreign Secretary, Malcolm Rifkind, announced (prior to a visit to Saudi Arabia) that the UK would seek to amend the 1951 United Nations Convention. He suggested that this could be done through a United Nations General Assembly Resolution. The amendment would be aimed at curtailing the requirement to provide protection to refugees who advocate violence and those whose actions damage the UK's relations with other States. On 25 July 1996 the Home Secretary, Michael Howard, announced "Political asylum should not be abused as a shelter for those engaged in terrorism", and that those engaged in such activities would be refused protection in the UK.

Defining terrorism - Howard's way

Michael Howard announced that the UK would be calling for a new United Nations Convention which would declare planning, financing, and incitement to terrorism as contrary to "the principles of the United Nations". This would allow the UK to refuse asylum applicants refugee status under Article 1(F) of the United Nations Convention relating to refugees which states that "the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:... (c) he has been guilty of acts contrary to the purposes and principles of the United Nations." Howard also announced that the Government intend to extend the law of criminal conspiracy to introduce an offence to engage in conspiracy with others, or incite others, to commit terrorist offences abroad. These moves should be viewed in relation to the Government's present approach to refugees.

There has been a significant increase in Home Office decisions refusing asylum on the grounds of the Secretary of State's view of certain organisations as being terrorist. Hence in a recent refusal of a Kurdish PKK activist from Turkey the Secretary of State notes "the fact that the PKK is an organisation that has admitted that it has used, and intends to continue using, violence to achieve its political aims". He further notes that the Turkish State's outlawing of organisations such as the PKK "which advocate the use of violence is both proper and reasonable", and that "investigation and prosecution within the law of Turkey of those suspected of membership, or of aiding the activities of a proscribed group is not persecution under the terms of the 1951 United Nations Convention relating to the Status of Refugees." The decision ignores any link between the individual and a specific crime. It makes no assessment of an individual's motives and actions. The Government has made a choice where refugees come from States involved in civil unrest or armed conflict. In such situations it will ignore the oppressive measures of States. Instead those who fight against oppressive regimes and Governments and later flee for their safety will be seized and forcibly returned into the hands of the oppressors.

Mr T - political crime and political object

Present attempts to exclude refugees on the grounds quoted above may fall at the appeal stages. In the case of 'T' the House of Lords (22 May 1996) judgement makes an assessment of a direct link between an asylum seeker's actions and a definition of terrorism. In that case the Lords agreed that 'T' should be excluded from the protection of the United Nations Convention on the basis that his crimes were indiscriminate "and therefore the link between the crime and the political object which Mr. T was seeking to achieve was too remote." The judgement raises a number of issues of concern, undermining the recommendations made in the UNHCR's Handbook for interpreting the Convention including the clauses relating to exclusion from protection. However it does focus on an individual's direct link with a specific crime.

This is what the Government aims to change. The proposals it is presently putting forward will exclude large numbers of asylum seekers from being able to obtain protection under the Convention. However the benefit is not only a dramatic reduction of those who would otherwise be able to claim protection from persecution. It helps the Government to maintain friendly relations with those countries who do not wish to see their nationals applying for asylum in this country. The policies being pursued by the Government also allows for the exclusion of those already granted refugee status on the grounds that they support an organisation found by the Secretary of State to be 'terrorist', or because their presence in the UK is viewed to be a risk to national security.

The Government has to date been able to exclude from protection refugees in danger of persecution but found to be responsible for crimes against humanity, war crimes, or serious non-political crimes. Those found to be a risk to 'national security' are issued with orders for their deportation under separate legal provisions under the 1971 Immigration Act. The latter cases remain difficult to assess given that the specific reasons as to why an individual is a risk to national security are not disclosed. However the present moves to introduce a United Nations resolution or Convention aims to expand the grounds upon which refugee protection can be refused - i.e. on the basis that an individual may not be personally responsible for a crime but because the asylum applicant is supportive of an organisation carrying out violence to achieve political change. An additional assessment which seems to be intended is the extent to which an individual's support effects the UK's relations with other States. This not only conveniently ignores an individual's responsibility for a particular act, but allows the Government to ensure that its primary interests are taken into account while ignoring the central human rights considerations which are at stake.

It also seems that the reasons used by the UK government to detain and deport on national security grounds under the 1971 Immigration Act seem to be expanding. Compare the notices given to Arab detainees during the 1991 Gulf War and another detainee issued with a notice in 1995:

Arab detainees arrested in January 1991 were told : "The Secretary of State has decided that your departure from the United Kingdom would be conducive to the public good for reasons of national security." In a later letter that same month the reasons were expanded to take into account the Iraqi Government's threats to take terrorist action against targets in Western countries. The letter stated: "In the light of this, your known links with an organisation which we believe could take such action in support of the Iraqi regime make your presence in the UK an unacceptable security risk."

What is national security?

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

Any proper assessment is difficult to make given that national security detainees have no right to the evidence held against them, no right to appeal against a refusal of asylum or in relation to an order to deport, and no right to legal representation before the Secretary of State's self-appointed 'independent' advisory panel (whose recommendations can in any case be ignored by the Secretary of State). Of course the Government's present proposals may also be intended to exclude large numbers of asylum applicants while avoiding the negative publicity created by the specific procedure of using deportation orders for 'reasons of national security' which deny asylum applicants and other immigrants basic human rights such as those to legal representation and appeal rights.

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

So what is the meaning of 'national security'? What are the specific "reasons of a political nature" identified in national security deportation orders and what are the implications for refugees of "the UK's international and domestic stance against the use of violence"? Some indication is given by Lord Justice Stuart-Smith who has produced reports on MI5 and MI6. In his report on MI6 he produces a definition of 'national security', describing it as being "the survival and well-being of the state and community". With regards to MI5, he describes them as being charged with the "protection against a threat to the economic well-being of the UK."

Perhaps this allows us to understand which refugee groups will be most vulnerable in the short-term to an increased use of exclusion clauses under the United Nations Convention for those supporting organisations using violence, and an increased use of "reasons of national security" for enforcing deportations under the 1971 Act.

Supporters of the PKK are being excluded from refugee protection while others have been detained and served with orders for their deportation "for reasons of national security". Supporters of other militant Turkish groups have also been refused asylum and excluded from protection because their organisations support violence. Members of the Sikh community have been in prison for several years facing deportation on national security grounds. Is it really coincidental that these individuals, Turks, Kurds, and Sikhs, all come from states which either have very close economic relations with the UK or whose regional interests serve those of the UK? The general view being generated by the UK and the P8 group of nations is that no violence is acceptable against any Government for whatever reason. The definition of what constitutes support for violence seems to be expanding as are the numbers who come under the net of the definition and who face the threat of exclusion from protection. Given that it also seems clear the Government will refuse protection to refugees supporting their organisations from the UK, even if they have been previously recognised as refugees, it begs the question to what extent it is willing to choose sides.

The Government will be deporting an increased number of individuals to almost certain persecution, a fact that will be welcomed by some states. Other states will become aware over time that the UK Government may actually fulfil a useful role, replacing that of the state of the country where a refuge claims a fear of persecution. States often persecute their opposition in order not only to gain information from them but also so as to silence them. When no more information can be obtained from a member of your opposition, why not avoid the expense of a lengthy detention or the risks of their assassination, and allow them to flee to the UK where the Government will silence them on your behalf?

Persecution by proxy?

Some states, may decide to increase their policy of stripping their citizens of nationality, and deport them to countries such as the UK. For those concerned with the equal treatment of refugees in the UK and for the maintenance of the right to freedom of expression, the future certainly looks grim.

It seems that the UK Government risks turning itself, at least in the eyes of a significant number of refugees, into an agent of the persecutors from whom refugees fled in the first place. What it means for UK citizen's rights is also a grave concern. The Government aims to extend the law of criminal conspiracy to include those who engage in or incite others to commit terrorist offences abroad.

If these policies existed at the time of the apartheid regime in South Africa we would be witnessing the deportation of supporters of the outlawed ANC (for example, because of an individual's publicly stated support for economic sanctions against a friendly nation). If a supporter of the ANC made political propaganda in support of the armed struggle against the apartheid regime, he or she would face deportation, but only after having served a conviction for conspiracy to incite others to commit what the UK Government considered to be terrorist offences in South Africa.

At the moment refugees who support violent organisations are being faced with Home Office decisions refusing them protection under the UN Convention. Will the extension of the criminal conspiracy law also apply to UK solidarity groups of organisations fighting oppressive regimes? If not, why should foreign nationals face deportation to countries where they will almost certainly be killed or tortured for actions otherwise deemed to be lawful if carried out by UK citizens?

Developments over the next few months need to be closely monitored because of the serious implications for refugees and civil rights in general. Lord Justice Lloyd is to shortly produce a report on 'terrorism'. It will be interesting to see to what extent his report underpins the Government's views and the attempts at redefining the United Nations Convention relating to the Status of Refugees.

THE WAR CRIMES TRIBUNALS - LEGITIMATE JUSTICE, OR A MISCARRIAGE IN THE MAKING?

Bill Bowring

The International Tribunal for the Prosecution of War Crimes, Crimes against Humanity, and Genocide, Committed in the former Yugoslavia (ITY) was created by Resolution 827 of the United Nations Security Council on 25 May 1993. One commentator, writing soon afterwards, asked whether this decision was an "act of powerlessness, or a new challenge for the international community". At that time the UN appeared, as it often still does, to be entirely impotent in the face of widespread human rights abuses in the former Yugoslavia. In this article I discuss the background, controversial process of creation, and recent work of the ITY, and argue that despite all its inadequacies and the lack of support from the international community, it offers the best prospects for enforcing humanitarian law - the most fundamental human rights - and deserves the support of socialist lawyers.

Since 1993 there has been some apparent progress in former Yugoslavia, not least in the shape of the Dayton peace accords signed in Paris on 14 December 1995, although there are many who see these as no more than attempts to appease the conscience of the international community. At the same time, the ITY has often appeared impotent. In the weeks prior to the writing of this article, the ITY was faced with the refusal of the IFOR forces to execute the international warrants issued on 11 July 1996 for the arrest of Radovan Karadzic and Ratko Mladic, despite the fact that they are known to be in Pale, the "capital" of the "Republika Srpska". The IFOR troops can only arrest them if they fall over them in the course of their duties, but cannot go and get them.

Struggling against the odds

Other suspects appear to benefit from state-sponsored impunity. The highly-respected President of the Court, Professor Antonio Cassese, has recently highlighted the letter he wrote to President Franjo Tudjman of Croatia, reminding him of his obligation to arrest Croats who have been charged with war crimes. In particular, he referred to Dario Kordic, a Croatian politician charged with war crimes against Bosnian Muslims. Professor Cassese said: "We know that he has an apartment in Zagreb. We have reports that he has been seen there." President Tudjman has not replied. Cassese rightly fears the effects of impunity for war criminals as a result of failure of states to comply with their obligations. Most worrying of all, perhaps, is the failure of the international community to make available the money needed for the proper functioning of the ITY. On 21 October 1995 a UN spokesman said that since the decision, taken in July 1995, to fund the ITY by assessed contributions, only $1.16m of the $20.16m needed had been received, and only 11 states had paid any money at all.

Nevertheless, despite lack of funds, and despite the absence of the most serious villains, the ITY has already been active. In the two years since the Prosecutor's office began work, the ITY has issued more than 14 indictments, accusing more than 75 people of war crimes. About seven of the accused are now in custody. It has attracted a degree of media attention, with its sessions broadcast internationally on television. Moreover, it has demonstrated in two extraordinary, fully reasoned decisions, those of the Trial Chamber on 10 August 1995 and the Appeals Chamber of 2 October 1995 in the case of The Prosecutor v Dusko Tadic aka "Dule", that it takes its role extremely seriously. I will analyse these important decisions below. Of course, the trial of Dusko Tadic has now commenced. He is charged with grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, and crimes against humanity, arising out of killings, torture and rapes at the Omarska camp in May and August 1992.

"Inevitably, this was victors' justice, and depended on the unconditional surrender of Germany and Japan"

Of course, the ITY's legitimacy suffers from the legacy of the only existing precedent for such international action, the Nuremburg and Tokyo Military Tribunals, established in 1945 and 1946 respectively. The Nuremburg Tribunal was established by the four major victorious allied powers through the London Agreement of 8 August 1945, to which the Charter of the Tribunal was attached. Control Council Law No.10 empowered each occupying power to prosecute German nationals. The Tokyo Tribunal was unilaterally created by General MacArthur. Inevitably, this was victors' justice, and depended on the unconditional surrender of Germany and Japan. There was no continuing conflict, and only the most important war criminals were to be tried: 24 were accused at Nuremburg, and only 22 actually tried.

The Charters of these two Tribunals provided for three categories of charge: crimes against the peace (waging aggressive war, irrespective of the manner in which it was conducted), war crimes (violations of the laws of war, namely the 1899 and 1907 Hague and 1929 Geneva Conventions then in existence), and crimes against humanity (murder, extermination, enslavement or other inhumane acts carried out against civilian populations). The last of these, set out in Article 6(c) of the London Charter, had never before appeared as a distinct category of international crime. The Tribunals were obliged to create new international law, or at any rate to declare what until then were no more than emerging rules of customary international law.

The lessons of Tokyo and Nuremburg

It was therefore of great importance that the judgments and legal opinions of the Nuremburg and Tokyo Tribunals were immediately adopted by unanimous resolution of the UN General Assembly. Furthermore, this was the first time that military and political leaders were forbidden to hide behind "state action" defences, and were held individually responsible for war crimes committed while serving the state. The Tribunals allowed no excuses, and military necessity was not permitted to justify legal breaches. So despite the shaky legitimacy of the Tribunals themselves, an important jurisprudence was developed. In the immediate aftermath of the horrors of World War II, two new treaty regimes created new international crimes: the 1948 Genocide Convention, and the four 1949 Geneva Conventions.

All these establish international criminal jurisdiction, but no international tribunal was created. Under the Genocide Convention persons charged with genocide are to be tried in the state where the act was committed, or by an international tribunal with jurisdiction - there has been none until the ITY. The Geneva Conventions create "grave breaches", and states are obliged to enact their own legislation to search for perpetrators, and to put them on trial in their own courts, or to hand them over for trial to another state. Britain has enacted legislation creating criminal liability for genocide and grave breaches of the Geneva Conventions. But these provisions have not been effective; hardly anyone has been brought to trial. Something more was required in the case of former Yugoslavia.

Difficult birth - difficult labours

The birth of the ITY took place in circumstances quite different from those of its Nuremburg and Tokyo predecessors. There have been no unconditional surrenders, and fighting is still going on. Rather than an agreement between victorious allies, there has been an extraordinary development of international law, by way of creative interpretation of the Charter of the United Nations. The Security Council proceeded, step by step, to give itself powers to make mandatory decisions, binding on all states. Resolution 764 of July 1992 reaffirmed that all parties to the conflict were bound by international humanitarian law, and confirmed that anyone committing or ordering violations of the law bore individual responsibility. Resolution 771 of August 1992 strongly condemned violations of international humanitarian law, particularly ethnic cleansing, and adopted a binding decision, under Chapter VII of the UN Charter, that all military forces operating in Bosnia and Herzegovina should abide by Resolution 764, failing which the Council would be obliged to take other measures. Chapter VII decisions must be based on a Security Council determination that there is a breach of or threat to international peace and security. The first step towards enforcement of these demands came in October 1992, when the Security Council, by Resolution 780, set up an independent commission of experts to examine the situation. This reported in February 1993. It confirmed the scale of the horrors taking place in former Yugoslavia - genocide, ethnic cleansing, rape, torture; and also confirmed that "the law applicable in international armed conflicts should apply to the entirety of the armed conflicts in the territory of the former Yugoslavia." Resolution 827, establishing the ITY, and approving its Statute, followed on 25 May 1993.

The ITY was set up as a going concern remarkably quickly, in premises close to the International Court of Justice at The Hague. Eleven judges were elected on 22 September 1993, eminent jurists from around the world. A Prosecutor was appointed in October 1993. He was replaced by Judge Richard Goldstone, famous for his work uncovering the perpetrators of violence in South Africa. He has been active and outspoken. He was replaced this summer by a Canadian judge, Louise Arbour.

"there is no provision for crimes against the peace"

The Statute of the ITY creates four offences, following the precedent of the Nuremburg and Tokyo Tribunals, but with one notable exception: there is no provision for crimes against the peace, that is, waging aggressive war. Thus, the main perpetrators in Zagreb and Belgrade will probably escape justice. The ITY has jurisdiction over crimes committed between 1 January 1991 (a neutral date and not tied to any specific event) and a date to be determined. It may try violations of humanitarian law, including grave breaches of the 1949 Geneva Conventions (Article 2); violations of the laws and customs of war (Article 3); genocide, drawing on a definition taken from the Convention (Article 4); and crimes against humanity (Article 5) - murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts. Liability extends to those who have ordered or instigated crimes, or who knew or had reason to know about crimes by subordinates and failed to take necessary and reasonable steps to prevent or punish them. Moreover, a person is not to be relieved of criminal responsibility for a crime because it was committed pursuant to superior orders. This is to be a matter of mitigation only.

The ITY's principles and rules of procedure seek to establish the fairest possible conditions for trial. Persons are not to be tried in absentia. Trials are to take place before a Trial Chamber of three judges, following the fair trial standards laid down in Article 14 of the 1966 International Covenant on Civil and Political Rights - presumption of innocence, rights to adequate facilities for preparing a defence, the right to call witnesses and examine prosecution witnesses, the right not to testify against oneself, etc. There is a right of appeal to an Appeal Chamber.

In general, the procedure is to be very much more "adversarial" in approach than "inquisitorial", in the interests of fairness. Criticisms to date have focused on admissibility rules, particularly as to hearsay evidence. But it is generally conceded that the drafters of the Statute and Rules have been guided by international best practice. The decisions of the Trial Chamber and the Appeals Chamber in Dusko Tadic are of great interest, not least because the Appeals Chamber was prepared to undertake a judicial review of the circumstances of its own creation, following a defence challenge. The defence contended that the establishment of such a Tribunal was never contemplated by the framers of the UN Charter as a Chapter VII measure; that the Security Council was constitutionally incapable of creating a judicial organ; and that the Tribunal has not and cannot promote international peace. The Appeals Chamber, in an unprecedented response, accepted the challenge of considering its own constitutionality, which meant reviewing Security Council's actions.

Important lessons for the future

This is of the greatest importance, given the pressure on the International Court of Justice in due course to review the Security Council's actions in relation to the Lockerbie case, in imposing sanctions on Libya. Equal attention was given at both levels to the question whether the Statute referred only to international armed conflicts. Drawing on customary international law, the Chamber found that the ITY has jurisdiction over the acts alleged in the indictment regardless of whether they occurred within an internal or an international armed conflict.

In November 1994 the Security Council established (Resolution 955) another Tribunal, for Rwanda. It began work at The Hague on 26 June 1995, and is now based at Arusha, Tanzania.

Perhaps the Tribunals' most important contribution will be the experience they can contribute to the creation of a permanent International Criminal Court (ICC). Work is already far advanced. The International Law Commission resumed work on a draft Statute for such a court in 1990. Their draft is now in circulation (UN General Assembly document A/49/355, 2 September 1994). The ILC decided to concentrate on four crimes: genocide, aggression, systematic or mass violations of human rights, and exceptionally serious war crimes. It will not, therefore, deal with international terrorism, illicit traffic in narcotics, unlawful intervention, colonial domination, or damage to the environment.

In 1995 the General Assembly set up a Preparatory Committee to prepare the text of a convention establishing the ICC. The Preparatory Committee held its first session in March-April 1996, and holds its second on 12-30 August 1996. In September 1996 it reports to the General Assembly, which must then decide whether to convene a conference of plenipotentiaries to finalise the text of a convention. A number of organisations, including the Redress Trust and Amnesty International are working as part of a Coalition of NGOs seeking to ensure that the ICC will be viable, legitimate, and effective. Socialist lawyers should take part in this process.

IS THERE A STRANGER IN THE HOUSE?

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

Stephen Knafler

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

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

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

The Court of Appeal decided the case of R v Secretary of State for the Environment ex parte London Borough of Tower Hamlets (1993) 25 HLR 524 on the basis that the above obiter dicta was correct. Sir Thomas Bingham MR accepted that the result could not be achieved by any process of construction of the Housing Act 1985 or of the Immigration Act 1971:

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

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

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

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

"Given that such asylum seekers would not be able to pay for their accommodation, having no access to income support and housing benefit, the local authorities were facing substantial additional expenditure"

In R v Secretary of State for the Home Department ex parte Vitale and Do Amaral (1996) The Times 26 January, the applicant argued that Article 8A of the Treaty of Rome as amended by the Maastricht Treaty conferred a free-standing right of residence in other European Union countries. The court rejected the argument that European Union citizens had any right to enter or remain in the United Kingdom otherwise than in the pursuit of economic activity. If was not accordingly unlawful for the Secretary of State to regulate so as to prevent such persons obtaining welfare benefits, as he did in the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1995.

R v Westminster City Council ex parte Castelli and Tristan-Garcia (1996) 28 HLR 616 concerned European Union nationals who entered the United Kingdom lawfully in order to pursue economic activities. However, as a result of being HIV positive, they were no longer pursuing or actively seeking to pursue any kind of economic activity and were accordingly no longer entitled under the Immigration (European Economic Area) Order 1994 to remain in the United Kingdom, nor were they obliged to seek leave to remain in the United Kingdom once their economic function ceased. Their presence in the United Kingdom could not be regarded as being 'unlawful' as it did not involve the commission of a criminal offence or a breach of any immigration laws. They were accordingly 'persons' for the purposes of the 1985 Act and could be owed duties thereunder if they otherwise qualified.

A little light relief from Hackney

Some relative light relief was provided by the case of Akinbolu v Hackney London Borough Council [1996] EGCS 73. Mr Akinbolu was a secure tenant of the London Borough of Hackney. He was arrested by the police and taken into custody as an 'overstayer'. He was detained for a few days them granted bail. On return home he discovered that Hackney had changed the locks. The county court judge rejected the tenant's application for an injunction to be re-admitted, apparently on the ground that the tenancy was void because the tenant was not lawfully in the United Kingdom.

The Court of Appeal allowed the tenant's appeal. He had not made any misrepresentations to obtain the tenancy. The illegality of his presence in the United Kingdom was no sufficient in itself to vitiate the tenancy contract in any was or to permit the summary eviction.

In R v Secretary of State of Social Security ex parte B and the Joint Council for the Welfare of Immigrants (1996) The Times 27 June (CO/0384/96) the Court of Appeal quashed the 1996 Regulations on the ground that (per Simon Brown LJ):

> *"rights necessarily implicity in the [Asylum and Immigration Appeals Act 1993] are now inevitably being overborne. Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma; the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs".*

R v Kensington & Chelsea RLBN ex parte Kihara (1996) The Times 1 May the Court of Appeal held that in-country asylum seekers who had been deprived of benefits by the 1996 Regulations, had no friends or relatives who might help them out, were unable to work and had language difficulties qualified for housing assistance under 21985 Act on the ground that for the purposes of section 59(1)(c) of the 1985 Act they were "vulnerable as a result of other special reason". It did not avail the Respondents to argue that the destitution of the applicants had been deliberately inflicted by the government. Neill LJ held that:

> *"In my judgment the words 'other special reason' permit an examination of all the personal circumstances of an applicant for accommodation. These circumstances will include but are not limited to their physical or mental characteristics or disabilities... I have the greatest sympathy with the difficulties faced by the housing authorities who have limited means to discharge their many responsibilities. I have been forced to the conclusion however that they were in error in construing the words 'other special reason' in section 59(1)(c) of the Act of 1985 in such a way as to exclude these appellants from the category of persons who were in priority need. In my judgment, if the facts relating to the individual appellants are as I believe them to be, they are in priority need of accommodation for an 'other special reason' within the meaning of the section".*

As Simon Brown LJ observed in the JCWI case, primary legislation alone was capable of achieving "for some a life so destitute that to my mind no civilised nation can tolerate it". Parliament duly obliged, with section 11 of the Asylum and Immigration Act 1996. Section 11 and Schedule 1 of the 1996 Act reverse the Court of Appeal's decision in the JCWI case and effectively resuscitate the 1996 Regulations, from 24 July 1996, apparently with retrospective effect.

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

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

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

Over the last few weeks leave and interim relief has however been granted in a number of cases in which destitute in-country asylum seekers have claimed to be in need of 'care and attention' within the meaning of section 21 of the National Assistance Act 1948. Section 21 of the 1948 Act and the Approvals and Directions made by the Secretary of State set out at Appendix 1 to Department of Health Circular LAC(93)10 require local authorities to provide 'residential accommodation' for all those who 'by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them'.

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

BOOK REVIEWS

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

Butterworths 1996 £28.95

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

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

Nathaniel Mathews

An Atlas of Industrial Protest In Britain, 1750-1990: A Charlesworth et all;

Macmillan £12.99

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

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

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

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

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

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

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

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

John Whitfield

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