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# Human Rights and the Use of Law in the Modern State

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## **HUMAN RIGHTS AND THE USE OF LAW IN THE MODERN STATE**

**Discussion Paper presented at the SOLON Experiencing the Law Conference**

**Institute of Advanced Legal Studies 22 October 2010**

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Firstly, let me thank the organisers of this conference for the invitation to speak at this conference. I hope that my credentials for being here are that I am a practitioner. I represent an organisation, *Praxis*, which works with vulnerable migrants, by which I mean refugees, asylum seekers, people on temporary visas, victims of human trafficking, visa overstayers, victims of domestic violence whose situation is complicated by their immigration status and Accession State nationals with varying entitlements. These are all people whose relationship with the State in which they reside rests upon the phraseology of a stamp in a passport. Some of these people may find themselves detained in maximum security prisons, and have to cradle their children there. For a number of them, their safety and their very lives are dependent upon their status. So there are significant words in the title of today's conference which have immediate coinage for their situation – 'human' – 'right' – 'law' – 'the use of law' – 'modern state'.

I think I was asked today, but I may be wrong, because I was a contributor to that very strange event held last year at the Institute of Education entitled: 'The Convention on Modern Liberty'. It was an exciting day, packed to overflowing, with an array of stars from the whole spectrum of liberal and conservative thinking. It felt like the intelligentsia had gathered to lay the Labour Government to rest and to bury it from the highest of principles, in particular from the perspective of civil liberties. The accumulation of the measures of the then government to reduce crime, deal with the real issues of terrorism, its approach to health and safety and the protection of citizens from themselves had led to an erosion of civil liberties and a feeling of the State having become dangerously intrusive. Labour in its post-election post-mortem has to face up to this reality. The endorsement of the Liberal Democrats by *The Guardian* was related to Labour's failure to protect the liberal (with a small l) values which is the inheritance of CP Snow and its remarkable predecessor the

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*Manchester Guardian*. I wonder if *The Guardian* is now entirely comfortable with that decision. Perhaps we should all be careful what we wish for.

### **‘Human’ Rights?**

For a long time in the Western world, we have assumed that the debate surrounding human rights was a settled discourse. Human rights are self evident. They are so self evident that they are enshrined in prosaic declarations as linguistically solemn as any ancient sacred text. They have been brought into legal statute and have both a quasi-religious moral authority and are active legal tools at work in the courts and policy formulation. They belong to the modern state. It is only failed states, the pre-modern states of this world which do not yet subscribe to the message. The interventions of the modern state on the international stage, violent or non-violent, with armies of tanks and platoons of aid workers in white 4x4s, are all carried out in the name of ‘Human Rights’ and its close and dear sister ‘Democracy’. However, we might have reached a bit of a crossroads in the UK if not a crisis for human rights. Having employed Democracy to remove what was perceived to be an overbearing government, we now have the opposite, a Government which is using fiscal decision making to establish a smaller state. They may call it a Big Society, but we are now used to the culture of politicians manipulating language to say the unpalatable in palatable form.

The utterance of the epithet ‘Big Society’ begs the question - what is the nature of our modern state and above all - what is its relationship to market and civil society (to employ more traditional terminology)? Clearly, under the new Government’s plans there is intended to be a shift from state to civil society. According to the rhetoric, Labour’s overburdening bureaucracy and over-protectiveness will give way to a freed up market and a liberated civil society. The principal tools for achieving this are fiscal management, localism, (devolution of responsibilities to the local state) and a resurgence of voluntarism. Although it should be said that they have a very selective understanding of civil society, not including for example Trade Unions!

This poses a whole new set of challenges. Is equality the duty of the state or civil society? Does it matter that the Treasury seem to have overlooked its duty to undertake a gender equality impact assessment of the budget? Is it the job of the state to be a ‘welfare state’ to protect the weakest and most vulnerable or is it a legitimate choice to become a small state, where welfare is only for the most deserving? Is it the job of the state to incentivise the poor to take themselves out of poverty or to protect their rights including the right to an adequate income? These are very pertinent, totally contemporaneous questions.

In the light of the Convention on Modern Liberty I confess to having wondered whether we are in a situation in which civil libertarians are scuppering the universality of human rights? Is my right to walk down the street without being followed by a CCTV camera more important than someone else's right to walk down the same street without fear of crime? Does surveillance of potential terrorists stray into racial profiling and direct discrimination against particular communities? Does a housing policy based entirely on the market create a vibrant home-owning democracy or exacerbate destitution and even potential 'social cleansing' of wealthy urban areas. These are practical issues of profound importance for the future and ones which we will encounter increasingly in debates.

What is clear to me is that we must hold on to the broadest possible understanding of Human Rights. Human Rights as vision, human rights as legislation, human rights as a comprehensive tool for the creation of the conditions in which human beings can flourish. Let us simply focus on the word human as it appears in the phrase 'human right' and the significance of the passport stamp which bestows a range of entitlements and non-entitlements upon a human being. Those rights range from full citizenship rights – the right to vote, the right to health care, the right to a home, the right to free education, the right to income – through to no recourse to public funds, no access to free health care, no right to cash, no right to liberty. Human beings exist within the structure of this modern state called the United Kingdom within this range of rights and exclusions from rights. How is this possible? It is possible because we make a distinction between the right of the human and the right of the citizen. The citizen can have full rights, the non-citizen only rights in proportion to their usefulness to us. The highly skilled professional, the budding academic, and the global businessman are of great value to our economy and easily accommodated within the structure of rights and entitlements.

### **Migration – a Human Right or Humane Right?**

It is entertaining to hear the strident voices now opposing the Government's migration cap. I attended Damian Green's launch of the new immigration policy. Unlike earlier days when we activists would be bombarding the questions, the strident criticisms were coming from public schools, universities, the cultural industries, major accountancy firms. But there are no establishment voices standing up for the cleaners, the security guards, the mini-cab drivers, the shift workers, the take-away food suppliers, and the people who hand you your free newspaper as you walk into the tube every morning. I have a personal discipline when I walk into a public building. I look around and notice how clean it is, just to silently appreciate the

effort of someone, maybe an undocumented migrant who was up and working while the rest of us were sleeping, treated disgracefully but still taking pride in their work. Silly maybe and I hope not patronising but we take so much for granted in this modern sanitised state. Our filth is someone else's job. Are the people who do those jobs human beings as well? Of course they are. But are they fully human within the meaning of the word human as it is contained in the phrase 'human right'? It is almost shocking to me to pose the question. But once the modern state has created different categories of belonging then a differentiation of rights becomes inevitable and therefore different categories of being human.

The modern state exists in relation to other states and in relationship with a global reality of fearsomely dangerous proportions. There is no migration cap worthy of the name which can be imposed by a modern European state without withdrawal from the EU (and all the benefits or our European open border arrangements), from the European Convention on Human Rights, and the Geneva Convention on Refugees. Neither is there a migration cap worthy of the name which will hold out against: the persistence of war, conflict, persecution and torture; or against the realities of changing weather patterns in which large scale environmental events and gradual erosion of habitable spaces force individuals to adapt to new environs; and the rapid movements of capital, skills, products and markets, which require flexibility of labour.

It is not only our clean public buildings which are dependent upon human beings who move around, it is the prosperity of our cities as well. One third of the world's cities are growing in size and prosperity. One third is stagnating and one third is declining. Those, like London, which are flourishing do so because of migration. And yet so many of the economic and social actors of our new cosmopolitanism are regarded as outsiders, non-persons, invisible and anonymous.

As in the days of apartheid in South Africa, when migrant workers, often separated from their families, forced to carry passes to confirm the identity and the limitations on their rights derived from their personhood, worked subserviently for very limited reward as others lived luxuriously, so we today have a sub-strata of humanity living in the shadows of our cities. Apartheid may have been outlawed in South Africa but on a global scale, its spirit stays strong.

If I take myself back to the Convention on Modern Liberty, it struck me that there were some very contradictory approaches to civil liberties. The most striking of which was the outrage over the lengthened detention of terror suspects compared to the silence over the prolonged

detention of children in the asylum system. Civil libertarians inevitably form liberty around the *civitas*! Human Rights advocates around our common humanity. That may be too stark and insufficiently nuanced a statement but putting it starkly highlights a powerful dynamic.

The more I engage with the issues of migration, the more I believe the pivotal question is ethical. The politics, the economics, the legislation, the 'narrative' as we have to call it these days all flow from the ethical position. And the core of the ethic is our fundamental equality as human beings. I think I want to say 'the sanctity of our being' by which I mean our value as individual and unique human beings in possession of a story, a web or relationships, a capacity to feel pain and to empathise with others' pain.

We should not employ the term 'rights based approach to migration' too narrowly. Let us call it a human approach of one group of humanity to another based on the universally acknowledged human rights declarations and our capacity to live side by side with our neighbour, empathetic to their needs and willing to share a common prosperity.

### **Pie in the Sky?**

Maybe it is, but the lack of vision and challenge in the migration debate is stultifying. The stakes are high. The exposure of the violence perpetrated against deportees through the death of a deportee at Heathrow last week, the backtracking on the ending of child detention, the resumption of deportations to Zimbabwe are all matters which have devastating effects on the lives of individuals and their families and are all urgent. My organisation saves lives through its casework interventions. I am really sorry that I have to say that. I would much prefer to say that we promote community cohesion and social justice, which we do, but we also have to defend people from an abusive and in places violent immigration system. In the modern, prosperous state of Britain, it should not be necessary to save people from dying or being permanently scarred by the immigration system. Ultimately, we are in this situation because the migrant is not regarded as a citizen and as a non-citizen has a diminished status as a human being. I am absolutely convicted that this is plain wrong and downright immoral.

So equipped with an alternative vision what is the praxis of engaging on the complex issues of migration?

Firstly, as I have said, it is vital to start from the perspective of the human being and their dignity. But then it is important to ask questions of the nature of the modern state - or is the title of this talk actually wrong. Are we not living in post-modern states? Although England, Scotland, Wales, Blackburn, Hull, Bradford, Stoke on Trent, Gloucester, Leamington Spa are

one political territory together with London and all under the umbrella of the United Kingdom, are we in reality a homogenous unit – a cohesive nation state? London is a city state, vibrant and dynamic and greatly helped by its engagement with its global connections. We cannot in a globalised world simply define our territory in the terms of the old nation state conceptualisations even though those territorial and governmental demarcations are unlikely to disappear.

We must have the right to protect territory from external threat, whether that is cyber-attack or terrorism or invasion but migration does not fall into that category. Employing the language of threat, however, in relation to migration is very dangerous indeed. Let me give a recent example. A series of photomontages have been designed, which portray the consequences of global warming. 'Climate change refugees' will all be coming to London. Pall Mall is portrayed as a shanty town. The Gherkin Tower is dressed up as a Calcutta slum. Environmental campaigners use the threat of migration as a frightener in securing a response from citizens. In reality, to look at migration from a global perspective, we can see it as a positive adaptation model for climate change. Environmentalists need to talk to migration experts before making wild apocalyptic statements. They also need to engage with the migration debate from a positive perspective. In truth as some areas become uninhabitable others will become very hospitable.

One of our difficulties is that politicians and planners know that the globalised world functions differently from past conceptions of territory and place but they do not share that with the wider public. We must adapt to the changing nature of the state. Of course, this is not an easy process and it is not without challenges but it is an imperative for the present age. Migration controls will become increasingly draconian and dangerous. The wall along the border of Mexico and the United States, the boats patrolling the Mediterranean, the encampment of Indian soldiers along the border with Bangladesh in order to prevent climate change provoked migration and the culture of disbelief of the UKBA and the aggression of private security guards in the deportation process are all reasons to realise that there is never going to be an effective control of migration without some form of coercion and litanies of miscarriages of justice and the denial of basic and fundamental human rights. Nor will immigration controls be possible without the occasional even if unintentional extra-judicial killing.

That is not to say that there are not levers which can be pulled to ensure that flows of people are not such that they produce create over demand of public services in some areas or further drag down under-developing regions. This matters in places of conflict and in areas of deprivation. A classic example was the decision by the Home Office to disperse asylum

seekers to Stoke on Trent, a town which was experiencing severe economic decline. Of course, it presented significant challenges for integration. But always the issue is one of economic planning and some common sense. Manchester would be a different example, as is Scotland where population growth through migration is a deliberate strategy and a very sensible one.

The real levers to manage migration are higher wages for less skilled work in relation to benefits. Another is to invest significantly in skills levels. This ensures that local people are gainfully employed and migration is no longer a threat. The provision of portable pensions would ensure people do not of necessity spend their whole lives in an adopted country. This is to address pull factors.

More urgent is the need to address the push factors. Refugees should not be regarded as 'collateral damage' in any armed intervention as has been the case in NATO's recent interventions. Refugees are human beings with rights. Equally, in climate change adaptation planning, displaced people cannot be parked in refugee settlements, there must be planning now for the adaptation of alternative territories to settle and flourish. And in the global market there is urgency in addressing the fairer distribution of resources. Fair trade does not only matter for banana and coffee growers but also for the migrant worker who provides the two for one packs of chicken in our supermarkets. All of this might seem to be too broad brush and beyond the scope of migration policy, but it places migration in the right context. The movement of people is a consequence of global mess in which we are currently immersed. It is a fact of life. The vulnerable migrant is as much our responsibility as anyone else regardless of where they were born. The state in which they reside must have a 'duty of care' to protect and care for them. If there is any place for the use of law in defending those at risk of destitution, deportation, detention without trial and death it is here.

So we do need to incorporate economic justice within the framework of human rights for migrants as their movement is an economic as well as a social, cultural and political act. There is a consistent pattern of free movement of capital and skill but not of labour. It is not difficult to imagine the reaction of western governments if developing countries put the same restrictions on the movement of personnel into their countries from the west. There would be restrictions no doubt through aid and credit conditionality. In a sense migration is a component of the "rules of the economic game" globally. Uneven economic development provokes the movement to brighter economic climes and fuels conflict and political unrest resulting in refugee flows. The human right to decent living conditions would diminish the movement of people and make that movement more evenly balanced and equitable on a global scale.



I want briefly to ask where the migration debate goes now after the Comprehensive Spending Review, the 'Big Society' and the reduction of the scale of state interventions as a provider of public services. This is complex but one in which the role of the modern state comes under immediate and topical scrutiny. On the one hand a less intrusive state, and less well funded law enforcement capacity, including the rejection of biometric passport controls may enable undocumented migrants to be more resourceful in avoiding deportation; it may also enable more unwelcome criminal activity in the area of migration.

However, the core question I want to ask is whether or not a 'smaller state' is that at all. It seems to me that the reduction of state intervention is going to have as big an effect if not bigger on the poorest than an overburdening, intrusive state. My great concern is housing. The combination of changes in housing benefits, the linking of social housing rents to market rents, the reduction in supply of social housing, the ending of the decent homes fund will all contribute to an increase in insecurity of tenure and actual homelessness. In this case the small state is rather an absent state. Non-intervention is a *de facto* intervention. This will have a huge impact on migrant communities and I am sure homelessness will increasingly be taking up our time and attention. Equally, we could point to the reduction in legal aid, the time limits on immigration cases and the cavalier closure of the NGO Refugee and Migrant Justice, are all disturbing components of the *absenting* (a more realistic description than the *small*) state. Here, the laws have not changed but the ability to access the law have changed drastically. It cannot be right that a City firm can employ a highly skilled and well paid lawyer to secure visas for the staff they need while a refugee from the Congo cannot find the legal means to prevent themselves from being deported to their death.

## Conclusion

Finally, I want to link these core words – 'human rights' – 'the use of law' – 'the modern state' – and ask whether the combination of dynamics at play in the contemporary world are creating a *zeitgeist*, which could ultimately undo the important gains of the post war period. These gains emerging as they did from a period of extreme totalitarianism, the genocide of millions, the presence of refugees in vast numbers both in Europe and the United States, as well as in Latin America and Asia, brought us the United Nations, the Universal Declaration of Human Rights, the Geneva Convention on Refugees, the European Union. These great and real advancements of human inter-connectedness are being put at risk. It would be naïve to think that they could ever just be taken for granted but: the polarisation of people of faith; the shifting nature of warfare; the changing nature of nature itself; the shifting nature of superpower both militarily and economically; and the continuing patterns of enslavement and

impoverishment all contribute not only to an apocalyptic atmosphere but to a dangerous attraction to extremes.

The rationality of the enlightenment is inadequate for interpreting the modern global world where the interplay of myth, religion, and rationality confuse and disturb past conventions. That poses an enormous challenge for the legalistic tools of human rights applications with their roots in the enlightenment and puritanical faith. But those tools whatever intellectual cloak they wear truly matter in ensuring a future which continues to value social justice for all.

The real danger is that the irrational will prevail. That might be the crooked logic of an absenting state which fantasises that the market and civil society can join forces and save the state from doing its job. It might be the irrationality of the ring-fenced national, ethnic or religious identity espoused by the Tea Party or Melanie Philips or the English Defence League. It might be the irrationality of a restored Caliphate or a romantic conception of Christendom. None of those will do within the realities of difference and diversity of our global world within which migrants move and new cultures, of necessity multi-cultures, emerge. The sort of irrationality we are witnessing invariably leads to the scapegoating of the other. It was a response to scapegoating and the violent negation of the other which led to the formulation of the pillars of human rights. To prevent violence, impoverishment and abuse, we must defend both the pillars of human rights and the communities that depend upon them.

I hope this overview is a helpful beginning to the day's discussions. There are few answers in this debate and lots of interlocking issues. But to me it is clear that responses to migration, and I imagine other areas of our discussions today, require both the vision and the architecture of human rights, the just and fair application of the law through equal access to the law, and an understanding of the state as a responsible protector of rights, provider of safeguards for the vulnerable and the equitable distributor of resources. It is vital that the state does not abrogate responsibility and that it does not pretend it can remain locked into increasingly outmoded concepts of nation states, but adapt to our post-modern, globalised realities. The state should neither be our master nor our servant. It must be the enabler of a process through which global apartheid has its undoing.