

BOOK REVIEWS

PUBLIC LAW AND POLITICS (1986) Edited by Carol Harlow. Sweet and Maxwell, London pp. v + 255. Price £ 28

I

CONTEMPORARY ENGLAND is, indeed, in the iron grip of Thatcherism. Thatcherism signifies the vitality of political conservatism wholly at odds with the cherished images of an authentically liberal and pluralist British society. The return to a minimal state, the privatization of the 'commanding heights of the economy', the steady dismantling of social services, the 'squeeze' on higher education and research, the handling of the coalminer's strike, the Northern Ireland militancy and the peace movement -- all these have posed sudden dilemmas and acute anxieties to the stalwarts of liberalism in England. The collected essays under review articulate, on the whole, the anguish of a Paradise Lost, and offer critiques of state and class power in terms less shrill (but for that reason no less poignant), familiar to many a scholar in the Third World societies. In a sense, these essays remind us of the extraordinary fragility of all intellectual complacencies in the face of resurgent class and state power which constantly mocks at the heritage of the rule of law. For this, if for no other reason, I recommend a close reading of these essays.

There are other, no less weighty, reasons, too. *First*, the book is vibrant with apprehensions of "creeping authoritarianism of democratic capitalist-democratic regimes".¹ *Second*, there is concern at the fostering of an unabashed nationalistic ideology: and "large doses of nationalism seems able in the modern world to make up for a large amount of what the best minds in the eighteenth and nineteenth centuries would have seen as intolerable injustice."² *Third*, there is concern with the frontier technologies which subjugate human beings, where "...man himself is overpowered by technique and becomes its object."³ *Fourth*, there is renewed concern, and fairly anguished one, with theories of legitimation and models of 'crisis-management' by the state through the law.⁴ *Finally*, without being exhaustive, there is the discussion concerning the 'politics of judiciary', agenda for judicial reform and the role of 'rights' in the context of legislative

1. See Ralph Milliband, "Activism and Capitalist Democracy" in C. Harlow (ed.) *Public Law and Politics* 38 (1986 hereinafter referred to as 'Harlow').

2. Harlow at 41.

3. David Schiff, "Reconstructing Liberty in the Nuclear Age" in Harlow 226 at 247, quoting J. Ellul, *Technological Society* 127 (1964).

4. See, especially, Rodney Barker, "Obedience, Legitimacy and the State" and Bernard Crick, "Northern Ireland and the Concept of Consent" in Harlow at 3-22 and 39-56 respectively.

majoritarianism.⁵

How close is this discourse for us all in the Third World! It is, indeed, a pity that the work under review, even at this stage, is tinged with insular, and imperial, pride, omitting any reference whatsoever to juristic and political thought and practice in Asian, African and Latin American societies. It is an undisguised purpose of this review to suggest that a fellowship of juristic learning must at least arise out of a fellowship of common subjection and suffering.

II

As the editor Carol Harlow notes right at the outset the book under review is not the traditional *estschrift* for Professor John Griffith; that the theme of the essays is primarily the interface between law and politics and only secondarily the work of Professor Griffith. And yet it is clear that the powerful challenges that Professor Griffith placed to the neglect of law by political theorists and of political theory by jurists and lawyers animate many a contribution in this volume.⁶ This is as it should be because, in the present opinion, John Griffith belongs to a rather rare breed of English liberal thinkers who has done much to build bridges between political thought and practice in England on the one hand and law and jurisprudence on the other.

Carol Harlow's contribution is dedicated to the continuing relevance of the Griffith thesis. It is surprising how common are the problems of judicial appointments in the United Kingdom and India. Ms. Harlow laments, in terms odiously familiar to Indian ears, about the "patronage system" of judicial appointments which "operates to serve the *status quo*".⁷ Knowing that it would remain a cry in wilderness, she still reiterates the need for a "programme of affirmative action...to redress the imbalances of sex and race in the judiciary".⁸ Her reference to Lord Chorley's suggestion, made in 1933, concerning a professional judicial service⁹ will also reverberate with Indian readers. She suggests that if judicial selections were made "by an all-party Committee of the House of Commons, difficulties over 'the politics of judiciary' might finally be laid to rest".¹⁰ One cannot be too sanguine on this, however.

Complaints against judges raise serious issues of accountability of the judiciary. It appears that more systematic academic attention has been given to this issue in the United Kingdom than in India. Attention has been focused in academic discourse, at any rate, to the California Commission on

5. Carol Harlow, "Refurbishing Judicial Service," in Harlow at 182-206.

6. I feel a special affinity to his work, as *The Indian Supreme Court and Politics* almost coincided in publication with Professor Griffith's *The Politics of Judiciary*.

7. *Supra* note 5 at 191.

8. *Id.* at 192.

9. *Id.* at 197.

10. *Id.* at 199.

Judicial Performance and the Swedish Justice Ombudsman set up as early as 1809".¹¹ As Harlow notes, however, in England there is no official readiness to devise structures which would reconcile the "two contradictory principles of independence and accountability".¹² In India, of course, non-state structures in recent years have attempted such reconciliation, especially through print media which has unflinchingly acted as a judge of judges as well as a strong defender of judicial independence against the executive. It would have been helpful to know how well this role is performed in the face of official apathy to the problem of judicial accountability in England.

III

Batting the logic of rights is now a respectable theoretical exercise in England and America. Kenneth Minogue's contribution provocatively titled "What Is Wrong With Rights"?¹³ seems to suggest an acutely simple answer: "Everything!" And it is relatively easy to bolster this conclusion by several elegant quotable quotes: the rhetoric of rights can "particularly lead to the relaxing of control over the generations",¹⁴ "rights in law thus become a new version of an old corruption: power without (financial or democratic) responsibility"¹⁵ the "cannibalistic character of rights" consists in "destroying large areas of the subtle network of rules by which the order of any society is constituted."

The rights explosion, thinks Minogue, marks the emergence of almost a new civilization; it "adumbrates a new world in which for every evil, indeed for every folly, there corresponds a new right."¹⁷ As his evidence, we have the repertoire of the Minogue wit at its very best:

Mr. Enoch Powell has recently discovered "the most precious of all liberties" in what he calls "the right to go to hell in one's own way." The most oblique right I have yet discovered turned up in a conversation about abortion in an American University in the sentence: "The unwanted child has a right not to be born." A right to access to personal files is currently being demanded, and a right to see one's own obituary an emerging possibility.¹⁸

These profundities certainly adorn a polemics on rights; yet they fail to make an argument. Abuses of conceptions do not prove them necessarily

11. *Id.* at 203.

12. *Id.* at 204.

13. *Id.* at 209-225.

14. *Id.* at 222.

15. *Id.* at 225.

16. *Id.* at 220.

17. *Id.* at 214.

18. *Id.* at 214-215.

wrong. For quite a large number of observations, too, Minogue gives us no cogent case. For example the attribution of the enormous "propensity of the state to regulate every corner of social life" is not necessarily related to "spread of rights";¹⁹ nor is it necessarily true, in all contexts, that the "rights process itself is expected to determine outcomes which previously depended upon a person's political activity."²⁰ Minogue offers no evidence in support of his thesis that implementation of right to self-determination has "led to the heavens falling in many a Third World Country."²¹ It may be an "error to imagine that once we have identified a right, it then becomes our duty to implement that right irrespective of all other considerations."²² But surely if this kind of argument can be made in regard to self-determination of colonized nations, it can also be made against the liberation from slavery or male-domination. And colonization in Asia, Africa and Latin America also proceeded from the very confusion between having a right to dominate the heathen world and its implementation regardless of all other considerations! Such observations really lead us, indeed, to what Minogue calls into "a charmless exchange of recriminations between hostile groups."²³ But this is so not because there is something wrong with all rhetoric of rights but because of a particular kind of rhetoric Minogue chooses to assail and ends up himself practising!

IV

David Schiff's paper "Reconstructing Liberty in the Nuclear Age" should be of particular relevance to the activist struggle in India for democratic rights against a 'nuclear state.' In a sense, the paper can be read as one long footnote to Albert Camus' dictum: "Without liberty, heavy industry can be perfected but not justice or truth."²⁴ Schiff demonstrates how the so-called considerations of national security carries the "potential for the erosion of 'employment and trade union rights,'" indeed to a point where the integrity of the working scientists comes to be regarded by the employers as "subordinate not only to the general interest of the nuclear industry but...merely to the prevailing fashion in reactor design."²⁵ The suspicious accidental death of Karen Silkwood campaigning against "lax safety standards", along with similar situations, represents for Schiff the "activities of the nuclear industry's *internal security* agents."²⁶

Schiff, reviewing all available evidence does indeed believe that the Atomic Energy...Act of England is indeed a "dangerous constitutional

19. *Id.* at 215.

20. *Id.* at 219.

21. *Id.* at 223.

22. *Id.* at 222-223.

23. *Id.* at 221.

24. *Id.* at 226.

25. *Id.* at 232.

26. *Id.* at 233 (emphasis supplied).

innovation”²⁷ mainly because the justification for excessive safety and security entail the same order of potential threat to human, democratic rights which are usually invoked to sustain “the concept of emergency within the liberal democratic tradition.”²⁸ This tradition “anticipates a crisis in our ideology to conceive an emergency without an end.”²⁹ The notion of emergency is the one which enables the differentiation between the ‘normal’ and the ‘abnormal’ time, between the ‘usual’ and ‘exceptional’ power. It is, indeed, the “ability to foreclose the exceptional that is so basic to our ideology.”³⁰ But the legislation on nuclear secrecy threatens this ability altogether by institutionalizing a permanent emergency.

The other major human rights cost entailed by legislation on nuclear power is the virtual suspension of free speech and participatory rights of public debate. Debate over nuclear technology inevitably tends to get polarized, owing to the “adversial use of experts”, the “presumed divergence between” the public and the expert view, and an “unwillingness to be moved by evidence” on the part of the technocrats and managers of nuclear power.³¹ Indeed, even the public enquiries and media discussion is permeated by “certain controlling influence”³² which restricts knowledge about nuclear power and “therefore limits opposition to it.” Indeed, Schiff goes so far as to say (and rightly in my opinion) that the public inquiries “approach or perhaps even precipitate the end of freedom of expression as the central liberty of our liberal democratic processes.”³³ This is so because nuclear power has been “presystematized as a good within our thinking and has even retained this status within scientific, expert knowledge...despite the apocalyptic character of nuclear weapons.”³⁴ In fact, the very perceived need to control dangerous material leads to a conflation; “lack of security, less scrutiny and less willingness to scrutinize.”³⁵ Thus it is that liberty stands reconstructed in a nuclear age: and the conception of liberty now asserted is more congenial to permanent emergency, rather than permanent democracy.

Schiff's answer, of course, is that we should deconstruct this reconstruction; and that is precisely what he has achieved through this excellent analysis. Although nuclear industry in India is in the state sector, the dilemmas and the results are not one bit different than in England or elsewhere. Indian activists, and theorists, should find Schiff's call for rethinking liberty back to its roots against legitimization of technology which devours justice should be a resource in a struggle for liberty for us all.

27 *Id* at 235

28 *Ibid.*,

29 *Ibid.*

30 *Id.* at 236.

31. *Id* at 238.

32. *Id* at 239.

33. *Id* at 240.

34. *Ibid*

35. *Id* at 246

V

Public Law and Politics, on the whole,³⁶ an endeavour to make us rethink our notions of state, science and law. It also highlights the dilemmas inherent in the liberal paradigm of political obligation. This work should be read by all those who take the future of human liberty seriously.

*U. Baxi**

36. Space forbids elaborate discussion of other papers such as, for example, Geoffrey Marshall's "Ministers, Civil Servants and Open Government" (pp. 80-90), Richard Rawlings' "Parliamentary Redress of Grievance," (pp. 118-142). In fact, each essay demonstrates the centrality of deformation of power, inadequacy of received ways of thinking, and above all commonality of basic problems in England and India.

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