Unjust Laws and Legal Education

A Review of Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment*, Guardian Faber, 2019. 320 pp. £18.99 (HB). ISBN: 978-1-78335-184-8

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Practical Jurisprudence

The question of how individuals ought to respond to unjust demands that are enshrined in law is as old as the law itself, and occupies a central place in university law school jurisprudence (legal philosophy) courses.

Whether questions concerning the moral obligation to obey the law are treated as largely abstract ones, or, conversely, as expressive of dilemmas which a sizeable portion of law graduates who enter law-related careers will encounter, very much depends on the extent to which the law school, through its curricula, is reconciled to the history of the broader society in which it is embedded, including that society's violent history. On the whole, UK law school jurisprudence courses discount the violence of Britain's colonial history. Consequently, they have been able to dissociate English law from those degenerate legal systems which routinely place individuals in a quandary over whether or not to obey a valid law.

This review argues that the coming into force of the Immigration Acts of 2014 and 2016 has fundamentally altered the terms on which UK law schools are able to explore the old jurisprudential question of obedience to unjust but valid laws. The Immigration Acts give effect to the UK government's desire to create a "hostile" or "compliant" environment for illegal immigrants by forcibly engaging a range of private individuals, such as employers and landlords, in the task of border control. Recently, the High Court concluded that sections 20-37 of the Immigration Act 2014 caused landlords to racially discriminate against black and minority ethnic prospective tenants "...where otherwise they would not" (*R (On the Application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019], para. 105).

There is an urgent need for legal strategies of support for individuals who are compelled to act immorally (e.g. in a racially discriminatory fashion) in order to avoid the Immigration Acts' quite draconian sanctions. University law schools have a role to play in developing such strategies, but will be hampered in doing so for as long as the question of jurisprudence is assumed to have little relevance to the routine of legal practice.

It is impossible to read Amelia Gentleman's *The Windrush Scandal: Exposing the Hostile Environment* and retain a sense of British exceptionalism and innocence in the production of laws which force private individuals to act in ways which offend the most basic precepts of justice. Less immediately obvious is the way in which this book, written by someone who was not trained in law but who "[f]or a while...was transformed into an immigration caseworker, spending all day scouring Home Office letters and files of evidence, learning a whole new vocabulary of complex immigration acronyms, trying not to drown in the confusing nuances of twentieth-century nationality legislation" (Gentleman 2019, p. 13), points toward the simplest and most effective of strategies of support for those caught up in the hostile/compliant environment. As the book's subtitle suggests, the strategy is to expose the laws which, by their nature, give rise to the question of whether or not they ought to be obeyed. There can be no question of a lawyer advising a client to disobey the law. However, the value of explaining to an employer who, after much soul-searching, arrives at the decision to dismiss a "... dependable and efficient worker...since the fines for employing illegal immigrants had recently doubled to £20,000...a fine...that...would push a small firm into bankruptcy" (Gentleman 2019, p. 55) that the dilemma s/he faces is real and not exaggerated should not be underestimated.

Developing strategies of support in UK law schools for those placed in a moral dilemma of the kind which the hostile environment policies bring about requires a culture shift and a recalibration of resources. The former is harder to achieve than is the latter for the first person to whom the unjust law must be exposed is the lawyer her/himself, and, as Gentleman's narrative illustrates, accepting this reality (in her case the fact of "...an unjustified persecution of a whole generation of people by the government" (Gentleman 2019, p. 74), is a difficult and disturbing experience, not least for the lawyer trained to believe that unjust outcomes are the effect of the law's application and not its inherent design. The resource shift is more easy to achieve. Most UK law schools have shown themselves to be receptive to the Legal Education and Training Review (LETR) recommendations that "a discrete assessment in the skills of research, writing and critical thinking" should be added to all law school curricula. Their positive reception is important, because, as Gentleman aptly demonstrates, exposing unjust laws is impossible without meticulous research.

3. Unjust Laws and Legal Education

Unjust Laws

Under certain circumstances, it is perfectly legitimate for a lawyer to advise a client to comply with the law but to expressly make it known to the relevant enforcement authorities that s/he is complying under protest. The Immigration Acts of 2014 and 2016 carry at least four characteristics that would persuade legal philosophers to put in question whether the obligation to obey the law applies in respect to them. All four characteristics are identified and amply illustrated in *The Windrush Betrayal.* Three of these characteristics are explored in this part of the review. The fourth, which warrants special attention, is addressed in the section of the review which follows.

The Windrush Betrayal documents the cases of a number of men and women who had "...all arrived in the United Kingdom as children in the 1950s and 1960s from Commonwealth countries, particularly from Britain's former colonies in the Caribbean" (Gentleman 2019, p. 8). By law, anyone migrating to the UK before 1 January 1973 - as was the case with the individuals included in the book - was legally entitled to remain in the UK indefinitely. Almost without exception, the men and women had remained in the UK since arriving there - not even taking holidays abroad (Gentleman 2019, p. 6; p. 8; p. 52; p. 60; p. 70). Mainly for that reason, they formed part of a group of approximately nine million UK residents who, whilst residing in the UK perfectly lawfully, do not possess a British passport (Gentleman 2019, p. 62 & p. 180). The Immigration Acts of 2014 and 2016 did not alter the legal status of the men and women as such. However, they require every person resident in the UK to prove by way of a limited range of documents their entitlement to be in the UK before they can access basic resources, such as public or private rented accommodation. This rule disproportionately impacted on people in the position of the men and women in the study, who would see their "...security disintegrating simply because of the absence of a faded stamp in a passport" (Gentleman, 2019, p. 12. In short, the effect of the 2014 and 2016 Immigration Acts was that "[t]he occasions on which it would be necessary to produce a passport were set to multiply" (Gentleman 2019, p. 124).

The UK's immigration laws have been the subject of much entirely justified critical commentary. The "...retrospective changing of laws governing...immigration status, the rules constantly shifting around…" (Gentleman 2019, p. 192) has proved to be the pattern. However, these features of the immigration system, including the requirement that an individual provides proof of her/his lawful residence, in and of themselves, do not raise questions relating to the moral obligation on individuals to obey immigration laws.

Even in the context of the UK's harsh record of immigration control, the Immigration Acts of 2014 and 2016 are exceptional. As stated in the introduction to this part, Gentleman's book details at least four features of the Acts' operations which might provoke certain forms of civil disobedience.

First, for the men and women included in the study, the burden of proving lawful residence was impossible to discharge. The burden was made even more onerous by the fact that "[f]or whatever reason, now forgotten with the passing of the decades, the Home Office neglected to keep a record of those people from the Commonwealth who were granted leave to remain on arrival" (Gentleman 2019, p. 149). The author deftly summarises the law's exacting demands when she questions: "[h]ow many of us are able to lay our hands on our first passport? How many of us can supplement this with three or four pieces of official documentary evidence showing where we were living every year for the past four or five decades? (2019, p. 181). In default of a passport, most of the men and women were able to gather official documentary proof of at least thirty years of National Insurance payments (see Gentlemen 2019, p. 24; p. 36; p. 51; p. 73 & p. 171). This entirely cogent proof of long-term evidence was rejected by the Home Office as insufficient. In all cases, National Insurance payment records were supplemented by other official documentation. In the case of one woman, "...copies of archive records from Shropshire Council showing that she had been in care in 1971" (Gentleman 2019, p. 36), and in the case of another "...seventy-five pages of evidence proving she had spent a lifetime in the UK - bank statements, dentist's records and medical files...tax records, letters from her primary school, from friends and family - but, inexplicably, this was not enough to satisfy immigration staff" (Gentleman 2019, p. 171).

The impossible burden imposed on long term resident non-nationals to prove their legal entitlement to be in the UK is all the more morally offensive when considered in light of the fact that a "...lack of record-keeping within the Home Office was to become a recurrent and very significant problem" (Gentleman 2019, p. 86). Especially worrying was the fact that in 2010 the Home Office had destroyed its "...archive of what were called landing cards or registration slips, which recorded a name and date of arrival and the ship's details" (Gentleman 2019, p.148). The landing cards/registration slips would have been able to provide definitive proof of the date of arrival of any passenger journeying to the UK by sea (Gentleman 2019, p. 151).

Having failed to discharge the impossible burden of proof, the men and women suffered a *de facto* loss of status. As Gentleman puts it, "...the government reclassified a large, wholly legal cohort of long-term residents as illegal migrants" (2019, p.8), "...forcing those in a Windrush-type situation to redocument themselves - making them apply and pay for papers that proved a status which they already had" (2019, p. 192).

The second sign that the Immigration Acts of 2014 and 2016 are inherently unjust is that they actively involve those individuals deemed to be lawfully resident in the UK in a strategy designed to strip others of basic human entitlements: "[p]eople without papers were being pushed out of normal society, beyond the protection of the state, forced into destitution and homelessness, excluded from employment and denied the support of the NHS and the police" (Gentleman 2019, p. 180). Losing, first, long-held jobs, then being denied unemployment benefits and then being forced to use food banks was a recurrent theme of the book (e.g. Gentlemen 2019, p. 30; p. 67; p. 72 & p. 141). Some were rendered homeless (e.g. Gentleman 2019, p. 73), and forced into street begging (Gentleman 2019, p. 178). Others were denied the fundamental right to private and family life, with the devastating consequences that they were robbed of the chance to attend the funerals of close family members (e.g. Gentleman 2019, p. 67; p. 72). In one of the cases which attracted substantial media attention, a man was refused the cancer treatment that medical tests had deemed necessary (Gentleman 2019, p. 75/6). Knowing of the Home Office's harsh treatment of undocumented migrants, another man decided that he would not apply for his state pension (Gentleman 2019, p. 71).

The third sign that the Immigration Acts are of a kind which invite individuals to question whether they should be obeyed is that they impose sanctions which are wholly disproportionate to the legitimate aims of border control. One of the men interviewed for the book described opening his door "...to find seven officers, six men and a woman, getting ready to smash their way into the house. One of them had a battering ram, another was carrying a shield…" (Gentleman 2019, p. 43). People wrongly suspected of being illegal immigrants were not the only targets of the Immigration Acts' unyielding regime: "...fines imposed on businesses that hired illegal immigrants doubled, and prison sentences were introduced for employers who took on people without papers" (Gentleman 2019, p. 118), which, under the 2016 Act, could extend to five years (Gentleman 2019, p. 138). In an effort to force individuals to 'self-deport', "...private outsourcing company, Capita,...bombarded individuals with an alarming combination of phone calls, letters, and, most controversially, text messages..." (Gentleman 2019, p. 163).

To discriminate or not to discriminate?

I return to the High Court decision in *R (On the Application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] in order to examine the fourth characteristic of the 2014 and 2016 Immigration Acts which leaves them open to legitimate debate over whether they should be obeyed. In an unprecedented move, the High Court concluded that sections 20-37 of the Immigration Act 2014, which contains the controversial "right to rent" provisions, caused landlords who would otherwise have rented property in a non-discriminatory fashion to discriminate on racial grounds. Gentleman puts the point more forcibly: "[i]f you're British-born, white, with a British-sounding surname, you won't ever face the hostile environment. Landlords aren't checking white people's papers" (2019, p. 291). The High Court decision is remarkable not least because of its recognition that racism is injurious to both victims and perpetrators, making clear that both black and minority ethnic prospective tenants and private landlords (many of whom, obviously, belong to black and minority ethnic communities) have suffered under a racially discriminatory, and otherwise flawed, government strategy of immigration controls.

It is hard to imagine a more morally offensive use of law than to place employers, landlords and others in a position where they are forced to debate between the merits of racially discriminating against individuals with whom they may have developed a close friendship as well as a working relationship, or face a possible fine or imprisonment for *refusing* to discriminate on racial grounds. This is not a theoretical dilemma. Gentleman reports that one of her interviewees "...was sacked by the man who had employed him for years as a painter and decorator. His boss was very apologetic when he told him in December 2016. They had become friends, and he respected Anthony as a dependable and efficient worker. But since the fines for employing illegal immigrants had recently doubled to £20,000, he felt he had no choice; a fine of that level would push a small firm into bankruptcy" (2019, p. 55). Another interviewee explained that the head teacher of the primary school he had worked in for fifteen years was "terrified" when appraised of the penalties imposed on employers for employing undocumented migrants (Gentleman 2019, p. 139). Overall, the number of interviewees reporting that their pre-dismissal meetings included discussion of the "substantial fine" (Gentleman 2019, p, 141) that the employer could face if the employment was not terminated without delay lends support to the High Court's conclusion that the hostile environment policies are capable of compelling individuals to act in a discriminatory fashion - entirely against their natural inclinations.

The UK government received ample warning of the racially discriminatory impact of the Immigration Acts from bodies with equality law and immigration law expertise, including the Joint Council for the Welfare of Immigrants (who brought the Judicial Review claim which resulted in the High Court decision discussed above) and the Immigration Law Practitioners Association. As Gentleman argues, "[i]f ministers had felt it was important to worry about the potential for racially discriminatory consequences, they would have listened to the chorus of warnings. The decision to ignore them reveals that they didn't much care" (2019, p. 144). *The Windrush Betrayal* is essentially "...a story about...race, poverty and marginalisation" (Gentleman 2019, p. 11).

Conclusion

No lawyer should advise a client to disobey a law and face the inevitable consequences. However, an unjust law can be undermined simply by subjecting it to intense and sustained debate over whether it is a law in relation to which the moral duty to obey the law should not be thought to apply. If, in the context of the Immigration Acts of 2014 and 2016, such a debate is coupled with increasing numbers of landlords, employers, NHS officials and others formally recording that they have complied with the law but do so under protest, the force of these laws, inevitably, will lessen. "The solicitor was worried…[s]he said: I can't stop this. I don't know how to stop this" (Gentleman 2019, p. 56) - so reported one of the men and women interviewed for the book. For that solicitor and others like her/him, there are no easy answers. However, as is so often the case, education (in this case, legal education) has an important role to play.

References

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