THE BACON CASE: IMPLICATIONS FOR THE LEGAL ORDER

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The legal profession in N.S.W. has never been known for its progressive thinking, and the Bacon case has done nothing to change its image. (See generally The National Times, 15/2/81.) Wendy Bacon applied to the NSW Barristers Admission Board for admission as a student-at-law on 5 June 1979. To gain such status she was required to obtain two certificates of good character and to disclose any circumstances which might adversely affect her good fame and character. These requirements she complied with and was duly admitted. Approximately two months later she applied to the Board again, this time seeking admission as a barrister. Her application was deferred and delayed until 9 December 1980. No decision was reached at that meeting: it was adjourned to Thursday, 18 December. On that date, her first application was finally refused: no reasons were given.

Why was Wendy Bacon denied admission?

At the December 9 meeting, members of the Board had before them a copy of a statement made in the NSW Parliament in October 1980 by Jim Cameron, MLA a member of the State Liberal Opposition. Members of the Board were also given copies of a chapter of a book written by Wendy Bacon and published in 1972. It is believed that the Registrar of the Bar Association had actually written to the Board prior to its decision conveying the view of the Bar Council, which opposed her admission in the absence of evidence that she no longer held the views expressed by her in the 1972 book. One correspondent suggested in the Sydney Morning Herald that the all-male Board could not accept in a woman anti-authoritarian views and attitudes, relating especially to the obscenity laws, which they would have accepted in a man. In any event, it does seem likely that it was her anti-authoritarian attitudes, reflected in the 1972 publication and in her confrontations with the authorities in the course of various political activities, which caused her rejection. (See the Editorial, (1981) 6 Legal Services Bulletin, from which we have drawn the above.

The Bacon case does not stand alone, but with other recent occurrences in keeping with the crusty traditions of the profession. The conservative

outcry which has accompanied the N.S.W. Law Reform Commission's discussion paper which recommends fusion of the organisation of the profession now divided between solicitors and barristers, and abolition of wigs - amongst other recommendations aimed at updating the practice of law - is simply a continuation of the earlier antediluvian justification of contemporary practice and attire at the Bar offered by one of its leading lights, Mr. Brian Sully, Q.C. (Sydney Morning Herald, 17/4/81.) Such public demonstrations of arch conservatism, coming on top of Mr. Justice Hutley's widely publicised honest devotion to authority and hierarchy, (e.g. "Unless the legal profession is to fall to the literacy level of its clients it is bound to have a different social background from its clients and it would be disastrous if it did not have that background" (from his submission to the N.S.W. Law Reform Commission's Enquiry into the Legal Profession), have helped to de-mystify the legal order in his State. Thus the public has been given a rare opportunity to focus upon the role of legal professionals in servicing disproportionately those who benefit extraordinarily from a system of vast inequity and wide-spread injustice. (See for example Professor Whitmore's critique, "Justice denied by outdated legal system", S.M.H. 6/4/1981.)

Much of the current debate about the inequity of the legal system borders on the ludicrous. Can you imagine anyone less in touch with the political reality of the struggle in the legal sector than Mr Sully, who referred to Professor Harry Whitmore of the U.N.S.W. Faculty of Law, as a "left-wing academic... determined to attack and undermine public confidence in the legal system, the courts and the legal profession" (op. cit.) (Professor Whitmore is certainly to the left of General Pinochet one has no doubt.) Nevertheless it is important that progressives attempt to treat the debate seriously for strategic reasons.

In the current crisis and re-structuring of the Australian economy there is, necessarily, a parallel transformation occurring in other sectors. The law as an instrument of control and a fundamental ideological institution is of primary importance to the ruling class in aiding this progress to occur without a fundamental rupture. Thus the law reflects and assists the transformation from one set of social relations to another. It is not surprising then that there are sufficiently serious tensions within the legal order that cannot be contained, and which occasionally become the subject of public scrutiny and debate. That is, they become political, (e.g. the recent legislation directing the High Court how to interpret legislation is a good example. A conser-

vative government has put the stamp of approval upon the work of a progressive judge (Murphy) and rejected the opposing conservative line of Barwick.) Yet the power of the law rests in its capacity to be seen as the opposite - non-political, objective, neutral. As Marx and other commentators have shown us, the great strength of the bourgeois legal order lies in its capacity to allow the law to be seen for the first time in history as representing the interests of all classes (i.e. a universalistic order). Thus we can more easily understand the current emphasis placed upon archaic garb by leading conservative legal professionals; for example, the president of the Bar Association was recently quoted as supporting traditional costume because "The greatest argument in favour of retaining wigs and gowns was that they tend to 'anonymise' people"(S.M.H. 17/4/81.) That process is crucial to the "universalism" of the present legal system.

In view of the serious threats to the legitimacy of the legal order arising out of this transitional period in contemporary Australian capitalism (e.g. increasing police surveillance and repression, the rigging of the system of industrial relations, the constant shifting of the rules in the social security field, widespread legal order corruption), it is not hard to understand why the more conservative elements in the legal profession perceived the case of Wendy Bacon as a major symbolic challenge. After all, a militant feminist who once appeared in court dressed in a Nun's habit with a scurrilous legend emblazoned on a placard hanging around her neck (see The Bulletin, 27/1/81) was not the sort of colleague who could be depended upon to aid in maintaining the anonymity - and thus legitimacy - of the Bar and the wider legal order. So the Bacon case is not simply an example of Neanderthal rationality, rather it indicates one of the real weaknesses of the bourgeois legal order; to a large extent it stands upon the shifting sands of popular conceptions of what is legitimate.

While one can argue confidently that the Bacon case was essentially an over-reaction by the arch-reactionaries in the profession - an over-reaction likely soon to be counter-balanced by the more politically perspicacious Supreme Court (see The Australian 14/4/81) - progressive legal workers ought not to assume that the Right is bereft of either an analytical capacity or an understanding of the imporant functions of the law in this society. At a deeper level the Bacon case suggests that the

Right does indeed have a basic understanding of the role of the law, and its limitations, in this society. While they may have acted foolishly in this case, we must remember that they have never really been taken on before, and therefore exercised power which, unbeknown to them, they may no longer be able to assert in such a public manner. Or, perhaps more accurately, a power they cannot exercise at this particular historic juncture.

It is worth referring again to the Hutley analysis of the legal profession, for it is pure, unadulterated free market, strong state thinking. (On the concept of the strong state and its link to free market ideology, see Andrew Gamble, "The Free Economy and the Strong State", The Socialist Register (1979), 1-25). It suggests, characteristically outlined clearly and boldly, the scenario of the future unless progressive legal workers take the Right seriously.

Indeed the current attacks by conservative elements in and out of government on funding for legal aid indicates that the future may be here. Thus Hutley:

> "I would submit that any proper assessment of the legal profession in society begins with the rejection of the view that society is a single entity, is capable of having needs to which the legal profession is or even should be responsive...
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> The assault upon the established traditions of a profession on the basis that they did not suit the needs of society is simply a covert way of avoiding having to disclose the type and quality of the source from which demands are coming ...
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> I proceed on the basis that there are many needs in society which the legal profession should not satisfy, and there are possibly worthy causes in society which the maintenance of the effective independence of the legal profession may mean that it cannot satisfy. And the maintenance of this independence is more important in the long run than the satisfaction of such special needs. The independence of the judiciary e.g. does not assist the efficiency of the executive government, but the impedance of the efficiency of the executive government is necessary for the maintenance of a legal system which gives space for orderly opposition in society. It is not necessarily the business of the legal profession to service anybody and everbody, whatever may be the cause."

The issue is clear: in this divided society whose needs will be met by a committed (our synonym for independent) profession? The gauntlet is down. It remains for progressives to meet that challenge by struggle throughout the legal system.

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