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Citation: Schuster, L. & Solomos, J. (2001). Asylum, Refuge and Public Policy: Current Trends and Future Dilemmas in the UK. *Sociological Research Online*, 6(1), pp. 75-82. doi: 10.5153/sro.582

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Link to published version: <https://doi.org/10.5153/sro.582>

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Asylum, Refuge and Public Policy: Current Trends and Future

Dilemmas in the UK

Liza Schuster and John Solomos

Abstract

Britain is a signatory of the 1950 European Convention on Human Rights and Fundamental Freedoms and the 1951 Convention Relating to the Status of Refugees. It is only in the last decade, however, with the passage of the 1993 Asylum and Immigration Appeal Act and the 1998 Human Rights Act, that these two Conventions have become part of British law. This paper begins by exploring the impact of the incorporation of the 1951 Convention and then moves on to look at the hopes that are now pinned on the Human Rights Act. It concludes by considering the (actual and potential) impact of these two Conventions on asylum policy and practice since their incorporation into British law and explores the possible conflict between the Conventions and recent British legislation on asylum. In doing so it highlights the need to develop a deeper and contextualised understanding of current preoccupations with the issue of asylum and refuge in Britain and other European societies.

Introduction

The British legal system is dualist in nature. Compared to monist systems, such as Germany's, international treaties and conventions to which Britain is a signatory are not automatically part of British law. In Germany, once an international treaty or convention has been signed it has priority in Germany law. In Britain, it is only when they have come before Parliament as a bill or part of a bill that are they incorporated into domestic law. Two of the most important Conventions relating to refugees and asylum seekers¹ – the 1951 Geneva Convention and the European Convention on

¹ Refugees are those who have received a positive decision on their application to be recognised as meeting the criteria specified by Art.1 of the Geneva Convention Relating to the Status of Refugees,

Human Rights – only became part of British domestic law in 2000. In this paper we explore what this has meant for the British asylum regime and what impact their incorporation is likely to have in the future.

We begin with a brief outline of the situation in Britain prior to 1993 and the role of the 1951 Convention before it became part of British domestic law. We then move on to consider its impact post-incorporation. This is followed by a consideration of the role of the European Convention and the European Court of Human Rights and a speculative evaluation of the 1998 Human Rights Act. There is, as yet, very limited asylum case law that makes reference to the Human Rights Act, and the provisions necessary to give effect to section 65 of the 1999 Immigration and Asylum Act relating to Human Rights have not yet been implemented. The final part of the paper explores some of the political constraints that impede the working of international law in relation to refuge and human rights.

Background to the British Case

Although Britain signed the 1951 Geneva Convention Relating to the Status of Refugees in 1954 almost four decades passed before a Bill brought it before Parliament. This did not, of course, mean that refugee status was not granted in Britain, only that the process of granting it, or asylum, was not regulated by primary legislation. Describing British asylum policy in mid-Victorian England, Bernard Porter wrote that ‘this policy of asylum was maintained, not by law, but by the absence of laws’ (1979: 3). Such a situation is to the advantage of government as it leaves room for a high degree of discretion and flexibility, leaving the government of the day free to choose who will be

while asylum seekers are those whose claims have not yet been decided or who are appealing a negative decision.

admitted and who refused. To all intents and purposes, this remained the case until 1993 when Parliament passed the Asylum and Immigration Appeals Act (although it could be argued that, in spite of certain decisions by the judiciary², the British government retains its flexibility and discretion).

Until that time, people were granted refugee status under procedural Immigration Rules. Until the late 1980s the annual number of asylum applicants did not exceed 5,000 and so there was little demand for legislation to regulate their acceptance, entitlements or integration. The Immigration Rules dealt primarily with entry and removal and it fell to the Secretary of State to determine refugee status. However, in spite of being incorporated into the rules, the Convention was not part of law and the rules were silent on procedures to establish whether a person was a refugee or not.

However, once asylum had been granted, refugees were usually given permission to remain for 12 months. Subsequently this could be extended by three years after which time they could apply for settlement (Macdonald 1995: 283). The main distinction between refugees and asylum seekers at that time was in terms of security of residence - once accepted as a refugee, one was generally free from the threat of removal; travel documents - with the issue of a refugee passport by the Home Office, one could leave and return to Britain; and the right to have their family come and join them.

In terms of welfare, both refugees and asylum seekers were entitled to social security benefits at the same level as British citizens and others with Leave to Remain. They had access to local authority housing, income support, education and healthcare, that is, most of the rights laid out in the 1951 Convention, though interpreted fairly narrowly. In general, so long as the numbers were low, the costs to the public purse were lightly

² The Law Lords and the Courts of Appeal have occasionally found against the government, but in general as Peter Billings has pointed out, 'judicial deference to the executive has resulted in the

borne, and the Convention was more or less honoured, though it must be stressed always at the discretion of the Home Office. Even when crises meant unexpectedly (relatively) large numbers were allowed to enter, such as the Chileans (3,000 approx.), or the Vietnamese (18,638 - Kushner & Knox 1999: 312). These groups were not seen as problematic since they were 'invited'. The numbers were limited and bounded since they came as part of government set quotas - they were seen as exceptional and therefore not a source of concern for the long-term.

The situation of the East African Asians in the late 1960s was peculiar because those people had British passports. They had lived in East Africa for generations as British Commonwealth citizens and retained British Nationality following decolonisation. However, they became targets during the process of 'Africanisation' as many of their businesses were taken over and they were forced to leave. Although they met some of the criteria of the Convention - they had a well-founded fear of persecution on the grounds of their nationality and race and had crossed international borders, the persecution was not by the state whose passports they held – Britain.

In theory they should have been able to claim the protection of the British state. However, rather than honour international obligations according to the 1951 Convention or their duties to British citizens, the British government chose to withdraw the right of entry and settlement from that group by introducing the concept of patriality in the 1968 Commonwealth Immigrants Act: 'any citizen of Britain or its colonies who held a passport issued by the British government would be subject to immigration control unless they or at least one parent or grandparent was born, adopted, naturalised or registered in Britain as a citizen of Britain or its colonies' (Solomos 1993: 66). Nonetheless, some people managed to enter before the new law and others were

susceptibility of domestic asylum administration to countervailing influences such as political expedience

subsequently admitted as part of schemes that involved the resettlement of East African Asians in Britain as well as other countries.

Incorporation of the 1951 Convention

During the early 1990s the situation changed and the response of the British state to asylum seekers and refugees moved much closer to its response to East African Asians than to the Chileans, or the Czechs and Hungarians before them. It was at this time that concerns began to be expressed that Britain’s asylum system was no longer adequate and suggestions for reform were put forward. This was partly because in the aftermath of the collapse of the Soviet Union and the outbreak of war in Yugoslavia, the numbers of people seeking asylum in Britain increased. This trend is shown in Table 1:

Table 1: Number of Asylum Applications received by year of application (including dependents).

2001		1994	42,200
2000	97,860	1993	28,000
1999	91,200	1992	32,300
1998	58,000	1991	73,400
1997	41,500	1990	38,195
1996	37,000	1989	16,775
1995	55,000	1988	5,739

(Source: British Home Office Statistical Bulletins)

In the light of a yearly increase up to 1991, Jeremy Corbyn, a left-wing Labour Party MP, introduced a Bill that sought to incorporate the 1951 Convention and to clarify Britain’s obligations to asylum seekers and refugees. Unsurprisingly, given the Conservatives’ hostility to immigration generally, and to asylum seekers in particular, the bill was thrown out. Instead, faced with increasing numbers of asylum seekers, the Conservative Government introduced another piece of legislation, the primary purpose of which was to deter applications for asylum. The 1992 General Election interrupted

and foreign policy imperatives’ (1998: 33).

the passage of the bill, but finally, and in spite of a decline in the numbers of applicants in 1992 and 1993 (*Table 1*)³, it passed through both houses and became the 1993 Asylum and Immigration Appeals Act - a very different piece of legislation to that envisaged by Jeremy Corbyn.

There were two important positive elements to the 1993 Act: the incorporation of the 1951 Convention and the introduction of a right of appeal. Given that the 1951 Convention commits signatory states to uphold the rights of refugees, and that a right of appeal is effectively an appeal against removal, it may seem odd that both were included in a Bill designed to reduce the number of people entitled to exercise those rights. If one looks closer, however, there was a logic to the inclusion of the 1951 Convention in the Act. Although the 1951 Convention had no force until the 1993 Act those who were granted refugee status already enjoyed many of the rights guaranteed by the Convention.

Why then give it greater force by including it in the bill? Part of the reason may be that since asylum practice was already largely in line with the Convention, its incorporation would make little difference. Since the Convention only applies to those recognised as refugees (with the exception of Art.33) it may be that it was hoped that its incorporation would soften liberal critics of a draconian bill. It was also clear that the Convention was a malleable instrument that could be and was interpreted to fit the needs and interests of the government of the day. The Convention was already widely cited and referred to in judgements and though successive Home Secretaries had been chastised for acting in breach of the spirit of the Convention, they had also successfully avoided having to go back on their decisions. Besides, if the bill served to reduce the number of asylum seekers - its ultimate goal - and hence the number of refugees who would be able to

³ The same pattern was evident during the passage of the 1996 Act, with numbers falling prior to its

claim their rights under the Convention, any additional costs would be a price worth paying. If this was in fact the logic behind the bill, it proved to be a serious miscalculation.

According to Deri Hughes Roberts, of the Refugee Legal Centre⁴, the introduction of a right of appeal in the 1993 Act had a greater impact than the incorporation of the 1951 Convention. The 1993 Act (section 8) introduced *for the first time* a right of appeal for asylum seekers and confirmed that ‘during the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of his decision on the claim, he may not be removed from, or required to leave, the United Kingdom’ (S.6). This created an environment in which cases could be litigated. This hardly occurred before 1993, since it was virtually impossible to pursue an appeal from outside the country and has proved to be a very positive development from the perspective of asylum seekers. Hughes Roberts suggested that without the 1993 Act, Shah and Islam⁵ might not have got the decision they did, certainly not as quickly. It meant that asylum seekers had greater access to due process.

Having acknowledged the positive facets of the 1993 Asylum and Immigration Appeals Act, it is important to note that incorporation of the 1951 Convention, which anchored the rights of refugees in British law, was a prelude to a sustained attack on the ability of people to gain access to that status. Subsequent legislation, such as the 1996 Asylum and Immigration Act, undermined the appeals system by, for example, introducing the concept of a ‘white list’ of countries in which there appeared to be no ‘serious’ risk of

introduction and increasing afterwards.

⁴ Telephone Interview, 15 December 2000

persecution (Nicholson 1996). Applicants from such countries were only allowed access to an accelerated appeals procedure. The 1999 Immigration and Asylum Act capped that by introducing 'One Stop Appeals', designed to speed up the process.

Ironically therefore it can be argued that the situation of those requesting refugee recognition has deteriorated markedly in the period since the early 1990s. This is despite the incorporation of the 1951 Convention into British law.

New Labour, Human Rights and Refugees

What hope then should we pin on the Human Rights Act? Among the promises made by the Labour Party during the 1997 General Election campaign were two of enormous potential relevance to asylum-seekers:

- first that there would be a major overhaul of an asylum system that was a 'complete shambles'
- second that the European Convention on Human Rights and Fundamental Freedoms (ECHR) would be incorporated into British law with the passage of a Human Rights Act.

In 1998 the Human Rights Act, which specifies that no laws must be passed that contravene the ECHR, was passed. The review of the asylum system culminated in the 1999 Immigration and Asylum Act. Though passed in 1998, the coming into force of the HR Act was delayed until October 2000 and even now some provisions have not yet

⁵ Two Pakistani women, who were estranged from their husbands, were granted refugee status on the grounds that they had a 'well-founded fear of persecution for reasons of... membership of a particular social group' (House of Lords – Islam vs. Secretary of State, Regina vs. Immigration Appeal Tribunal and another ex parte Shah 25 march 1999).

been implemented. Before discussing the Act itself, a few words on the influence of the ECHR before incorporation are in order.

Until now, those seeking to defend asylum seekers and refugees using the ECHR have relied primarily on Art.3, which prohibits cruel and inhuman treatment, and occasionally on Art.5 (right to liberty and security), Art.6 (right to a fair trial) and Art.8 (right to respect for private and family life). However, only when all avenues had been exhausted in Britain, could one have recourse to the ECHR in the European Court of Human Rights. The number of such cases have been very few and only a handful have been successful, e.g. *Chahal and Aziz*. In the first, the European Court of Human Rights found that the Government of the United Kingdom's attempts to deport Karamjit Singh Chahal to India was in breach of Arts.3, 5(4) and 13 (in conjunction with 3) of the ECHR. The Court agreed that Mr Chahal was at serious risk of torture (Art.3) if he was returned to India, that there was no effective domestic remedy to review the Home Secretary's decision (Art.13) (Amnesty International 1996)⁶.

The *Aziz* case came to court in the early 1980s as the then Home Secretary tried to introduce a law permitting only women with British citizenship and at least one parent with British citizenship to bring in their husbands. Until then, only men had the automatic right to bring in their spouses. The Court found that such a law would be in breach of Art.8, which guarantees the right to respect for private and family life. However, the government got round this by abolishing the automatic right for men and introducing the 'primary purpose rule', which did not allow entry to spouses for whom the *primary* purpose of the marriage was to effect entry to the UK. The ability of

⁶ Unsuccessful cases include *Lukka vs. UK* and *Uppal and other vs. UK*. In both cases the court decided that the asylum proceedings were of an administrative nature and did not infringe the rights of the appellants.

national governments to change the rules in order to evade international obligations should not be underestimated. We will return to this point below.

Nonetheless, it is anticipated that the HR Act will change law and practice in the UK. New laws must be compatible with the ECHR and existing law will be open to reinterpretation, as UK courts will apply ECHR rights directly (Justice 1999). The 1999 Immigration and Asylum act took cognisance of these requirements and created a 'free-standing human rights appeal (S65(1)) and a human rights ground as an additional limb of an existing appeal (S65(3))' (JCWI 2001: 49). While these subsections of the Act apparently extend the right of appeal, in fact they are curtailed by sections 73-77, which introduce the 'one-stop' procedure, reducing the number of appeals in many cases to one inclusive appeal, during which the adjudicator will rule on all possible grounds for appeal. This applies to all kinds of migration cases, not just human rights or asylum. Furthermore, large sections of the Act are exempt from the constraints of human rights considerations (such as support, detention, living conditions etc) since the human rights appeal is only available in relation to the appellant's right to enter and remain (JCWI: 2001: 50-1).

In a significant development, the courts recently upheld the right of Francisco Rose⁷, a Jamaican citizen convicted of a drugs offence, to remain in the UK with his family on release from prison, citing Art. 8 of the ECHR. While Mr Rose was not an asylum seeker this decision should have implications for those that are⁸. Groups working with asylum seekers who have had their claims rejected are planning fresh appeals using the Act. For example, if someone's claim has failed and subsequent appeals are dismissed

⁷ Francisco Rose -v- Secretary of State for the Home Department (Determination promulgated 9 March 2001)

⁸ Importantly, the adjudicator found that '...deportation at the end of a ten year sentence may indeed come close to a double punishment - and one that would appear to be, largely, reserved for persons from the ethnic minorities' (NCADC 2001).

and that person has been ordered to leave the UK, they can make a fresh claim under the 1998 Act provided they have not received a 'One Stop Notice'. It is a slim hope, but it is a possibility.

However, there have also been a number of very worrying developments of two main types. The progressive legislation may be used to adverse effect, and new repressive legislation has also been introduced. For example, there are concerns relating to the high number of provisions for secondary legislation in the 1999 Immigration and Asylum Act, since there is no obligation to provide a certificate of their compliance with the Human Rights Act. In addition, once the Human Rights Act is in force it seems likely that more (though how many more remains open to question) people will be able to claim rights articulated in the ECHR and ultimately to remain on humanitarian grounds. However, this could prove to be a negative development. Over the past decade it has become clear that governments in Britain prefer to grant temporary status such as Exceptional Leave to Remain, which has fewer attendant rights (e.g. to family reunion) and is less secure, since it is open to revision and withdrawal. It is to be hoped that the courts will not become even less likely to grant refugee status knowing that asylum seekers may now be protected by the Human Rights Act.

One of the concerns must be how many people will actually benefit from the cases that reach the courts. While refugee advocates and others point to the possibility that 'hundreds' may benefit from the recent Adan and Aitsegur⁹ cases, similar assumptions arising out of Shah and Islam and Chahal have proved unfounded. By contrast, when

⁹ On the 19 December 2000, the Law Lords found for Adan and Aitsegur, who were threatened with return to Germany and France respectively. They were saved from removal because the court decided that, although France and Germany do not accept non-state persecution as grounds for asylum, the UK does, and therefore *pace* section 2(2) © of the Asylum and Immigration Act 1996, the Secretary of State cannot guarantee that the 'government of that country or territory would not send him (sic) to another country or territory otherwise than in accordance with the Convention'.

the Law Lords have found against an appellant, as for example, Horvath¹⁰, this has been followed by the mass expulsion of the relevant group (in this case, Roma people from Slovakia).

Two other developments arising out of two different pieces of legislation give rise to further serious concern. The first is the exemption given to discrimination on the basis of 'ethnic group' from the 2000 Race Relations (Amendment) Act. This Act, which is partly a direct response to concerns raised by the Macpherson Report into the death of Stephen Lawrence, is designed to bring public bodies such as the police within the remit of the 1996 Race Relations Act. Originally, it had been decided that the immigration services would continue to be exempt (presumably since they cannot be other than discriminatory), but it was subsequently decided that discrimination on the basis of colour by immigration officers would be outlawed. However, Barbara Roche announced in Parliament of 1 May 2001, that she had:

...Made an authorisation permitting members of the Immigration Service to discriminate, where necessary, in the examination of passengers belonging to the following ethnic or national groups: Tamils, Kurds, Pontic Greeks, Roma, Somalis, Albanians, Afghans and ethnic Chinese presenting a Malaysian or Japanese passport or any other travel document issued by Malaysia or Japan (*Hansard*_Written Answers 1st May 2001, Col. 626W).

Given that the majority of asylum seekers are drawn from just these groups, it is clear that the purpose of this authorisation is simply the reduction of the numbers of people

¹⁰ In July 2000, Horvath appealed against the rejection of his asylum claim on the grounds that, as a Roma in Slovakia he was subject to persecution for reasons of the and that the Slovak government was unable or unwilling to protect him. Although it had been hoped that this test case would be resolved in favour of Horvath, it was rejected and in the weeks that followed the decision, the Home Office deported hundreds of Roma (Telephone Interview, Amanda Sebestyen, Europe-Roma, 30 May 2001). Given that most Roma find it difficult to get legal representation, it is likely that some of these were without appeal.

managing to make a claim¹¹. Since most would be entitled to protection under the terms of both the Geneva Convention and the ECHR, the abandonment of humanitarian principles in relation to these groups is quite striking.

The second development relates to the Prevention of Terrorism Act 2000. Under this Act the Home Secretary has proscribed 21 organisations, alleging that they are terrorist organisations. These include the PKK, Mujaheddin e Khalq, the Tamil Tigers, and Kashmiri and Palestinian organisations. Normally, membership of such organisations would have been considered proof that one was in fact politically persecuted, now it can become grounds for deportation.

Contradictions and Conflicts

The 1951 Convention and the ECHR have both influenced British asylum practice to the advantage of asylum seekers and refugees. Some have been permitted to remain in Britain by virtue of Art.33 of the 1951 Convention, which prohibits *refoulement*, others because their removal would entail a breach of Art.3 of ECHR, which prohibits cruel and degrading treatment. However, the 1993, 1996 and 1999 Acts together with Carriers Liability and visa controls represent a sustained attack on asylum seekers, making increasingly difficult for them to access any of the rights specified in the 1951 Convention and the ECHR. The needs and rights of asylum seekers have been sacrificed by successive British governments determined to restrict entry and settlement into the UK.

Commenting on a draft of the 1999 Immigration and Asylum Bill, *Justice* argued that there were significant areas of the Bill that were incompatible with the HR Act and with

¹¹ Applications from Africa have in the past made up on average 40% of all applications (excluding

the UK's obligations under the 1951 Convention. Regrettably, though unsurprisingly, many of these areas of conflict remain in what has become the 1999 Immigration and Asylum Act. Clauses 32-40 of the 1999 Act, dealing with illegal entry and Carriers' Liability, contravene Art.3 & 6 ECHR and Art.33 of the 1951 Convention, since they make it extremely difficult for an asylum seeker to leave their countries of origin. It is especially worrying that the 1999 Act explicitly defines clandestine entrants as someone who 'claims, or indicates that he intends to seek, asylum in the United Kingdom' (32 (1)).

Other clauses of the Act that effectively limit the rights of asylum seekers include those relating to bail (44-55), which undermine Art.5 – the right to liberty; appeals (56-79); detention and detention centres (147-157) and those provisions relating to the support of asylum seekers (94-123). It is hoped that it will be possible to challenge these provisions, which deprive asylum seekers of cash benefits and other forms of support and give the Secretary of State the power (though not as *Justice* points out (p.23) the duty) to provide 'adequate' accommodation on a no-choice basis and 'essential support. The challenge would be on the grounds that the group of people targeted are particularly vulnerable and that therefore this treatment is inhuman and degrading.

It seems as though the Human Rights Act is a step forward in terms of judicial review. Previously it was very difficult to get judicial review, if one had a right of appeal from abroad. Before the Act, arguments that an appeal from abroad was impractical because someone was subject to inhuman or degrading treatment would be dismissed as the ECHR had no validity in British courts. However, the passage of the Human Rights Act means that judicial review has gone from extra-statutory to statutory footing – the Secretary of State must now make provision for judicial review as part of the process.

dependents), most of whom have come from Somalia.

Refuge and the Political Agenda

Jack Straw, Home Secretary during the Labour Government of 1997-2001, is unhappy with the 1951 Convention. He has argued that it is no longer an appropriate instrument for dealing with asylum seekers and refugees. He claims that:

thousands of would-be migrants are taking advantage of one aspect of the Convention - namely that it places an obligation on states to consider any application for asylum made on their territory, however ill-founded¹².

This links up to a goal that seems to be shared by the post 1997 Labour Government and previous Conservative administrations: namely the concern keep asylum seekers as far from Britain as possible - proposing that only those already recognised as refugees should be allowed into Britain, i.e. that their claims should be examined in the country of origin, before entry into Britain. It is possible that a number of decisions by the Law Lords have caused the Home Secretary some concern because, in theory, the number of people who might be recognised has increased. *Shah and Islam* is a case in point. When it was accepted that divorced or separated women in Pakistan constituted a particular social group, the Home Secretary claimed that this decision was anomalous, and that there would have to be a change in the law to ensure a narrower interpretation. One way to do this would be to dismantle the Convention itself. This stance, though it is currently being resisted, has found some support elsewhere. It has been the preferred option of the Christian Democratic Union and the Christian Social Union parties in Germany for almost two decades. Such a development would render the Convention worthless.

¹² Speech delivered by the Home Secretary at a seminar hosted by the Institute for Public Policy Research – 6 February 2001.

At this stage it is impossible to judge the impact of the Human Rights Act. In the light of the above discussion, it may seem that the 1951 Convention and the ECHR have not and will not have any real restraining effect on the illiberal tendencies of the British Government. And yet, it could be argued, that if Jack Straw wants to alter the 1951 Convention significantly this must mean that it is doing its job.

There are conflicts between the aspirations and norms embodied in the 1951 Convention and the ECHR and the asylum practice of Britain. This is inevitable, given the fundamentally different principles on which they are based - humanity versus the nation. The question then is how will these be resolved? Past experience teaches us that this will usually be in favour of governments. There are exceptions, but in general the judiciary upholds the decisions of the Home Office, e.g. Horvath. Where decisions go against governments, they simply change the rules – as in the case of Aziz.

Macdonald (1995: 293) has pointed out that praise for the Convention should be leavened with a degree of caution. As with all laws and treaties drafted by and signed up to by states, while they may embody universal ideals, woven into them are certain safeguards for states. It has been very difficult traditionally for individuals, firstly to bring a complaint, then to see it through what is inevitably a long, complicated and expensive process, with the result that the number of cases that have actually been successful are very few. This is not to suggest that hope should be abandoned. The efficacy of international law depends on the skill of lawyers, but - even more importantly - on the creation of a public climate in which it is not possible for states to brush aside their commitments and the creation of a polity that will hold them to account.

Acknowledgements

An earlier draft of this paper was presented at the 7th International Research and Advisory Panel on Forced Migration, 5-11 January 2001, University of Witwatersrand, Eskom Conference Centre, Johannesburg, South Africa. Financial support was provided by the British Academy.

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