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Editors' Welcome

Welcome to Ebor Lex's Spring 2015 Edition, and the final edition from your current editorial team.

This year, rather than following our usual 'themed' editions, we have attempted to reflect the breadth and variety of option modules and student opinions at YLS, resulting in a slightly more eclectic collection of articles. From heated debates over the rightful future of the Elgin Marbles, to an insightful analysis on the merits of restorative justice, via discussions of the bedroom tax and

an ode to Elle Woods, this issue has something for everyone.

All the editors have thoroughly enjoyed reading the contributions of this term's authors, who represent the scope and diversity of interests at YLS. In this, the joyful season of assessments, we hope you enjoy taking some time away from essay writing, portfolio drafting and dissertation panic to read an article outside a module's recommended reading list. Hopefully, this term's edition of Ebor Lex will introduce readers to some new concepts, opinions and areas of law, helping you engage with some of the most interesting debates facing society.

As always, our thanks go out to all our contributors and sponsors who make publication of Ebor Lex possible, and if you are interested in contributing to Ebor Lex in the future, please get in contact. We are always looking for pieces of writing from any year group, on any topic. Our editors' details can be found at eborlex.com, or alternatively contact us at eborlexjournal@yusu.org.

Happy reading,

The Ebor Lex Team



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The Elgin Marbles should not be returned to Greece

Sersha Godfrey

The Buddhas of Bamiyan, the city of Buhden and the Harps of Ur: a sobering list of monumental treasures lost forever to mankind in the rampages of war.

The Elgin Marbles, however, are not in this list. It is the good fortune of all mankind that Lord Elgin took it upon himself to save these Marbles. For 200 years, all of humanity has benefitted from the British Museum's protection of these magnificent sculptures from further destruction.

The calls for the Marbles' return to Greece, though emotionally appealing, are unsound on every possible ground, from legal to moral.

The line between looting and cultural preservation is often unclear, sullied by an imperial history of illicit appropriation. However, the Elgin Marbles are one of

history's rare clear instances of legal and morally sound exportation.

In fact, the legal status of the Marbles could not be clearer. Law dictates that Lord Eglin could not give better title to Britain than he possessed. Thus, the crux of the Marbles' legal status lies in the details of their acquisition.

Elgin was neither thief nor smuggler. He began to remove 'Parthenon stone' in 1802 after being granted a firman, the highest form of imperial Ottoman law.

The Ottoman's entitlement to dispose of Greece's cultural property has been thoroughly investigated. In 1802 the Ottomans had ruled Greece for 4 centuries. Their governance was internationally recognised. As sovereign rulers, they had legal authority over all public property.

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These are the facts; attempts to evaluate the validity of this law retrospectively are misguided.

Perhaps this is why Greece has exhausted every route to claim the Marbles, other than the courts, from diplomatic to media propaganda. Greece has no legal right, a fact of which they are very well aware.

Yet this legal account alone is unsatisfactory. Art and cultural property can rarely be simplified, confined and categorized by law. There is something special, emotive and inexplicable about art that distinguishes it from other chattels, morally if not legally. Though Britain retains title, cultural property of this kind carries moral weight, which complicates legal ownership.

Thus, justifying why the Marbles *should* remain in Britain begs more than a legal explanation. The moral elements and consequences of any decision are also relevant.

Restoring the integrity of artefacts to their original context so that they may be better understood and admired is a noble justification for repatriation. But for the Marbles, this has been rendered impossible by past indiscretion. Over 2000 years, the Parthenon has been defaced; converted from treasury to temple, from church to mosque, to military base. Just half the Marbles survived, the others displaced, shattered, ground up or sold long before Elgin arrived.

What Elgin salvaged has been wholly preserved. This cannot be said for those left behind to slowly erode in the Athenian atmosphere. When Athens' caustic smog drove the deteriorating sculptures into an Athenian museum, any remaining chance for a return to integrity vanished.

Transporting the Marbles from one museum to another, as the Greeks demand, will not restore their integrity. The unity and purity of artefacts are *integral* to their *integrity*. Integrity is not a spectrum; it is an absolute of which the Marbles have been robbed.

Despite this loss, the Marbles remain important material manifestations of mankind's cultural heritage - a universal culture that is bred of mixed peoples and shared amongst nations.

Morally, cultural property does not belong to one person, people or nation. Certain

artefacts, such as the Marbles, physically represent our shared intangible culture.

They are tangible representations of democracy; an intangible heirloom the world has inherited and cherishes. The universal significance of the Marbles cannot be overstated.

If you are unconvinced that these Marbles are humanity's universally, I ask one question: could Greece, owners of Acropolis, bulldoze and replace it with a mall? If this proposition disturbs you, ask why your voice ought to matter?

The answer is simple. The Parthenon is one of the greatest monuments of human antiquity; all of mankind has a stake in our shared cultural fabric. The Marbles' universal importance comes with the owner's obligation to provide the best protection, preservation and universal access.

With great treasures comes great responsibility. Ultimately, this is a question of how the Marbles can be best shared.

London and the British Museum open their doors to three times more tourists and visitors than their Athenian counterparts. Access is free in London, unlike Athens. The disparity in condition between the London and Athenian Marbles is painfully clear. The British Museum has proved itself as best placed to promote the access to and preservation of the Marbles.

Finally, this repatriation discussion must draw a clear distinction between illicitly and licitly obtained artefacts for the sake of the World Museum.

Returning the Marbles will set a precedent that artefacts with good legal title can be demanded by source nations.

The British Museum wondrously exemplifies the inherent value to dispel ignorance and prejudice, engender awe and respect for foreign peoples and civilizations, and nurture artistic and scholarly advancement. Are we prepared to herald the end of the World Museum?

I say no.

Legally Greece has no claim and morally Britain is stronger, and so the Marbles for all these reasons should remain. ■



The Elgin Marbles should be returned to Greece

Aidan Świętochowski

Currently housed in the British Museum, the Parthenon Marbles have been stripped of their integrity, much in the manner that they were stripped from the Parthenon in the early 19th century.

To observe them away from the magnificent monument, of which they were once part, does little to explain the significance of the Marbles and fails to educate the viewers who, according to plundering nations, justify the retention of looted and

inappropriately acquired cultural property.

The Parthenon Marbles were originally one with the Parthenon, standing majestically at the foot of the Acropolis for centuries. It was only following their plunder and removal from their home that they were rebranded the Elgin Marbles, disassociating these treasures from the carcass left behind. Consequently, the structure now stands crippled, ravaged by the actions of Elgin and his excavation team who themselves admitted to using 'barbarous' force.

Through stripping them from their home,

the Parthenon Marbles have lost their integrity; they cannot be appreciated as intended by their creators. To view them outside of their original context subverts the importance of these great works of art, which once stood proud as one of the greatest shrines of artistry. Moreover, academia is stunted, as understanding their cultural impact is spoiled by their retention away from Athens. Now they are presented, beautiful yet vacant, within the bleak walls of the British Museum.

They deserve more than to be denoted as the Elgin Marbles. These are the Marbles of Parthenon.

Whether the sale, which allowed them to be taken from Athens, was valid is debatable. What is not, is the fact that the Parthenon Marbles prove a clear reminder that cultural imperialism allowed for actions that would be deemed unethical and barbaric in modern civilised society. Therefore had Elgin attempted to take the Marbles in our current time, the Greek consensus would be that this would constitute a betrayal to the heritage of Greece and the transaction would never happen.

This betrayal stems from the irrefutable fact that cultural property cannot be treated as a simple chattel. Art is a special commodity in itself and cannot be handled the way we handle other objects. Consequently, cultural property embodies this reality. The Parthenon Marbles hold an emotional wealth that prohibits them from being treated as such; they cannot be quantified as simplistically as you would an object at a market or in a shop. Thus, the actions of the Ottoman Empire were immoral and unethical. A foreign coloniser should not be able to throw away the culture of a subjugated nation.

Undeniably, Elgin was successful at excavating the Marbles and protecting them

prior to the independence of Greece, following the demise of the Ottoman Empire. However, the Marbles no longer need protection by a foreign nation. They require repatriation to their rightful place, beside the Parthenon to be observed as a whole, although irreparably fragmented.

The current proposal from Greece, to extend the authority of the British Museum to the Acropolis Museum, enforces the desire for the integrity of these objects to be restored, rather than use of the Marbles as objects of politicised nationalism.

The new museum rests close to the Parthenon, with walls of windows allowing a clear view of this architectural monument. The Marbles can then be seen as closely as possible to how the creators intended, while also providing a safe haven from the smog that has unfortunately maimed some of the sculptures left behind in Athens outside the museum walls.

British retention is not only an offence to the Greek people, but to the Marbles themselves.

Returning the Marbles to the Acropolis

Museum would allow them to be viewed safely within eyesight of their original home, allowing the Parthenon to be viewed as one combinative structure rather than the Marbles alone as purely magnificent individual works of art. To do this would restore the Parthenon Marbles to their superiority - as the wonderful origins of the western world, not just wonders of cultural imperialism.

Should we allow this act of imperialism to govern the future? Surely we should look towards a modern civilisation, built on the democracy that the Parthenon Marbles have come to represent. The attachment to the Marbles, although international, gravitates towards the magnetic pull of Greece, the true home of these works.

We are situated in a time where cultural property is no longer a luxury to be adored by the educated or those deemed worthy to view them. To retain the Parthenon Marbles and deny the integrity of such majestic work is an offence not only to the Greek people, who were unable to prevent the treason of their sale, but also to the Marbles themselves. ■■



Can Graffiti ever be legal?

Possession is nine tenths of the law, but expression is nine tenths of humanity

Xavier Peluso

In response to Luther's rejection of several teachings of the Medieval Roman Catholic Church and the conception of the Protestant Reformation – articulated in the 95 theses – the

papacy decided to circulate grandiose artistic propaganda which had never been seen before.

Raphael and Michelangelo epitomized this move to captivate the imagination and inspiration of the Christian world, whilst the church employed Ghiberti, Donatello and Andrea del Castagno to deco-

rate Florence Cathedral; the location of the birth of the Renaissance and catalyst for art. This was a 'top down' approach of social expression, by what was widely considered to be the establishment of the day, which can be directly compared with the 'bottom up' approach of the marginalised; characterised by graffiti.

The art of a renaissance painter like

Raphael added emphasis to scripture; personalising it. Yet graffiti exhibits 'silent voices', struck dumb by capitalism and lack of opportunity, using the urban landscape as a canvas. This conveys the irony of graffiti, using the infrastructure of our cities as a means to exude identity, political thought and expression; when it was the same steel and cement that silenced the voices to begin with.

Graffiti has been notoriously frowned upon as vandalism and abuse of public property, which of course in the legal sphere is absolutely true, unless permission is given. Despite lawyerly persistence, art has never pretended to be compatible with law across the broad spectrum. The crux of this matter is that artistic expression is synonymous with thought, an entirely autonomous concept and simply

ungovernable by laws. However, graffiti is nebulous with many sub-categories. These include piecing, tagging and throw ups. Piecing is the creation of pictures or pieces (short for masterpieces), which is regarded as the most sophisticated graffiti. Artists in this category include Banksy and Keith Haring who have created many seminal works. To quite a considerable extent, Banksy's work is accepted culturally by the communities which feature his art. In Cheltenham, for example, a group of Cheltenham business leaders formed 'Save the Banksy' in response to a defacement of a Banksy mural.

Incidentally, this defacing was committed through tagging, which is the use of one layer of paint to write one's name or gang communication (a 'tag'). A throw up is similar to this,

though is prone to containing exclamation marks, two colours of paint and bubble like writing. Often offensive and crude, this form of graffiti is rarely appreciated and one is tempted to discard its value as art or purpose as expression. However, what cannot be discarded is that graffiti, including tagging, has been seen in all past human civilizations, from cave drawings in Mexico to graffiti on walls in Pompeii. This has to be appreciated as a pattern giving rise to the human desire for establishing oneself as more than just a faceless statistical citizen. It would be easy to champion the artistic merits of piecing over tagging, but simply, tagging is the most common form of graffiti. Therefore, despite my argument that only piecing should be legal (with structured parameters), it is naïve if law enforcement and legislators think that any action would halt tagging; the most widespread type of graffiti for over two thousand years.

In essence, suffocation and social deprivation has always been the main ingredient of the motivation for graffiti. Thus, when graffiti is expressed in such a way that requires artistic intent, the work should be legal. Haley tells us that skill, intent and aesthetics combine to result in art. What does this mean? Art's validity is not dependent on property or criminal law. It could not be said that Van Gogh sunflowers are not art as they are painted on a canvas not belonging to Van Gogh. This is significant especially in graffiti, where criminal damage is the primary concern of critics. At present, society is ready to accept the legality of pieces, as shown above in the aforementioned Banksy example. Pieces and murals, such as the Northern Irish mural are an important reflection of societal perspective, whose benefit should be seen beyond the legal ramifications.

If the works of Keith Haring and Banksy are to continue to survive and inspire, piecing must be made legal. This is not for the improvement of law and legal processes. In fact, my argument may seem misplaced from a legal viewpoint. Fundamentally, my argument is based in the realm of expression and art, a symbiosis that is intangible but represents an important part of humanity. Tagging and throw ups have become a medium for gangs to communicate, though piecing affects an audience and causes them to contemplate the graffiti artist's perspective. As Raphael inspired artistic development, perhaps Banksy will motivate social betterment. ■■



Can Graffiti ever be legal?

If Graffiti changed anything, it would be illegal

Nicholas Attwooll

Graffiti is, undoubtedly, art. However, its overtly public and disobedient nature takes it further than any other form of artwork and in turn brings it controversy and criticism; none more so than that of the law.

In a way this is the dangerous appeal of graffiti; it is already illegal, socially unaccepted and liable for destruction from the moment of its inception. Its nature removes all inhibition and drives artists to be even more overt, more political and more brilliant than they would ever achieve working with canvas or any other medium.

The issue of legalising graffiti is undoubtedly a two-tone issue from the law's per-

spective. On the one hand, there is a question of whether or not the act itself could be legal and the consequences that would bring. On the other hand, the rights associated with a legal activity are far more established and better protected than those of illegal activities, so there is a question of whether or not graffiti should be legalised in order to support and protect artists' rights.

In legal terms, this is answered very

simply. The law considers property rights to be fundamental and grants them a high status of protection. Graffiti is an overt infringement of another's property rights, regardless of its artistic value. In certain ways, the law does not judge at all - something artists find incredibly vexing - and views infringement of another's property rights the same way whether it be a beautiful mural painted with care and affection, or manure which is daubed across a property. In civil law, the main issue for graffiti artists is being able to obtain copyright, recognition and financial remuneration for their work. This leads to a clash with another fundamental legal principle: the doctrine of clean hands in equity. In short, the law will not help a person who, in the course of their claim, has acted illegally.

Again, this means the law draws no distinction between the drug dealer whose product has been stolen and sold by a rival and the graffiti artist whose illegal graffiti is being used without their permission by a major advertising company. Though perhaps unfair, the law prides consistency and objectivity above all else; there can be no exemptions, least so for such a loose and subjective field as art.

From an artistic perspective, I would equally argue that graffiti should remain illegal, as its power and potency are undeniably drawn from its illegality. Further to this, graffiti's overt nature speaks of the motives of the artists behind it. There is a fundamental sense of proliferation in graffiti art, a hunger for recognition and

fame which eclipses financial gain and in turn leads to derision and disdain from the graffiti world when an artist is involved in attempting to obtain financial compensation for their work.

Take, for instance, the case of Cantwo. The Spanish swim team wanted to use waterproof lights on their swimming costumes for the 2008 Olympics but were disallowed, so instead opted to use graffiti as it was similarly eye-catching. Cantwo, a German graffiti artist, claimed the design was based on one of his and thus attempted to sue the Spanish. This created a significant backlash in the artistic world against Cantwo: although he should have been proud millions around the world would see his work, claiming financial gain from graffiti undermines its entire message. Graffiti should not be for profit.

If we reverse this issue, there is another argument against graffiti art being given legal recognition. The art market is brutal and often unfair, with careers exploding or dwindling overnight based on such ephemeral considerations as the favour of a major collector or a bad auction. It could be suggested graffiti's advantage in this regard - its overt and public nature - could very well be balanced by the legal consequences of such actions and the unenforceability of rights associated with the work. Put simply, the price of advertising so boldly and illegally is unavoidably being unable to claim full reward for the work.

So the real issue here is a question of both the origins of graffiti and the law. Graffiti originates from a fundamentally illegal act which has played a crucial role in the growth and formation of graffiti art, moulding and shaping the powerful political and social messages for which it is known. To legalise graffiti would not only deeply insult this tradition of disobedience and defiance of authority, but also be a cheap means of avoiding the very real social and political issues which graffiti highlights. The law holds as sacrosanct its consistency and objectivity. In the eyes of the law, art is an alien world where the standards it applies so rigorously do not apply. The law cannot allow graffiti to be legal because it cannot differentiate, and nor should it, between beauty and vandalism; beauty is indeed in the eye of the beholder. ■



that has essentially blocked them from future funding applications from the association.

It seems a shame that institutions have to contemplate going to such lengths to secure funding, especially as they bring so much benefit to the economy. For example, a 2010 study for the Natural History Museum suggested that for “every £1 the government grant, the Museum delivers around £4 in wider economic benefit”.⁵ This shows museums and galleries, although not-for-profit businesses themselves, have a massive role to play in terms of the economy, attracting huge visitor numbers to cities and locations across the country. This role can only be fulfilled, however, if museums can afford to remain open and continue to offer the experiences they currently do.

Although public opinion and the two aforementioned cases show distaste towards the idea of deaccessioning, the question must be asked: in an ethical and legal sense, are museums and galleries allowed to sell their assets? The 2002 National Museum Directors’ Conference publication *Too Much Stuff?* argues that “careful review and rationalisation of collections” can ensure the public continues to enjoy and use them.⁶ The conference members, including museums such as the National Gallery and Imperial War Museum, identified four reasons for which museums should be able to deaccession items from their collection: preservation, access and use, context and resources.⁷ It can be noted that filling a budget deficit is not a reason to sell, yet the conference accept that the deaccessioning of collections can “release resources which could deliver more elsewhere”;⁸ be that storage space, time or money. The conference argues that the museums’ boards of trustees have a duty to act in the public interest when caring for these national assets and “disposal should be regarded as a proper part of collection management” if “carefully conducted”.⁹ The idea is perhaps not as sacrilegious as initially perceived.

⁵ Natural History Museum, ‘Museum Funding’ (Natural History Museum 2010) <<http://nhm.ac.uk/about-us/corporate-information/museum-governance/funding/index.html>> accessed 04/01/2015

⁶ The National Museum Directors’ Conference, *Too Much Stuff? Disposal from Museums* (The National Museum Directors’ Conference, London 2003) 3

⁷ The National Museum Directors’ Conference (n 6) 4-8

⁸ The National Museum Directors’ Conference (n 6) 3

⁹ The National Museum Directors’ Conference (n 6) 14

As the majority of museums are set up as trusts or non-profit, charitable organisations, the trustees and the boards of directors hold a fiduciary relationship with the public. As such, they are tasked with acting in the public’s best interest (in the interest of the nation), as it is simply not feasible to expect the public to be consulted on the day-to-day affairs associated with caring for all of the collections bestowed to them. In standard trust law, “a trustee is expected to invest trust funds to produce a steady flow of income and to preserve the trust principle”.¹⁰ When applied to a museum context, this can be interpreted as seeing that the collection is well looked after and there is enough income to maintain the appropriate level of care: i.e. “ensuring that it is solvent”.¹¹

The Code of Ethics for Museums reflects the National Museum Directors’ Conference’s opinion that “financially motivated disposal” must not be used as a means to “generate short term revenue”. It states museums must ensure that they “refuse to undertake disposal principally for financial reasons, except in exceptional circumstances”;¹² this would be in line with J White’s observation that trustees must “exercise the care that an ordinarily prudent person would exercise in dealing with his own property”.¹³ In other words, an ordinary person (a member of the public) would not sell his greatest treasures unless there was no other viable option to resolve the exceptional circumstances.

Yet, it would seem under UK Law that this sentiment is not shared, with the British Museum Act and the Museums and Galleries Act stating national museums and galleries may not sell an item from their collection unless it is a duplicate or has become useless for the purpose of the museum (it is not of interest to students or has become too damaged).¹⁴ The Law also states any money gained from sale

¹⁰ J White, ‘When It’s OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses’ [1996] MLR 1041, 1053

¹¹ Charity Commission, *Charitable Museums and Galleries: A guide to conflicts of interest policies, trustee benefits and transactions between trustees and charities* (Department for Culture, Media and Sport, London 2008) 6

¹² Museums Association, *Code of Ethics for Museums* (n 1) 17

¹³ J White, ‘When It’s OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses’ [1996] MLR 1041, 1053

¹⁴ British Museums Act 1963 s 5 (1-2), Museums and Galleries Act 1992 s 4(1-5)

Picassos for Pennies

A Problem for Museums

Mary Sutherland-James

As stated in the Code of Ethics for Museums, society can expect museums to “hold collections in trust on behalf of society”.¹ Museums exist to serve the public, to inspire them and

to offer the opportunity for both learning and enjoyment.²

The issue surrounding deaccessioning is contentious and emotive, as many believe it is the duty of museums and art galleries to collect and preserve items for the people, not to relinquish them. But what if this is the only way for a museum to remain solvent? With museums facing

funding cuts, yet wishing to remain free to the public, surely this option must be considered.

According to the Museums Association, in December 2012 the Department for Culture, Media & Sport passed on thirty-four million pounds worth of budget cuts to Arts Council England and national museums,³ resulting in staff redundan-

² Museums Association, ‘Frequently Asked Questions’ (Museums Association) <<http://www.museumsassociation.org/about/frequently-asked-questions>> accessed 04/01/2015

³ Museums Association, ‘Cuts Timeline’ (Museums Association 2014) <<http://www.museumsassociation.org/campaigns/funding-cuts/19122012-cuts-timeline>> accessed 04/01/2015

cies, fewer temporary exhibitions and a reduction in the number of free public events offered.⁴ The difficult situation that has arisen as a result of these cuts has seen more museums and galleries considering the deaccession of objects in order to remain able to adequately benefit the public. For example, in July 2014, the Northampton Museum sold an ancient Egyptian statue for almost sixteen million pounds to enable it to extend and improve the museum’s facilities. In November 2013, Croydon Council also raised eight million pounds to redevelop a local arts centre from the sale of Chinese ceramics. Both museums saw their Museums Association accreditation stripped as a result of their actions; a bittersweet turn of events

⁴ Museums Association, ‘Cuts Survey’ (Museums Association 2014) <<http://www.museumsassociation.org/campaigns/funding-cuts/cuts-survey>> accessed 04/01/2015

¹ Museums Association, *Code of Ethics for Museums* (1st, Museums Association, London 2008) s 1



“shall be applied by the Board in the acquisition of relevant objects to be added to their collection”. The law is at odds with the Code of Ethics as the code allows the sale of items from the museum’s collection if the sale would “significantly improve the long-term public benefit derived from the remaining collections”,¹⁵ potentially translated as ensuring that no further items from the collection deteriorate to the point that they are useless. Surely raising funds to ensure the museum could remain solvent (thus improving the long-term public benefit) by enabling the money to be spent on more than just acquisitions is a more than reasonable proposal? Enabling museums to spend the proceeds from sales on day-to-day running costs would, in turn, free-up more money for the museums to spend on improving facilities, which could result in the museums being able to contemplate further acquisitions for their collections. There seems little sense in adding to collections if the museum cannot fulfil its duty to the public due to lack of solvency.

As laid out by the Charity Commission, “there comes a point where “storage” becomes hoarding”¹⁶ if there is no expectation that items in the collection will or

even can be exhibited. In such cases, the Commission expects trustees to consider if it is in the public interest to be holding on to such items. It could be argued that keeping items for the sake of it would inhibit the ability of the trustees to properly care for items that are exhibited and studied. In situations like this, if the selling of assets was permitted, thorough and exhaustive research must first be undertaken to ensure there is not even a slim chance the museum is selling something that may later turn out to be of notable interest or value.¹⁷

Perhaps the greatest threat museums face when deaccessioning assets is deterring future would-be donors. The National Museums Directors’ Conference argue that people may be less inclined to offer things to museums if they suspect their donation “may be traded or otherwise disposed of”.¹⁸ However, this situation could easily be avoided if donors attach strict guidelines to their bequests.

Beyond the British Museums Act and the Museums and Galleries Act, which only apply to national museums, there is no UK legislation governing those in control

of museums and galleries (apart from charity law). Essentially, withdrawal of accreditation from professional bodies is the worst consequence that can be faced by organisations who choose to sell parts of their collections and do not breach their trustee duties. To this end, as the heritage and arts face more budget cuts, it may not be surprising to see more selling taking place to maintain solvency. In cases where the proposed deaccessioning is taken to court, trustees and directors may even argue that by failing to remain solvent they are in fact breaching their fiduciary duties to the public, as remaining solvent and accessible is their primary objective.

What is certain is that if we are to accept that museums and galleries are within their rights to sell parts of their collections, it must only be as a last resort. Hard work and research must always come before the lure of a high market price and buyers in the form of other public museums must always be sought before a private collector.

Museums and galleries must do all that they are able to protect public interest and maximise the accessibility of their collections to the public. ■

¹⁷ The National Museum Directors’ Conference (n 6) 13

¹⁸ The National Museum Directors’ Conference (n 6) 12

¹⁵ Museums Association (n 1) 17

¹⁶ Charity Commission, *The Review of the Register of Charities: Museum and Art Galleries* (1st, Charity Commission, United Kingdom 2002) 8

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Private School Charitable Status: Advancement of education or inequality and aristocracy?

Cameron Allwood

The debate over the sanctity of education through the private school system is one that will constantly rage on. The ability for a select few to buy a conclusively better education is something that a number find exclusionary and socially damaging, whilst others consider that the opportunity for lower class

sizes, more advanced resources and improved facilities should be available to those who are willing to spend, on average, £27,500 each year for the benefit.

Whilst I remain particularly opinionated on the matter, the debate has exhausted itself, often resorting to vituperative and personal attacks as opposed to authentic, contentious debate. I have therefore chosen to adjust the focus to an equally controversial, yet less publicised, aspect

of the private education sector. It may be surprising to some that each and every one of the 2,500 private schools in the UK are considered charities, achieving the lucrative tax breaks that accompany this status. I will consider the original intention behind the legislation countenancing such status, whether or not private schools amount to 'public benefit', as well as the relevant taxation issues.

Described as 'sounding like a legal phrase' by Lord MacNaghten, the difficulty in defining the word 'charity' has directly

led to institutions completely lacking in charitable motivation nevertheless falling within the bracket. The Charities Act 2011 defines at s.3 'the advancement of education' as constituting a charitable purpose. This remains the prominent justification for private schools benefiting from exemptions on tax for contributions from donors; profits from trading; bank interest as a result of investment or profits, or from the disposal of assets within the schools. It is without question that such institutions meet the requirement for the legislation (they are undoubtedly 'advancing education'), but the matter in contention is whether the legislation was intended only to provide this benefit for a select few in society. Technically 'a school for pickpockets would come within the legal objects of a charity (advancement of education in the abstract)' yet for obvious reasons it is not readily applicable.¹ There remains no

¹ The Coveyancer and Property Lawyer 2014, Publication Review, Public Benefit in Charity Law, Jonathan Garton, Reviewed by J. Picton Madcudd, Re [1896] 2 Ch. 451 at 474

fundamental charitable purpose behind these schools, more concerned with enlightening the elite as opposed to facilitating the educational needs of all. It seems rather obscene then that an organisation can provide a fast track to the highest position in society (to the detriment of other, less wealthy people) and call itself a charity, an institution that implicitly helps the disadvantaged. Winchester College remains a prime example, referring to its own foundation as being established for 'many poor scholars, suffering from want of money or poverty' before declaring its commitment to 'hold out helping hands and give the assistance of charity'. This seems far removed from the current £31,350 that it currently costs to attend.

Charities are also required to meet a public benefit requirement. It would seem, however, that private schools encourage quite the opposite, acting in detriment to the prospects of children who are deprived the opportunity to attend. A child privately educated is 55 times more likely to receive an Oxbridge offer than a child on free school meals. Furthermore, children with 3 A*'s from a private school in comparison to 3 A*'s educated from a comprehensive still had a 9% advantage of obtaining a place at Cambridge or Oxford. Clearly, the advantage that private schools provide for the 550,000 students that attend them acts in detriment to those at comprehensive schools, with this 7% earning more A's at A-level than the 93% majority. No one is naïve enough to argue that this, for the most part, does not eventually lead to a better life. One need look no further than the House of Commons, the legal system and the majority of newspaper editors to see the increasing number of privately educated people with considerable influence in society. Parents are paying for more than smaller classes and better resources, but for the privilege of being at an advantage in a process of social selection, alongside not equally intelligent, but equally wealthy individuals. The justification that these institutions are then beneficial to the general public seems absurd.

If this were not enough, the average wage in the United Kingdom is £900 less than the average fees of a private school, as the increase in 'oligarch fees' has seen private education become inaccessible to the middle classes. It is consequently worth considering how such schools can possibly provide a public benefit if the majority of the population cannot afford to attend them? The bursary scheme is an attempt

to combat this, providing funds for those from impoverished backgrounds with the opportunity to study alongside the privileged (supposedly around 1% receive full fee reduction and around 33% a deduction). This is not done with altruistic, bountiful intention though. It is a financially motivated attempt to reach that sought after 'charitable status'. This educational segregation therefore leaves only a select few in society able to afford such prices, exacerbating the class divide and restriction on social mobility in an already fractured society.

The matter of tax remains a huge factor within the argument. In turning our attention to the North, we see that Fettes College in Edinburgh saw its tax liability fall from £209,139 to £41,828. Compare this to Wester Hailes, where over 40% of children are on free school meals, who paid £261,873 in full tax contributions in comparison. It seems baffling that schools whose entire funding amounts to one sixth of some private schools fees (not including donations from parents) can be liable for five times the tax. Despite this, it is maintained that the private education sector generates around £3.6bn in tax each year, even with the number of exemptions in place. One would consider that whilst this is a huge figure, this is £700m lower than if the schools were not awarded charitable status. Unfortunately, if the 'charity' label was removed, the prediction is that many of the schools would cease to function. It is therefore a question of what is preferable, a lower number of private schools making full tax contributions, or a higher proportion that pay a smaller figure individually, but collectively larger. In an ideal world, the first option speaks to my passion for equality and an education system that is beneficial for all as opposed to a select few, yet the practicality and sustainability of the latter choice has its financial benefits, meaning it will always prevail.

I will conclude by putting to you a final question. Imagine if universities were forced to consider students who received an A* from a state school in priority to the same grade from a private institution, or if state school students were automatically guaranteed a place at interview if they met certain requirements. If we entirely removed the social advantage, and present private schools as simply places where education is funded better, would they be as popular? Would they care about the charity status? Almost definitely not. ■■



The Bedroom Tax

What does it actually achieve?

Georgina Gamble

Introduced by the current government as an attempt to combat welfare dependency and redistribute social housing, the ‘Bedroom Tax’ (or ‘removal of the spare room subsidy’ as it is more formally known) has become highly controversial. The government refers to it as the ‘removal of the spare room subsidy’¹ while opponents call it

the ‘bedroom tax’; but I suggest whatever you decide to call it, the scheme is simply not working.

What is the Bedroom Tax?

Introduced under the Welfare Reform Act 2012 (Regulation B13 of The Housing Benefit (Amendment) Regulations 2012),² the ‘Removal of the Spare Room Subsidy’ applies to all working age households claiming housing benefit in the social rented sector. It works to restrict the amount of housing benefit council and housing association tenants can claim, stating that where a house is under occu-

sector-tenants published 22/06/2014

² The Housing Benefit (Amendment) Regulations 2012 No. 3040. Regulation 5(7) B13

pied by the household, if they are deemed to have more bedrooms than they require for example, their benefit entitlement is to be reduced.³ Such a reduction amounts to 14% of the total housing benefit if households have one ‘additional’ bedroom, or 25% for two or more bedrooms not being used as such.⁴ Thankfully, there are some exceptions to the Bedroom Tax. For instance, disabled adults who sometimes require an overnight carer are exempt from paying for a spare bedroom but, following a string of high profile cases involving disabled children, they are now more likely to be exempt from payment. Yet worryingly, this is not a full statutory exemption and there are not nearly enough safety nets in place to catch the

³ Ibid. Regulation B13 (2)(b)

⁴ n2 Regulation B13 3(a)-(b)

more vulnerable applicants.

Through the Welfare Reform Act, the government has made it clear ‘it is no longer prepared to meet the full costs of housing benefits for tenants [who] are now expected to start pulling their weight.’⁵ The Removal of the Spare Room Subsidy intended to: reduce the £23 billion annual housing benefit bill,⁶ redistribute social housing stocks and encourage people back into work, therefore reducing dependency on the welfare state.

But the extent to which these aims have been achieved is increasingly questionable.

Is it working?

The government suggest the Removal of the Spare Room Subsidy provides housing benefit claimants with a simple choice: find work to pay for the reduction in housing benefit or move to a smaller property. This was aimed to help people make a rational choice, get them onto their feet and empower them to find work, removing the idea of social housing tenure for life. However, is there any rationality in choosing to leave the family home you have lived in for years? For many the answer is no, there is not. Similarly, in a time of high unemployment, just how easy is it for someone to find work?

In a report published last year⁷ it was found the ‘Removal of the Spare Room Subsidy’ had not resulted in the scale of downsizing that the government had hoped for. Only 4.5% of tenants affected by the policy had downsized within the social rented sector (this does not account for tenants moving into the private rented sector, though it should be noted this causes issues in and of itself, namely higher rents) and only 19% of those affected had even registered to downsize.⁸

So does this suggest tenants were paying for the shortcomings of housing benefit themselves as the government had hoped? The same report found that, of the tenants affected, 41% had paid the short comings in full but 57% of those had cut back on

⁵ Sadia Adebimpe Bello, Social landlords and the courts bear the brunt for welfare reform J.H.L. 2013, 16(5), 95-100 at 100

⁶ <http://www.bbc.co.uk/news/business-21321113> published 30/07/2013

⁷ The Department of Work and Pensions ‘Evaluation of Removal of the Spare Room Subsidy: Interim Report’ 15 July 2014

⁸ *ibid.* at p16

essential expenditure.⁹ Not only does this suggest the tenants had not necessarily got themselves into work, but it negates the idea of ‘affordable housing’ and poses worrying questions about poverty in the UK.

The bedroom tax is inherently problematic; if it were simply about redistributing social housing, the policy would include the largest group of under-occupiers: the elderly (The Joseph Rowntree Foundation found 57% of older households under-occupy). Similarly, there can be seen to be a failing in the government’s attempt to end welfare dependency. Households are able to circumnavigate paying the shortfall in housing benefit by moving to a smaller property – if they can find one – and if they do so, will continue to get their housing benefit paid in full, even if they have relocated into the (more expensive) private rented sector.

David Orr, the National Housing Federation’s chief executive stated he believed the bedroom tax was “ill-conceived”, adding “the government’s assumed savings are questionable” and “it takes no account of the fact that there are not enough smaller homes in the social sector available for people who are under occupying to move to”.¹⁰

Where does the Bedroom Tax fit in wider welfare and social policy?

A damning report from the UN special investigator Raquel Rolnik stated the UK was in danger of going backward in its protection of rights, remarking “people were increasingly having to choose between putting food on the table, and paying the welfare penalty”.¹¹

While the government wanted to “end the dependency culture”, “make work pay” and step away from “welfare as a lifestyle choice”¹² as part of the wider reforms, it arguably forgot its aspirational social and more specifically housing rights commitments when formulating the bedroom tax.

⁹ *Ibid.*

¹⁰ <http://www.housing.org.uk/media/press-releases/bedroom-tax-some-home-truths/> published 28/03/2013

¹¹ Susan Marks ‘Backlash: the undeclared war against human rights’ European Human Rights Law Review 2014, 4, 319-327 at 320

¹² David Cameron quoted on Inside Welfare Reform, Radio 4. 2/11/2014

Academics argue housing, in light of the European Social Charter,¹³ should be a basic human right and “if the right to housing is understood as a possibility to benefit from an adequate dwelling, then affordability means housing expenditure should not overburden a person or family financially”.¹⁴ This read alongside Article 30 ECHR means: “the price of housing should not reach a level that forces a person or family into poverty”.

There are many instances where the bedroom tax has done exactly this. Ipsos MORI research showed households cut back on essential spending with 32% of affected households cutting back on food and 26% cutting back on heating¹⁵ in order to meet the reduction in their housing benefit.

It has been recognised by academics and practitioners alike that any advancement of the social right to adequate and affordable housing “has to be coupled with a mandate for the government to increase the supply of housing”¹⁶ to create a practical and enforceable right. The bedroom tax is penalising people for under-occupying their homes, but a shortage of smaller properties means that for many, they have no choice but to face a reduction to their housing benefit. The government is not wrong in its assertions that taxpayers’ money is being wasted on the costs of providing housing benefit, but their reasoning is conceivably flawed; it is arguably high unemployment combined with the high costs of living that are to blame, rather than an intrinsic dependency on the welfare state. Perhaps the key to addressing the problems faced by the government, with regard to welfare dependency and a lack of housing, is simply a programme to build more houses. This would stimulate the economy, create jobs, provide affordable housing, provide social housing which more closely reflects the demographic of those who require it, and reduce the housing benefit bill. ■

¹³ The European Social Charter Art 31.1 the Right to Housing

¹⁴ Matti Mikkola ‘Housing as a human right in Europe’ 10 European Journal of Social Security 249 (2008) at 255

¹⁵ <http://www.housing.org.uk/publications/browse/one-year-on-the-impact-of-welfare-reforms-on-housing-association-tenants-1/> published 27/05/2014

¹⁶ Kyra Olds ‘The role of courts in making the right to housing a reality throughout Europe: lessons from France and the Netherlands’ Wisconsin International Law Journal Vol28 Issue 1 (2010-11) pp 170-200 at 197



The Many Faces of CSR

Bolaji Oladipo

Companies are increasingly adopting Corporate Social Responsibility (CSR) policies which go beyond what is required by law. A brief glance at any website of a large company will most likely see a section with the heading “Corporate Social Responsibility”.

Ford UK, for example, notes under such a section¹ how it provides funds to local schools and other not-for-profit projects through its Ford Britain Trust. Another example would be Apple, which not

only has a section titled “Environmental Responsibility”² but also another under the heading “Supplier Responsibility”³. Indeed, more and more companies are arguably engaging in more socially responsible activities whilst still attempting to maximise profit and compete in an increasingly globalised market. For example, a recent announcement⁴ by the major car manufacturer General Motors, stating it will soon use wind to power its manufacturing projects, comes amid an increasing number of large corporations⁵

² <<http://www.apple.com/uk/environment/>>

³ <<https://www.apple.com/uk/supplier-responsibility/>>

⁴ <<http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2015/feb/0217-windfarm.html>>

⁵ BMW's use of hydropower: http://seattletimes.com/html/business/technology/2023573267_

pushing towards using clean energy in their operations.

Thus, with the above in mind, it can be advanced here that the engagement by companies in socially responsible activities leads to wider societal benefits, despite mixed underlying motives. Although this position might be put forward, some issues still arise from CSR and these will be subsequently identified. This will then lead to the conclusion that whilst engagement by companies in socially responsible activities results in numerous benefits

bmwmoseslakexml.html; Google's intention to use wind power to run the Googleplex Headquarters in California <http://googleblog.blogspot.co.uk/2015/02/from-altamont-pass-to-mountain-view.html?m=1>; Apple's \$850m investment in solar farm project <<http://www.montereyherald.com/technology/20150210/apple-spending-850-million-on-solar-farm-project-in-monterey-county>>

for society, some important issues still remain, such as those relating to democracy and the blurring of the boundaries between business and political spheres.

Whilst it can be said that the initiatives mentioned above, for example, are arguably good for society and the environment, a sceptical stance can be readily adopted in response to companies following CSR obligations. For example, commentator Subhabrata Banerjee⁶ notes how CSR can form a major part of a business strategy which has the maximisation of profits at its heart. Many companies realise the business case⁷ in following CSR policies and how it can positively contribute to the image presented to investors, consumers, competitors and partners alike.

Developing this further, however, an

⁶ SB Banerjee, *Corporate Social Responsibility: The good, the bad and the ugly* (Edward Elgar Publishing 2011).

⁷ B Horrigan, *Corporate Social Responsibility in the 21st century* (Edward Elgar Publishing 2010) at 272-274.

issue also arises in this regard: the issue of the long-term viability of engaging in particular socially responsible activities. For instance, Banerjee notes⁸ an example of a pharmaceutical company offering a free drug program in some developing countries. Whilst it is noted that the company itself benefits in several ways along with the program participants, the long-term sustainability of such an initiative will inevitably be called into question. For example, what if a company's situation changes and it has to discontinue a certain socially responsible activity which it has voluntarily engaged in? Indeed, there is also the matter of profitability. Whilst the example of the free drug program involved treating a relatively “low-cost” illness, it would certainly be difficult to see such a drug program being offered to treat some of the leading causes of death in the developing world, such as malaria.

It can be argued further that not only can CSR be two-faced, but it can also be used by companies as part of a PR or busi-

⁸ See n 6 above, at 57-58.

ness strategy. Companies may, for example, portray themselves as ethical, whereas in reality such a portrayal could potentially mask a number of contradictory issues. An example can be given here of a large supermarket which has built an environmentally friendly superstore in a small town. Whilst this would arguably have a positive environmental impact, other concerns may still remain, such as the potentially detrimental effects to small local businesses.

With that being said, it may also be argued that there is an increased blurring of the boundaries between the political and business spheres. One commentator⁹ extensively discusses the inevitable drawbacks of CSR which involves the shifting of more power into the hands of corporations, leading to a decline in democracy and diverting focus away from the role of governments in dealing with societal problems. An obvious issue here is that a government is elected to serve the best interests of a nation and its citizens, whereas a corporation is arguably concerned with maximising profits. In this regard, an inevitable burden is therefore placed upon CSR to deliver business results, when its ultimate goal should actually be to directly benefit society.

Nevertheless, it must be concluded that a rise in the power of corporations has been occurring for decades.¹⁰ While such a conclusion is not supposed to encourage apathy in this regard, it does lead us to admit that companies following CSR obligations can only be a good thing. Whilst there could arguably exist an imbalance in the level of benefits directly received by both external and internal stakeholders as a result of a company engaging in socially responsible activities, it is still nevertheless a win-win situation. The alternative would see fewer benefits to society resulting from the voluntary actions of companies. Despite this, a final note of caution is that the increasing participation of companies in CSR could inevitably lead to a slippery slope regarding democracy. Our capacity and power as citizens will inevitably be diminished alongside an increase in our power as consumers and investors. This therefore leads to an increasingly powerful role of corporations over our lives and in society, much to the detriment of the role and power of governments.



⁹ R Reich, *Supercapitalism* (Icon 2009).

¹⁰ Ibid.



The demise of the UK prison system

A European Interpretation

Freddie Brock

There have been 125 prison suicides in England and Wales over the last 20 months,¹ in-

¹ Sandra Laville, Matthew Taylor and Leila Haddou, 'Inmate suicide figures expose human toll of prison crisis' (*The Guardian*, 17 October 2014) <<http://www.theguardian.com/society/2014/oct/17/-sp-inmate-suicide-figures-reveal-human-toll-prison-crisis>> Accessed 19 February 2015

cidents of self-harm are on the rise, and prisons are increasingly lacking both the staffing levels and funding to support the most vulnerable inmates. Instead of taking informed decisions in relation to the state and the current penal system, the Government seems committed to a path appearing to prioritise winning votes by pledging to introduce harsher punishments for criminals.

In light of the direction policy appears to be taking, this article will contrast the UK approach with examples from some of the more successful prison services in Europe. Unfortunately, HM Prison Service is often hijacked by those on the Left and Right of the political spectrum, transforming what should be a national, reasoned discussion into inflammatory rhetoric and an inaccurate monologue. To change our struggling prison system for the better, our political class must consider substantive evidence and examples from abroad to finally enact cogent policy for the benefit of our society and prisoners.

Where are we now?

There are 85,000 individuals detained in Britain's prisons.² The incarceration of each prisoner costs approximately £40,000 per year, with the average sentence standing at just over 15 months.³ Upon release, a high percentage of inmates reoffend.⁴ This same problem is repeated in the female and juvenile sectors even though they, on average, spend less time in prison than their male counterparts.

UK Prison Policy

With such vast expenditure on the books, it is logical to ask questions. What actually is the purpose of the Prison Service? What goals have the Government put in place? It would seem inconceivable that

there is no long-term strategy and that such expense is simply directed at a whim.

Prison policy over recent years has been inconsistent. In 2009, the then Prisons Minister Maria Eagles attributed the fall in crime rates during the Labour years to longer sentences.⁵ An effective deterrent for certain crimes perhaps, but hardly a coherent policy in light of current re-offending rates which are considerably higher than those of a number of other countries. The 2010 election saw the creation of the current Coalition Government, with the Conservatives promising to ensure 'honesty in sentencing'⁶ and end the pattern of prisoners being released after serving only half of their sentences. Whilst popular with some of the electorate, this policy was completely unenforceable and abandoned shortly after the Conservatives took office.⁷

Prison expenditure has in fact been cut since the Coalition was elected. However, the building of so called 'Super Prisons' by private firms like G4S has proliferated and over 1,600 male prisoners can be found housed in places like HM Prison Oakwood near Wolverhampton. This increasing level of privatisation within the Prison Service could lead in a number of directions, but with the requirement of privatisation to generate profit to justify a company's existence, it is dubious to suppose the welfare of prisoners will be at the heart of this new system. This new arrangement seems to be in concert with other public services in this age of austerity, characterised by efficiency, cutbacks and increasing privatisation.

So, whilst financial efficiency can be achieved by super-sizing our prisons, it leaves many vulnerable individuals out in the cold. In a report released on the 18th of February HM Prison Oakwood was found to be twice as likely to use force against inmates as other smaller prisons, suggesting this perceived financial efficiency may lead to increased pressures on staff. Such pressure may give rise to an

² Gov.uk, 'Prison population figures' (*Gov.uk*, 9 January 2015) <<https://www.gov.uk/government/statistics/prison-population-figures-2014>> Accessed 19 February 2015

³ Prison Reform Trust, 'Bromley Briefings Prison Factfile' (*Prison Reform Trust* 2014) <www.prisonreformtrust.org.uk/Publications/Factfile> Accessed 19 February 2015

⁴ Norman Baker MP and The Rt Hon Damian Green MP, 'Reducing reoffending and improving rehabilitation' (*Home Office and the Ministry of Justice* 26 March 2013) <<https://www.gov.uk/government/policies/reducing-reoffending-and-improving-rehabilitation>> Accessed 19 February 2015

⁵ Alan Travis, 'The prisons' minister who likes to drop in at jails unannounced' (*The Guardian*, 2 December 2009) <<http://www.theguardian.com/society/2009/dec/02/prisons-minister-maria-eagle>> Accessed 19 February 2015

⁶ Conservative Party, 'Prisons with a Purpose: Our Sentencing and Rehabilitation Revolution to Break the Cycle of Crime' (*Conservative Party* 2010)

⁷ The Justice Committee, 'What is prison for?' (*Parliament.uk*, 3 November 2009) <<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/361/36104.htm#note31>> Accessed 19 February 2015

The Norwegian prison system provides an example of a radically liberal alternative to the rest of the world.

increasing number of similar ‘incidents’⁸ In tandem with this, the use of riot squads has increased substantially over the last few years and homicide and GBH have increased accordingly.

The Spanish Experiment

In stark contrast to the UK, Spain has adopted a radically different approach to dealing with young offenders in particular. An especially high-risk group, young offenders require effective, early rehabilitation as this can have a marked impact upon reoffending rates.

The Guardian recently carried out a study of one of the Spanish rehabilitation centres; ‘La Zarza’. They found it had 100 ‘educators’ to a potential maximum of 61 inmates. The offenders engage in finger painting, horse-riding and a number of other recreational activities; a shock to a UK public that is seemingly opposed to prisoners even having access to library books.⁹ Yet the results have been impressive. After release, the reintegration into society¹⁰ rate for the children is 70% as opposed to the reoffending rate of nearly 70% in the UK.¹¹ Given the similar demographics and societal structure of Spain and the UK, it is arguable that the approach of the former may have an equally potent impact in the latter if it were to be adopted.

Admittedly the costs to replicate this in the UK would seem astronomical as there are approximately 8,300 young of-

fenders in the UK.¹² Based on the ratios found in Spain, this would require around 9,000 staff and 140 rehabilitation centres. However, there are numerous justifications for investing in this approach. Boys in prison are 18 times more likely to commit suicide than their counterparts in the community, three quarters will reoffend within a year of leaving prison¹³ and studies by the British Medical Association have shown the damaging implications imprisonment can have on the young.¹⁴ Whilst critics would contend that rehabilitation centres, with activities like horse-riding and finger painting, act as holiday resorts and reward those who commit crime,¹⁵ rehabilitation is ultimately not a reward. It is a deprivation of liberty, allowing for the identification of individuals at risk. Identification facilitates the prevention of further crime by inhibiting the development of a cycle of criminality.

A Nordic Conclusion

The Norwegian prison system provides an example of a radically liberal alternative to the rest of the world. They have a reoffending rate of less than 20%, only 4,000 prisoners in total and have been described as providing ‘prison utopia’.¹⁶ However, this did not happen by chance. Whereas most criminals in the UK are treated as numbers in an impersonal system, Norway views prisoners as individuals. The guards eat meals and play sports with

the inmates, with some institutions only having 5 guards on duty after 3pm.¹⁷

This is an expression of the power rehabilitative philosophy can have on societal perceptions of prisoners and how they can transform reoffending rates. Yet, as Time magazine pointed out, this programme has a key flaw. Murderers, rapists and paedophiles are housed in accommodation that would shame some hotels and are given a level of respect and kindness they never gave to their victims.¹⁸ An illustration of this can be seen in the case of Anders Breivik, the perpetrator of the Utoya shooting and Oslo bombings, killing a total of 76 people. His sentence amounted to just under 100 days in prison for each of his victims, a statistic horrifying to the staunchly retributivist UK public. This, undoubtedly then, is the dark side of a restorative justice system that promotes rehabilitation ahead of punishment. However, this Norwegian philosophy of rehabilitation appears to be the most effective method of reducing reoffending rates, even at the expense of awarding relatively weak sentences to crimes society deems abhorrent.

The UK continues to build larger prisons and incarcerates more people than ever, even as the crime rate appears to be declining. This escalating prison population requires a choice to be made between the continued marginalisation of prisoners and the provision of a system that can drastically change the lives of inmates. Whilst this may come at the expense of our social instinct to exact revenge by punishment, in Norway this has been accepted; their society consequently has fewer prisoners and a healthier prison system for it. ■

12 Prison Reform Trust, ‘Old Enough to Know Better’ (*Prison Reform Trust* January 2012) <www.prisonreformtrust.org.uk/portals/0/.../oldenough-toknowbetter.pdf> Accessed 20 February 2015

13 Ibid

14 Prison Reform Trust, ‘A Healthy Approach to Children and Young People in Trouble’ (*Prison Reform Trust* 2012) <http://www.prisonreformtrust.org.uk/ProjectsResearch/Childrenandyoungpeople> Accessed 20 February 2015

15 Jerome G Miller, ‘The Debate on Rehabilitating Criminals: Is It True that Nothing Works?’ (*The Washington Post* 1989) <www.prisonpolicy.org/scans/rehab.html> Accessed 20 February 2015

16 William Lee Adams, ‘Sentenced to Serving the Good Life in Norway’ (*Time* 12 July 2010) <http://content.time.com/time/magazine/article/0,9171,2000920,00.html> Accessed 20 February 2015

17 Doran Larson, ‘Why Scandinavian Prisons are Superior’ (*The Atlantic* 24 September 2013) <http://www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949/> Accessed 20 February 2015

18 William Lee Adams, ‘Sentenced to Serving the Good Life in Norway’ (*Time* 12 July 2010) <http://content.time.com/time/magazine/article/0,9171,1986002,00.html> Accessed 20 February 2015

The demise of the UK prison system

The new weapon of restorative justice

Evie Cameron

A central tenement of the criminal justice system is the punishment of offenders, aiming both to inflict retribution and encourage rehabilitation.

However, determining the most effective means of inflicting this purposive penalty remains a complex riddle the relevant authorities have yet to solve. The traditional approach of removing offenders from society through imprisonment is increasingly criticised for failing to reform inmates and prevent recidivism. This is particularly important for offenders facing short-term sentences; typically individuals involved in socially-defined low-level criminal acts, such as theft or anti-social behaviour. For these offenders, the failure of the prison system has led to an increase in restorative punishments, forcing them to confront their behaviour in victim mediation sessions. Whilst media perceptions portray restorative justice as a soft punishment, failing to satisfy the necessary levels of suffering required for effective punishment, statistics suggest the restorative approach reduces reoffending. Therefore, it must be asked in the current age of a ‘rehabilitation revolution’¹ whether continued, draconian mass imprisonment is the most appropriate instrument of punishment, or whether a transformation is needed, placing techniques encouraging offender atonement at the heart of the justice system.

Previously utilised as gaols for those awaiting trial, the prison system saw a remarkable transformation in the nine-

teenth-century, built upon the belief the temporary removal from society of individuals was the most effective mechanism for punishing convicted offenders.² Born at the heart of the Victorian era, the fledgling prison system has expanded into a universally utilised mechanism of punishment, with approximately ten million individuals³ behind its concrete walls.

However, this era of global mass imprisonment must not continue. It is imperative that social attitudes placing prison at the forefront of punishment are transformed in relation to certain crimes. Whilst for serious crimes, such as murder, prison provides an effective instrument of punishment, for others imprisonment merely acts as a revolving door for continuous reoffending.⁴ Ineffective rehabilitation mechanisms, a rising prison population and the opportunity for criminal networking renders incarceration a fundamentally flawed mechanism of punishment, especially in relation to petty, repeat offenders.

There are currently over 80,000 people in prison in the UK; double the number since 1993.⁵ Consequent to this rapid escalation is overcrowding,⁶ impacting expenditure available to detain offenders and deliver important rehabilitation projects. In 2012

2 Michael Ignatieff, ‘State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment [1981] *Journal of Crime and Justice* 153, 184

3 Roy Walmsley, ‘World Prison Population List: Ninth Edition’ (*International Centre for Prison Studies* 2010) <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> accessed 16 February 2015

4 Prison Reform Trust, ‘Bromley Briefings Prison Factfile’ (*Prison Reform Trust* 2013) 26

5 Ministry of Justice, *Story of the Prison Population: 1993-2012 England and Wales* (Ministry of Justice Press Office January 2013)

6 Howard League for Penal Reform, ‘Weekly Prison Watch’ (*The Howard League for Penal Reform* 28 March 2014) <http://www.howardleague.org/weekly-prison-watch/> accessed 16 February 2015

the total prison population was at 112% of the Certified Normal Accommodation, the aspiring acceptable level of detention;⁷ adversely impacting resources available to implement rehabilitative projects, including educational, addiction-based or mental health related projects.⁸

Furthermore, overcrowding has resulted in increased prisoner movement, transporting offenders potentially over fifty miles away from their homes to serve their sentence.⁹ This offender migration can result in the breakdown of relationships with family and friends, as maintaining face-to-face contact becomes increasingly difficult. This also impacts community integration on release as the offender is removed from familiar, recognisable territory. Fragmenting community and family bonds increases the prospect of reoffending, illustrating just one of the many flaws of the mass incarceration system.

A further nail in the coffin is the intrinsic ability of prisons to facilitate offender networking and education. First publicly suggested by Lombroso in 1876,¹⁰ the reality of this initially speculative perception is gaining credence. Adult male offenders in the UK are classified from A to D depending on the severity of their

7 Morag McDonald, Robert Greifinger and David Kane, ‘The Impact of Overcrowding’ [2012] 8 *International Journal of Prisoner Health* <http://www.emeraldinsight.com/journals.htm?issn=1744-9200&volume=8&issue=1&articleid=17058213&show=html&PHPSESSID=hf1flgr52kbrcaa50k5vuh0pn6> accessed 16 February 2015

8 Yvonne Jewkes and Helen Johnston (ed), *Prison Readings: A Critical Introduction to Prisons and Imprisonment* (Willan Publishing 2006) 283

9 The Howard League for Penal Reform, ‘Prison Overcrowding’ (*The Howard League for Penal Reform* 2014) <http://www.howardleague.org/overcrowding/> accessed 16 February 2015

10 Mary Gibson and Nicole Hahn Rafter, ‘Book Review: Cesare Lombroso *Criminal Man*’ (*Twil* 2013) <http://www.twil.info/wp-content/uploads/2013/03/criminal_man.pdf> accessed 16 February 2015

crime.¹¹ However, during their incarceration, aside from in exceptional circumstances, offenders irrespective of category can interact. This freedom enables offender networking, facilitating the creation of educational sub-cultures which may promote criminal careers.¹² The network of delinquency within prisons is therefore perpetuated,¹³ establishing a cycle of crime; an engenderment of reoffending.

These are only two of the many inherent flaws in the current system of imprisonment which render it imperative that social and political attitudes to punishment are transformed. The penalty of imprisonment should be reserved only for the most dangerous criminals such as those convicted of murder or sexual assault. Other instruments of punishment such as restorative justice should be adopted to penalise other offenders, particularly those most at risk of recidivism. These community mechanisms provide an alternative, and more importantly, effective means of punishment and reform.

Founded upon the idea of community integration, restorative practices originated from the belief that criminal behaviour occurs as a consequence of feeling isolated and excluded from society. Emphasising the importance of individual equality, restorative justice aims to involve all members of the impacted community to help reengage and reintegrate the offender.¹⁴ These practices and beliefs have existed for centuries, forming an essential part of social interaction, particularly among indigenous and tribal groups. For example, some aboriginal Canadian groups utilised “healing circles” as a mechanism to develop consensus for determining the most effective means of remedying the harm caused by crime.¹⁵ Involving the offender, community members and the victim, this practice sought to discover and understand the reasons underlying the offence and nature of the harm caused. Confronting the criminal behaviour whilst providing victims with an opportu-

nity for empowerment led to an organic sense of justice within the community;¹⁶ enabling the offender to attempt to correct the harm caused by their actions. Whilst these practices were not confined to tribal groups, occurring in some format across the developing Western world, until recently they were largely excluded in favour of incarceration; perceived as not inflicting an appropriate level of suffering on the offender.

However, the effectiveness of restorative approaches is once again being recognised. Principally used in Canada, premised upon aboriginal traditions, the utility of restorative mechanisms has spread across the Western world. The flexible, dynamic nature of the approach renders its conduction possible in a multitude of forums and in numerous ways. A conceptual umbrella, the most common form is the victim-offender mediation session; controlled environments facilitated by neutral third-parties seeking to engage the offender and victim in meaningful dialogue. Especially useful for petty repeat offenders, the controlled environment of a restorative justice session generates a personal sense of justice for the victim, whilst also allowing effective rehabilitation of the offender.

In contrast to the prison system, restorative justice provides victims with a voice in the criminal justice process because it forces the offender to meet their victim face-to-face to hear details of the suffering caused by their actions. Unlike the trial process in which the victim may have the opportunity to present a Victim Personal Statement upon its conclusion,¹⁷ the restorative approach provides direct interaction and an avenue for personal justice. The victim becomes empowered by the process, which places them at the heart of the issue as a willing participant. By confronting the reasons behind the criminal behaviour, a victim mediation session is intended to generate feelings of remorse and a desire for forgiveness. The punishing process of restorative justice demands the offender accept responsibility for their actions¹⁸ and exert labour in order to repair the harm caused by their crime. This arguably shaming mechanism uses

the offender’s conscience as a weapon¹⁹ to elicit feelings of repentance. This atonement on behalf of the offender becomes a self-directed mechanism of rehabilitation, acting as an instrument of community acceptance. Direct confrontation of their wrongful behaviour, whilst also discussing the harm caused by the crime with the victim, provides a powerful rehabilitation tool, rendering restorative justice an apparatus of punishment not to be underestimated.

Should retribution be the only intention behind punishment then it may be appropriate to concede that prison works. However, it is clear that this is not the case. It has long been recognised that rehabilitation is also an essential purpose of punishment.²⁰ The detrimental impact incarceration has on this purpose, particularly for offenders serving short-term sentences, illustrates the importance of utilising alternative punishment mechanisms such as restorative justice. Whilst it may be inappropriate for some criminal activity, for others it may be the most effective method of punishing and reforming. Forcing offenders to confront the damage caused by their actions and the subsequent rebuilding of social solidarity underpins restorative justice. This historical mechanism, which is gradually finding favour again, encourages atonement on behalf of the offender whilst also providing victims with a voice in the criminal justice process. Governmental failure to recognise the success and effectiveness of this punishment will continue to impede and undermine not only the importance of victims in criminal procedure but also offender reformation. Enduring perceptions that incarceration is the most appropriate punishment for many offenders will only serve to perpetuate high reoffending rates.

Governments can no longer underestimate the benefits of restorative justice, particularly its lower recidivism rates.²¹ In light of escalating prison populations and high reoffending rates, social attitudes pertaining to the enduring use of incarceration for many crimes must be eradicated in favour of alternative and genuinely effective punishments. ■

¹¹ “A” signifies the highest risk offender

¹² Nick Cowen, ‘Does Custody Cause Crime?’ (*Institute for the Study of Civil Society* 2010) 2

¹³ Michel Foucault, *Discipline and Punish. The Birth of the Prison* (Penguin Books 1991) 301

¹⁴ Correctional Service Canada, ‘FORUM on Corrections Research’ (*Correctional Services Canada* 2015) <<http://www.csc-scc.gc.ca/research/forum/e121/e121j-eng.shtml>> accessed 16 February 2015

¹⁵ Justice Education Society, ‘Aboriginal Restorative Justice Remedies’ (*Justice Education Society* 2015) <<http://www.justiceeducation.ca/research/aboriginal-sentencing/restorative-justice>> accessed 16 February 2015

¹⁶ Ibid

¹⁷ This is a document written and submitted by the victim, providing an account of the harm caused to them by the criminal act. Delivered to the court upon conviction of the offender, this statement can be utilised to form part of the sentencing decision.

¹⁸ Charles Pollard, ‘Victims and the criminal justice system: a new vision’ [2000] *Criminal Law Review* 5, 15

¹⁹ Peter Raynor and Gwen Robinson, *Rehabilitation, Crime and Justice*, (Palgrave Macmillan 2005) 140

²⁰ Criminal Justice Act 2003 s142(1)(c)

²¹ Restorative Justice Council, ‘Restorative justice works’ (*Restorative Justice Council* 2014) <http://www.restorativejustice.org.uk/restorative_justice_works/> accessed 16 February 2015

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Fault or no fault in English divorce law?

Dominic Ehler

Divorce has historically always been a topic of tentative debate, but the centuries have seen vast reforms in the area. Traditionally, divorce was only available to the exceedingly wealthy, but a feature of common debate nowadays is whether divorce is *too* accessible, and whether greater accessibility increases divorce rates.

In having a fault-based system, England could be said to be an outlier compared to other countries. English law requires individuals to prove particular 'facts' in order to be granted a divorce, as compared to the more accessible 'no-fault divorce' approach in many other jurisdictions, which looks more simply at separation and the breakdown of relations. There

have already been unsuccessful attempts to bring no-fault divorce into English law. However, with Lady Hale recently pledging support for the notion,¹ the issue arises again as to whether no-fault divorce has a place in English law, or whether it would do more harm than good.

Part 1: English divorce law – the five 'facts' and special procedure

English divorce law is currently found in the key Matrimonial Causes Act 1973. The Act dictates that a divorce will only be granted if the party requesting the divorce, or 'petitioner', can prove "the marriage has broken down irretrievably".² The legislation also sets out five 'facts', at least one of which must be proven to the courts in

order for a divorce to be granted: adultery, unreasonable behaviour, desertion for 2 years, 2 years separation with consent of both parties, and 5 years separation. Both irretrievable breakdown *and* one of these facts must be proven in order to grant a divorce, even in the event that the courts are completely satisfied that the marriage has broken down.³

Firstly, section 1(2)(a) requires the other spouse, or respondent, to have committed adultery, but also for the petitioner to "[find] it intolerable to live with the respondent" any more.⁴ The adultery and the intolerability are two separate elements,⁵ and the intolerability is subjective to how the petitioner in question feels.⁶

However, despite case development making adultery easier for petitioners to access, the most common ground for

divorce is the wider concept of 'unreasonable behaviour', accounting for approximately 48% of divorces in 2012.⁷ The expression 'unreasonable behaviour' is an inaccurate reflection of the statute, however. This fact requires the respondent to have "behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent".⁸ The test considers objectively whether any 'right-thinking person' would expect the petitioner to remain with the respondent, taking into account 'the whole of the circumstances' and 'personalities of the parties', not whether the behaviour itself was unreasonable.⁹

The last three facts focus on separations over extended periods of time. Desertion

requires the respondent to have left the petitioner's household¹⁰ without consent,¹¹ with the intention of not returning¹² and without good reason¹³ for a continuous period of two years.¹⁴ Lastly, there is separation, both with¹⁵ and without consent¹⁶ from the respondent, requiring two and five years of separation respectively. Consensual two-year separation is the second most common type of divorce, accounting for approximately 26% of divorces in 2012.¹⁷

The English system theoretically relies on the petitioner proving the respondent was at fault, yet this seems at odds with the true nature of divorce proceedings. It is a well-known fact in legal circles that

the vast majority of divorces go uncontested, and therefore, 'special procedure' that requires little to no court presence is the norm for divorcees.¹⁸ In the event that a divorce petition is uncontested, the courts will initiate 'special procedure', approving the divorce's paperwork without any of the parties being present. If both parties consent to a divorce, why is it necessary to still have them prove cases that apportion blame, albeit via affidavit? Furthermore, the 2 years required for a consensual separation divorce seems unnecessarily lengthy and complex when you consider that parties will be separated for two years, then have to prove such in the petition, as opposed to merely applying for a divorce together and having it dealt with quickly. Arguments favouring no-fault divorce such as these are also Lady Hale's, suggesting that no-fault divorce would avoid stress and favour simplicity, "reduced cost and less focus on the other

1 Katherine Alexander, 'Baroness Hale proposes no-fault divorce' (*UKSC Blog*, 19th December 2014) <<http://uksblog.com/baroness-hale-proposes-no-fault-divorce/>> (Last accessed 20th February 2015)

2 Matrimonial Causes Act 1973, s 1(1)

3 *Buffery v Buffery* [1988] 2 F.L.R. 365

4 Matrimonial Causes Act 1973, s 1(2)(a)

5 *Cleary v Cleary and Hutton* [1974] 1 W.L.R. 73

6 *Goodrich v Goodrich* [1971] 1 W.L.R. 1142

7 Office of National Statistics, 'Divorce in England and Wales, 2012' (*ons.gov.uk*, 6th February 2014) <http://www.ons.gov.uk/ons/dcp171778_351693.pdf> (Last accessed Saturday 21st February 2015)

8 Matrimonial Causes Act 1973, s 1(2)(b)

9 *Livingstone-Stallard v Livingstone-Stallard* [1974] 3 W.L.R. 302

10 *Le Brocq v Le Brocq* [1964] 1 W.L.R. 1085

11 *Joseph v Joseph* [1953] 2 All ER 710

12 *Perry v Perry* [1963] 3 All ER 766

13 *Glenister v Glenister* [1945] 1 All ER 513

14 Matrimonial Causes Act 1973, s 1(2)(c)

15 *Ibid*, s 1(2)(d)

16 *Ibid*, s 1(2)(e)

17 See footnote 7.

18 Ruth Deech, 'Divorce – A Disaster?' [2009] 39 Fam. Law 1048-1055, 1050

person's failings".¹⁹

Part 2: No-fault divorce and an Australian example

Lady Hale is not alone in her calls for divorce reform. Summarising the proposals of legal advice and policy campaign group *Resolution*, Jo Edwards outlines the group's proposed 'manifesto', including the abolition of fault-based divorce. Edwards argues that a fault-based system "has no place in a civilised society ... especially one which increasingly places emphasis on the importance of non-court dispute resolution, yet pits couples against each other in an acrimonious way from the outset".²⁰ She cites other countries as ahead of the curve on the topic of divorce, including Australia.

Australia underwent huge reforms in the area of family law in the last century, all culminating in the federal Family Law Act 1975.²¹ Amongst many other things, this Act created a system of no-fault divorce, which is still in use nationally. The law states that an application for divorce under the Act must be based on the grounds that the marriage has "broken down irretrievably", much like ours.²² However, in the absence of fault, the Act merely stipulates the parties must have been separated for 12 months prior to the application being made, and that there is no likely chance of cohabitation being resumed.²³ So the question arises: does no-fault divorce lead to greater divorce rates? At least in Australia's case, the statistics seem to indicate that the answer is 'no, not really'. Although both marriages and divorces are more common in the United Kingdom, despite its smaller population, the marriage-to-divorce rates of both countries are quite similar, approximating 45%.²⁴ However, according to Ruth Deech, it is risky to over-apply statistics to divorce law. She believes statistics and social policy have taken over divorce law, and this presents a risk to the civil liberties and, by extension, access to justice for those who are in a system undergoing "invasion... by

mediators".²⁵

Part 3: The Family Law Act 1996

The influence of mediation and other forms of ADR in divorce proceedings could be attributed to increased legal costs and decreased legal aid. However, it could also be attributed to attempted reforms from the 1990's – the Family Law Act 1996. This Act reformed a number of areas in family law, including provisions for divorce. The Act only required that the marriage had broken down irretrievably. However, in order to prove this, one or both of the parties would have to provide statements that they believed that the marriage was indeed irretrievable, and only after extensive periods of mandatory education, future planning and 'reflection'.²⁶ These proposals became very unpopular, and were subsequently repealed following political and press criticism, along with disappointing results from trial periods. Nigel Shepherd, a national committee member of the aforementioned group *Resolution*, believes the Act fell victim to 'realpolitik' and a 'not-so-hidden agenda'.²⁷ Shepherd believes the politics of the day were pushing more onto mediators to alleviate the stress on legal aid. He believes "mediation was promoted as being suitable for far more of the divorcing population than even the most committed promoters of mediation accepted as realistic". As a result of "political maneuvering", the Act was "far from satisfactory". The trial periods for the information sessions proposed in the Family Law Act were met with low praise and over-reliance on mediation, designed to smooth the process of divorce and not "promote or assist reconciliation", meant the Act appeared unlikely to have achieved its goals and was ultimately scrapped.²⁸

Part 4: Conclusions and a view to the future

So what lies ahead for divorce law? Lady Hale coming out in support of no-fault divorce certainly brings the topic into the spotlight. Lady Hale believes no-fault divorce could remedy the high costs and time consuming nature of divorce pro-

ceedings. Reform groups such as *Resolution* agree, arguing fault-based divorce is no longer a functional system – that the "blame game" and the complexity and duration of current divorce procedures is detrimental not only to parties going through divorce, but also to those who may have any chance at reconciliation. Australian law strikes an interesting example whereby there are numerically fewer divorces, yet similar rates of divorce per marriage. However, there are those opposed to approaching family law in a purely sociological manner. Ruth Deech argues family law has been commandeered by statistics and has lost its way concerning the more legal elements of justice and protection of individual's rights through often difficult and distressing times. Deech believes that reforming again and installing no-fault divorce could in fact worsen divorce rates, due to a link between reform loosening divorce laws and the number of people seeking divorce.²⁹ She argues that those who wish to divorce at present can obtain divorces simply enough with the current law. She argues that information and education should be used in the wake of excess legal proceedings and mediation. She advocates for teaching people the significance of marriage, about the responsibility therein and the far-reaching consequences a divorce can have on spouses, their children and maybe even society as a whole.

The discussion of this topic is building momentum again, and so is support for no-fault divorce. Lady Hale's support lends serious legitimacy to calls for reform. However, this topic is seen as a political minefield, a "lose/lose", and there is an uncomfortable stalemate between the current issues of cost and complexity weighed against the risk of causing divorce rates to increase even further with reform. Views on marriage and divorce are changing with every generation. Perhaps the best way to prevent divorce is to ensure that all future marriages are happy ones. However, as Deech says, if divorce is the only option, "we should face up to it." It seems that facing a difficult separation in what is currently an unnecessarily complex and adversarial system may be doing more harm than good. ■

¹⁹ Rob George, 'Observations from the Bar' [2015] 45 Fam. Law 116-117

²⁰ Jo Edwards, 'Time for a Manifesto' [2014] 44 Fam. Law 759

²¹ The Australian 'Family Law Act 1975' is available here: <http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/>

²² Family Law Act 1975, s 48

²³ Ibid, s 48(2) – (3)

²⁴ See footnote 7; Australian Bureau of Statistics, 'Marriages and Divorces, Australia, 2013.' (abs.gov.uk, 26th November 2014)

²⁵ Ruth Deech, 'Divorce Law and Empirical Studies', (1990) 106 L Q Rev 229

²⁶ Family Law Act 1996, Part 2

²⁷ Nigel Shepherd, 'Ending the Blame Game: Getting No Fault Divorce Back on the Agenda' [2009] 39 Fam. Law 122-126

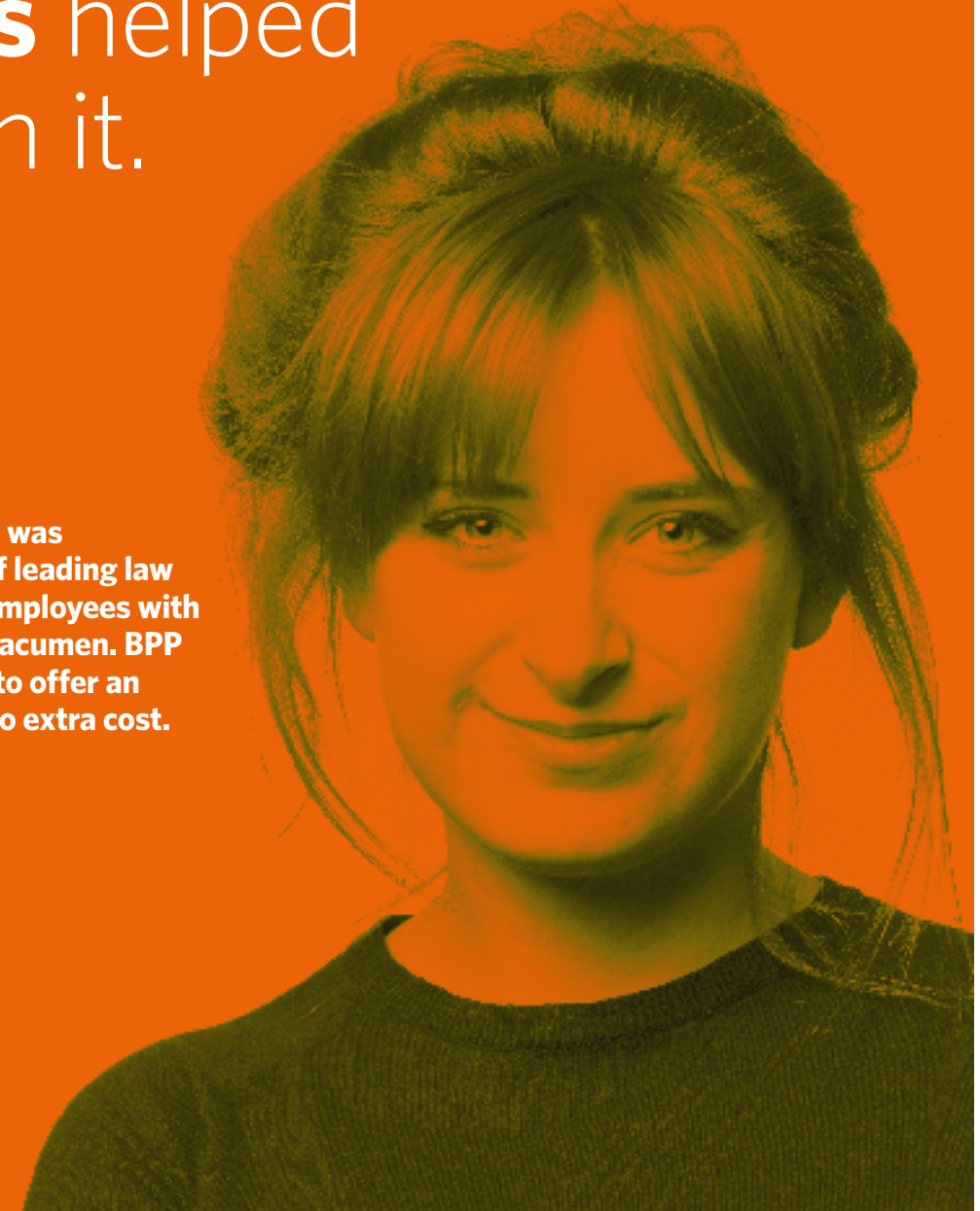
²⁸ Ruth Deech, 'Divorce – A Disaster?' [2009] 39 Fam. Law 1048-1055

²⁹ Ibid, 1049

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Sophie Davies

Section 172 of the Companies Act 2006 enshrines the principle of 'enlightened shareholder value' into UK company law by appending to the directors' duty to promote the success of the company a requirement to 'have regard' for other stakeholders' interests.

However, whilst this 'enlightened shareholder value' reminds directors that shareholder value depends on the successful management of the company's relationships with other stakeholders, directors are still ultimately required to promote shareholders' interests.¹ This article investigates whether the shareholder primacy norm is justified, arguing that although shareholders are not owners of the company, they are the residual risk bearers whose investments lack little protection compared to other stakeholders' contributions.

Shareholders do not 'own' the corporation in any strict legal sense. *Salomon v Salomon* demonstrates the law's clear recognition of a company as a separate legal personality; "the company is at law a different person altogether from the subscribers".² Furthermore, by virtue of section 170(1) and (4) of the Companies Act, the directors of a company owe their duties to the *company*, not the shareholders. This highlights the recognition of the company as a person with its own rights and duties, and not as an entity capable of being owned. According to the doctrine of separate legal personality, a company is technically 'self-owning' and the idea that it belongs to the shareholders is a legal fiction.³ Although shares may be called property in that they are transferable, they do not comprise any proprietary interest in the company's assets.⁴ Although shareholders have certain rights, these rights do not constitute ownership; they are merely a right to participate in the residual income of the going concern and to repayment of the capital.⁵

Moreover, Horrigan provides that the bundle of different rights of possession, control and other attributes that come with legal ownership are not vested in shareholders of modern corporations.⁶ Shareholders do not have the right to exercise control over the company's assets and are not involved in the day to day running of the business, which is instead vested in the directors. Although some decisions by directors require shareholder consent, shareholder influence over the company is indirect and, as Berle admitted, "often so diluted as to be negligible".⁷ However, Berle was concerned with widely held corporations. Majority shareholders' influence in closely held companies is clearly not "so diluted as to be negligible", nevertheless their influence and control is *indirect*.

Pennington asserts that shares "are simply bundles of contractual and statutory rights which the shareholder has *against* the company".⁸ The contractual nature of the share gives rise to the conclusion that the relationship between shareholder and the company is similar to that of creditor and debtor. However, although shares are of a contractual nature, a share constitutes the holder a member of the company and thus shareholders have an interest *in* the corporation.⁹ However, the assertion that these contractual rights confer "*some sort of proprietary interest in the company*"¹⁰ is not very persuasive, and it is to be remembered that shareholders have no proprietary interest in the company's property. Nevertheless, the separation between shareholders, with rights in the company and against it, and debenture holders, with rights against the company but never in it, collapses in economic reality.¹¹ In reality, shareholders, uninvolved in management and with very limited ownership rights, are similar to debenture holders as they are both money capitalists external to the company and the production process.¹² The share is thus a particular and distinctive form of money capital; property in the form of a claim on the compa-

ny's profits.¹³ Therefore, from both a legal and economic perspective, describing the shareholders as the owners of a corporation is inaccurate.

One response has been to suggest there is still a meaningful sense of 'ownership'. Advocates of shareholder primacy suggest that those who invest in a company are its true 'owners'.¹⁴ Parkinson argues "although shareholders are not the owners of the company's assets as a matter of strict law, they are *in substance* the owners by virtue of being the contributors of the company's capital".¹⁵ However, the idea of shareholders as investors of capital is of limited persuasiveness. Companies can increase their share capital by allotting new shares. Accordingly, shareholders can directly contribute new capital. However, the majority of shares transferred on the stock market are pre-existing, fully paid up shares, thus the stock market of today is not a significant form of investment capital for companies.¹⁶ Mumford notes that much of a company's capital is "self-owned -- that much of its capital comes from its own earnings, and that most of the 'reserves' represent the proceeds of its own endeavours".¹⁷ Furthermore, other kinds of essential capital are invested in corporations, such as labour capital and intellectual capital.¹⁸ Therefore, the argument that those who invest something of value into a company can be considered 'owners' actually provides the foundation for the recognition of stakeholder interests.

Shareholders are free at any time to sell their shares in an active public market.¹⁹ Stakeholders such as employees and creditors, however, make personal and resource investments that are firm specific and bear significant risk.²⁰ Therefore, the justification for shareholder primacy based on shareholders being residual risk bearers is inadequate.²¹ Not all shareholders have diversified portfolios, however,

Should directors be required to prioritise shareholders' interests?

1 Dignam and Lowry, *Company Law* (5th edn, OUP 2008) 345.

2 *Salomon v A Salomon & Co Ltd* [1897] AC 22, [51].

3 G.A. Goyder, *The Future of Private Enterprise* (Oxford: Blackwell 1951) 23.

4 Robert Pennington, 'Can Shares in Companies be Defined?' (1989) *Company Lawyer* 10 144; Goyder, above n 5, 23.

5 Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) *Modern Law Review*

62(32), 46.

6 Bryan Horrigan, *Corporate Social Responsibility in the 21st Century* (Edward Elgar Publishing, 2010) 105.

7 Adolf Berle, 'For Whom are Corporate Managers Trustees: A Note' (1932) *Harvard Law Review*, 45(8), 1378.

8 Robert Pennington, *Company Law* (Butterworths 6th edn 1990) 135.

9 Paul Davies, *Gower's Principles of Modern Company Law* (London: Sweet & Maxwell, 6th ed 1997), 299.

10 Davies, above n 10, 300.

11 Davies, above n 10, 300.

12 Ireland, above n 5, 47.

13 Ireland, above n 5, 47.

14 Horrigan, above n 6, 104.

15 J Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (OUP 1993) 34.

16 2004 Report of the Citizen Works Corporate Reform Commission, in Horrigan, above n 7 104.

17 M Mumford, *Strategic directions for corporate governance* (2000) (Lancaster University Management School Working Paper, 2000/024).

18 Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) *Virginia Law Review* 85(2), 249.

19 Margaret Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-first Century* (Brookings Institute, Washington, DC 1995).

20 John Legge in Horrigan, above n 26 99.

21 Green, above n 36.

Since the fulfilment of the duty under section 172 is determined by a good faith judgement, if directors' duties were framed in the interests of every stakeholder, any decision could be justified as being in the interests of *someone*, and thus directors would have more room to act in their own interests.

and the 'exit option' is not without risk since the share value could plummet. Moreover, in insolvency, shareholders are only entitled to whatever is left over after all non-shareholders' claims are satisfied.²² Other stakeholders' investments are more certain; for example, creditors have fixed claims on their finance to the firm and employees generally receive agreed payments in advance of performance.²³ Therefore, shareholders receive the residual gain and bear the residual risk associated with the firm, thus their investment can be seen to carry significant risk.

Furthermore, stakeholders are adequately protected through other areas of law such as contract,²⁴ whereas shareholders have limited means of protecting their interests.²⁵ A derivative action, whereby a shareholder sues the company on behalf of the company, allows aggrieved shareholders to challenge the acts or omissions of directors. In *Franbar Holdings Ltd v Patel and others* (2008)²⁶ the judge stated that when deciding whether to continue a derivative claim a director, acting in accordance with their duty under section 172, would take into account the prospects of success of the claim, the disruption which would be caused to the company's business, the cost and any damage caused to the company's reputation. Moreover, it is the company who benefits from a successful claim, and although this may filter down to the shareholders, the costs involved and the rigour of sections 260-264 of the Companies Act may outweigh the actual benefits received

by the shareholders. Therefore, shareholders have little effective recourse to protect their interests. It follows that the primacy of shareholders in company law can be justified because if directors were not required to ultimately promote shareholders' interests, shareholders' investments would be uncertain and unprotected. This may lead to a lack of investment, which would ultimately be to the detriment of other stakeholders anyway.

Ultimately requiring directors to promote shareholder interests can also be justified as a way of reducing agency costs; a servant of two masters is accountable to none.²⁷ Since the fulfilment of the duty under section 172 is determined by a good faith judgement, if directors' duties were framed in the interests of every stakeholder, any decision could be justified as being in the interests of *someone*, and thus directors would have more room to act in their own interests.

What's more, with a multi-interest approach, unless directors are required to prioritise one or more interests, they will have no criteria to apply in balancing the interests of different groups and making trade-offs.²⁸ Since it is "logically impossible to maximise in more than one dimension",²⁹ the primacy of shareholders can be justified as an attempt to induce directors to engage in purposeful behaviour. Mumford argues that this could be achieved by requiring directors to act in the interest of the company itself, and thus there is no need to explicitly prioritise shareholders' interests.³⁰ However, since a company is a fictional person, a

requirement to benefit an artificial entity would be irrational.³¹ Therefore, requiring directors to benefit the *company* still requires a decision as to what the company's interests are, and to whose interests the company should be answerable. However, this still leaves unanswered the question as to whether it is justified to prioritise shareholders' interests over those of other stakeholder groups who provide valid contributions and have legitimate interests in the company. It is submitted that shareholders are an acceptable choice because they are the weakest group. Therefore, since a single group to whom directors should ultimately owe their duties is needed, the primacy of shareholders in company law is justifiable.

In conclusion, both shareholders and stakeholders make valid contributions to the success of a company. Although it can be argued that stakeholders' contributions more *directly* affect the success of a corporation, shareholders are crucial to the formation and continuance of limited companies. The shareholder primacy approach warrants taking stakeholders' interests into consideration anyway. The success of a company is the foundation for maximising shareholder value and most of the stakeholders' contributions are essential for corporate success. It follows that "it is unnecessary to worry too much about the position of non-shareholder stakeholders since they are keys to the success of the company, which is in turn crucial to shareholder wealth maximisation".³² ■

²² Insolvency Act s176ZA(2)(b).

²³ Easterbrook and Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press 1991).

²⁴ R Kraakman and H Hansmann, 'The End of History for Corporate Law' (2001) *Georgetown Law Journal* 89, 439.

²⁵ Bainbridge, above n 17, 1434.

²⁶ *Franbar Holdings Ltd v Patel and ors* (2008) EWHC 1534 (Ch).

²⁷ Kraakman and Hansmann, above n 28, 439.

²⁸ M.C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2001) *European Financial Management*, 7(3), 297-317.

²⁹ Jensen, above n 33, 297.

³⁰ Mumford, above n 20, 6.

³¹ *Brady v Brady* [1988] BCLC 579, "the interests of the company as an artificial person cannot be distinguished from the interests of the persons who are interested in it."

³² Min Yan, 'Why Not Stakeholder Theory' (2013) *The Company Lawyer* 34(5) 148-158.



One law for us, another for them?

Lauren Smith

Egalitarianism is a philosophical school of thought that favours equality for all, especially with regard to social, political and economic concerns. However, literature on the compatibility of this concept within legal systems is relatively sparse.

This article attempts to reconcile the two disciplines of egalitarianism and law by considering the extent to which laws should apply equally to all individuals and whether the consequences of unequal application of laws are ever justified. Exceptions to a universal applicability of law

will be considered in two different legal areas; first, the anomalous area of charitable trusts in property law and second, the tortious obligation of a duty to rescue (that only applies in some circumstances). At the very least, I hope this article illustrates the advantages of evaluating law from the perspective of an external academic discipline; philosophy in this instance. At most, I hope to challenge the (understandable) presumption of some that indiscriminate blanket application of law is essential to minimise societal inequality. It is not the universal application of one law to all people that determines its justification or value, but rather the consequences that flow from unequal application of law. When one compares the law of property to the law of obligations, it can be seen that the law of property has arguably

gone too far in allowing the development of exceptions to general trust principles. In contrast, the law of obligations has justifiably resisted calls for a duty to rescue to be developed, which would permit an exception to the Anglo-Welsh legal tradition of not imposing a duty to act.

The legal area in which egalitarian application of law is most obviously disregarded is in property law; specifically in the anomalous area of charitable trusts. The traditionally stringent requirements of trust creation are somewhat diluted by special privileges for any individual wishing to create a charitable trust. The exceptional nature of charitable trusts is placed on a statutory footing by the Charities Act 2011, but has also been emphasised in judicial precedent. Cases

including *Morice*¹ and *Bowman*² demonstrate that the need for certainty of object is negated for charitable trusts. Furthermore, case law demonstrates that where the purpose of a charitable trust is impossible³ or impracticable,⁴ the cy-près doctrine⁵ allows courts to modify its wording so the trust's purpose can be carried out. This is relatively uncontroversial; it seems natural that where a trust purports to fulfil a charitable purpose, the courts would want to do everything they could to realise it. However, perhaps most startlingly, where the purpose of a charitable trust is illegal, the cy-près doctrine can still be invoked to modify and carry out the trust. One could argue that these legal exceptions encourage charity, an institution that furthers egalitarian ideals, and are therefore justified. However, it is submitted that the potential for exploitation of such rules outweighs any positive consequence they may have.

Some, including Dunn, who recognise charity's power as 'a sword for social change'⁶ would consider the non-egalitarian application of trust law justified, because as noted above the relaxation of traditional trust principles allows for easier and less hindered furthering of charity. Despite this apparent justification of the exceptions at first instance, there are far stronger arguments against them. Dr Levy, for example, seems to weaken Dunn's assertion when he hesitantly concludes that charitable trust law exemptions are mistaken. He lucidly argues that such furthering of charity is self-defeating, by enabling the government to evade responsibility for issues that they should bear responsibility to resolve.⁷ Dr Levy's criticism of Dunn's account attracts credibility when synthesised with the equally cautious thesis of Luxton. He too acknowledges the underlying tension between charitable and political purpose.⁸ Principally, he criticises the fact organisations

with underlying political motivation find it easier to create a trust they deem 'charitable' to further their agendas. Luxton's claims are particularly persuasive when one considers the empirical evidence Atkinson⁹ cites in support of his claim. Thus, it can be tentatively concluded that whilst in principle this non-equal application of law furthers egalitarian ideals, in reality the potential for exploitation is high. Making the law of trusts more egalitarian by subjecting charitable trusts to the same rules as regular trusts could go some way to resolving this inequality.

Whilst trust law attempts, but arguably fails, to further egalitarian principles by relaxing the law surrounding charitable trusts, the law of obligations achieves the egalitarian ideal better by actively rejecting the possibility of imposing one general duty to rescue on all individuals equally.

A blanket prohibition on imposing general duties to act exists in English law, save in exceptional circumstances, for example where a relationship exists between parties that creates a duty of care, or where a tortfeasor creates a dangerous situation. This becomes controversial in the context of rescue. Some suggest that regardless of exceptional circumstances, where individual A observes individual B in peril, there should be a legal duty placed on A to intervene and rescue. Nevertheless, judicial refusal to impose such a duty remains unwavering; the ratio of Lord Nicholls in *Stovin*¹⁰ was clear in stating that imposing such a duty would be contrary to the well-established Anglo-Welsh legal principle of 'no liability for omission'.¹¹ Some would argue that this is non-egalitarian in that the rights of the observer (to not intervene) are placed above those of the individual needing rescue. From this perspective it could be argued equality is not achieved. However, this article submits that whilst a moral duty to rescue arguably exists, the prohibition of imposing a legal duty is justified and does in fact achieve egalitarian aims.

The strongest argument in favour of imposing a general duty to rescue is utilitarian, outlined in the seminal work of John Mill¹² which states that law works best when it achieves maximum happiness for society as a whole. Clearly, a duty to

rescue would do this – whilst it may inconvenience the rescuer, maximum happiness would be achieved if those in peril were rescued. However, this theoretical moral justification for such a duty is soon rebutted by the strength of practical arguments to the contrary. In addition to such a duty contradicting the traditional acts/omissions distinction in English law, as outlined above, in practice such a duty could lead to more dangerous situations than it would resolve. Emergency personnel, who rescue those in danger on a daily basis, such as paramedics and fire fighters, are able to do so because they are trained. Empirical studies demonstrate that very few people are confident in their ability to administer first-aid,¹³ thus any ability to rescue those in extremely perilous situations would be even weaker. There is a vast distinction between rescuing a small child from shallow water and rescuing a climber from 200ft up a mountain. To impose a general duty to rescue in both circumstances could hardly be said to be egalitarian, as it would place vastly different demands on observers depending on the circumstances. Most importantly perhaps, until first-aid training becomes a mandatory civic duty, imposing a duty to rescue would be futile as even the least serious rescue situations could be made worse by the intervention of observers who have no idea how to respond.

To conclude, this article has briefly examined the role of egalitarianism in two legal areas; the law of property and the law of obligations. It can be seen that the law of obligations is far less willing to allow exceptions to established law; a duty to rescue is only imposed where absolutely necessary. To the contrary, the law of property, specifically in the area of charitable trusts, is more liberal in legalising exceptions to established trust law. In practice, this can be seen to have very broad effect and whilst it further egalitarian ideals in principle, in practice this is limited by the potential for some rules to be exploited. Egalitarianism is only one lens through which to examine the operation of law. However, this article tentatively concludes that the fewer exceptions that exist to general principles of law, the better. ■



Law in the digital age

What the establishment of libel as an offence can teach us about expanding protection of consumers from spam email

Casey Murphy

Freedom of expression in the twenty-first century poses a problem for law-making and reform because of the difficulties involved in achieving a balance between people being able to speak freely and this freedom encroaching on the freedoms of others.

The main challenges to freedom of expression come from the issue of a right to

privacy and to reputation; Baroness Hale in *Campbell v MGN* addressed the fact that privacy and freedom of speech are equally important. This, however, does not mean that a satisfactory balance has yet been struck, as cases such as this demonstrate. The dawn of the Internet revolution has led to people theoretically being able to express themselves as much as they wish and communicate with people all over the world very easily. This does mean, however, that it is extremely easy to harm others. The abuse of this freedom of communication by businesses is an urgent issue and the right to privacy is extremely important in terms of curbing this 'excess'

freedom of speech. The current approach, however, involves what is arguably a lack of involvement in the form of enforcement of penalties to prevent spammers.

As one would expect, the growth of the Internet has led to a real change in the way people communicate. The sudden ability to contact people instantly and en-masse seems entirely novel. However, just as the swift rise of the internet proved revolutionary, the introduction of national daily newspapers in the nineteenth century tasked law makers and the judiciary with a similar issue of attaining a balance between facilitation of free speech and

1 *Morice v Bishop of Durham* [1805] EWHC Ch J80

2 *Bowman v Secular Society* [1917] AC 406

3 *Re Dominion Students Hall Trust* [1947] 1 Ch 183

4 *Re Lysaght* [1966] Ch 191

5 Charities Act 2011, s 61 - 68

6 Alison Dunn, 'Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers' (2008) 11(1) The International Journal of Not-for-Profit Law 51

7 Neil Levy, 'Against Philanthropy, Individual and Corporate' (2002) 21(3) Business and Professional Ethics Journal 95

8 Peter Luxton, 'Making Law? Parliament v The Charity Commission' (2009), Politeia, London 5 July 2012 <<http://politeia.co.uk/p109.pdf>> accessed 25 May 2014

9 Karen Atkinson, 'Charities and Political Campaigning: The Impact of Risk-Based Regulation' (2008) Liverpool Law Review 143

10 *Stovin v Wise* [1996] 3 WLR 389

11 Ibid, 930 (Lord Nicholls)

12 John Stuart Mill, On Liberty, (Harper Collins, 2013)

13 <http://news.bbc.co.uk/1/hi/health/8246912.stm>

protecting other individual rights. This battle is one that is still very relevant in society today as junk mail amassing in email inboxes is inconvenient and in some situations may be harmful.

During the nineteenth century, literacy levels rose dramatically with the Education Act introducing compulsory schooling for children. Combined with the creation of the national railway, national daily newspapers became common and affordable. People were able to publish their opinions to a vast audience with very little restriction to begin with and the press were truly free. The Newspaper Libel and Registration Act 1881 introduced a defence for newspapers when reporting fairly and accurately on a public meeting. The 1888 Law of Libel Amendment Act extended this qualified privilege. From the first Libel Act after the 1843 Select Committee, the defence of public benefit was established as Lord Campbell argued the press should be protected from the crimes they expose. Defamation and freedom of speech were as vital in the nineteenth century at the birth of libel as an offence as they are today. Whilst cases such as *Campbell v MGN* and *Mosley v News Group* demonstrate the excessive approach by the press to what is considered to be a matter of public interest and infringement on a person's right to privacy, the subsequent actions demonstrate a clear penalty system utilised by the judiciary.

UK legislation to fight spam provides that any company intending to contact someone using email requires their permission. Within each email there must also be an option to unsubscribe from such a mailing list. However, businesses often get around these restrictions by including clauses into online transactions that necessitate your agreement. Theoretically, these are entirely legal as part of the contractual agreement. Realistically however, consumers do not often read these terms and conditions and so they unwittingly agree to such clauses. This infringement of a person's privacy, though annoying, is not sufficiently serious to be considered harassment. However, such an infringement on privacy requires more measures to be taken to curb it. Email service providers have therefore adopted methods of attempting to protect their customers. Microsoft, for example, have set up decoy email accounts to catch people and businesses that consistently send people junk mail; they have then challenged their

actions under the EC Regulations and have also incorporated junk filters into the service they provide to consumers. This spam filter suggests that Microsoft, along with other email service providers, are able to make judgements about the definition of spam mail without any real accountability or consistency. This filtering system is able to filter and censor genuine businesses. The balance has therefore not been adequately struck as of yet between the right to privacy and that of free speech.

More state regulation is essential to clarify to businesses and individuals what is appropriate. While it is reasonable to assume that this will occur with time, the current situation suggests spam regulations are not being adhered to in the manner that they were intended to protect consumers. A clear example of this is the case of *Information Commission v Neibel*, who sent out unsolicited texts on an industrial scale seeking potential claimants who had been mis-sold PPI loans. Despite hundreds of complaints, both the First-Tier and Upper-Tier Tribunals have quashed the original decision of a £300,000 fine. This shows an extremely strong stance of freedom of expression in the UK, at the expense of the right to privacy due to an extremely high threshold of 'substantial distress or damage' that must be fulfilled for an action to be successful against a 'spammer'.

In the modern English legal system, freedoms are key. Our society is considered liberal with only minimal restrictions on freedoms. However, where a restriction has been made on a freedom to protect the rights of the individual and ensure privacy, the legislation should be enforced by practical restrictions and penalties. The evolution of libel as an offence was a clear reaction to the introduction of large-scale literacy within the nation. As the Internet has caused another restructuring of society, it seems only rational that new offences will arise within its domain. A strengthened governmental approach is essential to take the onus of balancing free speech and privacy away from companies in order to reach a more appropriate balance. ■

Gemma Horton

Hollywood first noted the need to cast women in such roles during the 1980s and 1990s when Ronald Reagan took hold of the Presidency and pushed for equal rights for women, most notably with his appointment of Chief Justice O'Connor to the US Supreme Court.¹ Hollywood sat up and took note of such feminist gains.

1 Cynthia Lucia, 'Will the BBC's Silk portray the reality of female lawyers?' (*The Guardian*, 2010) <<http://www.theguardian.com/law/2010/aug/09/bbc-silk-female-lawyers>> accessed: 14 February 2015

Large stars were placed at the forefront of screen, portraying female lawyers as equals to male lawyers, or in some cases making the female the star of the show. Large names like Glenn Close² and Susan Sarandon³ opted to make their portrayals of female lawyers. Julia Roberts took on such a role not once, but three times in the space of seven years.⁴

However, there have been many critics of the way in which these female lawyers were portrayed. Notably, Cynthia Lucia finds herself rather disillusioned with such portrayals, lamenting that women are represented inaccurately as workaholics,

2 Jagged Edge (Columbia Pictures, 1985)

3 The Client (Warner Bros, 1994)

4 The Pelican Brief (Warner Bros, 1993); Conspiracy Theory (Warner Bros, 1997); Erin Brockovich (Columbia Pictures, 2000)

moral activists and seemingly unhappy in their careers.⁵ Lucia questions why well-educated women are presented in such an unprofessional way. She simply believes that Hollywood wished to reflect President Reagan's promotion of feminism and allowed women to dominate the screen by focusing on a gripping storyline, not a realistic one. Such an example comes from Jagged Edge where the attorney falls in love with her murderous client. Although media is in need of drama, such portrayals can put female lawyers in a negative light and present them as both weak and unprofessional.

5 Cynthia Lucia, 'Will the BBC's Silk portray the reality of female lawyers?' (*The Guardian*, 2010) <<http://www.theguardian.com/law/2010/aug/09/bbc-silk-female-lawyers>> accessed: 14 February 2015

Has much changed in the past few decades? Arguably so. There have been a wide range of television shows where female lawyers have been portrayed as wholly profession. They have not fallen in love with their clients, behaved in an unprofessional manner, nor have they relied on their male counterpart who they share a screen with. Katherine Lasher⁶ comments that the first breakthrough came in the form of Elle Woods from the hit film Legally Blonde.⁷ Although the film is highly inaccurate and unrealistic with regards to the life of a lawyer, it does show a woman dominating the film and succeeding in her career. Her idol even

6 Katherine Lasher, 'The Portrayal of Women in Film After 1970' (*Picturing Justice*, 2002) <http://usf.usfca.edu/pj/portrayal_lasher.htm> accessed: 14 February 2015

7 Legally Blonde (MGM, 2001)



happens to be a female law professor. Such a dominating role showed that female lawyers could be placed at the forefront of media without a reliance on a male counterpart.

The real question followed on from *Legally Blonde*: would it be possible for a female lawyer to be portrayed in an accurate light as well as remaining the dominating force of the screen? Christine Corco notes one character who defies this brief: 1990's Ally

McBeal.⁸ Ally McBeal⁹ was a television show which centred on the titular character who merely decided to practice law in an effort to win back her boyfriend. Although this is simply one portrayal, it is arguably because, in comparison to films, television series require the audience to watch on a more regular basis, giving the characters opportunities for development over a longer period of time. There is a chance for the female lead to further her position and prove herself as competent,

⁸ Stephanie B. Goldberg, 'Women Lawyers on TV Moving Closer to Reality' (2005) 14(2) *Perspectives Magazine*

⁹ Ally McBeal (20th Century Fox, 1997)

ethical and just as capable as her male co-workers. Ally McBeal unfortunately failed to do this.

For many law students at university, they will instantly think to the more recent depiction in BBC's *Silk* of a female in a dominating position and acting professionally. Maxine Peake's portrayal of Martha Costello, a lawyer in her thirties fighting her way to become Queen's Counsel, was highly praised. However, the shocking revelation in regards to *Silk* was the accuracy of the show. Sarah Palin, a practicing lawyer at One Brick Court, Temple, was keen to point out that the show portrays the Bar rather accurately.¹⁰ *Silk* was a breakthrough in being such a legal drama to put its main focus on a female lead, along with accurately showing the trials and tribulations of being a lawyer.

Over the Atlantic, another female lawyer has captured American's attention. The *Good Wife*¹¹ centres on Alicia Florrick, and whilst Ally McBeal was happy to remain content in her job, longing after her boyfriend, Alicia is a character who works her way up from an intern to a lead contender for State Attorney. During the series she deals with personal life but never lets it interfere with her professional life. The show also features other female lawyers in prominent position of powers, showing their professionalism and making decisions which they think are best for their clients. Some of the storylines may be farfetched to the practicing lawyer, but that is once again the need to draw viewers in.

With people influenced by the media, these portrayals are the closest that many shall come to the legal world. Shows like *Silk* and *The Good Wife* are proof that female lawyers can, and are, being portrayed in a positive light. Females have come a long way since the 1970s, and these modern day portrayals are a step in the right direction. Whilst there will always be shows and films where women do not feature as the main characters, nor will they be portrayed in a positive light, as these portrayals become fewer, the rise of female lawyers on screens seems inevitable. ■■

¹⁰ Sarah Palin, 'Silk, BBC One: A lawyer's verdict' (*The Telegraph*, 2011)

¹¹ The Good Wife (CBS, 2009)

Goodbye



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