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The Roots of Reform in the Penal System of England and Wales

ALEX ROBINSON

Abstract

To understand how our penal system can be reformed one has to respect the history of our penal system. Evidently, society and attitudes to prisoners have changed dramatically from the Victorian era, and even society has changed vastly since the beginning of the modern penal era.

Nonetheless, even with major changes in prison regime, there are still problems in prison surrounding overcrowding, lack of access to education and employment, and poor conditions. There is still a high reoffending rate. Political pressure is placed on the prison system by certain areas of the media and public pressure to deliver 'just desserts' to offenders. There are problems with a lack of financial resources, there is unwillingness by some sentencers to allow offenders to serve their sentences in the community and there are still staffing problems. Taking into account these factors there is still another possibility of another system meltdown which was seen in 1990 at Strangeways and other establishments.

This article highlights areas which have improved; and also proposes suggestions that the authorities ought to consider to improve the penal system, increase the public's confidence in the justice system, reduce reoffending and make our communities safer.

History of prisons and prison reform

There have been some key moments throughout the history of prisons, not many will be as important as in 1773 penal reformer John Howard became High Sheriff of Bedfordshire. The effect of his reforms and his attitudes to the fair treatment of prisoners still resonates today through the Howard League for Penal Reform.

Although prisons had existed hundreds of years before Howard's appointment, the records of the conditions of the prisons and the inmates were often not recorded. Moses Pitt, himself a prisoner at Fleet Prison published *The Cry of the Oppressed* in 1691 which highlighted the terrible conditions at the prison¹. In 1777 John Howard published a dossier of prisons in England and Wales which noted their conditions, facilities for prisoners and cost prisoners had to pay to their gaolers. A description at Warwick gaol noted that some inmates were detained in pits '*Men-felons have a day room: their night room is in an octagonal Dungeon about twenty-one feet diameter.....close, damp and offensive*'² at Wolverhampton gaol "*No court-yard, no sewer, no employment...The prison is greatly out of repair; and so insecure that Prisoners, even for the slightest offences, are kept in irons*"³. Howard highlighted many areas of reform including a revamp of buildings that prisoners were housed in, Howard suggested "*...Every prison should be built on a spot which is airy, and if possible near a river or brook, I have constantly found prisons near a river to be cleanest and most healthy.*"⁴

This ideology was undoubtedly moving away from the dank medieval dungeons and pits which were a commonplace before Howard's criticisms. Furthermore, Howard suggested prisoners ought to have individual cells and be separated.⁵

¹ English Prisons, An Architectural History, Brodie, Croom & O Davies 29 citing R Condon *Reforming English Prisons 1773-1813*

² John Howard, *The State of Prisons in England and Wales, 1777*, 270

³ Ibid, 329

⁴ Ibid, 40-41

⁵ Ibid 43-44

Howard's ideal started to become reality, a select committee report in 1820 led to the enactment of *The Gaol Act 1823*⁶ the purpose of which was to introduce standards of decency and consistency in the running of prisons. Additionally *the District Courts and Prisons Act 1842*⁷ permitted that should two separate authorities want to build a prison they could submit their plans to the Home Secretary, for approval. This laid the foundations for Pentonville prison to be constructed and the decline of local, privately run gaols. Ultimately this was crucial in the development of prison layout and treatment of prisoners. The layout of a prison and its location is a key indicator important factors in respect of how prisoners are going to be treated whilst inside, the single-cell plan of Pentonville indicated that prisoners were going to spend a majority of time alone, whilst the radial plan ensure that the officers and warders could easily monitor the prisoners.

As a result of Pentonville's construction more radial prisons were built and by 1877 it was becoming increasingly difficult to run a local gaol as an independent authority due to *The Prisons Act 1865*⁸ as this prevented independent managing of prisons and any authority which failed to comply with the rules in the act would lose their funding from the government.

Ultimately, in 1878 in which *The Prison Act 1877*⁹ was enacted, this introduced the Prison Commission which nationalised the system ending privately run gaols.

Despite these reforms, the conditions were generally appalling, although prisoners were separate from each other they spent much of their time isolated and were given unproductive tasks.

⁶ 4 Geo. IV, c. 64

⁷ 5 & 6 Vic. c. 53

⁸ 28 & 29 Vic. c. 126

⁹ 40 & 41 Vic. c. 21

Additionally, the current classification of prisoners was inadequate they had little or no contact with visitors on the outside and, amongst other things the standard of food was poor¹⁰.

In 1895 the Gladstone Committee recommended a number of reforms, such as special treatment for certain categories of inmates, abolishing unproductive labour, introducing associated work which gave prisoners skills enable them to earn a livelihood after release. Over the next couple of decades there were numerous prison closures and the prison population fell to 7,938. This can chiefly be attributed to the fact that in the 1910s many prisoners would be enlisted; others obtained paid-employment, restrictions on the sale of alcohol accounted for a drop in relation to drunkenness. Following the war the in the 1920s, there was an increase in the use of borstals, probation and other community based sentences, higher wages improved living standards and educational standards were raised¹¹.

It was not until the 1960s that the next major development took place in the Prison system.

Similar to the changes made in the 1840s, this development involved prison buildings and was an indication of a changing attitude towards treatment of prisoners. In 1963 the Prison Department replaced the Prison Commission and the Home Secretary contrasted the former flagship prison of Pentonville to the new flagship prison, Blundeston which was open in 1963. The Prison Committee remarked that inner-city based Pentonville was '*completely cut off from the outside world, into which the prisoner was discharged totally unprepared for freedom*'¹². Whereas Blundeston, located rurally, was surrounded by a fence instead of a wall which permitted the

¹⁰ SOURCES OF INFORMATION ON PRISONERS, HISTORY AND ARCHITECTURE 2002, Prison Service HQ Library

¹¹ English Prisons, An Architectural History, Brodie, Croom & O Davies 172

¹² Ibid, 198, citing Report of The Work of the Prison Department 1963, vii

inmates to look out across the open countryside. Additionally the internal layout of Blundeston was vastly different to Pentonville, instead of the radial plan which was extremely common within Victorian prisons, Blundeston was built to have four separate wings, effectively, communities within their own right, holding 75 inmates.

This layout was to allow prisoners to be managed and studied according to their needs rather than simply confining them in isolation. These changes ushered in the start of the modern prison era that we have today. Following a series of embarrassing high-profile escapes from older prisons the Mountbatten Report was commissioned. The report, amongst others areas, devised a categorisation of prisoners, Category A is reserved for prisoners whose escape would be extremely dangerous to the public and the security of the state. Category B is for those prisoners whom do not need to be in the highest category, but escape must be made highly difficult. Category C is for prisoners who cannot be trusted in open conditions even though they do not possess ability or resources to attempt to escape. Category D is for those prisoners whom can be reasonably trusted to serve their sentences in open conditions¹³. The report found that no prison could claim to be secure and that a new prison would need to be built to make escape impossible whilst still allowing a positive regime. Alternatively, this category A could serve as a medal of honour for some prisoners who may deliberately misbehave to achieve this status.

The next issue which ensued from the prison estate expansion from the 1960s was the prison population increase and subsequent overcrowding. The average population in the 1960 was 27,099 increasing to 39,028 in 1970, 42,264 in 1980, and 44,975 in 1990. By 2000, the prison

¹³ Mountbatten Report 1967

population had rocketed to 64,602¹⁴ and currently stands at 85,447¹⁵. Although there are many issues that can contribute to a failing of the prison system, the high prison population, as highlighted by *Cavadino & Dignan* in their radical pluralist account of the penal crisis, is caused by many reasons, such as, social pressure, new imprisonable offences which will ultimately lead sentencers to pass custodial sentences¹⁶.

Cavadino & Dignan's account indicated how politics can directly affect the prison population. Tony Blair promised to be "*tough on crime tough on the causes of crime*"¹⁷ this was similar to Michael Howard's statement that "*prison works*"¹⁸ and "*If you don't want the time, don't do the crime. No half-time sentences for full-time crimes.*"¹⁹

The strain placed on sentencers and on the prison system from these policies was enormous, within twenty-one years the prison population has nearly doubled without a corresponding increase in new prison building. It occurs to this author that political parties are using crime prevention and prisons as vote winner without considering the consequences on the individual prisons and the over-worked staff. With respect to staffing, these policies lead to industrial relationship problems, a collapse of staff morale, and a decrease in staff-management relationships and decline in staff-prisoner relationships. As pointed out by *Cavadino & Dignan*, these problems lead to a crisis of legitimacy, which can lead to disorder.

¹⁴ <http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snsg-04334.pdf>, 18

¹⁵ Weekly Prison population figures 1st April 2011

<http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=85>

¹⁶ Cavadino & Dignan, *The Penal System* 30, 2007

¹⁷ 1997 Labour Party Manifesto

¹⁸ Conservative Party Conference 6th October 1993

¹⁹ Conservative Party Conference October 1995

The recent disturbance at Ford prison was a perfect example of the above. Alarming, The Independent Monitoring Board (IMB)²⁰ had highlighted problems with Ford in their annual reports in the years before the January 2011 disturbances. They had remarked, amongst other areas, on the inadequate level and vulnerability of staff at night²¹, high levels of sick absence amongst staff²², some accommodation buildings are not for purpose²³ and contraband was being smuggled with ease into the prison due to the difficulty of patrolling the perimeter fence²⁴. Other examples of similar disturbances have occurred at Ashwell²⁵, Moorland²⁶ and Warren Hill²⁷.

The most destructive series of riots in British penal history started in April 1990. The riot at Strangeways²⁸ took place between 1st-25th April, the prison was gutted, one inmate died, 47 prisoners and 147 staff were injured, the estimated cost of damage was £60million. As news of the disturbance spread round the prison estate there were major incidents at Glen Parva, Dartmoor, Bristol, Cardiff and Pucklechurch Remand Centre²⁹. Although disturbances on the scale of Strangeways were a new concept for the prison system, there had been numerous incidents during the 70s & 80s, including prisoners peaceably demonstrating in order to secure improved living conditions³⁰.

²⁰ The IMB are independent watchdogs that monitor the day-to-day life of a prison. The Prisons Act 1952 and the Immigration and the Asylum Act 1999 require every prison and Immigration Removal Centre to be monitored by an independent Board. The board are appointed by the Home Secretary from members of the community in which the prison or centre is situated: <http://www.imb.gov.uk/about/about-us.htm>

²¹ HMP Ford, Annual report of the Independent Monitoring Board 2006/2007

²² HMP Ford, Annual report of the Independent Monitoring Board 2007/2008

²³ HMP Ford, Annual report of the Independent Monitoring Board 2008/2009

²⁴ HMP Ford, Annual report of the Independent Monitoring Board 2009/2010

http://www.imb.gov.uk/reports/Ford_2009-2010.pdf

²⁵ Now closing as a result of the damage from the riot

²⁶ <http://www.bbc.co.uk/news/uk-england-south-yorkshire-11699179>

²⁷ <http://www.bbc.co.uk/news/uk-england-suffolk-11683032>

²⁸ Renamed HMP Manchester

²⁹ Rebuilt as HMP/YOI Ashfield, opened in 1999

³⁰ *The Future of the Prison System*: King & Morgan

Hull suffered a major disturbance over five days 1976³¹, there were incidents at Gartree in October 1978, in 1979 there were disturbances at Wormwood Scrubs and in May 1983 there were disturbances at Albany³².

Prior to the April 1990 disturbances the worst incidents in the prison system occurred over a 4 day period from 29th April to 2nd May 1986. This was following widespread industrial action by the Prison Officers Association. Forty-six prisons were involved, forty-five prisoners escaped and the damage that ensued was estimated at costing £5.5m³³. A report prepared by the Chief Inspector of Prisons identified a number of areas of discontent amongst inmates and staff including overcrowding, impoverished regimes, lack of sanitary conditions and extensive periods of inmates being locked in their cells. Staff had raised concerns of poor working conditions and substantial overtime. It was these incidents which started the transformation but the disorder of 1990 served to accelerate these reforms.³⁴

The riots of 1990 led to an inquiry chaired by Lord Woolf, which aimed to answer what happened during the riots, whether the riots had been handled properly, the causes of the riots and how future riots could be prevented?³⁵

Sanitation

In Lord Woolf's report it was highlighted that 'slopping out' was inhumane and ought to be abolished. For those not familiar with this practice, 'slopping out' is the act of a prisoner using a

³¹ *Brief History of Hull Prison* <http://www.justice.gov.uk/inspectors/hmi-prisons/docs/hull%282%29-rps.pdf>

³² *English Prisons, An Architectural History* 220

³³ *Ibid*

³⁴ *Ibid*.

³⁵ Woolf Report 1991

bucket in his cell as a toilet and at morning unlocking of his cell, the prisoner would 'dispose of their human waste' with the rest of the inmates, into a sluice room. Imagine the conditions, three grown men in a cell built for one man, with three buckets each filled with waste, imagine trying to sleep and live in these conditions? There is no conceivable way that society can expect these individuals to be rehabilitated if they have to live in these conditions. 'Slopping out' legally ended in 1996; however fifteen years on due to lack of in-cell sanitation, slopping out still exists in some areas of ten prisons³⁶. As the IMB report identifies, at Bulwood Hall some inmates have been given plastic pots³⁷ to use as toilets, pots have been issued at Gloucester because the night sanitation system is inadequate³⁸. Other recent reports have identified that a lack of in-cell sanitation has resulted in inmates expelling their excrement out of cell windows onto yards or roofs³⁹. The 2010 inspection report for Gloucester remarked:

*'The physical environment was simply degrading. C wing was in very poor condition ...Cells were small and badly ventilated. They had no toilets or basins and prisoners could only access these by an electronic call system or they had to rely on pots and slopping out.'*⁴⁰

'Slopping out' must cease, it is degrading to inmates, it creates an unpleasant environment not only for prisoners but also for staff, it could also impinge on the health of staff and inmates. As highlighted in the IMB report there are a number of violations of specific articles and regulations

³⁶ 'Slopping Out?' A report on the lack of in-cell sanitation in Her Majesty's Prisons in England and Wales, National Council for IMB. 2010

³⁷ Ibid, 9

³⁸ Ibid

³⁹ Ibid

⁴⁰ HMCIP report of HMP Gloucester 2010

in relation to prisoners, Article 10 of the International Covenant on Civil and Political Rights states:

'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'

Furthermore, Principle 1 of Basic Principles for the Treatment of Prisoners:

'All Prisoners shall be treated with the respect due to their inherent dignity and value as human beings'

The Standard Minimum Rules for the Treatment of Prisoners, Rules 9-21 states:

*'The sanitary arrangements shall be adequate to enable every prisoner to comply with the needs of nature when necessary in a clean and decent manner.'*⁴¹

The solution to this would be, only inmates who are trusted enough to be given their own keys to their cell to be able to access the toilets during lock-up, if that is not desirable then in-cell sanitation ought to be installed, if the prison still cannot accommodate that requirement, the cell ought not to be used and the prisoner should be placed somewhere else in the establishment or transferred to another prison.

Overcrowding

Overcrowding is still a major issue in our prisons; it is discussed in the Green Paper: Breaking the Cycle⁴² that community sentences can be utilised to cut down the prison population. This

⁴¹ *'Stopping Out?'* A report on the lack of in-cell sanitation in Her Majesty's Prisons in England and Wales, National Council for IMB. 2010 citing Andrew Coyle: *A Human Rights Approach to Prison Management: Handbook for Prison staff 2002*. P16. International Centre for Prison Studies: London

author is convinced this is the correct approach, although one is of the view that Kenneth Clarke may need to do more to win over certain pockets of society and the media⁴³. Community sentences can be handed down by way of *Section 177 Criminal Justice Act 2003* which provides twelve different orders that can be handed down by sentencers. The logic is to tailor the sentence to the offence and the offender rather than the prescriptive nature of prison. For example, if an offender was convicted of domestic violence it would be improbable that they would receive a 'subsection E' order, which is a curfew⁴⁴. Under the *Section 177 Criminal Justice Act 2003* legislation, the sentencer has the power to hand down 'subsection C' order consisting of a requirement that the offender must attend a group programme designed to address the activities and patterns of behaviour that contribute to committing crime like domestic violence⁴⁵. Economically, this option is sensible as it costs an estimated £45,000 per annum per individual in prison.⁴⁶ Whereas the costs of administering community sentences are far more cost effective in that, many cost less than £10,000 per annum per prisoner.⁴⁷

The problem with sending offenders to prison for low level offences is they will become 'students at the College of Crime', often sharing cells with hardened offenders. The low level offenders are likely to learn new skills to commit crime and will often reoffend. This not only furthers the argument for more community sentences but highlights why individuals are reoffending. A 2007 study by the Home Office found that 65% of all prisoners were reconvicted

⁴² Breaking the cycle: Effective Punishment and Rehabilitation Orders

⁴³ <http://www.dailymail.co.uk/news/article-1373830/Blow-Kenneth-Clarke-80-say-prison-sentences-soft.html?ito=feeds-newsxml>,

⁴⁴ http://www.cjsonline.gov.uk/offender/community_sentencing/curfew/

⁴⁵ http://www.cjsonline.gov.uk/offender/community_sentencing/programme_requirement/

⁴⁶ Hansard, 3.03.2010: C. 1251W,

⁴⁷ http://www.howardleague.org/fileadmin/howard_league/user/pdf/Community_sentences_factsheet.pdf

within two years of being released⁴⁸. It is worrying that this percentage of reconvictions are on the increase, Prison statistics in England and Wales published by the Home Office show that from 1993 to 1997 there has been a small but significant increase in reconvictions from 53.4% to 58.2%⁴⁹. Reconvictions can happen for other reasons, if an offender has been incarcerated for a lengthy period it is possible that they will have lost any employment they had, their career options are limited due to their criminal record, there may be family breakdown and loss of their home. It would be reasonable to assume that the offender will have decreased or no self worth, therefore in absence of stability on the outside they will quickly return to a life of crime.

Media

A major factor that hinders the workability of prisons is media intrusion, unfortunately this is an area that one cannot contain, but this author would request that journalists in future take more care when publishing articles as they can be very misleading. As certain parts of the media are able to pressure the government by constantly criticising their penal policies it has the potential to persuade the government to act differently with their policies.

If a person who has no experience of prison picked up a copy of *The Sun* they could be forgiven for thinking that prisons are better than the average hotel. Apparently, offenders are allowed to watch the latest blockbusters⁵⁰, they have been granted money for music lessons⁵¹ and their

⁴⁸ <http://www.howardleague.org/why-prison-system-needs-reform/>

⁴⁹ <http://www.homeoffice.gov.uk/rds/pdfs/prisonstats2000.pdf> p.154

⁵⁰ <http://www.thesun.co.uk/sol/homepage/news/2915943/Taxpayers-pay-350000-for-prisoners-to-watch-DVDs.html>

⁵¹ <http://www.thesun.co.uk/sol/homepage/news/2895471/400k-for-lags-music-lessons.html>

prison life consists of “*playing on a PlayStation, swilling home-brew and binging on chocolate cakes*”⁵².

Clearly those reports undermine the confidence the general public has of the prison system, reading the contributions by other readers’ highlights that. Nonetheless this is an area which this author believes will never improve. The sensationalist media has been reporting about the ease of prison for years and the readership has swallowed it up, of course, it angers people, that’s the intention of the article but, one has to wonder if many journalists ever consider the true impact of prison. This author contemplates if those journalists who promulgate that prison is easy were themselves at the wrong end of a miscarriage of justice or made a careless mistake and were soon locked up in a cell 22 hours a day; where they had to ‘slop-out’, share a cell with a hardened criminal, gain limited purposeful activity, have little or no contact with their family and no guaranteed stability on release, would they still suggest that prison is easy?

Purposeful activity and long sentences

As there are many crimes that warrant a custodial sentence, often a lengthy sentence, it is important for prisoners on these sentences to have a constructive regime including employment in the prison and participating in education. Therefore, as prisoners are provided education to address their offending behaviour and to improve their employability this may mean that they are less likely to reoffend on release.⁵³ Additionally, providing prisoners with employment can also assist offenders to learn new skills whilst serving their sentence. It is important that prisoners have an opportunity to participate in purposeful activity; otherwise they will be left to wallow in

⁵² <http://www.thesun.co.uk/sol/homepage/news/2839193/Lags-cushy-life-Facebook-boast.html#ixzz0kLZiRTt7>

⁵³ Prison Service Order 4205 – Education in prisons

their cell and will leave prison having not gained anything. At Pentonville the 2009 inspection identified there was no part-time work available, inmates spent a lot of time in their cell and the education provision was only satisfactory⁵⁴.

As of Section 225 of the Criminal Justice Act 2003, courts can impose an indeterminate sentence for public protection (IPP); if the court feels the offender poses a significant risk to the community⁵⁵. Whilst the IPP is a relatively new sentence it has been at the brunt of criticism from prisoners, prisoner's families⁵⁶ and prison reformers. However, it is important that offenders know their release date, having the degree of uncertainty that the IPP brings can only serve as damaging to the offender. If the offender has to participate in specific courses as part of their sentence but due to funding cuts the course has limited places or is not being offered in their establishment then they will not be given parole and will still be left waiting.

Prisoner's voting rights

This has been a huge area of debate recently, on 10th February this year MPs voted for keeping a blanket ban on prisoners being able to vote whilst serving a prison term. The state should not be allowed to deny the right to vote on the grounds that the individual has broken the law or contravened someone else's human rights. Allowing the right to vote is part of the democratic process, to deny those a right to vote on the above basis is adding to the punishment of prison, prison is there to keep people in custody not to allow the government to violate human rights.

⁵⁴ HMCIP, Annual Report on an announced inspection of HMP Pentonville 2009, 14

⁵⁵ Section 225 (1) (a) '*a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and*
(b)*the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.*'

⁵⁶ *Locked up with no end in sight:*

:http://www.insidetime.org/articleview.asp?a=920&c=locked_up_with_no_end_in_sight

Denying them the vote also removes them from the democratic process and expels the prisoner further from society.

Conclusion

Prisons are institutions for the most dangerous members of society, if sentencers continue to send offenders to prison rather than dealing with them by using other available disposals, then prisons will never work. A radical approach to dealing with prisons needs to be taken and that is to focus on rehabilitation, whilst the offender is inside, with the appropriate facilities a secure environment could be ideal for educating or training an offender to lead a crime-free life on the outside. Community orders need to be increased, if there are offenders working in the community and improving the community, the public will see for themselves that in many circumstances these sentences are far more appropriate than a short spell imprisoned in which little is achieved.

Community sentences can cut costs dramatically; they allow an offender to remain with relative freedom, more importantly, they serve as a warning to the offender that if they do not comply with the terms of their order or commit further offences they may end up in prison.

Furthermore, the Ministry of Justice should act quickly on issues raised by prison inspectors and independent monitors, as acting on problems raised can prevent major incidents that cost millions of pounds to remedy.

It is hoped that the media and the public are patient with Kenneth Clarke's proposals, the prison system cannot improve overnight but if the system is allowed to run as it is at the moment, as proved with Strangeways it only takes one major incident to bring the system crumbling down. Simply locking up offenders, with no effort to rehabilitate them, will not make our communities safer, it will not cut costs, it will not reduce crime and there will be no confidence in the system. Vast radical approaches as highlighted in this article are required if there is going to be any successful reform of our system.

The Mismatch of Stakeholder interests in Prison Privatisation

RANA NAZEER AHMED

Abstract

This article examines the interplay between the interests of the public at large in having an efficient prison system that reduces overall criminality and reduces cost to the taxpayer contrasted with the solely financial needs of the private financiers that now building and run a significant proportion of our prison system. Specifically the article critically examines the contradictory interests in rehabilitating offenders as the public has an obvious need to reduce crime, while reduced crime is tantamount to reduced profit for private investors.

Introduction

Prison privatisation originated in the UK in 1984 when the Adam Smith Institute proposed that allowing private companies to run prisons would increase creativity in organisation, reduce red tape and lower operating costs⁵⁷. This is classic conservative economics which could be seen as a natural expansion of the mass privatisation seen under Margaret Thatcher. Even within the prison system some facilities such as provision of catering and library services were privatised pre-CJA, but the issue of privatising the right (and duty) to incarcerate prisoners was far more controversial than merely saving pence on buying in goods.

The UK government subsequently carried out an initial investigation of privatised prisons in other jurisdictions (by visiting private Prisons in the US, and conducting a cost-benefit analysis albeit in purely financial terms) before approving the Adam Smith Institute logic and recommending that tenders be invited for future prison building schemes⁵⁸. This led to the enabling provisions on Private Finance Initiatives covering the entire criminal justice system being implemented by the Criminal Justice Act⁵⁹.

⁵⁷ ASI Research. 1984. Omega Report on Justice Policy. London: Adam Smith Institute

⁵⁸ Contract Provision of Prisons, Fourth Report from the Home Affairs Committee, Session 1986/87, 6 May 1987

⁵⁹ Criminal Justice Act 1991

On 31 March 2011 Kenneth Clarke announced in Parliament⁶⁰ that security firm G4S would as of October 2011 run Birmingham prison. This is the latest in a long line of privatisations in the penal system which was initiated by Mr Clarke back 1992 when he was Home Secretary.

Recent Developments

This is however the first time that a public prison has been privatised .On previous occasions the private prisons were new builds under the 'Design, Construct, Manage and Finance' (DCMF) scheme which saw private finance turn a raw building site into a new prison, and subsequently run the prison. This involves the crown retaining the freehold site, but granting a lease and contract for provision of prison places to the private contractor for a fixed duration of 25 years. The idea behind the scheme is that private capital will be at risk rather than large public spending for each new prison, and commercial competition should result in lowered operating costs as investors innovate free to establish new working practises rather than being encumbered with existing public sector systems. This should therefore lead to provision of "value for money"⁶¹ for the taxpayer.

Mr. Clarke appears to have awarded G4S the contract on this low bid basis, despite the fact that a parliamentary question in 2007 demonstrates that the costs of private places are on average more expensive than public sector prison places⁶². Mr. Garnier asked the Secretary of State for the Home Department what the average cost of housing a prison per year was and, while the Prison Service does not routinely collate cost-per-place data, the following tables were provided by Mr. Sutcliffe in response:

<i>Table 113641 A: public sector prison costs by function</i>	
<i>Function name</i>	<i>Cost per prison place (£)</i>
Male category B	25,881

⁶⁰ Alan Travis, 'Troops on standby after Kenneth Clarke privatises Birmingham prison' The Guardian (London, 19 June 2008) <<http://www.guardian.co.uk/society/2011/mar/31/birmingham-prison-privatisation-troops-kenneth-clarke>> accessed 9 April 2011

⁶¹ National Audit Office, Examining the Value for Money Deals under the Private Finance Initiative, House of Commons 739 Session 1998-99: August 13, 1999 (TSO, London, 1999), para 1.5

⁶² Hansard HC, 9 January 2007, c546W

Male category C	21,976
Male dispersal	43,904
Female closed	34,617
Female local	37,366
Female open	23,932
Male closed YOI	32,887
Male juvenile	42,143
Male local	31,912
Male open	120,183
Male open YOI	27,413
Semi open	23,571
Prison totals	28,486

Table 113641 B: contracted sector prison costs by function

<i>Function name</i>	<i>Cost per prison place (£)</i>
Male category B	26,813
Male category C	20,855
Female closed	44,400
Male juvenile	48,669
Male local	33,805
Prison totals	33,722

This data broadly demonstrates that on average public prison places are 18% more expensive than private prison places, although in specific areas such as Category C men's prisons a modest saving was found in the private sector.

This clearly undermines the purpose in using a privatised model, especially when the rehabilitative purpose of imprisonment is contrasted with the financial interest in having more prisoners rather than less which was recently dubbed a 'Perversion of Purpose'⁶³.

This has attracted further criticism from the Prison Reform Trust as these companies are incentivised to hide any malpractice as many of the contracts contain bonuses' for meeting targets⁶⁴, and thus there is a real danger that shareholder interest in profit will override public interest⁶⁵. This isn't an unexpected danger as these dangers were highlighted as far back as 1996 by crime management charity NACRO by ambassador Elliot Currie in their 30th anniversary lecture series which considered US implementation of private finance in the prison system, and warned that Britain would encounter exactly the same dangers and pitfalls⁶⁶.

The International Perspective

Some countries have declared private prisons to be unconstitutional⁶⁷ on the basis that "the state has a monopoly in the organised use of force. The right to enforce criminal law, especially by putting people behind bars, is a fundamental, and as a result of this decision, inalienable, power of the state and the privatisation of the responsibility to keep order and to guard the public security violates the sovereignty of the state in the use of force."⁶⁸ Subsequent commentary has queried if this decision would have been the same had the organisations taking responsibility for the system been of a charitable rather than for profit nature⁶⁹.

In the United States Californian Senate Leader Gloria Romero commented that "[p]ublic prisons are morally and fiscally accountable to the taxpayers of California. Private prisons are

⁶³ E. Genders, "Prison privatisation, performance targets and value for money? Fundamental fallacies and the perversion of purpose" (2003) 62 *The Key* (Spring) 6

⁶⁴ National Audit Office, *Examining the Value for Money Deals under the Private Finance Initiative*, House of Commons 739 Session 1998-99: August 13, 1999 (TSO, London, 1999), para.2.2

⁶⁵ Prison Reform Trust, *Prison Report 53* (Prison Reform Trust, London, 2000); Prison Reform Trust, *Monitoring the Private Sector* (2001), www.prisonreformtrust.org.uk

⁶⁶ Elliot Currie, "Is America really winning the war on crime and should Britain follow its example?" (NACRO 30th Anniversary lecture, 1996)

⁶⁷ *Human Rights Department v Minister of Finance*, Unreported, November 11 2009 (Israel)

⁶⁸ President Beinish at para 22 *Human Rights Department v Minister of Finance*, Unreported, November 11 2009 (Israel)

⁶⁹ Amy Ludlow, *PRISON PRIVATISATION IN ISRAEL : IMPORTANT TRANSNATIONAL LESSONS*, *Cambridge Law Review* 2010 p329

accountable to their shareholders, with a binding obligation to maximize profits. If the Governor goes through with these private prison contracts, he risks exposing the state to costly civil lawsuits. California can't afford this mistake. I call on the Governor to do what is ethical and constitutional and withdraw these contracts immediately."⁷⁰ As a result of the ensuing discussion the Governor withdrew privatisation plans on the basis that they would contravene Section 1 of Article VII of the California Constitution.⁷¹

In protest against the first ever privatisation of a previously public prison (moving away from the DCMF model) Colin Moses, chair of the Prison Officers' Association has begun to instigate a campaign of industrial action at existing prisons in protest⁷². It should be noted however it is not irreversible as HMP Buckley Hall was transferred back to Her Majesty's Prison Service after a re-tender in 2000⁷³. This is a purely contractual system however as the original tenders are fixed for 25 years, and this allows for, in theory, optimal renegotiation of the contracts. It is not a deliberate constitutional safeguard.

There are currently 13 private prisons run by firms Kalyx, Serco and G4S security, and the current drive to expand the interests in out of a motivation to find 10% cost savings across all prisons over the current parliamentary term. These 13 prisons hold 9,892 prisoners which is approximately 11.6% of the current prison population⁷⁴. With the HMP Birmingham privatisation, and the building of Featherstone 2 by G4S this is likely to jump to almost 15% based on projected capacity at Featherstone 2.

In order to achieve these initial raw cost savings the welfare and adequacy of the penal system is being put at risk. Staff in private prisons are paid less, have a higher staff turnover frequency and consistently receive lower 'Healthy Prison' ratings from HM Inspectorate of Prisons⁷⁵. Ashfield Prison had inmates withdrawn by the Youth Justice Board due to repeated rioting, and poor

⁷⁰ Gloria Romero, 26 October 2006, floor speech, US Senate

⁷¹ Prison Privatisation Report International No. 74, October 06 Public Services International Research Unit (PSIRU) University of Greenwich, London.

⁷² Jo Adetunji, 'Birmingham Prison Privatisation' ><http://prisonofficer.org.uk/about8.html>> accessed 17 April 2011

⁷³ Group 4 loses prison contract". BBC News. October 22, 1999. <<http://news.bbc.co.uk/1/hi/uk/482224.stm>> accessed 9 April 2011

⁷⁴ NOMS Monthly Prison Population Bulletin, February 2011

⁷⁵ Bromley Briefing Prison Factfile (December 2010), pp56-7

management⁷⁶ and is a clear cut example of how problems can escalate when profit is paramount to prison safety: the same freedom from government mandated routines that can lead to lower costs can lead to mismanagement: the systems and routines exist for a reason.

If these corners are cut high rates of recidivism are likely to increase costing society in more than merely financial terms in the long run as the social costs far outweigh the relatively minor initial cost savings given by the low bid tender from G4S. Private finance initiatives do remove the need for initial capital investment by the state but at a "severe risk of projects being financed by debt leveraging."⁷⁷

The way forward

It is submitted that in order for a prison to succeed it must focus on two fundamental aims:

1. Rehabilitate the offenders capable of rehabilitation as efficiently as it is possible.
2. If the first should prove impossible, the system must safeguard the rights and liberty of the public at large by isolating the few criminals incapable of reform.

The current system currently does neither as demonstrated by Appendix A to the 2009 cohort Reoffending of Adults report published by the Ministry of Justice⁷⁸ which shows that more than a third of those released from prisons go on to re-offend (and this is only those whom are caught!).

The cost of processing these prisoners through the system is thought to exceed £100,000 per prisoner according to analysis by Reuters⁷⁹, with an unprecedented proportion of the population in prison (indeed, some are even held in police stations due to overcrowding under Operation Safeguard).

⁷⁶ "Youngsters removed from 'worst' jail". BBC News. <<http://news.bbc.co.uk/1/hi/england/2726981.stm>> accessed 9 April 2011

⁷⁷ William, A, "Cost effectiveness and comparisons of private versus public prisons", Baton Rouge, 1996

⁷⁸ Ministry of Justice, 'Reoffending of Adults appendix A tables' <http://www.justice.gov.uk/publications/docs/tables-adults-2009.xls> accessed 17 April 2011

⁷⁹ Jennifer Hill, 'Cost of prisoners under-estimated by a third' <http://uk.reuters.com/article/2007/05/21/uk-britain-prisons-idUKL2021229120070521> accessed 17 April 2011

The conservative party (as of Jan 13th 2010) dropped plans for an extra 5000 prison places that was previously expected to form part of their election manifesto⁸⁰. This leaves no mainstream political party willing to build more prisons. Therefore either one or more political parties must make a 'u-turn', or a more creative method of solving overpopulation must be found.

The realistic 'solutions' in this regard are threefold. Either cut the average prison length (Politically unlikely given no-one wants to be seen as "soft on crime"). Secondly, one could reduce the number of offences which result in incarceration (which again could be seen as "soft"), or, thirdly, work to reduce the rate at which criminals re-offend. The latter is the most socially responsible - what better way to cut crime than to reduce the recurrence of criminality?

In 2006 the Co-operative Financial Services tested a pilot scheme of giving bank accounts to criminals upon leaving prison⁸¹ - this enabled them to get work and accommodation. It also resulted in a 30% drop in re-offending rate. Further trials by Equal Engage the following year tested using ex-prisons to advise prisoners on their release on how to resettle back into the community, with hands-on "been there, done that" experience. This was financed by the European Social Fund and helped an initial 277 prisoners. It was expected that they would conform to the national reoffending rate and thus 96 were expected to reoffend, however only 18 did so – a remarkable 6.5%!⁸²

With the costs outlined above at stake, a cut this low could see literally billions in savings on both a direct and indirect basis (the immediate savings of not having to process, and the indirect benefit of those fully rehabilitated becoming contributing members of society).

The US has begun to embrace the ethos of treating prisoners as people capable of rehabilitation with the proliferation of the Community Court system. Here the question asked is not "How long should I send you to jail?" but "How can I help you, the offender?"

⁸⁰ 'Tories accused of U-turn on prison places pledge' http://news.bbc.co.uk/1/hi/uk_politics/8392027.stm accessed 17 April 2011

⁸¹ Co-operative 'News, 19/08/10 – 1000th Prisoner banks on fresh start' <http://www.co-operativeinvestments.co.uk/servlet/Satellite?c=Page&cid=1263305237429&pagename=Corp/Page/tplCorp&currant=1282288591437&currnth=8> accessed 17 April 2011

⁸² 'Project Equal Engage' <http://www.perspective-uk.com/en/projects.html> accessed April 17 2011

Convicts are given help with problems, such as redressing housing issues, combating drug addiction. The system prides itself on being "justice that works" through three aims - swift justice, visible justice, and payback to society.

Prisoners are helped with their issues, but are expected to make good the damage done through community service projects that deal with the needs of the community, such as programs to clean up graffiti. The US has seen phenomenal success with this approach. One community court in Manhattan saw re-offending rates fall to just 5%⁸³ mirroring the 6.5% rate seen the EU trials. The way forward is not more prisons, nor indeed is it more prisoners.

Prisoners must be given the chance to help themselves, to re-integrate into society, and to mitigate the damage done by their crimes through community service. Thousands could be helped by therapy, but the UK has just one dedicated therapeutic criminal centre (another success, this time dating from the 60s, that never saw wide-scale implementation)⁸⁴. This however may change with the current 'Care Not Custody' plans outlined in the Ministry of Justice green paper 'Breaking the Cycle'⁸⁵ which will see over 100 such sites for mentally ill prisoners to receive treatment albeit on a much smaller scale at each site. These will provide a full range of drugs, mental health and other rehabilitative counselling services.

The benefits are obvious - cleaner streets, less crime, a small prison population, and a huge saving to the tax payer.

This isn't a "soft" option. It's the right option - it would unconscionable to allow prison populations to escalate in a vicious circle as offenders are given less help and less time by the prison service, and therefore reoffend more. It is a tide that must be turned, and it is in the public interest to see reoffending rates as low as possible for both economic and political reasons, so reform in this area must focus on the needs of the community rather than becoming an area of political tug of war.

⁸³ 'The Midtown Community Court Project' <<http://www.courtinnovation.org/project/midtown-community-court> accessed 16 April 2011>

⁸⁴ 'Criminal Rehabilitation', <http://www.ourmessage.org/> accessed 28 March 2011

⁸⁵ Ministry of Justice 'Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders' (London, 19 June 2008) <<http://www.justice.gov.uk/consultations/docs/breaking-the-cycle.pdf>> accessed 9 April 2011

Ken Clarke announced⁸⁶ on April 16th that the coalition government is aiming to cut the number of prison by places by 3,000 over the next four years. This is to be achieved by two measures. Firstly, a greater discount will be given on sentence for an early guilty plea, although how much of a discount this will be has yet to be announced. Secondly the coalition government intends to allow private initiatives in prisons whereby private companies will be paid on the basis of target cuts in reoffending rates. This is an encouraging step in the direction of rehabilitation, but it is questionable whether this needs to be done while lining the pockets of private investors.

Clear cross-party action needs to be taken urgently to rectify a situation that is stifling the efficacy of our prison service. This means adopting the community approach, but also removing private prisons from the system. It is utter absurdity to consider that this community approach can be rectified with a desire to bolster balance sheets - private prisons depend on people being incarcerated in order to be a successful fiduciary. The two concepts cannot be reconciled, and private prisons must be returned to the public sector to maximise prisoner welfare, lower reoffending rates, and allow the mentally ill to access much needed medical treatment in order to reduce reoffending rates.

⁸⁶ Ben Quinn 'Kenneth Clarke: prison is a waste of money' <http://www.guardian.co.uk/politics/2011/apr/16/ken-clarke-prison-waste-money> accessed April 17 2011

House of Cards Contracts – the End User License Agreement in Onward Sales

SEAN CAMPBELL

Abstract

Software usage requires the user to agree to additional terms on installation of the program. This is known as an 'End User Licence Agreement' that can be click-wrap or shrink-wrap form. These agreements often include terms such as third party rights to terminate or modify the program, and in many cases users fail to read what they agree to. The article examines the validity of such agreements, how best to classify them, and the importance of consumer rights legislation for contracts agreed to here in the United Kingdom.

Introduction

Software purchases are divorced from usage of the software bought because of contractual hurdles, specifically the terms contained within the End User Licence Agreement (“EULA”). These typically purport to restrict a consumer’s ability to deal with the software by, for example, making copies, lending or otherwise dealing with the property. These terms are not necessarily problematic when basic intellectual property law is considered as they are primarily designed to protect the rights of the copyright and or patent holder. Things become problematic when EULAs go beyond these terms by imposing duties on the consumers, or giving rights to the publisher that they would not normally have in law. This could be for example, a term that any disputes are adjudicated in a jurisdiction favourable to the software provider such as Santa Barbara County California (used by many commercial providers, including Google).

Further, there are inherent theoretical and practical issues with End User Licence Agreements as a concept. These are broadly that, without evidence to the contrary, the agreements are post contractual in nature and should therefore be void, and secondly that no reasonable consumer could be expected to read potentially hundreds of pages of contract prior to using a product that they have already bought. One software house tested how often consumers read EULAs by inserting a clause offering \$1000 to the first consumer to email them on a given email address

contained in the middle of their EULA. It took 3.4million downloads of the Spycheck software before this sum was claimed – by an English barrister!⁸⁷

This article examines if EULAs work within traditional contractual principles, and how the problems of preserving third party rights and interests can be addressed with practical solutions suggested for both the legal and technical issues raised by EULAs.

International Protection

International law provides both solutions and problems in the area of EULAs as jurisdiction needs to be determined in any given dispute. EU law prevents the UK imposing standards above the rest of Europe as otherwise competition law will allow any software legal in another state to be published here, which would simply destroy the UK software industry by encouraging it to move elsewhere and export to the UK market while solving none of the issues.

The problem was partially addressed by the EU's response in the form of the E-commerce Regulations 2002⁸⁸ which require full contact details for companies to published on their website making contact in the event of a dispute much easier. It does not however address the underlying issue that any dispute is bound to fail by reason of the EULA agreed to by the consumer.

The final added complication is the multitude of jurisdictions involved - the sale of the software, the use of the software, the acceptance of the terms, the drafting of the terms, the acceptance-authentication servers, and the EULA's specified jurisdiction may all be different. This could mean weighing up seven jurisdictions to decide where any dispute should be heard, and as such deciding the validity of terms becomes enormously problematic. One simplification likely to happen in this regard is harmonisation of EU regulation, or even substantive international agreement as the UN have now met several times to discuss the general regulation of the 'Information Society'.

However, in the absence of unified international regulation, this remains a multi-jurisdictional issue regulated by several key areas of law (with an expansion into tort to be found in the US).

⁸⁷ PC Pitstop, 'It Pays to Read Licence Agreements' < <http://www.pcpitstop.com/spycheck/eula.asp> > accessed April 18 2011

⁸⁸ E-commerce Regulations 2002

EULAs should primarily fall within the realm of contract law, and be subjected to standardised usage rights for digital media, restrictions on disproportionate terms being imposed upon the consumer (unless explicitly brought to their attention). This would however require substantive international law achieve. The final issue to put the issue in context is that of termination, and what happens in the event that software is uninstalled by a consumer. From a practical perspective the result is that some registry files will always remain, and that the data won't cease to exist until other data over-writes it.

Many products have DRM technology bundled to prevent redistribution and or unauthorised use. All of the software examined leaves the DRM technology active *after* the program has been removed. Clearly the DRM is only installed in connection with usage of the software as no consideration has been provided for DRM otherwise. Thus surely when the program is removed, the DRM should follow suit - the 'package' of software/ service plus DRM should be kept or removed together. This provides further hurdles for the consumer to overcome as if the software (or the EULA, which are often modified post-contract as part of the EULA) prove unsuitable or unagreeable. An individual consumer could then be left with the choice of agreeing to a more oppressive EULA through continued use (implicit acceptance) or removing validly purchased software. Any DRM would then need to be manually removed by the consumer (which cannot contractually be done while the EULA remains in force). This is clearly an added burden for the consumer, who has no power to negotiate this.

Jurisdictional issues also exist within the context of EULAs as many contain 'choice of law' clauses pursuant to the Arbitration Act⁸⁹. This allows for any given jurisdiction to be used to resolve a dispute under the EULA, and is favoured by large corporations such as Google as illustrated above. However when this has been litigated English courts have found themselves competent to adjudicate if, per Tugendhat J, "prospect of success on the merits of its claims and that it had a good arguable case that its claims fell within the provisions of CPR 6.20. The latitude afforded by the doctrine of *forum non conveniens* might succeed if the factual evidence

⁸⁹ S9 Arbitration Act 1996

of the breach is located in the United Kingdom, as this could be a good reason for the English Court to take jurisdiction instead of the nominated foreign court⁹⁰.

Thus it may be that this particular section may be less effective when companies try to construe it against a meritorious and arguable claim.

Could EULAs work as a traditional contract?

The main problem as outlined above is that of consideration as prima facie the terms appear to be purely post contractual, and therefore void. The alternative would be that consideration attaches at the point the consumer accepts the EULA which logically does not work as the consumer has then taken the media on which the data resides without providing consideration. These could be split into two contracts: one for purchase of the media, and the other for use of the software vis-à-vis the EULA. Again, practically this fails on a number of levels as the media is not of use without the EULA, and the EULA is of no value without the media; it is tempting to argue here that these are two constituent parts of one whole that can be bought separately, but if the parts are not interchangeable – each EULA attaches only to one piece of software, so this neat separation cannot be a true solution.

The other option is to argue that there are two co-dependent contracts that stand or fall together. These 'House of Cards Contracts' are valid only together.

Consideration attaches to point of sale	EULA is post contractual
Consideration attaches to EULA	Media has therefore been given freely/ stolen?
Two Contracts: Media, and EULA	Separates transactions neatly but has commercial flaws - Media is not fit for purpose on its own, EULA has no value without data on the media.

⁹⁰ The principles are contained within the famous case of *The Spiliada* [1987] A.C. 460. There two chartered ships had been chartered by the shipment of sulphur coming into contact with water and corroding the hull of the vessel, and a claim was brought in the Canadian courts. The claim in respect of the 'Cambridgeshire' was more advanced and the expert evidence was in England, so the action in Canada was restrained by an anti-suit injunction, and the case in England allowed to continue despite the express choice of court clause in the charter.

Two co-dependent contracts	Media is a token representing your right to enter into a contract for the licence. EULA is this latter contract.
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Figure one – This compares the competing forms of analysis.

The fundamental problem with applying a contractarian viewpoint to the EULA is that of consideration. This article does not consider 'online' purchases where EULAs may be viewed at or prior to the time of purchase, but considers 'instore' purchases of software.

Here, the consumer buys the shrink wrapped medium with no idea what sort of EULA is attached to usage of the software. At the time of purchase money has been exchanged for merely a used data storage medium such as a DVD, a plastic case, and some cover artwork.

If this is a 'purchase' of the software then the EULA has no effect. The EULA, as denoted by its very name applies to a purchase of a licence. If however the EULA is valid then the right to deal with the software as an owner such as selling or giving it away is restricted. This could impact upon saleability - how would a birthday present consisting of a computer game operate at law? It is submitted that the only sensible way for a contractual analysis to work is that the purchase is of the media only, and that the EULA, and the pursuant licensed right to use the software come into effect at the point of installation (When "I agree" or "Next" is clicked to agree to the EULA).

This therefore denotes two transactions:

1. Sale of the physical medium.
2. Exchange of consent to EULA for the right to use the software.

This would appear to be more sensible that implying consent to the (unread) EULA at time of purchase, or pretending the financial exchange was at the same time of the EULA.

If however the above is taken as true, then the purchase of the medium is absurd as ALL products will be on the same or similar media, and thus the price differential must reflect the product. This muddies the waters between which consideration attaches to which of the two transactions. Otherwise on a simple view one might pay £4.99 for a 700mb CD containing a budget game or £99.99 for a 700mb CD containing Microsoft Office. The media is the same in either.

Also, if these are two transactions, what rights does a consumer have if the EULA is unpalatable? The media would be unaffected by the EULA, and the contract for said media would not be affected, thus could any right of return (outside of the Distance Selling Regulations, or any store policy included within the contract) exist?

Thus if the contract is at point of sale, EULAs are likely post contractual, and therefore void. If there are two contracts then issues occur with consumer rights, and consideration.

The final option is to use the notion that the purchase and subsequent acceptance of the EULA are one continuous transaction (essentially borrowing a twisted version of the continuous act principle from criminal law⁹¹). This would prevent any absurdity as to the nature of the contract and what consideration is to be provided on a conceptual basis, but still has a factual situation of a consumer spending money for a product the use of which is conditional on the acceptance of further contractual obligations.

If this situation were to arise it would mean essentially two contracts forming a 'House of Cards' where they either stand together, or both are invalid - each is contingent upon the other. This would be a purchase of the media, which acts almost as a token to represent the purchaser's right to enter into the latter contract for the licence. The token therefore is a physical representation of a right to enter into a contract for an intangible service rather than a good itself. If the EULA is then declined then neither contract works - the latter was never entered into, and the former is void *ab initio* allowing the consumer to receive a refund.

The problem here still remains that the consumer is spending money for a product in their eyes, and need to agree to further terms to use it - and many will simply click "I Agree" to get use of 'their' software. Similarly this does nothing to assuage concerns regarding whether the consent given is informed, or if the EULA has yet again gone unread.

Costs could also be incurred by the retailer if they are constantly processing and reversing transactions, so although co-dependent stack of cards contracts may be conceptually viable, it may be commercially expensive. The final issue with the co-dependent contract scenario is that

⁹¹ Fagan v Metropolitan Police Commissioner [1969]

the retailer will not know when the EULA has been agreed to, and thus when the money received for the token can be used. It is suggested the good practice would be to ring fence the monies for a reasonable period to allow for the consideration of the EULA by the consumer, and then to transfer the money into general funds at the end of this period. This period is however likely to be fairly short to maintain cash flow, so it must be made clear the length for which the token is valid: if it is not time limited this could cause problems years later. This could perhaps be solved by legislative intervention, although it is suggested that if this solution is to be adopted then it should be done on a pan-European basis in order to avoid constricting the free movement of services within the union.

As regards intangible purchases many distributors use a generic 'terms of service' for the distribution website, but still retain the EULA for every individual method of software, which is often viewable only after purchase. It must be noted here however that some digital distribution platforms do now allow the user to browse the EULA prior to purchase such as STEAM, the largest digital distributor of computer games. There are clearly no issues with consideration with respect to this type of purchase, however the End User Licence Agreements used are still immensely complex and unlikely to be read and understood by the average consumer.

What is being licensed?

EULAs licence software, but what exactly is the licence for? An End User Licence Agreement regulates what the licence is for and if the proposal set out below is adopted a key facts statement will be introduced for all such licences. One of the sections therein will be what the licence is actually valid for. This may be for 'one person' for a limited or unlimited duration which is fairly straightforward (although it would suggest the need to buy multiple copies in a family home). It may be for use at 'one address' in which case larger geographical locations will get greater use, which may not have been intended by the author of the EULA.

It may however, as is common in current EULAs, be for 'one computer'. Initially this seems to be very straightforward, but what constitutes one computer may vary over time. For example, a consumer may buy several items of software licensed for 'one computer' and then add more 'random access memory' to make it run faster, changing the computer in a strict sense. However

the line must be drawn somewhere - otherwise a consumer could transfer a licence between computers by simply changing parts repeatedly - and thereby deny the licensor future revenue. The most logical solution is to tie the licence to the most major part of all - the motherboard. Firstly it is unlikely the average consumer will change it, and secondly motherboards have a limited technological lifespan as newer technology requires different connections, thus the licence will have to terminate at some point allowing the licensor to sell future software versions. Further, with the advent of 'micro-transactions' in which users pay for 'virtual' goods within games, the EULA can be even more fundamental - 'e-goods' bought for an online account may be deleted if even a minor infraction of the games rules is found. This could severely detract from a games ability to monetarise it's content if the EULA is too restrictive. It could also see user uploaded content become the intellectual property of the game owners⁹².

The likelihood is this is factor which could escalate disputes over EULAs, and lead to a re-consideration of the factors considered, and their weighting. One academic went so far as to consider that " EULAs may not be enforceable in all cases if valuable property interests are at issue"⁹³. This could be the case when a service provider withdraws the service entirely, or shuts a regional server denying users in that regional reasonable speed access to the service. If virtual goods are owned when this action is taken, the consumer may resort to litigation as a method of recourse. It would be unfair to the user to disregard a claim solely on the basis of the EULA. 'Courts cannot enforce excessive EULAs allowing owners to do whatever they like with valuable virtual property.'⁹⁴

Domestically it would not be unforeseeable that this sort of term could fall foul of the Unfair Contract Terms Act. One American online game, Second Life, has even recognised the value of virtual property in their EULA, although they still retain a catch all indemnification clause⁹⁵.

⁹² City of Villains End User Licence Agreement, available at: http://www.plaync.com/us/help/eula_cov.html [Accessed March 1st, 2010]

⁹³ Charles Blazer, "The Five Indicia of Virtual Property" (2006) 5 *Pierce L. Rev.* 137 at 13.

⁹⁴ F. Gregory Lastowka and Dan Hunter, "The Laws of the Virtual Worlds" (2004) 92 *Cal. L. Rev.* 1 at 51

⁹⁵ <http://secondlife.com/corporate/tos.php> accessed March 23rd 2010

The value of this virtual property has even been recognised by the US Government - as a potential tax revenue!⁹⁶ although this has yet to be passed into law.

Digital Rights Management technology ("DRM") is a software-driven encryption technology which "manages digital content distribution"⁹⁷. Provision for this use of this is integral to the EULA. This has essentially two elements; one passive and one active. The former 'passive' element is concerned with digital watermarking - impregnating any and all copyrighted information with the corresponding ownership details: this means it is possible to tell who owns what by way of intellectual property rights, and is designed to prevent 'passing off' occurring on the internet, and stop information being disseminated so freely that it becomes public domain. However, many pirated programs still retain the logos, copyright information etc, that identify the owner throughout the product - little or no effort is made to conceal the true ownership of the intellectual property. Instead, it is simply bandied about freely, and without let or hindrance by anonymous e-pirates. Thus the passive technology is practically insufficient and fails to protect software ownership.

The latter method, of active digital content management, uses encryption to prevent the dissemination of copies - it is first and foremost an anti-piracy measure. This sort of front line practical defence against piracy is in the interest of both legitimate consumer and company, as without returns little or no software would ever be created.

However, in recent years, this has gone much further. As outlined with the Apple case in Norway, DRM has been used as an anti-competitive method tying digital distribution purchases to hardware purchases and thereby excluding competitors. This has a clear detrimental effect on the consumer. The real consumer issues arise however when large scale DRM is employed such as in Windows Vista, as the consumer agrees to in their EULA⁹⁸. DRM is used to prevent disclosure of benchmarking against other products (s9), not being able to use 'virtualisation software' under s4 (unless you pay the £300 premium for 'vista ultimate' which does include permission to do so, but no actual extra software) . The "real kicker" according to Ed Boff,

⁹⁶ Daniel Terdiman, "IRS taxation of online game virtual assets inevitable" (December 4, 2006), CNET News.com, http://news.com.com/IRS+taxation+of+online+game+virtual+assets+inevitable/2100-1043_3-6140298.html accessed March 23rd 2010

⁹⁷ DRM: can it deliver? Nick Hanbidge Entertainment Law Review 2001

⁹⁸ download.microsoft.com/.../Windows%20Vista_Ultimate_English_36d0fe99-75e4-4875-8153-889cf5105718.pdf

former Microsoft Security Analyst⁹⁹, comes with s6 which gives Microsoft the right to disable your hardware if they think you've used their proprietary software formats without permission (and warn you that subject to s4, they cannot authenticate rights in a virtual environment).

Of course, virtualisation software is a limited component of the software market, and those that use it tend to be software developers, computer sciences students etc, but this encroachment has costs for the consumer. As Scott Granneman observed in IT Director back in 2006

"What's the result of Microsoft's actions? Less freedom and much higher costs to end users."¹⁰⁰

The real danger is that these, and similar terms, as outlined in the Consumer Focus study above, are simply not read, and the law needs to recognise that the parties to these 'take-it-or-leave it' adhesion contracts are not of parity - the bargaining positions are massively different. The publisher has the weight of a large multi-national and the legal department that goes with that. The consumer has a some software already bought in store, an extremely long digital contract, and a very easily accessible "I Agree" button. The practical solutions outlined in chapter six would go a long way to equalise the position by ensuring informed consent. However, in order to obtain informed consent, consumers must realise what it is that they agree to when they assent to the installation of bundled DRM technology. DRM has many forms as most programs are proprietary, and the effects are often hidden deep within the EULA (or, worse yet, in a linked document!).

First and foremost, the linked document EULAs must be made illegal - it is unreasonable to expect consumers to go through a digital paper chase of online documents to find out what the terms they are agreeing to actually are. Secondly, EU law should be used to implement one easily recognisable and safe DRM standard technology - that the consumer understands the form of, and that the rights it will enforce are clearly labelled in the EULA.

Domestic Enforcement & Other Jurisdictions & The future of E-Commerce in Europe

While no cases have been reported in England of the EULA being challenged for validity *by a consumer*, there have been many challenges internationally.

⁹⁹ Ed Boff, "Get facts, not spin, about Vista's new license" <http://blogs.zdnet.com/Bott/?p=158>

¹⁰⁰ http://www.theregister.co.uk/2006/10/29/microsoft_vista_eula_analysis/page3.html

In Scotland, it was held in the Beta Computers case that an unopened EULA was valid, as Lord Penrose considered that to hold otherwise would be to jeopardise the rights of the copyright-holder. This however must be considered in light of being in a business to business context, rather than one in which a consumer had a stake. It should also be noted that no arguments were put forth by counsel to the effect that criminal and intellectual property law would still protect the rights of copyright holders. It is submitted that perhaps these are the proper remits for this area of law, and that as such EULAs may be less necessary than Lord Penrose thought.

One of the earliest cases arose in Canada¹⁰¹, in which the MSN EULA was challenged as the plaintiffs argued that individuals didn't read EULAs, and should not be bound by them. The court was unimpressed as the terms were unambiguous and click-wrap contracts were held valid under Canadian law. This decision may be influenced by an element of policy - otherwise ignorance would become a defence in EULA disputes, which could prove disastrous.

The early US law focused on the relative bargaining positions of the parties, and held in Davidson¹⁰² that a company well accustomed to EULAs was bound by the term preventing reverse engineering of a product. Again, this could be a public policy issue as it leaves wide judicial discretion in dealing with future cases, and clearly protects the intellectual property interests of the claimant.

Some US Academic opinion however has a distinctly different flavour to it. Posner¹⁰³ illustrates the economics of one sided contracts, contending that e-consumers are demand-savvy and that consumers actively choose lower priced, but contractually complicated offerings as they prefer cost savings. Posner contends that if this were not so, the market would self adjust to reflect consumer demands so that more products were consumer contract friendly, but more expensive. This represents a typical libertarian free market economist view, and arguably gives the average consumer too much credit given the plethora of evidence outlined above (such as the Davidson case) that illustrate consumers are not EULA-savvy.

¹⁰¹ Rudder v Microsoft Corp [1999] 2 C.P.R. (4th) 474 (Ont).

¹⁰² Davidson & Associates Inc v Internet Gateway. 334 F. Supp. 2d 1164 (E.D. Mo. 2004).

¹⁰³ ONE-SIDED CONTRACTS IN COMPETITIVE CONSUMER MARKETS, Lucian A. Bebchuk and Richard A. Posner, Michigan Law Review (2006)

Later US case law saw a divergence among the states, with the US District Court for the Northern District of California declaring PayPal's browse wrap contract unconscionable¹⁰⁴, but New York Law was applied in DeJohn¹⁰⁵ to uphold a similar adhesion contract. The former case was declared procedurally unconscionable as the consumer had little but choice but to use the service despite the take it or leave it methodology of the contract. Further, the only recourse was through a disproportionately expensive arbitration service which denied natural justice. Conversely DeJohn used no high power or pressure tactics and displayed all terms openly and concisely. As such it appears the US is following a policy oriented jurisprudence allowing wide judicial discretion to deal with disputes on a case by case basis. This leaves much to be desired by way of legal certainty.

In contrast, the domestic cases, which all deal with a business to business context, are fairly uniform. In Ling¹⁰⁶ a business tried to use competition law to invalidate a Microsoft EULA as a restraint of trade. However, this is a clear policy decision akin to those in the states: the courts could not invalidate the EULA as to do so would be to condone and excuse Ling's alleged piracy. Similarly in Computer Future Distribution¹⁰⁷ delabelling by removal of the EULA of Microsoft products for resale (by including one copy in each bundle rather than one per licence), was prevented by injunctive relief.

The current case-law in England and Wales favours the publisher, but this may merely be down to policy reasons, as there has yet to be a reported test case with similar attributes to the US cases examining when terms are valid. It is not impossible to imagine certain restrictive terms, such as those pertaining to overbearing DRM restrictions, being held UCTA invalid.

The future of EULAs in the UK however may be dependent upon a European development of this area of law. Currently all computer programs are protected by copyright under EU law¹⁰⁸ although "in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be

¹⁰⁴ *Comb v PayPal, Inc* 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

¹⁰⁵ *DeJohn v TV Corporation International* 245 F. Supp. 2d 913 (C.D. Ill. 2003).

¹⁰⁶ *Microsoft Corp v Ling* [2006] EWHC 1619 (Ch)

¹⁰⁷ *Microsoft Corp v Computer Future Distribution Ltd* [1998] E.T.M.R. 597

¹⁰⁸ Council Directive 91/250, n.20

performed in accordance with its intended purpose by a lawful acquirer of that copy"¹⁰⁹. Thus copyright law may not entirely protect the rights of the copyright holder, and EULAs are required to absolutely prevent copying of data. Copyright may also fail when the licence is granted in perpetuity according to Pitell as it fails to clearly satisfy the requirements of copyright (Pitell, 2004)¹¹⁰.

EULAs are therefore the key component in securing the rights of the copyright holder, combined with the use of DRM. It is submitted however that the need to protect copyright does not prevent fair and open presentation of all terms used in the EULA, nor is an active DRM methodology required beyond basic encryption. Technologies which go further, and monitor or disable other files are intrusive (e.g. the Amazon Kindle). DRM has the potential to go too far, as outlined in relation to Chinese law by Xie 2008 "it can enforce, displace, and override legal rights (para 5 IV)"¹¹¹.

Future cases, both domestically and internationally, must ensure that DRM is used as a protectionist measure, a shield rather than a sword.

The future of End User Licence Agreements

The real issues with End User Licence Agreements can therefore be distilled into two key problems. Firstly, contract law conceptually does not work in this area as it fails to deal with the incorporation of the post contractual terms that are incorporated by way of the EULA. Secondly users simply do not know what it is that they are agreeing to - there is no informed consent, merely a "continue" click as users rush to use the already purchased software. This is undesirable as disputes are easier to resolve if both parties entered into the agreement with equal knowledge of what that agreement would entail.

¹⁰⁹ Council, 2490th Council Meeting, "Competitiveness (Internal Market, Industry and Research)" (Presse 59) (2003), p.24, at <http://ue.eu.int/pressData/en/intm/74752> accessed March 25th 2010

¹¹⁰ Non transferability of software licences in the European Union, Lisa R. Pitell, European Intellectual Property Review, 2004

¹¹¹ The regulation of digital rights management in China, Huijia Xie, International Review of Intellectual Property and Competition Law, 2008

Dealing with the latter issue first, it is submitted that many users simply do not treat end user licence agreements with the respect they deserve. Very few people would sign printed documentation without reading it, but clicking "I agree" (or similar) can bind the user just as effectively. This should be redressed through a combination of practical IT solutions and hard law.

In order to facilitate an IT solution being applied here, there ought to be a standard form of End User Licence Agreements - it must be emphasised that this would be a change to the layout of the contract, not forcing the contract to contain given terms. To use a standard End User Licence Agreement would be to disproportionately impinge upon privacy. The ability for users to enter into any contract they wish to must be retained - thus it is only the form of the contract that must be standardised. This would be analogous to the 'T1' form used for transfer property in land law - it would provide broad headings under which the terms could be categorised, plus a final box for 'other terms' so that the contract may include or exclude such terms as the contracting parties deem fit.

This would therefore give a layout such as 1. Contact details of the contracting parties. 2. Relevant Jurisdiction. 3. Digital Rights Management Technology Used. 4. Privacy Policy 5. Definitions 6. Licence Granted 7. Liability Exclusion. 8 Copyright Notice(s). Something as simple as this can make it very clear to the user what they are agreeing to, and it and of itself this legal harmonisation would benefit the consumer.

It is submitted however that in order to retain complete free movement of IT services with the European Union this has to be done on a pan-European basis. Thus a regulation would satisfy the need to maintain this standard. Once this standardised form approach is in place, information technology can be applied in several ways to make consumers more aware of what it is that they are agreeing to.

Firstly, it is submitted that the current End User Licence Agreement structure prevents users from retaining a copy of what it is that they have agreed to - and thus if they need to litigate a

dispute, they must rely on what the publisher/retailer claims they agreed to - and clearly leaving this sort of evidence in the hands of the stronger contracting party is manifestly unfair.

End User Licence Agreements should therefore be retained much like the current browser cache/history within a browser. This would give users a time stamped copy of exactly what they have agreed to. This should be an automated system that copies ALL End User Licence Agreements that are entered into, and saves them within a 'library' of agreements for future reference.

An automated system will be used to compare a standard EULA with the EULA which the consumer is considering agreeing to. This will identify the different standardised subsections e.g.

2. Relevant Jurisdiction and split them up for ease of reference.

The computer program can then compare these individual sections with a 'safe' End User Licence Agreement benchmark already on file (e.g. prescribed in the regulation) in order to identify discrepancies. Thus for 2, Relevant Jurisdiction, if the Relevant Jurisdiction stated does not match the jurisdiction where the agreement is taking place it will be noted.

Once this comparison has been completed, the discrepancies will be flagged up to the user "Warning: Jurisdiction is non-standard. Do you wish to proceed?" etc would be posed to the user so that they can be accepted or rejected on their merit, rather than subsumed as they currently are within the small print.

Thus consumers will be agreeing to the terms only when they wish to actively agree to them rather than passively agreeing, and a copy of the agreements made will be retained (encrypted and time stamped) for future reference. The program could also fetch the 'WHOIS' record¹¹² for the website through which the End User Licence Agreement is authenticated in order to double check and retain a copy of the publisher/retailers contact details, in order to facilitate resolution of a dispute. This therefore leaves users in a position of choosing to give informed consent or not as appropriate, and should encourage 'fairer' End User Licence Agreements as all discrepancies will be highlighted publicly for all to see. This therefore solves the second issue.

¹¹² WHOIS is the Internet Registry of Domain Ownership which is conclusive evidence of ownership of any given domain name. In essence, 'who is [?]'.

Alternatively a more unusual conceptual solution may be found in Equity. It is submitted that there is not a traditional contractual relationship in respect of End User Licence Agreements. Instead, the purchase of the media is actually a contract to settle a trust of the licence in favour of the holder of the media subject to the pre-requisite of the End User Licence Agreement. This has several major benefits: Firstly, it allows for the avoidance of all consideration issues outlined above - there beneficiary need not be the purchaser (thus gifts pose no problem) and the contract is neatly separated theoretically from the installation.

Secondly, the trustee for the trust created will be the publisher. The publisher is a suitable trustee as they are legally distinct from the developer of the software, which should avoid any conflict of interest. This allows the publisher to act in the best interest of the beneficiary, and thereby allows them to re-activate the licence in the event of hardware malfunction. This gives the consumer the greatest possible access to recourse in the event of a problem as the publisher will be bound to serve their interest.

The publisher would not be paid for this work as a trustee, but would be expected to build the cost into the charge for distribution of the software. This should also ensure greater transparency in the packaging of EULAs, particularly in respect of the notion of a key facts summary being included per chapter five. It would be in the publishers interest to demonstrate informed consent, as if no such consent existed the trust would fail as the pre-requisites had not been met, and the contracting party would be due a refund.

If however the publisher is found to be insufficiently separated from the developer so as to avoid a conflict of interest, it is submitted another trustee should be found - perhaps even going so far as to create a public office of Trustee of End User Licence Agreements for Consumers to act as a watchdog to ensure fair regulation of EULAs.

Digital Rights Management

Digital Rights Management technology needs to reflect these changes, and be a fair enforcement of copyright holders rights. It must act equitably - DRM must be a technological shield rather than a sword. It should be used to prevent malicious use of the software, but never to prevent a

lawful use. DRM must be standardised to become interoperable rather than proprietary, so that all software publishers may make use of such a shield. A DRM standard would likewise benefit the consumer - it would be familiar, and the effects would be easily ascertainable as a one stop shop guide to the DRM in question could be placed within the now-standardised EULA (and the pursuant key facts sheet). This would detail what system resources are in use, when checks by the DRM will be performed (it is submitted that DRM should only run checks during a period of system downtime, and thus use slack resources rather than be a drain on the system when it is fully in use) and even give a warning system before actions are taken that might activate the DRM (and thus infringe the EULA).

It may be reasonable to go so far as to criminalise excessive DRM usage, as DRM that is unnecessary uses up legitimate system resources and thereby accrues real costs in the form of increased electricity usage. DRM has the potential to cause real problems, and a standardised version would allow for known risks to be evaluated, and insured against more easily. Thus, the twin standardisation approach, along with an adoption of either the equitable theoretical underpinning, or the house of cards contractual theory would allow for an appropriate, workable and commercially viable system of EULAs, with enforcement both through legal means, and the practical shield that is digital rights management technology. This would ensure fair EULAs, under public scrutiny, so that the acceptance given can be considered informed. The consumer will benefit from knowing what it is they are agreeing to, and the public visibility of all terms may lead companies not to use oppressive terms for fear of media exposure. In turn, companies can expect consumers to have fewer complaints regarding EULAs as they have chosen to accept whatever terms are presented to them.

The solution therefore is equitable, and practical in nature, and will lead to a much more efficient international regime for dealing with End User Licence Agreements.