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CASE NOTE

Poetic Justice

Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23

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Abstract This note examines the decision of the Court of Appeal in *Tabernacle v Secretary of State for Defence* (2009). The court held that byelaws prohibiting camping on Ministry of Defence land adjacent to the Atomic Weapons Establishment at Aldermaston, Berkshire violated the human rights of women peace protestors under Articles 10 and 11 European Convention on Human Rights. The note argues that this decision calls into question arguments recently made, that the association of women with peace should be abandoned. It also reveals the potential of law to facilitate the performative and transformative production of subject positions, as 'woman', which do not depend on or connect with debilitating patriarchal constructions of women as weak or vulnerable.

Keywords Aldermaston Women's peace camp · Byelaws · Deconstruction · Free speech · Human rights

Introduction

> The critical task is not simply to speak "against" the law, as if law were external to speech, and speech the privileged venue for freedom. If speech depends upon censorship, then the principle that one might seek to oppose is at once the formative principle of oppositional speech. There is no opposition to the lines drawn by foreclosure except through the redrawing of those very lines. This is, however, not a dead-end for agency, but the temporal dynamic and its peculiar bind. The possibility remains to exploit the presuppositions of speech to produce a future of language that is nowhere implied by those presuppositions. (Butler 1997, p. 140)

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Freedom of speech, albeit guaranteed by Article 10 of the European Convention on Human Rights (ECHR), is a problematic idea: fundamentally, no speech can be wholly free of the conditions of its possibility. To speak is to utilise social conventions of language, which preclude the possibility of a fully self-referential and autonomous speaker. What we can speak of is delimited by the words we have available to us, and by the concepts thereby permitted or excluded from our vocabulary/reality. Given the politicised nature of language, it follows, as Butler suggests, that free speech is the product of censorship. For feminism, the concern has long been that language has been and remains a key socio-political mechanism through which gender bias is expressed and normalised. For radical feminism, for example, there is no possibility of free speech under the conditions of false consciousness imposed on women by patriarchy. For Luce Irigaray, similarly, if woman does not exist, then clearly her speech cannot be free. For feminist legal scholars, these problems of language and consciousness have been identified also as a problem of law. Law, like language, functions as censorship, sifting claims, complaints and ideas and rejecting those incompatible with its (patriarchal) first principles.

Although different scholars have responded differently to such concerns, one standard feminist response has been a certain fatalistic despondency regarding the potential of patriarchal frameworks to provide a mechanism through which to challenge patriarchal norms. There have been many expressions of this view, but perhaps one of the best known is Lorde's (1984, p. 112) concise statement, that "the master's tools will never dismantle the master's house". In a legal context, this statement speaks to two ideas. The first is that in general terms law reinforces rather than challenges existing power structures. The second is that when it is a woman who turns to law, she is through that process affirmed in her inferiority, always already marked and coded as 'woman' (for which read weak, emotional, irrational, etc.) in a man's world.

Such an argument has recently been made, for example, by Hilary Charlesworth. Charlesworth, writing in an international law context, is concerned that the equation of women with peace in international law and policy presents a one dimensional view of women and their lives, and, in the rhetoric used, relies heavily on disempowering connections between femininity and motherhood, and between femininity and vulnerability. This in turn shores up the corresponding equation of men with war—the idea that 'boys will be boys'—which somehow naturalises and legitimises the very things—patriarchy and war—that the equation of women and peace seeks to challenge. This leads her to conclude (2008, p. 359) that "we should abandon … the claim that women are more peaceful than men and that women are more vulnerable in conflict than other groups".

Such concerns of course cannot be summarily dismissed. They have substance, but it is in my view a *non sequitur* to argue that the linkage of women and peace should therefore be abandoned. There is too much inevitability about claims such as those made by Charlesworth or Lorde, too rigid a connection posited between tools and owners. The symbolic order of latterday western patriarchy cannot insulate itself from the fusing of new, and subversive, configurations of old truths. I agree with Charlesworth that the symbols and messages thereby recycled and regenerated

may in some ways be one dimensional; but the question of whether this invalidates their deployment is properly strategic, not theoretically predetermined.

A case in point, I would suggest, is the freedom of speech litigation taken to the Court of Appeal by members of the Aldermaston Women's Peace Camp (AWPC). In the *Tabernacle* case, AWPC members demonstrated that although the association of women and peace may often be counter-productive and disempowering, tapping into patriarchal notions of women as weak and vulnerable, on some occasions the equation of women and peace may instead produce symbols of strength and dignity; and, what is more, may give a glimpse of a future language in which symbols such as 'woman' and 'peace' have transcended the negative connotations which history has allotted to them.

Background to the Appeal

The AWPC was established on Ministry of Defence (MoD)-owned land outside the Atomic Weapons Establishment (AWE) at Aldermaston, Berkshire in 1985 and has continued in existence ever since. For most of its history, the AWPC was seemingly in breach of byelaws made in 1986.[1] The 1986 byelaws distinguished between 'Protected Areas', comprising the weapons base up to and including its perimeter fence,[2] and 'Controlled Areas', being other MoD-owned land immediately adjacent to AWE.[3] The byelaws prohibited, amongst other things, camping in Controlled Areas.[4] However, the 1986 byelaws were never enforced and the AWPC, which convenes on the site for one weekend each month, was tolerated by the authorities. Apparently, this was initially because of difficulties in establishing the precise contours of the Controlled Areas, and, later, because of concerns about the impact on the 1986 byelaws of the Human Rights Act 1998.[5]

However, when the byelaws were remade,[6] coming into force on 31 May 2007, the MoD adopted a different approach to the enforcement of restrictions imposed on activities in Controlled Areas. A number of AWPC members, including Kay Tabernacle, were arrested as they arrived to set up camp at Aldermaston one Friday

[1] The Atomic Weapons Research Establishment (AWRE) Aldermaston Byelaws 1986 SI 1986 No 746, available at http://www.defence-estates.mod.uk/byelaws/Internet/Revoked.php (last accessed 30 April 2009).

[2] 1986 byelaws, para 1(a).

[3] 1986 byelaws, para 1(b).

[4] 1986 byelaws, para 4(2)(b).

[5] See *Tabernacle v Secretary of State for Defence* [2008] EWHC 416 (Admin) para 5 per Maurice Kay LJ. It is worth pointing out that the understanding of the AWPC and MoD police seems to be that the 1986 byelaws did not prohibit their camp (which was not in any case in one set location), and that the 2007 byelaws extended the scope of the Controlled Area to cover the AWPC for the first time (AWPC 2009, p. 1).

[6] The Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007 SI 2007 No 1066, available at http://www.defence-estates.mod.uk/byelaws/Internet/Reviewed.php (last accessed 30 April 2009).

evening. The women were charged with the criminal offence of breaching a number of the provisions of paragraph 7(2) of the 2007 byelaws.[7]

The criminal charges were eventually dropped (although not before the women were held overnight, and bailed subject to draconian conditions including a five mile exclusion zone around AWE),[8] but Ms Tabernacle and others were not content to let the matter end there. Judicial review of the 2007 byelaws was sought and granted. Three provisions of paragraph 7(2) were challenged: 7(2)(f), which forbade any person to "camp in tents, caravans, trees or otherwise"; 7(2)(g), which required that no person "attach any thing to, or place any thing over any wall, fence, structure or other surface" on the land in question; and 7(2)(j), which required that no person "act in any way likely to cause annoyance, nuisance or injury to other persons".

Ms Tabernacle challenged the legality of these provisions both by reference to standard judicial review criteria and on the basis that they breached her rights to freedom of expression and freedom of assembly and association under Articles 10 and 11 ECHR. In the High Court she was successful in respect of paragraph 7(2)(g). The Court held that although "surface" in paragraph 7(2)(g) was to be read as meaning only any man-made surface (because the rest of 7(2)(g) refers only to human installations—walls, fences and structures), nonetheless its scope was so broad as to place it in breach of common law principles.[9] So far so good: the AWPC members could now legally put down their rucksacks, lay a blanket on the ground, and have a picnic when they arrived on site.

However, the High Court found against Ms Tabernacle on paragraph 7(2)(j),[10] and, crucially, 7(2)(f), which it dealt with briefly. It held that there was no mileage in the applicant's argument that the word "camp" was too imprecise of meaning to be enforceable, before accepting that the policy of the Secretary of State, to prohibit camping across the Defence Estate in general and Aldermaston in particular, was reasonable at common law, and justifiable and proportionate under the Convention on grounds of national security[11] (and possibly the prevention of disorder).[12] Counsel for the applicant argued that the court should take cognisance of the point

[7] Breach of the 2007 byelaws is made a criminal offence by para 9 and by s 17(2) Military Lands Act 1892.

[8] See the camp blog for 17 June 2007, available at http://www.aldermaston.net/camp/blog.php (last accessed 30 April 2009).

[9] *Tabernacle v Secretary of State for Defence* [2008] EWHC 416 (Admin) at paras 13–15.

[10] The court held that "annoyance" is to be measured by the reaction of a reasonable person and so is a term of sufficient certainty to satisfy judicial review, and that as the purpose of paragraph 7(2)(j) is to prevent anti-social activity which falls short of constituting the tort of nuisance, there was a justifiable infringement of Articles 10(1) and 11(1) ECHR, being "necessary…for the prevention of disorder or crime…, for the protection of…the rights of others": *ibid* at para 34. This point was not further argued on the appeal.

[11] *Ibid* at para 23.

[12] The court was rather vague about which of the justifications in Articles 10(2) and 11(2) were being relied on. Mention was made, by way of justification, of issues of security raised by persons camping near military bases. The court also referred to the lack of sanitary facilities on the site, and "numerous complaints" made to AWE regarding the behaviour of AWPC members, and of members of the public reacting to the camp, for example motorists were said to be sounding their horns when passing the camp (*ibid* at paras 23–25).

that the manner of protest (i.e. camping) is an integral part of the free expression and free assembly rights of the AWPC members, when evaluating the proportionality of its prohibition. The court, however, was unimpressed by this, commenting that "[counsel for the applicant] is eloquent on the significance of camping to his client and her colleagues but we see his point more in terms of poetry than of true principle."[13]

In the Court of Appeal

Ms Tabernacle appealed against the decision of the High Court in respect of paragraph 7(2)(f), and the appeal was determined by the Court of Appeal[14] solely by reference to Articles 10 and 11 ECHR.[15] There was an accepted interference with Ms Tabernacle's Article 10(1) right to freedom of expression,[16] and the court seemed to accept without argument that the byelaws pursued a legitimate aim. The main issue therefore was proportionality, that is, whether the restriction imposed by paragraph 7(2)(f) could be said to be "necessary in a democratic society" as required by Article 10(2), which in turn depends on whether the measure in question is required to meet a "pressing social need".[17]

Although Ms Tabernacle was the appellant, the onus of demonstrating that the interference with her Article 10 right was proportionate was on the Secretary of State. This he failed to do to the satisfaction of the court. Lord Justice Wall pointed out that "there is absolutely no evidence that the presence of the AWPC over many years has been incompatible 'with the operational requirements of the establishment'",[18] as a witness for the MoD, a MoD estate manager, had alleged. For Wall LJ, the case for the Secretary of State "comes nowhere near demonstrating a 'pressing social need'".[19] Lord Justice Laws first noted that in his view, the reasons given for the many years of non-enforcement of the byelaws prior to 2007 were "extremely feeble".[20] He then turned to the justifications given for the new policy of enforcement of the ban on camping. These too were found to be insubstantial. In his view "the Secretary of State has viewed, or treated, the AWPC's presence at Aldermaston for all the world as if it were no more nor less than a nuisance. I accept he appears to have regarded it as more than that… But the individual points made—

[13] *Ibid* at para 25.

[14] [2009] EWCA Civ 23. All subsequent references to the Court of Appeal's decision are to this report unless otherwise indicated.

[15] Laws LJ treated the claimed breach of Article 11 as secondary to the claimed breach of Article 10. This was on the basis that the freedom of assembly issue "is on the facts not so much to be regarded as an autonomous claim, but rather as underlining the mode of free expression relied on: a communal protest in a camp established for the purpose" (para 10), although he did proceed to find a breach of both Articles (see para 44).

[16] Para 11.

[17] *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

[18] Para 48.

[19] Para 49.

[20] Para 41.

the security fence, traffic problems, lavatories, the bad behaviour of other members of the public—are, in objective terms, nuisance points".[21] He concluded that although the activities of the AWPC may be "inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope".[22]

This would have been enough to dispose of the appeal, but the court was obliged to address various further arguments[23] made on behalf of the Secretary of State. In particular, as the court discussed, there is ample authority from the European Court of Human Rights to the effect that a distinction is to be drawn between state action which interferes with the essence of the Article 10 right, and that which merely goes to questions of the manner and form of its exercise. In the latter situation the margin of appreciation afforded the state in question is somewhat more generous.[24] Counsel for the Secretary of State argued that the prohibition effected by paragraph 7(2)(f) was an example of an interference only with the manner and form of the appellant's Article 10 rights and as such the concept of proportionality should be construed to allow a greater discretionary area of judgment[25] to the Secretary of State.

Lord Justice Laws did find it "plain in this case that the Secretary of State has not sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas".[26] However, he also observed that "the supposed distinction between the essence of a protest and the manner and form of its exercise has to be treated with considerable care. In some cases it will be real, in others insubstantial",[27] and it is possible that:

> this "manner and form" may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protesters' message; it may be the very witness of their beliefs. It takes little imagination to perceive, as I would hold, that that is the case here…the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it. To them…the "manner and form" *is* the protest itself.[28]

[21] Para 42.

[22] Para 43.

[23] The Secretary of State also argued that as the Government owned the land and the only right of public access came from the byelaws, the interference with the Article 10 rights of the applicant should be treated only as minor. This point was significant in the High Court (see *Tabernacle v Secretary of State for Defence* [2008] EWHC 416 (Admin) at para 25) but the Court of Appeal dismissed it summarily (para 38) on the basis that the position of the Secretary of State, as guardian of public land, is not analogous to that of a private land-owner as he or she has no capacity to reserve rights in the land vis-a-vis the general public.

[24] See the cases cited by Laws LJ at para 16.

[25] "Discretionary area of judgment" was Laws LJ's suggested replacement for the concept of the "margin of appreciation" when the concept is employed in a domestic law context (para 26).

[26] Para 36.

[27] Para 35.

[28] Para 37.

This led to his view that here, "the fact that the camp can be categorised as the mode not the essence of the protest carries little weight".[29]

Rights Worth Having?

How should this judgment be read? Although Laws LJ styled the rights the court had protected in this case as "rights worth having" which are "unruly things",[30] in that they protect protest that is inconvenient to the state, nonetheless it could be suggested that if the Court of Appeal was strong on rhetoric, it protected little of substance. The court's reading of the extent of Articles 10 and 11 ECHR affirms that the rights to free speech and assembly, the right to protest, amounts to a right to be a nuisance or an irritant. Were the activities of the AWPC to amount to more than that, the infringement of those rights by the 2007 byelaws would be justified and proportionate. As Laws LJ put it, protest may attain "an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified".[31] If this is the extent of the rights the court protects, then, for some, it is perhaps not clear that they are "worth having". Put another way, here is evidence that human rights, ultimately, are sculpted in the interests of the state rather than the citizen. Moreover, the court operationalises—cannot help but operationalise, given the context and the parties—the equation between 'women' and 'peace', and so risks giving force to the corresponding negative connotations and implicit acceptance of the naturally warlike nature of men, that Charlesworth objects to. Is this judgment anything more than an instance of the marginalisation of both 'women' and 'peace'?

I would argue that it is, and start by pointing out that the court's attitude to the distinction between the essence of a right and the form or manner of its performance is underpinned by its alignment with the perspective of the AWPC rather than that of the state. Lord Justice Wall cites directly from Ms Tabernacle's witness statement in order to "emphasise how fundamental camping is to the AWPC's protests at Aldermaston. As AWPC's name suggests, its very nature is the camp. Without the camp AWPC simply would not exist".[32] In this sense, and for these purposes, the court adopts a 'feminised' subject position against the patriarchal state. To put this differently, the court validates and protects a certain performance of femininity—that of the AWPC members—which posits the link between pacifism and womanhood as a foundational, essential, component.

From this perspective, it can be seen that the argument of the Secretary of State is disingenuous. What is at stake, as Ms Tabernacle's witness statement makes clear, is the survival, not just of the camp as a physical entity, but the very identity of the

[29] Para 38.

[30] Para 43.

[31] Para 43.

[32] Para 47.

AWPC members. It is claimed that the byelaws prohibit or regulate activity,[33] but really or also, they are an attempt to delimit the contours of discourse and therefore identity, to remove the conditions of possibility for some subject positions, namely those of the AWPC members. As Butler notes (1997, p. 16) speakability is the condition of possibility of survival. The 'interference', with the human rights and the psychic space of the AWPC members, cannot be classified, as the MoD sought to do,[34] as 'weak'.

In rejecting the relevance of the distinction between essence and manner, the Court of Appeal also rejects the distinction between principle and poetry made by the High Court.[35] This distinction used in this context can be read as gendered/sexed: principle denotes objectivity, logic and rigidity (implicitly masculine), whereas poetry is a subjective, emotional, and less linear discourse (implicitly feminine). For the High Court, 'poetry' is also code for non-justiciable or extra-legal. In its use in this context, to posit poetry as external to principle is also to posit the feminine as external to law. So, when the Court of Appeal, in contrast, finds the principle in the poetry—the essence in the manner—through a move that effectively elides the two, again this should in my view be read as a feminist act.

Moreover, this is not merely an assertion of the feminine as against the masculine. The court goes further: it 'scrambles all the codes' (Deleuze and Guatarri 1984, p. 15), as now the distinction between principle and poetry, essence and manner, masculine and feminine, is unintelligible. This does not mean that terms such as 'women' no longer have the capacity to function (deconstruction means analysis, not abolition or destruction), but it does mean that control of their functioning in this particular context has been to some extent redistributed in favour of those so termed. Perhaps the real value of *Tabernacle*, then, is that it provides an example of how terms such as 'women' can be pushed beyond the presuppositions of their initial use, and be made to function not as a link between the present and the past (the baggage and associations which this term has accrued) but rather as a link between the present and the future. In such a future, there would be no call to abandon, as there would no longer be reason to fear, the association between women and peace.

Concluding Comments

Some readers may feel that I have offered an overly romanticised or utopian reading of this case. The topic under consideration here exists beyond the abstract textual boundaries of both legal doctrine and scholarly analysis. In the real world, the camp has been attacked by local residents,[36] and the high number of complaints[37] said to have been received by AWE further indicates long-standing hostility to the camp

[33] See para 46, citing the witness statement of the MoD estate manager.

[34] See para 14.

[35] Wall LJ at para 49 describes the High Court's view as "unduly dismissive".

[36] Noted by Laws LJ at para 23.

[37] Some of which took "a particularly unpleasant form" according to Laws LJ at para 31.

amongst some members of the local community. Camp members have also long reported harassment by the authorities.[38] The new Aldermaston byelaws came about as part of a rolling review of the byelaws at all MoD sites, which began in 2004 and is ongoing, in order to ensure that the byelaws meet both the operational and security needs of the MoD and human rights obligations. However, as the AWPC noted, the MoD's prioritisation list included places "many activists and protestors would find familiar" (AWPC 2009, p. 1), and to date Aldermaston is the only site for which the review is complete and new byelaws have been made. For whatever reason, the MoD seems to have decided to up the ante with the AWPC.[39] This is hardly a romantic tale.

However, it is precisely because of the difficulties, the arrests and the harassment, and the legal battles, that this case carries a utopianism within it. The AWPC members have insisted on their own agency despite the cost that protest has extracted from them. *Tabernacle* provides a practical example of Marshall's (2006) argument that the deconstruction of existing power structures, including the liberal, self-present autonomous subject, is not incompatible with the continued existence of the subject. Indeed, I would argue, the deconstruction of existing structures, such as gender, is what liberates the subject to 'be' differently. This is what I see happening in the judgment of the Court of Appeal: it both deconstructs the rather crude sexism of the High Court and promotes, enables and validates the identity of Ms Tabernacle and her colleagues, as defined by themselves rather than by law or the state.

This, in my estimation, is what makes the use of the equation between 'women' and 'peace' worthwhile and justifiable. Here, Charlesworth's suggestion that feminists should not deploy this equation seems counter-intuitive and insensitive to context. It is true that the law reports, and secondary literature such as this note, do present a very one-dimensional view of Ms Tabernacle and her colleagues. We learn nothing about any other aspect of their lives from these sources. But in this context, it is not clear why that is a bad thing. In any case, I would argue, Charlesworth's critique of 'one-dimensionalism' is underpinned by a theoretically questionable figure of the fully present, multi-dimensional, subject. This does not mean that I necessarily disagree with Charlesworth's argument as applied in the context—of international law—in which she writes, but it does mean that feminists should think long and hard before making universalising statements that particular routes, tools or strategies should be considered off limits. Even if the status of the AWPC is in reality epiphenomenal—it does not exist for the sake of existing, of course, but to promote the message of its members regarding weapons of mass destruction—this case is a victory for feminism as well as for the AWPC and for the cause of peace. It would be a shame if feminism were unable to recognise it as such.

[38] See the camp blog, *supra* n 8.

[39] This includes the imposition of some surreal interpretations of the byelaws. For example, the camp blog for 12 August 2007 (*supra* n 8) recounts an incident in which a woman lying at night in a bivouac bag in the Controlled Area was woken by MoD police at hourly intervals, on the basis that lying in a bag awake was not in breach of para 7(2)(f) of the 2007 byelaws, but lying asleep in the same bag constituted camping and so was in breach of that para. This seems to posit a crime, the *actus reus* of which is sleeping.

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