

Tom Mabbott

*Fighting for your right to party*

Music. Everyone loves a bit of it. And, much as we deny it, we all have a passing interest in law. But I think its fair to say that we all appreciate these as two independent entities. Never the twain shall meet, in other words. However, this dichotomy doesn't always work perfectly. Law seems to survive perfectly well without reverting to music but there are odd instances of music reverting to the language of law to makes its point.

The phenomenon first struck me when I was listening to "*Poetry*", a summery little jot by jazz group the RH Factor, which contains the lyrics; "'The overtone of funk is being driven by the students. The benevolence of Roy issued me this jurisprudence". Complete gibberish, I know, but there is a point. I rewound a few times but upon checking, he does indeed utter the word "jurisprudence". Weird. And completely nonsensical.

Likewise, in Blackalicious's tune "*First in Flight*", the MC gives a list of definitions of "free"; underwhelming in itself, were I not in the middle of revising for jurisprudence, for part of which I had to study an essay "Four Concepts of Liberty" by Isaiah Berlin. And then I started a dangerous thought process; working out whether the lyrics conformed to Berlin's view or the Dworkinian, monistic view of Liberty (if anyone other than me cares, he seemed to opt for the former). I then almost slapped myself for being such a loser.

My reasons for drawing attention to the usage of legal language springs from a conversation I had last year with my noble and learned colleague, Sam Dipper. We mused on the workings of those most underrated of all legal philosophers, the Beastie Boys, whose 1986 work "*Licensed to Ill*" clearly purported to pose interesting legal quandaries to the world at large. The title itself takes on legal language; could such a licence even exist legally? I have no idea about the relevant US law on the matter but I can at least consider whether they would have had a valid licence on the UK leg of their tour. A bare license can be created orally (whether this extends to lyrically has yet to be explored by courts) and may arise expressly or impliedly. To know whether the Beastie Boys were so licensed, we need to know what "illin'" would entail. Luckily, they give us an answer on the album; "I am most ill and I'm rhyming and stealing". Here, we hit upon a problem; the courts will not enforce an illegality, so will not allow a license to ill if illing entails theft. However, the 'Boys could argue that the lyrics are misleading and simply say that illing implied rhyming (and perhaps that thieving was just an optional extra) and that refusal to grant a licence would infringe on their Article 10 rights. However, the issue may well be one of consent. Licences cannot be unilaterally assumed but must be granted. Quite who would grant such a licence is unclear; perhaps those arranging a tour, or those who let the Beastie Boys into the country (knowing of their predilection towards illing).

However, whilst the name of the album is itself legally provocative, it is the album's signature song on which I wish to focus. Apparently alien to the ease with which most people can nowadays party in even the scruffiest of trainers (case in point; Moonlighting), they tell us that you gotta "*Fight for your Right to Party*". From a legal stance, this would have been simply impossible in mid-1980's UK law and one might still think it equally difficult today. If me and my friends decide to assemble at a party (let's say at a nightclub), can we

use the Human Rights Act to help us do so and to bring a challenge to any bouncer who unreasonably sends us on our way home? On its face, Article 11 gives freedom to assemble and/or associate, which is perhaps, if one really boils it down, what partying entails. But it is not of course quite so simple.

Firstly, Article 11 doesn't really extend to cover a casual night at the Roxy. It keenly protects protests and demonstrations and even the formation of trade unions (we'll all sleep better for that) but seems to rank a good old boogie as outside of its remit. It isn't quite the right the Beastie Boys would have liked to remedy their deprivation (Freedom to Party, with suitable exceptions for national security, democratic necessity and LSE students, with the right becoming absolute for freshers?). Fortunately for those wishing to indulge, the jurisprudence of the European Court of Human Rights has tended to be expansive on the qualified rights (see, for example, *Malone v UK* on Article 8). As yet, fuelling university students with drink hasn't received the protection of Article 11 but with a few minor mistruths, it could be possible. Firstly, if the nightclub in question could be argued to have a political agenda which refusal to allow entry was a blatant attempt to suppress, then those Strasbourg types might be more inclined to help. However, let's be frank; no-one who I'm willing to help would attend a political soiree. To successfully argue that refusal of a gargantuan bouncer to allow entry to a regular, apolitical, party was an infringement of my fundamental freedoms, a most creative legal argument would be needed; namely, that my right is equal to that of a political protest. I would attempt to do so as such; partying encourages a feeling of inclusion within society and, in an increasingly secular society, for the atheists among us, what comes closer to the mesmerising conformity of religion than belting out "*Mr Brightside*" with arms round your compadres? Also, the ECHR promotes pluralism, attempting not only to block the down-treading of, but also to positively promote, cultural diversity. Clubbing and partying are as much of a culture choice as any others, and the freedom to associate in such a manner is important to free choice and indeed free expression, and thus, arguably, need protection. To further support the Beasties' assertion of rights, Conor Gearty's influential book *Principles of Human Rights Adjudication* advocates a strong judicial intervention whenever there is a deprivation of human dignity and I can hardly think of a greater loss of dignity than hearing the words "You're bladdered, mate. You're not getting in".

So perhaps we've proven that clubbing engages Article 11 (or at least that we might get lucky in having this established). There are still other barriers to a successful claim in *R v Big Fat Bouncer ex parte Disgruntled Clubbers*. Firstly, the amenability of aforementioned big fat bouncer to the Human Rights Act is doubtful. If it were a governmental party and he was a publicly employed bouncer, his refusal would be less of a legal problem (as well as less of a party). Section 6 says that only public bodies are bound but there are ways around this. Firstly, the same section binds the courts, meaning a judgment which gave insufficient regard to Convention rights would itself be a breach of the 1998 Act. Also, assuming that the clubs are acting under a function prescribed by statute (probably the Licensing Act 2003), a challenge against the statute itself could be brought by s3 or s4 of the HRA for permitting its users to violate one's right to party. The attack on the statute is perhaps more unlikely to succeed because the Act strikes the balance needed for Article 11 compliance. Therefore, if a HRA claim is to be brought, it will be best done under s6, ie. the test becomes whether a public body is acting in violation of Convention rights. Fortunately the test for a public body (or, more precisely, a "hybrid" public body, undertaking "functions of a public body") is

becoming increasingly liberal. The test for what functions are of a public nature now more closely resembles the test throughout the rest of public law (following the *Wallbank* decision). This standard is wider than ever before, following the decision in *R v Panel on Takeovers and Mergers ex parte Datafin*, which takes amenability to judicial review further than claims against publicly-funded bodies. Now a more wide and substantive test is used and more closely targets any abuse of power, regardless from what source the power originates. Some of the influencing criteria are that it performs an important public duty, which may seem divorced from the duty of a bouncer but the test is that, were the power not there, a public body would have to be set up. If entry to clubs were unregulated, the government would surely step in (indeed they have already made several statutory interventions), so this criteria might be satisfied. Another *Datafin* criteria successfully satisfied is the use of a judicial-type power, and surely nothing is more based on individual judgment (indeed, individual vindictive bias) than the discretion of a bouncer. Equally, being self-regulated just increases the potential abuse of power, a factor which further increases the *Datafin* susceptibility. All in all, bouncers are surprisingly susceptible to claims under the HRA (at least if the judge follows my slippery reasoning).

However, having established all these introductory questions, it still remains to be seen whether a bouncer would have violated Article 11 ie. whether or not his actions (kicking you onto the proverbial kerb) are disproportionate to his aims (keeping his club clear of Burlington Bertie's notorious drunkards). Judges may well stay clear here on the basis that it's over half a century since any of them last got down with their bad selves. Legally speaking, they may declare that they simply don't have the right types of information at their disposal, show a degree of deference and decide that bouncers have a "discretionary area of judgment" on decisions of inclusion and exclusion. Even if they do decide to assert themselves, the bouncers may well get off via the procedures "prescribed by law" requirement or on the basis of "prevention of disorder". Shame.

All in all, will the claim against a bouncer who excludes you have any success? Erm, no. The average IQ of a bouncer is equivalent to that of an antibacterial soap so they're unlikely to be impressed by a nuanced legal argument influenced by 1980's progressive hip-hop. But, just on the off chance, it's worth a shout.