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A Statute on Statues? Changes to the Law Governing Criminal Damage to Monuments and Memorials

By Fahrid Chishty

Members of the House of Lords have been debating a raft of proposed changes to the criminal justice system in recent weeks. The Police, Crime, Sentencing and Courts Bill 2021-22 ("PCSCB") is approaching its third reading in the Upper House and (if passed) will radically reconfigure elements of criminal procedure in England and Wales. Prominent amongst these reforms are proposals for British Sign Language (BSL) to be introduced at Crown Court trials to assist deaf jurors, Serious Violence Reduction Orders (SRVOs) to combat knife crime in the community and a tightened notification regime for the management of sex offenders. Amidst these major new measures, one may be forgiven for missing Section 46 which refines the law governing desecration to memorials. This article outlines the changes Section 46 seeks to introduce and discusses the implications for protesters, campaigners and defence advocates in an era of polarised public discourse and 'wokeness.'

How does English law penalise damaging memorials?

Desecrating or damaging a memorial is not a discrete offence in English law. It is simply treated as criminal damage, contrary to Section 1(1) of the Criminal Damage Act 1971. At first blush, this makes sense: Section 1(1) draws the contours of the offence broadly and so the need for a more specific offence seemingly falls away. As it stands, for a person to be convicted of criminal damage in English law, they must have destroyed or damaged property belonging to another either intentionally or recklessly, and without lawful excuse. As far as liability is concerned, it is neither here nor there whether the property in question is a Picasso painting or a luxury Lexis or – for that matter - a war memorial.

Put another way, the logic against creating a more specific offence is one of not gilding the lily. It simply would not add to the existing regime to introduce a stand-alone offence when Section 1(1) already does the trick in providing an effective avenue for charging and prosecuting criminal damage to memorials. It

is telling that a Private Members' Bill that sought to create a more specific offence was swiftly shelved when tabled in Parliament in June 2020. Evidently, there was little appetite amongst lawmakers for the move.

In terms of the mode of trial, criminal damage is triable either way. What matters here is the value of the damage caused to the property. If it totals less than £5,000, the case must be tried summarily and the maximum penalty that can be imposed is a three months' custodial term and/or a fine up to £2,500. Where the damage exceeds £5,000, the matter must be sent for trial in the Crown Court and the maximum penalty on conviction would be a ten-year custodial term.

What will Section 46 change?

It is no secret that Section 46 was drafted in response to the events of summer 2020. Following the death of George Floyd in the US, anti-racism campaigns swept across the UK and much of Europe, giving rise to serious debate about equality, diversity and the enduring existence of monuments to slaveowners. On the 7th June 2020, a statue of Edward Colston in Bristol was toppled by protesters and submerged in the local Harbour. Public opinion was - and remains - deeply divided over such issues. It is yet to be seen whether the 'Colston Four' - on trial this week at Bristol Crown Court - will be convicted or acquitted of the Section 1(1) indictments they face. Interest in the trial is so high that even in Omicron conditions mass crowds assemble outside the courthouse each day. Also of interest is the fact the street-artist Banksy has designed a series of t-shirts in order to raise money for the defendants, proving just how deep this debate runs in and across society.

But what exactly does Section 46 propose? Essentially, it makes provision to amend the Magistrates' Court Act 1980 such that the mode of trial for criminally damaging a memorial will no longer be determined by reference to the value of the damage caused. This means that cases of criminally damaging a memorial may be tried on indictment in the Crown Court, even if the value of the damage done is less than £5,000. The government's rationale in tabling this amendment is that damaging memorials can be a very offensive act and that the existing provisions governing the mode of trial - and thus the limited range of sentencing powers available to the court - do not account for the community and emotional impact and fall far short of providing justice.

But what constitutes a 'memorial' for these purposes of the amendment? Is it only memorials proper - such as those dedicated to fallen war heroes - that will be covered by this amendment? Or does the long arm of the amendment extend to the statues of slave-traders too? The PCSCB actually answers this question for us. According to Section 46(2), a memorial is a building, structure or any other thing erected or installed on land or in a building having a "commemorative

purpose". This may be a statue, an abstract piece of art or "a garden or things planted or grown on land". A commemorative purpose is made out if at least one of the purposes of the building, structure or other thing is to commemorate a person or people, an animal or animals, or an event or series of events. Although the jurisprudence of the senior courts will no doubt shed further light on the scope of "commemorative purposes" later down the line, the proposed amendment reads relatively unambiguous. Suffice to say, it is almost certain that statues of war heroes and slave-traders alike will fall within the reach of the amendment.

Implications

The proposed amendment will no doubt cause consternation in some quarters. To many, the amendment is simply a subversive move to protect the statues of controversial historical figures. To others, it is a proportionate and necessary measure to penalise those who commit inexcusable acts of criminal damage against artefacts of local history and heritage. Irrespective of one's moral position, protesters, campaigners and defence practitioners should be aware of the (anticipated) new regime. If the toppling of statues continues to be pursued as a tool of activism and civil disobedience, campaigners should be aware that they place themselves at risk of a Crown Court trial and a potential (albeit unlikely) custodial term of up to ten years on conviction. In reality, it is likely that future decisions to try criminal damage to memorials summarily or on indictment will be fact-sensitive. In any case, Section 46 proposes an interesting and contentious amendment to the existing law which (if approved) may continue to divide opinion as it enters into force next year and begins to be applied in criminal trials.

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