THE GROWING COMPLEXITY OF A HUMAN RIGHT TO ASSEMBLE AND PROTEST PEACEFULLY IN THE UNITED KINGDOM

David Feldman KC*

Policing demonstrations is difficult, and prosecuting people for public order offences arising from protests may risk closing down some channels for democratic engagement. In the United Kingdom, delicate judgements by police, prosecutors and courts have become still more complex as a result of the domestic application, under the Human Rights Act 1998 (UK), of the rights to freedom of expression and of peaceful assembly under the European Convention on Human Rights. When is it permissible to interfere with those rights in order to protect other interests and rights? When is it necessary to strike a balance between them, and who is responsible for doing so? What are the limits of the responsibilities of the police, prosecutors and judges or juries respectively to make judgements about the appropriate balance, and when may a defendant be allowed to say, in answer to a criminal charge, that criminal legislation should be read and given effect in such a way as to respect the defendant's right to freedom of expression or peaceful assembly so as to entitle the defendant to be acquitted? This article examines developments in policing and prosecutorial practice and in case law responding to those issues.

I INTRODUCTION

My friend and sometime colleague Tony Smith is a leading expert on the law, policy and practice of policing to maintain public order in England and Wales.[1] He has criticised the difficulties posed for judges trying to apply case law of the European Court of Human Rights to establish a convincing rationale for justifying police tactics to contain people in restricted spaces in order to limit risks from

* KC (Hon), FBA, Emeritus Rouse Ball Professor of English Law and Emeritus Fellow of Downing College, University of Cambridge; Academic Associate, 39 Essex Chambers, London. I am grateful to the anonymous reviewer of this article for comments and suggestions which have helped me to improve this article significantly. Remaining errors, omissions and eccentricities are my own.

1 See for example ATH Smith *The Offences Against Public Order: Including the Public Order Act 1986* (Sweet & Maxwell, London, 1987).

public disorder ("kettling").[2] This article looks at the complex demands which human rights law makes of police and courts in the United Kingdom as they seek to manage potentially unlawful behaviour by protestors seeking to advance political and other goals. It briefly sets the topic in historical perspective before focusing on more recent cases thrown up by protestors' concerns relating to the environment, climate change, the arms trade, violence against women, and COVID-19. A level of complexity and uncertainty has emerged in relation to the law and practice, and as protest has extended into courtrooms it has generated inconsistency of application and led some judges to resort to the law of contempt of court, another subject on which Tony Smith is an outstanding authority. We shall ask how the new challenges facing police, courts and the public as a result of the human right to freedom of peaceful assembly and protest can best be met.

II A "RIGHT" TO PROTEST IN ENGLAND AND WALES?

Law enforcement officers who police public protests have a difficult task. They must protect the protestors against any counter-protest while allowing everyone to express their points of view to onlookers, passers-by and each other. They must do their best to prevent breaches of the peace while preserving as far as possible people's freedom to go about lawful business and pass unobstructed along highways. All this must often be done in the face of raucousness, verbal or physical aggression and ill humour. At common law in England and Wales police officers historically had broad discretion as to how they balanced these demands, subject to a requirement to act reasonably in the circumstances; save where officers were considered to have made very grave misjudgements or acted egregiously, it was rare for a court or inquiry to hold that a constable had acted unreasonably, as judges recognised that officers had to make difficult judgements in stressful situations with little opportunity to stand back and reflect. This led to a permissive attitude to police action which consequently limited the scope for a "right" to assemble peacefully to protest or travel for that purpose.[3] Indeed, in 1936, Lord Hewart CJ (a judge notoriously unsympathetic to left-wing or libertarian views) noted that:[4]

> … English law does not recognize any special right of public meeting for political or other purposes. The right of assembly, as Professor Dicey puts it,[5] is nothing more than a view taken by the Court of the individual liberty of the subject.

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2 ATH Smith "May Day, May Day: Policing Protest" (2008) 67 CLJ 10.

3 For an extreme example, see *Moss v McLachlan* [1984] IRLR 76 (Divisional Court), where the police were held to have acted lawfully when they stopped striking miners leaving Kent, on the south coast of England, if they were thought to be trying to drive hundreds of miles north to join sometimes violent picket lines at collieries in Nottinghamshire in the north Midlands or Yorkshire or Durham in northern England.

4 *Duncan v Jones* [1936] 1 KB 218 (Divisional Court) at 222.

5 AV Dicey *Law of the Constitution* (8th ed, Macmillan, London, 1914) at 499.

When common law discretion was supplemented with statutory powers, courts tended to be similarly lenient in enforcing any statutory restrictions on the exercise of the powers.[6]

There was an observable pattern in the history of public protest in England and Wales whereby increasingly aggressive or obstructive tactics on the part of protestors resulted in increasingly intrusive and forceful responses from officers, with courts refusing to say that police tactics were unreasonable or otherwise unlawful in the circumstances, and increasingly restrictive legislation being passed to prevent or contain protests. This can be seen repeated in, for example, policing of the campaign for women's suffrage in the first two decades of the 20th century, labour unrest in the third decade and again during the miners' strike in 1983–1984, anti-Nazi protests against Blackshirt demonstrations in the 1930s and racist rallies in the 1960s, and disruption by environmental campaigners of road-building and other major infrastructural works or violent attacks on people moving live animals abroad or hunting wild animals in the 1980s and 1990s.[7]

III ARTICLES 10 AND 11 OF THE ECHR AND THE HUMAN RIGHTS ACT 1998

Under the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly called the European Convention on Human Rights, hereafter ECHR) of 1950, which took effect with regard to the United Kingdom in 1953, several articles imposed obligations on the United Kingdom in relation to policing protests.[8] Article 5 guarantees a right to liberty and security of the person by placing limits on the circumstances in which and conditions on which a person may be deprived of liberty. Article 10 protects freedom to express oneself by requiring that the freedom, which carries with it duties and responsibilities, may usually be interfered with only where the interference is prescribed by law and necessary in a democratic society for one of a number of specified purposes, and art 11 protects freedom of peaceful assembly and to associate with others, subject only to such restrictions as are prescribed by law and necessary in a democratic society for a range of enumerated purposes which overlap those which may be used to justify an interference with freedom of expression. Indeed, arts 10 and 11 tend to march hand in hand in relation to protests. The European

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6 For discussion, see David Williams *Keeping the Peace: The Police and Public Order* (Hutchinson, London, 1967).

7 See on the early period Keith D Ewing and Conor Gearty *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford University Press, Oxford, 2000). For the later 20th century, see Bob Fine and Robert Millar (eds) *Policing the Miners' Strike* (Lawrence and Wishart, London, 1985); Sarah McCabe and Peter Wallington *The Police, Public Order, and Civil Liberties* (Routledge, London, 1988); and Keith D Ewing and Conor Gearty *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford University Press, Oxford, 1990).

8 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953).

Court of Human Rights regards art 11 as *lex specialis* to the *lex generalis* of art 10.[9] These provisions became part of the law in the United Kingdom on 2 October 2000, since when s 6(1) of the Human Rights Act 1998 (UK) has provided that it is unlawful (subject to certain limitations which do not concern us here) for a public authority (such as a police force) to act in a manner incompatible with one of the protected rights.

From the point of view of law enforcement officers, these provisions mean that enforcement action relating to protests can be justified at common law as a reasonably necessary step to prevent or end a breach of the peace which is in progress or reasonably apprehended and imminent as to time and place. That action may nevertheless interfere with Convention rights in ways which may not be justifiable in accordance with the ECHR and the Human Rights Act 1998. Where that is the case, s 6(1) of the Human Rights Act 1998 provides that public bodies and officials act unlawfully if they exercise discretion in ways which interfere with Convention rights in ways that are unjustified in the circumstances of each case. It has been rare for courts to hold police conduct which would have been justifiable and lawful apart from the Human Rights Act 1998 to be unlawful because of it, although an example of such a case is *Regina (Laporte) v Chief Constable of Gloucestershire Constabulary*, where a coachload of people travelling to RAF Fairford to protest against the Iraq War in 2003 were turned back several miles from the site and forced to return to London in a locked coach without stopping on the way.[10] Officers said that they took the action to prevent anticipated breaches of the peace and criminal offences at the boundary of the base, but the House of Lords held that the action was not compatible with Convention rights. Forcing them to go somewhere they did not want to go to in a locked coach deprived them of liberty unjustifiably contrary to art 5, while not letting them get close enough to the base to join the protest was not necessary in a democratic society for a permitted purpose because there had been insufficient ground, in their Lordships' view, to conclude that all those protestors were likely to commit offences or give rise to a breach of the peace.

Where police action is founded on legislation rather than common law, s 6 of the Human Rights Act 1998 ensures that it is not unlawful to give effect to primary legislation even if it is incompatible with Convention rights, ie those specified by s 1 of the Act as forming part of domestic law. Subordinate legislation is, in principle, unlawful to the extent of incompatibility with a Convention right unless primary legislation required it to be made in an incompatible way; but s 3(1) requires all legislation to be read and given effect so far as possible in a manner compatible with Convention rights. As a result, a statutory provision conferring a broadly expressed power on officers to take

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9 Registry of the European Court of Human Rights *Guide on the case-law of the European Convention on Human Rights: Mass protests* (Council of Europe, 31 August 2022) at [20], referring to *Ezelin v France* ECHR 11800/85, 26 April 1991 at [35]; *Schwabe v Germany* ECHR 8080/08 and 8577/08, 1 December 2011 at [101]; and *Hakim Aydin v Turkey* ECHR 4048/09, 26 May 2020 at [41].

10 *Regina (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 5, [2007] 2 AC 105. See ATH Smith "Protecting Protest – A Constitutional Shift" (2007) 66 CLJ 253.

action to control against protests might have to be read as not empowering action incompatible with Convention rights. This applies both to legislation which confers powers to take action such as imposing conditions to limit the place, time, scale and noisiness of gatherings, prohibiting processions, moving people on, requiring people to go home, making arrests or giving fixed-penalty notices, and to legislation creating criminal offences committed by people who breach conditions or act in particular ways in the course of protests. Only when the statute cannot be given effect compatibly with Convention rights will parliamentary sovereignty override ss 3(1) and 6(1).

Laporte's case showed that the advent of Convention rights had shifted a persuasive burden. Previously protestors had been expected to show that officers who sought to prevent them from demonstrating were acting unreasonably, a very high bar which was rarely reached. Where Convention rights were engaged, it was now necessary for enforcement officers to persuade judges that their response to demonstrators had been compatible with Convention rights, and judges appeared to be more willing to scrutinise officers' judgements critically where a Convention right was affected than had been the case before. In what was described as a "constitutional shift", instead of asking whether a decision or action was *Wednesbury* unreasonable, it was now often necessary for the police to show that it was proportionate to a pressing social need in pursuit of a legitimate aim.[11] This did not mean that the police faced an insuperable hurdle to justifying their actions. Other cases showed that judges would continue to view officers' problems sympathetically as long as it could be shown that the situation had been continuously monitored by appropriately senior officers and decisions had been made on the basis of the best available current information. Not only did this mean that very restrictive measures such as "kettling" of crowds of people, most or all of whom were unconnected with a breach of the peace, could sometimes be justified for their own protection; both domestic judges and the European Court of Human Rights surprisingly went so far as to hold that such considerations could affect the circumstances in which people would be regarded as having been deprived of their liberty so as to engage the protection of ECHR art 5, although this interpretation of art 5 has been strongly criticised.[12]

IV THE CLIMATE OF PROTEST AND POLICING IN THE EARLY 21ST CENTURY

Between 2000 and the 2020s, campaigns against the arms trade, globalisation, climate change and environmental degradation, and the Black Lives Matter movement (to name but a few) have involved interfering increasingly aggressively with people's lives and businesses by such means as blocking

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11 See for example *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789 (QB) at 795 per Sedley LJ (before the Human Rights Act 1998 (UK) came into force); and *Regina (Laporte) v Chief Constable of Gloucestershire Constabulary*, above n 10, at [34]–[37] per Lord Bingham.

12 *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] AC 564; *Austin v United Kingdom* (2012) 55 EHRR 359 (ECHR); and for critique of the Court of Appeal's decision (*Austin v Commissioner of Police of the Metropolis* [2007] EWCA Civ 989, [2008] QB 660) see Smith, above n 2.

roads to traffic (including emergency vehicles) and airport runways, causing economic damage as well as personal inconvenience and sometimes danger. There were anti-police demonstrations connected with incidents in which encounters between police officers and women and people of colour led to harassment, violence or death of citizens, and the Black Lives Matter movement coalesced with concern about England's colonial past to generate physical attacks on monuments to people or institutions thought to have benefited from the slave trade and allied activities.

The legislative response to these developments in the era of human rights in domestic law has been largely to introduce new statutory restrictions on protest and new powers to control gatherings. One piece of legislation appeared to buck the trend. The Crime and Courts Act 2013 (UK), s 57 amended s 5 of the Public Order Act 1986 (UK) so that *insulting* words or behaviour likely to cause harassment, alarm or distress ceased to be a criminal offence. But the real effect was very limited, as the Director of Public Prosecutions had advised that no prosecution had been brought in relation to "insulting" words or behaviour where the words or behaviour could not equally have been described as "abusive",[13] so the word "insulting" had been redundant. Threatening or abusive words or behaviour likely to cause harassment, alarm or distress remain an offence under s 5.

More typically, legislation has extended the criminalisation of assemblies and extended the powers of police and courts to take countermeasures. Successive conservative governments have flirted with trying to limit the effect of Convention rights. At the time of writing (late 2022 and early 2023) a Bill of Rights Bill was before Parliament,[14] designed to restrict availability of judicial remedies for violating fundamental rights under the ECHR in order to inject what the then Secretary of State for Justice Dominic Raab called a "healthy dose of common sense".[15] Legislation (primary but to a greater degree subordinate) introduced in response to the COVID-19 pandemic, imposing a precautionary approach to permitting contact between people, had a significant impact on freedom to assemble either to protest or to mark or memorialise deaths from the actions of police officers or from the pandemic. Part 3 of the Police, Crime, Sentencing and Courts Act 2022 (UK) then significantly extended powers both to impose conditions on public assemblies and processions, and to impose criminal liability and maximum sentences for offences related to protests in response to campaigns of disruption to transport links and related infrastructure projects (for example, work on the HS2 high-speed railway line being built between London and the Midlands).

Most recently, the Public Order Act 2023 (UK) contains provisions introduced because the Government was frustrated by a rash of protests in which protestors brought traffic and other activities

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13 (12 February 2013) GBPD HC 407 (Crime and Courts Bill – Public Bill Committee, Jeremy Browne).

14 Bill of Rights Bill 2022 (117), which was withdrawn from the House of Commons without a second reading on 27 June 2023.

15 Dominic Raab "New bill of rights will deliver a healthy dose of common sense" *The Times* (online ed, United Kingdom, 14 December 2021). See also Ministry of Justice "Bill of Rights to strengthen freedom of speech and curb bogus human rights claims" (press release, 22 June 2022).

to a halt by gluing or locking themselves to roads, railings and other fixtures, and the police feared that protests would disrupt the coronation of King Charles III in May 2023. Section 1 of the Act makes it an offence to lock on to another person, to an object or to land in a way that causes or is capable of causing serious disruption to two or more people or an organisation where the accused person intends that act to have such a consequence or is reckless as to whether it will have such a consequence. There is a defence if the accused proves that he or she had a reasonable excuse for the act. Section 2 makes it an offence to be equipped for locking on, a provision used by the police to justify arresting people at the King's coronation who were in possession of placards and items to secure the placards rather than to secure themselves to anything; the Metropolitan Police later reviewed the arrests and decided to take no further action.[16] Sections 3 to 5 criminalise tunnelling, causing serious disruption by being present in a tunnel and being equipped for tunnelling, respectively. Sections 6 and 7 outlaw obstruction of persons undertaking major transport works and interfering with the use or operation of any key national infrastructure. Section 9, on a slightly different tack, prohibits seeking to influence, obstruct or harass anyone in a "safe access zone" who is trying to make use of abortion services at an abortion clinic. (As explained below, this was required in order for the United Kingdom to comply with its obligations relating to availability of abortion under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).)[17] Subsequent provisions confer on the police a power of stop and search, including in some circumstances search without suspicion that the person searched has committed an offence. Other provisions include making available serious disruption prevention orders imposing significant burdens on their subjects following conviction,[18] and allowing the Secretary of State to obtain injunctions against people carrying out protest activities which the Secretary of State reasonably believes to be causing or likely to cause serious disruption to use or operation of key national infrastructure or access to essential goods or services in England and Wales, or to be having or likely to have a serious adverse effect on public safety in England and Wales.[19] "Serious disruption" occurs when, among other consequences of protests, there is any delay that is "more than minor" in receiving or accessing time-sensitive or essential products or services, very broadly defined.[20] This makes it possible to take action not only against people who block roads but also against those who hinder the traffic by walking slowly.

This is not the place to attempt a detailed analysis of these provisions. One can, however, make two general comments. First, the various restrictive measures may potentially have a major impact on

16 Metropolitan Police "Update: Arrests made during policing operation for the Coronation" (8 May 2023) <https://news.met.police.uk>.

17 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981).

18 Public Order Act 2023 (UK), ss 20–29.

19 Sections 18 and 19.

20 Section 34.

people's freedom to take part in protests, whether peacefully or not. As a corollary, they repose great responsibility in the police in the first instance, and in prosecutors and courts subsequently, for protecting Convention rights of people affected by them, but those responsibilities are not spelt out in the legislation. Instead, these important matters are to be elucidated in codes of practice or guidance, which already proliferated and, as we shall see, had only limited success in ensuring that the police exercised their pre-existing powers in a lawful (including Convention-compatible) manner.

Secondly, the measures were presented on the footing that the extent and types of protests being employed by campaigners now is qualitatively different from the type and effect of tactics used by campaigners in the past. This was fallacious. Suffragettes campaigning for votes for women in the early years of the 20th century used "locking-on" extensively. Campaigners against major infrastructure projects on ecological grounds used tunnelling, tree-climbing and locking-on regularly in the 1980s and 1990s. Daniel Hooper, an environmentalist, known as Swampy, was famous for having spent a week in a tunnel underground in 1996 to try to stop work on an enlargement of the A30 in Devon, and he was not alone. The Government also assumed that existing laws were not adequate, but seems to have made no detailed assessment of what was needed to maintain a proper balance between freedom of assembly and protest and the liberty of other people to go about their business. It is not clear that this was the case. While many people have been impatient at the inability or unwillingness of police forces to remove and detain protestors who block roads and otherwise inconvenience people, the main factor constraining police action has been the need to take proper account of the rights to freedom of expression, peaceful assembly and protest alongside the right to go about one's lawful business. The Government (and Parliament) gave overriding weight to facilitating "business as usual" and very little to the contribution of protests to public debate and political action concerning issues of vital public importance such as climate change and environmental degradation. Freedom of speech and of assembly go hand in hand, and both have been weakened without sufficient scrutiny of the justification for doing so. The new measures will still need to be applied in ways that take account of all the rights and duties that are in play, so the best hope of finding an appropriate balance lies in careful, case-by-case assessment by police, prosecutors and courts in the light of circumstances rather than in passing more, necessarily generalised legislation.

Indeed, while Government and legislature have gone in one direction, there have been signs that judges are heading in a somewhat more nuanced direction, responding positively to invitations from advocates to use Convention rights in ways which impose some limits on the application of criminal penalties on demonstrators in some circumstances while still giving weight to the needs and convenience of people adversely affected by protests. They are actively exploring the relationship between the interpretation of legislation (including criminal provisions), police discretion in the exercise of their powers, and the operation of Convention rights. This is not easy, and judges are feeling their way, somewhat tentatively, towards balanced outcomes; but there can be little doubt that this gradual process can significantly complicate the tasks of police and prosecutors as well as trial courts. This is not the fault of courts or lawyers: it is a result of the weakness of understanding on the

part of the Government, Parliament and police officers at all levels that Convention rights form a structure within which public authorities must work unless primary legislation unequivocally requires them to disregard them.

V RECOGNISING THE EXERCISE OF CONVENTION RIGHTS AS "LAWFUL EXCUSE" FOR SOME OTHERWISE UNLAWFUL ACTS

A first clear indication that this process was under way and could be burdensome came when the Divisional Court decided *Director of Public Prosecutions v Ziegler*.[21] The defendants had blocked a road approaching the venue of an arms fair to protest against the arms trade, lying in the road and attaching themselves to lock boxes to make it more difficult for police to remove them. They did not respond to efforts by the police to persuade them to leave. The police eventually managed to remove them and they were charged with wilfully obstructing a highway without lawful excuse. They accepted that they had caused an obstruction, but argued that they had a lawful excuse in that they were exercising their right to freedom of expression pursuant to art 10 of the ECHR and freedom of assembly under art 11, as given effect in domestic law by the Human Rights Act 1998, so it would be contrary to s 6 of the Act (which makes it unlawful for a public authority to act in a manner incompatible with a right under the Convention) to convict them. The District Judge (Magistrates' Court) accepted the argument and acquitted them. The prosecutor appealed to the Divisional Court of the Queen's Bench Division, where Singh LJ and Farbey J agreed with the Magistrate that to decide whether the defendants had a "reasonable excuse" it was necessary to make a case-by-case assessment of the proportionality of an interference with arts 10 and 11 rights by convicting protestors of a criminal offence. Whilst the Court disagreed with the District Judge's proportionality assessment and so convicted some of the defendants[22] (while holding that it had no jurisdiction in the case of other defendants because the prosecution's appeal in those cases had been brought out of time), the Divisional Court's judgment established that exercising Convention rights could constitute a "reasonable excuse" where that was available in relation to an offence. It was on that basis that the Court of Appeal held that restrictions subsequently imposed by COVID-19 regulations subject to a "reasonable excuse" being shown were not inherently incompatible with Convention rights.[23]

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21 *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin), [2020] QB 253 [*Ziegler* (Divisional Court)].

22 The Supreme Court by a majority reversed this aspect of the decision: *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 [*Ziegler* (SC)].

23 *Regina (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 WLR 2326.

The remainder of this article considers how this is happening and what it shows about the interaction of common law, statutes, criminal law, police and prosecutorial powers and Convention rights at a time when judicial protection for human rights is under severe political pressure.

VI POLICE DISCRETION AND OVERLAPPING LEGAL REGIMES

Police in the United Kingdom faced special problems during the various periods of lockdown imposed to control the spread of COVID-19 in 2020 and 2021.[24] A series of regulations made under the Public Health (Control of Disease) Act 1984 (UK) as amended in 2008 imposed restrictions on leaving one's home or gathering in public, subject in most cases to an exception if one had a "reasonable excuse" for acting inconsistently with the restrictions. In *Regina (Dolan) v Secretary of State for Health and Social Care*, it was held that the restrictions were not themselves incompatible with qualified Convention rights because the "reasonable excuse" provisions allowed for an assessment of whether an outing or gathering was lawful as a legitimate exercise of a Convention right such as the right to private and family life.[25] This applied equally to the rights to freedom of expression and assembly. Where an assembly was planned, this meant that the police, when deciding to exercise their powers to prohibit or impose conditions on gatherings or issue fixed-penalty notices to organisers (who faced very high penalties) or participants (who faced less devastating financial penalties on a first occasion but progressively higher penalties for subsequent breaches of the regulations), should have considered in relation to each case whether the effect of exercising or threatening to exercise those powers would, through the immediate impact or chilling effect, constitute an interference with Convention rights where the interference was prescribed by law and necessary in a democratic society for a legitimate aim.

Nobody doubted that the aim of limiting the spread of infection with COVID-19 served the legitimate aim of protecting health. It was more difficult to say whether taking action was necessary in a democratic society; that is, whether it was necessary for the purpose, went no further than necessary, and was proportionate to the significance of the interference with the right. The College of Policing and National Police Chiefs' Council issued guidance about enforcement, stressing the need for a proportionate approach and advising forces to follow the "four Es": police who suspected that people were breaking the regulations should first engage with them, then explain what the regulations require and encourage them to comply, and move to enforcement only if all else fails.[26] In addition,

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24 An outstanding review of the impact of COVID-19 regulations on public protest is David Mead "Policing Protest in a Pandemic" (2021) 32 KLJ 96.

25 *Regina (Dolan) v Secretary of State for Health and Social Care*, above n 23.

26 The lawfulness of such guidance can be judicially reviewed and declared to be unlawful if it encourages behaviour which would be unlawful: see *Regina (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931 at [38]–[48], applied in *Regina (Miller) v College of Policing* [2021] EWCA

each police force developed its own guidance and policies. There was almost a surfeit of guidance, itself giving rise to a risk of inconsistency and misunderstanding, and this was reinforced by a combination of lack of clarity about the state of the law and absence of clear directions that police should conduct a human rights compatibility assessment of all steps which would interfere with a Convention right, including public gatherings. As a result, police action was variable and on occasions unlawful.[27]

This can be illustrated with two, contrasting examples. At one extreme, the Police Service of Northern Ireland decided not to intervene overtly when the funeral of Bobby Storey attracted a huge crowd of people who were packed together without social distancing or masks. Storey was a divisive figure in Northern Ireland politics. He had joined the IRA in 1972, was interned from 1973, and after his release he was imprisoned in 1981 for possession of a firearm in connection with an attack on the Army. After his release in 1994 he is said to have been head of intelligence for the IRA and he had been linked to major criminal incidents. A close ally of Sinn Féin president Gerry Adams, he became chairman of Sinn Féin in Northern Ireland. His funeral procession in June 2020 included large crowds of Republicans and political speeches were made at a time when people were being prevented from attending family funerals and were facing far stricter enforcement of regulations. The organisers, however, had consulted the police in advance, and the Director of Public Prosecutions decided that this, together with lack of clarity and coherence in the regulations, would make it impossible to bring a successful prosecution.[28]

At the other extreme, in London in March 2021 a group wanted to hold a vigil on Clapham Common on 13 March 2021 for Sarah Everard, who had been abducted and murdered by a Metropolitan Police Officer, Wayne Couzens, who later received a whole-life sentence for her kidnap and murder. The group, *#ReclaimTheseStreets*, wanted to draw attention to risks facing women in public places and campaign to change attitudes to violence against women. The group advertised the event, advising people attending to observe social distancing guidelines and wear masks. The

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Civ 1926, [2022] 1 WLR 4987 (holding aspects of guidance on recording "non-crime hate incidents" to be unlawful and in need of revision) at [105]–[106] per Dame Victoria Sharp P.

27 In *Regina (Leigh) v Commissioner of Police of the Metropolis* [2022] EWHC 527 (Admin), [2022] 1 WLR 3141, discussed below, for example, police followed guidance from the College of Policing and National Police Chiefs' Council and also that from the Metropolitan Police, none of which expressly stated that they should undertake an assessment of the effect of proposed police action on the group's members' rights to freedom of peaceful assembly and freedom of expression. As a result their attempt to justify any interference with rights to freedom of expression and peaceful assembly fell at the first hurdle of failing the "prescribed by law" test.

28 His Majesty's Inspectorate of Constabulary and Fire and Rescue Services' (HMICFRS) report on the policing of the incident largely concluded that the police had acted justifiably and had not discriminated in favour of Republicans in their decision-making: HMICFRS *The Police Service of Northern Ireland: An Inspection into the Police Service of Northern Ireland's Handling of the Bobby Storey Funeral on 30 June 2020* (17 May 2021).

Metropolitan Police Service advised the group that the gathering would breach the coronavirus regulations and refused to rule out enforcement action against the organisers and other participants. As a result, the organisers cancelled the event, although a number of people attended for a peaceful vigil. Later a more belligerent group hijacked the event, and the police made nine arrests (eight for breaches of the regulations and one for threatening or abusive words or behaviour likely to cause harassment, alarm or distress contrary to s 5 of the Public Order Act 1986). Eight of the people arrested were de-arrested at the scene having given their names and addresses. Nine fixed-penalty notices were issued under the regulations, eight of the recipients being people who had previously been arrested. Two people were taken into custody, one later receiving a fixed-penalty notice and the other being released under investigation.[29]

At this stage, it seems that the police did not consider that there was a need to take account of the duty to protect people's right to freedom of assembly and protest under ECHR art 11 when developing a response to a proposed gathering. The police were not alone in this. In his illuminating study of policing protest in the pandemic, Professor David Mead wrote that, in the absence of specific permission in the regulations to conduct protests, the idea of a "reasonable excuse" for a gathering would have effect only if people were charged with offences and came to court having been removed from the site of the protest.[30] Once judges got their hands on it, however, this turned out to be an over-simplification. The original organisers of the vigil for Sarah Everard sued the Metropolitan Police Commissioner for violating their Convention rights by making decisions which had a chilling effect on the exercise of their art 11 rights. In *Regina (Leigh) v Commissioner of Police of the Metropolis*, the Divisional Court (Warby LJ and Holgate J), following the earlier judgments in *Ziegler* and *Dolan*, held that the police had misunderstood the law and so had failed to undertake a proportionality assessment when liaising with the organisers.[31] In order to comply with their responsibilities, the police should have considered the factors set out in the judgment of the Divisional Court in *Ziegler* and by Lord Hamblen and Lord Stephens JJSC in the Supreme Court in the same case:[32]

- the nature and extent of any potential breach of domestic law;
- the importance of the issues and the depth of concern about them giving rise to the protest, bearing in mind that, under Strasbourg jurisprudence, hate speech and some criminal speech carry very low weight but expression on political topics carries very high weight;

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29 HMICFRS reported on 30 March 2021 on the policing of the event, largely concluding that the police acted appropriately: HMICFRS *The Sarah Everard Vigil: An Inspection of the Metropolitan Police Service's Policing of a Vigil held in Commemoration of Sarah Everard on Clapham Common on Saturday 13 March 2021* (30 March 2021).

30 Mead, above n 24, at 101.

31 *Regina (Leigh) v Commissioner of Police of the Metropolis*, above n 27.

32 See *Ziegler* (SC), above n 22, at [13], applied in *Regina (Leigh) v Commissioner of Police of the Metropolis*, above n 27, at [13]; and *Ziegler* (Divisional Court), above n 21, at [63]–[64] and [96].

- the extent to which the protest would itself interfere with other people's rights;
- the likely duration of the protest;
- the nature and extent of prior notice to and cooperation with the police; and
- the nature of any precautions proposed or considered in order to ameliorate potentially harmful effects of the gathering.

In addition, one must consider the significance of the actual or proposed location for the gathering, bearing in mind that a particular place may have symbolic significance for protestors and others.[33]

In the Divisional Court in *Ziegler*, the Court had anticipated that, when the issue arose in the course of a prosecution, the decision would usually come down to an assessment of proportionality according to those criteria.[34] The position is different, however, when a case concerns the lawfulness of decisions or actions concerning a protest before or during the event. Here, if officers fail to make an adequate assessment of proportionality in relation to people's potential "reasonable excuses", they act unlawfully regardless of the likely outcome of such an assessment had it been properly made. In *Leigh*, therefore, having found that the police had failed to make an assessment because they had not understood that one was legally required, the Divisional Court found no need to make its own proportionality assessment: the decisions made by the Metropolitan Police had been unlawful, and so failed to meet the initial requirement for justifying an interference with arts 10 and 11 rights under the ECHR and the Human Rights Act 1998 that it be "prescribed by law".[35]

VII NARROWING ZIEGLER*: SIMPLIFYING THE LAW?*

Director of Public Prosecutions v Ziegler made it clear that Convention rights to freedom of expression and freedom to protest could have an impact on the criminal process as well as police powers. In the Supreme Court, there were two issues for decision: first, the test for deciding whether to reverse a first-instance judge's decision as to the proportionality of an interference with a Convention right; secondly, whether, where a statute provides a defence where a person has a reasonable excuse for carrying out a prohibited act, there is a "reasonable excuse" if the person acted in the exercise of the Convention right to freedom of expression or freedom of peaceful assembly.[36] On the first point, the majority (Lords Hamblen and Stephens JJSC in a joint opinion and Lady Arden JSC in a separate opinion; Lord Sales JSC, with whom Lord Hodge DP agreed, dissented) held that the Divisional Court should not have reversed the stipendiary Magistrate's carefully reasoned conclusion that in the circumstances it would have been a disproportionate interference with the

33 *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039 at [39] per Lord Neuberger MR, cited in *Ziegler* (Divisional Court), above n 21, at [96].

34 *Ziegler* (Divisional Court), above n 21, at [65].

35 *Regina (Leigh) v Commissioner of Police of the Metropolis*, above n 27, at [12] and [107].

36 *Ziegler* (SC), above n 22.

defendant's right to freedom of expression and peaceful assembly to have convicted him of the offence. On the second point, all the Justices agreed with the Divisional Court that a defendant may have a "reasonable excuse" for obstructing the highway by reference to his or her rights under ECHR arts 9, 10 and 11, although there was disagreement as to the application of the Convention to the facts.

At one level, this is a small but significant step in implementing Convention rights. At the same time, it generates difficulties for law enforcement and requires first-instance criminal tribunals to make difficult, contested assessments of a balance between competing rights and interests. Problems are of two kinds. First, it is hard to know the scope of the decision in *Ziegler*. Does it apply only to prosecutions under the Highways Act 1980 (UK), s 137, or is it authority for a wider principle applying to any offence which is subject to a "lawful excuse" or similar exception, or even applicable to any offence arising out of an activity which falls within the scope of arts 9, 10 or 11 of the ECHR regardless of the character of the offence charged? The last of these possibilities would be truly radical, amounting potentially to a defence of conscientious exemption from any criminal liability.[37]

Soon after the Supreme Court's judgment in *Ziegler*, the Queen's Bench Divisional Court (Lord Burnett CJ and Holgate J) rejected this possibility in *Director of Public Prosecutions v Cuciurean*.[38] The defendant had been a member of a party of environmental protestors tunnelling under part of the route of the HS2 railway-building project with a view to stopping or delaying construction work on the site. He was charged with aggravated trespass contrary to s 68 of the Criminal Justice and Public Order Act 1994 (UK), which made it an offence to trespass on land where people were carrying on or proposing to carry on lawful activities with a view to intimidating them to deter them from conducting those activities or obstructing or disrupting the activities. There was no "lawful excuse" exception. In the Magistrates' Court the Deputy District Judge decided that, following *Ziegler*, she had to acquit the defendant because the prosecutor had not satisfied her that conviction would be a proportionate interference with the defendant's rights under ECHR arts 10 and 11. The prosecution appealed successfully by case stated to the Divisional Court, which held that the need for a *Ziegler*-type proportionality analysis arose only where the definition of a criminal offence was subject to a "lawful excuse" exception. Public order offences which do not include such an exception do not require it. The Court also cast doubt on the idea that rights under arts 10 and 11 were applicable at all where the defendants were trespassers on property belonging to someone else; the European Court of Human Rights had rejected a claim that those articles give people a right to protest on other people's land, even if the general public are allowed access to the land for the purpose of the landowner's retail business.[39]

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37 On a wide-ranging right of conscientious exemption, see John Adenitire *A General Right of Conscientious Objection: Beyond Religious Privilege* (Cambridge University Press, Cambridge, 2022).

38 *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888.

39 *Appleby v United Kingdom* (2003) 37 EHRR 38 (ECHR).

This, however, is problematic. In England and Wales, everywhere belongs to someone, and it is difficult to establish a legal right to use land belonging to someone else except with the owner's permission or for a limited purpose. Public assemblies and demonstrations rely on those who own property not enforcing their rights. There is a strong argument for changing the law to make freedom of assembly for political expression a permitted purpose for which other people's land may be used, subject to appropriate restrictions as to time, manner and place, in order to maintain the reality of public, political expression which underpins a functioning democracy, alongside other activities which members of society should be able to undertake in order to advance their rights, welfare and dignity. Professor Kevin Gray referred to such rights as advancing "equitable property", in the light of the ideas that property is allowed to people because of the public benefit that it confers, that it carries with it responsibilities to others and that the scope for excluding people can properly be restricted for the public good.[40] This resonates powerfully with a generation who for several years suffered significant restrictions on their freedom to leave their homes during the COVID-19 pandemic. Failing to act accordingly treats land as a private commodity and makes a sensible resolution of tension between the interests of owners and the freedoms of others nearly unattainable.

The Divisional Court in *Cuciurean* certified that the case raised issues of general public importance suitable for consideration by the Supreme Court and gave permission to appeal, but the defendant did not pursue the appeal. Nevertheless, the Supreme Court soon had the opportunity to consider issues arising from *Ziegler* in a devolution case from Northern Ireland. In *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill*, the Northern Ireland Assembly (the devolved legislature for Northern Ireland) had passed a Bill to protect the rights of women seeking a lawful termination of pregnancy in Northern Ireland.[41] Abortion had long been a divisive issue in Northern Ireland as in many other places. It had been unlawful until changes were introduced by the United Kingdom Government during a period when the Northern Ireland Assembly was not sitting. The Northern Ireland (Executive Formation etc) Act 2019 (UK), s 9(1) imposed on the Government an obligation to amend by statutory instrument the law of Northern Ireland in accordance with the United Kingdom's obligations in international law under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in accordance with recommendations in a report by the Committee on the Elimination of All Forms of Discrimination Against Women, the treaty body for CEDAW, which had inquired into and reported on a complaint by pro-choice organisations in Northern Ireland that the law of Northern Ireland, allowing only very restrictive access to abortion services, violated the Convention. Section 9(2) repealed, for Northern Ireland, provisions of the Offences against the Person Act 1861 (UK) 24 & 25 Vict c 100 which had made it a criminal offence to attempt to procure an abortion.

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40 Kevin Gray "Equitable property" (1994) 47 CLP 157.

41 *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] 2 WLR 33.

Early in January 2020, the Northern Ireland Assembly and Executive were restored, but the Secretary of State made the Abortion (Northern Ireland) Regulations 2020, despite 79 per cent of respondents to a consultation having opposed change.[42] There was strong opposition in Northern Ireland to the changes, and when abortion services started to operate access was made difficult by anti-abortion protestors taking up positions near the entrances to public and private health facilities and forcing baby dolls and pro-life literature on people entering the facilities, while begging them not to "murder" their babies. This had been regarded by the CEDAW Committee as harassment. Picketers also filmed individuals, held up bibles and religious pictures, held prayer services or silent prayer vigils, gave advice contrary to that given by doctors, gave exaggerated and inflated estimates of clinical risk and generally caused distress and confusion to women seeking services. The protests were not violent but caused stigma, intimidation, alarm and distress to women making an already very difficult, emotionally sensitive decision.

In response to this, a Private Member's Bill was introduced to the Northern Ireland Assembly to create "safe zones" for "protected persons" around "protected premises", a designated area not exceeding 150 metres from an entrance to health facilities from which protestors would be excluded by law.[43] Entering the zone would be a criminal offence. During consideration in the Assembly, a defence of "reasonable excuse" was removed from the Bill. After extensive debate the Bill was passed, but the Attorney-General for Northern Ireland referred to the Supreme Court the question whether s 5(2)(a) of the Bill, making it an offence within a safe access zone "to do an act with the intent of, or recklessness as to whether it has the effect of … influencing a protected person, whether directly or indirectly", was within the Assembly's legislative competence. That competence does not include legislating in a manner incompatible with a Convention right, and it was suggested that the subsection would violate protestors' rights to freedom of conscience and belief, freedom of expression and freedom of peaceful assembly under ECHR arts 9 to 11. It was argued in particular that the absence of a "reasonable excuse" defence or exception prevented a case-by-case assessment of proportionality and in that way made the provision ultra vires.

The judgment of a seven-Justice bench of the Supreme Court (none of whom had sat in *Ziegler*) was delivered by Lord Reed P, with whom the others agreed. The first issue was the test for whether a Bill of one of the devolved legislatures would be outside competence on the ground of being incompatible with a Convention right by reason of an absence of proportionality. In *Christian Institute*

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42 HM Government *A new legal framework for abortion services in Northern Ireland: Implementation of the legal duty under section 9 of the Northern Ireland (Executive Formation etc) Act 2019 – UK Government consultation response* (March 2020) at 9.

43 The United Kingdom Parliament made equivalent provision for England and Wales in the Public Order Act 2023 (UK), s 9. In Scotland, a consultation is under way with a view to a Bill being introduced to the Scottish Parliament: see Gillian Mackay *Proposed Abortion Services (Safe Access Zones) (Scotland) Bill: A proposal for a Bill to introduce safe access zones around healthcare settings that provide abortion services* (9 May 2023).

v Lord Advocate, Baroness Hale DP, Lord Reed and Lord Hodge JJSC in a joint judgment with which the other Justices agreed had said that a legislative provision would survive such a test if capable of being operated in such a way that "it will not give rise to an unjustified interference with article 8 rights in all or almost all cases".[44] This is ambiguous, but what was meant was that the legislation would be within competence unless in all or almost all cases it would be impossible to give effect to it in a compatible manner. By contrast, in *Re McLaughlin*, Baroness Hale P in a judgment with which Lord Mance DP, Lord Kerr and Lady Black JJSC agreed said that legislation would be outside competence if it would "inevitably operate incompatibly in a legally significant number of cases", citing (or mis-citing) *Christian Institute*.[45] In *Re Abortion Services*, Lord Reed P firmly reasserted the formulation in *Christian Institute*. This is a sensible step, as it tends to uphold the competence of otherwise valid legislation and avoid too closely confining the law-making of democratically accountable legislatures.

Against that background, the Court considered whether it would be impossible to give effect to s 5(2)(a) without a "reasonable excuse" exception in a Convention-compatible manner in "all or almost all" cases. *Ziegler* was relevant because, if that judgment had the effect of requiring a "reasonable excuse" requirement to be read into s 5(2)(a) despite the Assembly's conscious, carefully considered decision to remove such a requirement from the Bill, it would have automatically saved the Bill. That decision, however, would have nullified the Assembly's judgement, after much debate, as to the proportionality of the provision even without an exception. The Court carefully considered the discussion of *Ziegler* by the Divisional Court in *Cuciurean*. Contrary to the Supreme Court's view in *Ziegler*, the Supreme Court in *Re Abortion Services* did not accept that an appellate court could depart from a trial judge's assessment of proportionality only if that assessment could be said to be unreasonable: proportionality was not a question of fact but one of law, or application of law to facts, and in the context of alleged interference with a Convention right appellate courts are not limited to asking whether the trial court's assessment is unreasonable but must make their own assessment.[46] But the Court in *Re Abortion Services* went on, following the Divisional Court in *Cuciurean*, to stress that *Ziegler* did not lay down a general requirement for courts to assess proportionality of an interference with Convention rights under arts 9, 10 or 11 in the circumstances of each individual case whenever those rights might be engaged. Not only is proportionality a legal rather than purely factual matter, but there are many statutes which can be treated as interfering proportionately with Convention rights because the statutes themselves ensure that their application in individual cases will meet the requirement of proportionality without needing that to be assessed on a case-by-case basis.[47] Some restrictions on Convention rights are inevitably proportionate, for example because of the seriousness

44 *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 at [88].

45 *Re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250 at [43].

46 *Re Abortion Services*, above n 41, at [30]–[33].

47 At [34]–[41].

of the harm which the restriction aims to prevent and the relative triviality of the consequences of conviction, because it will always be proportionate to limit freedom of assembly to protect property rights[48] (so that there is no need for a proportionality assessment to be included in the offence of aggravated trespass for which trespass on another's land is an essential element of the offence),[49] or because the nature of the offending behaviour is such that Convention rights are not engaged.

In addition, the Supreme Court did not accept that it would always be necessary to conduct a proportionality assessment even where a statute provides a "lawful excuse" exception. The protestors might have behaved in a way that took them outside the protection of the rights, for example by reason of their violent intentions, incitement to violence or rejection of the foundations of a democratic society,[50] of which *Attorney General's Reference (No 1 of 2022)*, considered further below, where protestors pulled down and significantly damaged a statue belonging to a local authority, was regarded as an example.[51] Article 17 of the ECHR, providing that the Convention does not confer a right to do things aimed at the destruction of any Convention right or restriction of the rights to a greater extent than provided for in the Convention, might apply. Even if the right is engaged, the ingredients of the offence themselves might strike the proportionality balance appropriately. If they do not prevent a lack of proportionality in an individual case and the offence is statutory, the court might be able to prevent a violation of the right by reading and giving effect to the provision in a Convention-compatible manner in accordance with s 3(1) of the Human Rights Act 1998. If that is impossible, however, courts must give effect to the statute in accordance with its terms, even if the result is that a declaration of incompatibility might later be made in respect of the provision. Where the offence is created by subordinate legislation, provisions will generally be unlawful and invalid to the extent of any incompatibility with a Convention right. In the case of a common law offence, the court must, as a public authority within the meaning of s 6(1) of the Human Rights Act 1998, develop the law if possible to avoid incompatibility.[52]

It followed that a statutory criminal provision limiting freedom of protest would not necessarily have to include a "lawful excuse" exception and permit a court to conduct a review of proportionality in the circumstances of an individual case, because absence of such an exception (express or implied) does not necessarily make a conviction an unlawful interference with a Convention right. The legislature is entitled to make a general judgement, and the Supreme Court decided that in the general

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48 *Richardson v Director of Public Prosecutions* [2014] UKSC 8, [2014] AC 635 at [3] per Lord Hughes JSC, approved in *Re Abortion Services*, above n 41, at [50].

49 *Director of Public Prosecutions v Cuciurean*, above n 38.

50 *Kudrevičius v Lithuania* (2016) 62 EHRR 34 (Grand Chamber, ECHR) at [92].

51 *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259, [2023] 2 WLR 651. See *Re Abortion Services*, above n 41, at [54].

52 *Re Abortion Services*, above n 41, at [55]–[61].

circumstances prevailing in Northern Ireland in relation to protests outside abortion facilities, bearing in mind the objectives of the Northern Ireland Assembly in passing the Bill, the interference with Convention rights was proportionate. Section 5(2)(a) of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill was accordingly not beyond the legislative competence of the Northern Ireland Assembly.[53]

It makes perfect sense to adopt an approach to legislation of the Northern Ireland Assembly which avoids unduly confining its legislative competence. A court should be cautious before ruling that a legislative provision is invalid; it is usually better to test individual exercises of the law to see, on a case-by-case basis, whether it has been given effect in a Convention-compliant manner. The help offered to the police when applying the legislation in specific situations does not, however, avoid practical complexity. One can see this by reflecting that, in *Ziegler*, the police's removing the protestors from the road in order to allow free passage was not a disproportionate and hence unlawful interference with their Convention rights, yet the Magistrate was entitled to conclude that convicting them of the offence of wilfully obstructing the highway would have interfered with their rights in a way that would not have been proportionate. The defendants' removal being lawful, the defendants could not have successfully sued the police for false imprisonment, but once the road was clear, imposing criminal sanctions was no longer necessary. Now, however, prosecutors must take account of protestors' Convention rights when deciding whether to authorise a prosecution for obstructing the highway. Looking at the two-part test followed by the Crown Prosecution Service in England and Wales for authorising prosecutions, where a suspect is likely to be able to establish having been motivated by a sincere desire to protest on a matter of public interest, the likelihood of obtaining a conviction (the first element of the test) is less likely to be satisfied and it may also be questionable whether there is a sufficient public interest in bringing a prosecution (the second element of the test). The prosecutor would, on the other hand, need to consider that assessments of proportionality are often finely balanced. Different first-instance tribunals might legitimately reach different conclusions, and appellate courts will be as cautious about rejecting a tribunal's conclusion that conviction would be a proportionate, and thus lawful, interference with a Convention right as they will be before overturning the tribunal's judgment that the interference would not be proportionate.[54]

VIII CHARGING DECISIONS WHERE MORE THAN ONE OFFENCE IS POTENTIALLY APPLICABLE

An additional element for prosecutors to consider is which offence to charge where there are two or more covering the factual situation. The discretion of prosecuting authorities to charge people with offences carrying greater penalties or fewer defences than would have been available had they charged

53 At [64], [124]–[140] and [156]–[157].

54 For guidance for Crown prosecutors who have to make these charging decisions, see Crown Prosecution Service "The Code for Crown Prosecutors" (26 October 2018) <https://cps.gov.uk>; and Crown Prosecution Service "Offences during Protests, Demonstrations or Campaigns" (15 March 2022) <https://cps.gov.uk>.

them with other offences is neither new nor exceptional. In *Regina v Gibson*, for example, the maker and exhibitor of a pair of earrings said to be made from freeze-dried human foetuses was charged with outraging public decency, a common law offence of strict liability.[55] The defendants argued that they should have been charged instead with a statutory offence of making an obscene publication contrary to the Obscene Publications Acts 1959 (UK) 7 & 8 Eliz II c 66 and 1964 (UK), which would have allowed them to try to establish a defence of public good. They claimed that it was an abuse of process to charge them with the common law offence and so deprive them of that statutory defence, not least because in 1964 the then Solicitor-General had given an undertaking to the House of Commons that it would not be done.[56] The Court of Appeal rejected that argument, taking the view that it would not have been possible on the facts to make out the public good defence, a somewhat dubious assertion. The decision was made before the Human Rights Act 1998 came into effect, so it is possible the prosecutor as a public authority under this Act would now have a duty to make charging decisions in such a way as to avoid violating defendants' Convention rights; but this depends on whether the prosecution and possible conviction would as a matter of law engage those rights. Even where the rights are engaged, trial courts and the High Court in judicial review proceedings do not readily second-guess charging decisions; trial judges take account of the conscientiousness of protestors' motives at the sentencing stage if the defendants are convicted.[57]

Where (on the basis of *Ziegler* as explained in *Re Abortion Services (Safe Access Zones) Bill*) at least one but not all of the offences would be likely to require the trial court to assess the proportionality of an interference with a Convention right on the basis of the circumstances of the particular case, the prosecuting authority may choose to charge the defendant only with an offence which would not require such assessment to be made. For example, following the Supreme Court's judgment in *Ziegler* prosecutors started charging protestors who blocked roads with public nuisance instead of violation of s 137 of the Highways Act 1980. Obstructing a highway could constitute the offence of public nuisance at common law where it interfered with the freedom of road users to pass and repass on the highway, subject to a de minimis exception and, more significantly, an exception where the person causing the obstruction was acting reasonably, either because he or she was doing something reasonably incidental to normal use of the highway (such as sitting on the verge for a short

55 *Regina v Gibson* [1990] 2 QB 619 (CA) at 625, criticised by David Feldman *Civil Liberties and Human Rights in England and Wales* (2nd ed, Oxford University Press, Oxford, 2002) at 937.

56 (3 June 1964) 695 GBPD HC 1212; and (7 July 1964) 698 GBPD HC 315–316.

57 *Regina v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136 at [89]; and *Attorney General's Reference (No 1 of 2022)*, above n 51, at [111]–[112]. For fuller discussion, see Ivan Hare "Statues, statute and freedom of expression" [2021] PL 691 at 698–699, discussing prosecutorial discretion relating to the valuation of damage for the purpose of deciding whether a case of alleged criminal damage is triable summarily or on indictment, in the light of *Regina v Canterbury and St Augustine Justices, ex parte Klisiak* [1982] QB 398 (Divisional Court); *R v Salisbury Magistrates' Court, ex parte Mastin* (1986) 84 Cr App R 248 (Divisional Court); and *R (Abbott) v Colchester Magistrates' Court* [2001] EWHC 136 (Admin).

rest when tired) or because the activity was itself socially useful. In view of the common law's recognition that freedom of speech and freedom of protest were important in a democracy, it was not unreasonable, and so not a criminal nuisance, to use highways for the exercise of those freedoms as long as public order and the rights and freedoms of other road users are protected.[58] When the Human Rights Act 1998 came into force in October 2000, the test of reasonableness had to be applied so as to meet the rather stricter requirement of showing that any interference with Convention rights to freedom of expression and peaceful assembly were "necessary in a democratic society" for a permitted purpose, ie served a pressing social need and was proportionate to that need.

The common law offence of public nuisance was abolished with effect from 28 June 2022 and replaced with a statutory offence of intentionally or recklessly causing public nuisance.[59] It is committed when someone does something or fails to do something required by law and the act or omission creates a risk of, or causes, serious harm to the public or a section of the public or obstructs the public or a section of the public in exercising or enjoying a right that may be exercised or enjoyed by the public at large, intending to produce one of those consequences or being reckless as to whether it will have one of those consequences. There is a defence if the defendant proves that he or she had a reasonable excuse for the act or omission.

The biggest difference between the offences of public nuisance and obstructing the highway in the context of protests on highways is the maximum sentence on conviction. The common law offence carried the possibility of a long period of imprisonment and unlimited fines. The statutory penalty following conviction on indictment is imprisonment for up to 10 years, an unlimited fine, or both, and on summary conviction imprisonment for up to one year, a fine, or both. Obstructing the highway contrary to s 137 of the Highways Act 1980 originally carried a maximum sentence of a £50 fine. With effect from 12 May 2022, this has been amended by s 80 of the Police, Crime, Sentencing and Courts Act 2022 so that the maximum sentence is now imprisonment for up to 51 weeks or a fine, or both. In serious cases, there is thus an incentive to charge a defendant with public nuisance and proceed by way of trial on indictment in order to increase the potential sentence. The increase in the sentence for obstructing the highway has largely eliminated the differential between that and available penalties for public nuisance in magistrates' courts and has significantly reduced it following trial on indictment, but the fact remains that the Crown Prosecution Service's charging discretion can greatly affect the possible maximum sentence.

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58 *Regina v Clark (No 2)* [1964] 2 QB 315 (Crim App); *Nagy v Weston* [1965] 1 WLR 280 (Divisional Court); *Hirst and Agu v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143 (Divisional Court); and *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240 (HL).

59 Police, Crime, Sentencing and Courts Act 2022 (UK), s 78(6). The elements of the new, statutory offence are contained in s 78(1)–(3).

IX JUDICIAL ATTITUDES, INCONSISTENCY AND CONTEMPT OF COURT

The indeterminacy of the proportionality assessment is shown by a case which is examined in depth by Ivan Hare KC in his article in this Special Issue.[60] In Bristol on 7 June 2020 during a peaceful march in support of the Black Lives Matter movement, a group of people with ropes pulled down a statue of Edward Colston, a 17th- and 18th-century local philanthropist who had made part of his fortune through importing African slaves to the West Indies and America. They rolled the statue to the docks and dropped it into the water. This caused significant damage. The statue was later recovered and placed in a museum. The defendants were charged with criminal damage contrary to s 1 of the Criminal Damage Act 1971 (UK), an offence subject to a "lawful excuse" exception, and tried in the Crown Court, the value of the damage being assessed as being over £5,000 (damage to the value of £5,000 or less being triable only summarily in a magistrates' court). In due course the trial Judge left to the jury the question whether they were sure that the interference with the defendants' Convention rights under arts 9 and 10 of the ECHR which a conviction would entail would be proportionate to a legitimate aim. If it would not be proportionate, the defendants would have a "lawful excuse" and should be acquitted. The jury found the defendants "Not guilty".

The Attorney-General sought the Court of Appeal's opinion as to the relevance of arts 9, 10 and 11 in such a case. In *Attorney General's Reference (No 1 of 2022)*,[61] the Court of Appeal (Criminal Division) followed Lord Hamblen and Lord Stephens JJSC in *Ziegler* in noting that, for the purpose of freedom of peaceful assembly under ECHR art 11, an assembly was not "peaceful" if organisers and participants have violent intentions, "incite violence or otherwise reject the foundations of a democratic society".[62] On the whole, criminal damage is not "peaceful", and on the facts of the case it was clear that considerable force had been used and a good deal of damage done. This may be why the defendants concentrated on the rights to freedom of conscience and belief (art 9) and expression (art 10) instead. But violence and the use of force without lawful justification are equally capable of depriving protestors of the protection of freedom of conscience and belief and of expression: as the European Court of Human Rights wrote in *Handzhiyski v Bulgaria*:[63]

> Public monuments are frequently physically unique and form part of a society's cultural heritage. Measures, including proportionate sanctions, designed to dissuade acts which can destroy them or damage

60 Ivan Hare "Public Order, Public Protest and Public Monuments" in this Special Issue.

61 *Attorney General's Reference (No 1 of 2022)*, above n 51.

62 At [13], referring to *Ziegler* (SC), above n 22, at [69], citing *Kudrevičius v Lithuania*, above n 50, at [92].

63 *Handzhiyski v Bulgaria* (2021) 73 EHRR 15 (ECHR) at [53], quoted by the Court of Appeal in *Attorney General's Reference (No 1 of 2022)*, above n 51, at [75].

> their physical appearance may therefore be regarded as "necessary in a democratic society", however legitimate the motives which may have inspired such acts.

The Court of Appeal therefore held that, while some acts of criminal damage might cause so little harm that those who cause them would be able to assert their Convention rights as a lawful excuse, that would not be the case when the damage exceeded £5,000 in value making the case eligible for trial on indictment in the Crown Court. A conviction in such circumstances would never be a more than proportionate interference with a Convention right, so defendants in the Crown Court should never be allowed to raise a defence of lawful excuse to a charge of criminal damage on the strength of an interference with a Convention right, even if the force used to cause such damage does not deprive the defendant entirely of the protection of that right.[64]

Where a proportionality assessment is appropriate, however, it is not easy to predict the outcome. This can be illustrated by two cases reported in *Private Eye*.[65] At Horsham Magistrates' Court, Deputy District Judge Amanda Kelly acquitted four protestors, who had blocked traffic on the M25 motorway in September 2021, of wilfully obstructing the highway, because (presumably having applied a *Ziegler*-style proportionality assessment) she decided that, while the protest had caused significant disruption to a large number of people, there was no evidence of grave consequences beyond those commonly experienced by people held up by delays on the M25. That being so, convicting the defendants would, she decided, have not been a proportionate interference with their right to freedom of expression and peaceful protest.

Compare this with the approach of his Honour Judge Silas Reid at Inner London Crown Court in 2023 when trying participants in similar protests on indictment charged with common law public nuisance arising out of an incident in October 2021 when they had glued themselves to the tarmac near Junction 3 on the M4 motorway, delaying about 10,000 travellers but not interfering with emergency vehicles. He refused to allow the defendants to put to the jury their explanation for their activities because he decided (presumably following *Director of Public Prosecutions v Cuciurean*[66] and the discussion in *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill*)[67] that the explanation could not constitute a defence to the charge given that the case was being heard on indictment in the Crown Court. Judge Reid is reported to have gone so far as to sentence three defendants to terms of imprisonment for contempt in the face of the court for refusing to comply with his order not to explain themselves to the jury.[68] After their convictions on the substantive charges

64 *Attorney General's Reference (No 1 of 2022)*, above n 51, at [116]–[123].

65 "Unfunny gag" *Private Eye* (United Kingdom, 31 March–20 April 2023) at 40.

66 *Director of Public Prosecutions v Cuciurean*, above n 38.

67 *Re Abortion Services*, above n 41.

68 "Unfanny gag", above n 65.

facing them, Judge Reid allowed the defendants to explain their motivation, as that was relevant to sentence. He sentenced three of them to six weeks' imprisonment suspended for 18 months and 100 hours of community service after they agreed to undertake not to repeat their criminal activity, and one, who refused to give that undertaking, to an immediate term of five weeks' imprisonment. Judge Reid told them that the normal sentence would have been in the region of imprisonment for 12 months, but that he was reducing it because they aimed to alert people to the climate crisis.[69] In addition, *The Times* reported that Judge Reid had ordered the arrest of Trudi Warner, who had been protesting outside Inner London Crown Court to protest against his refusal to allow the defendants to mention climate change in their defence and holding a placard telling passing jurors that they were entitled to acquit the defendants according to their consciences.[70] He also referred the cases of 24 people who protested against his treatment of Ms Warner to the Attorney-General with a view to contempt proceedings being brought against them.[71]

At the Old Bailey later, Cavanagh J ordered Ms Warner's case to be referred to the Attorney-General for consideration of proceedings against her for contempt of court. This did not prevent a group of protestors from making a similar protest during another trial in May 2023. On this occasion, nobody was arrested despite Judge Reid's telling the jury that the writers of the placards were "improperly trying to influence" them, but Judge Reid referred the protestors' cases to the Attorney-General for contempt proceedings to be considered.[72] Several juries have failed to reach verdicts after defendants have told them (contrary to Judge Reid's instructions) of the threat of climate change,[73] while other juries have acquitted defendants despite having been told by the judge that there was no legal defence.[74] In other cases, *The Times* reported that at Southend Crown Court, where two "Just Stop Oil" protestors (each of whom had one or more previous convictions for offences relating to protests) were convicted by a jury of public nuisance for having climbed the Queen Elizabeth II Bridge at the Dartford Crossing over the River Thames and brought traffic on the bridge to a halt, leading to

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69 Press Association News Agency "Insulate Britain protester jailed for five weeks over road-blocking stunt" *Bracknell News* (online ed, United Kingdom, 13 March 2023).

70 Catherine Baksi and Jonathan Ames "Protestors tell jury to acquit four in climate change case" *The Times* (United Kingdom, 16 May 2023) at 9.

71 Jonathan Ames "Climate group face contempt charge risk" *The Times* (United Kingdom, 2 June 2023) at 11.

72 Baksi and Ames, above n 70, at 9; and Insulate Britain (@InsulateLove) "Judge Reid indicated in court yesterday that the 24 people who held up signs to Jurors outside Inner London Crown Court on Monday & Tuesday this week …" <https://twitter.com/InsulateLove/status/1659469202124570627>.

73 See for example Nathan Okell "Climate change activist gets temporary reprieve after trial ends with hung jury" *Yahoo! News* (online ed, United Kingdom, 9 March 2023).

74 PA Media "Jury acquits Extinction Rebellion protestors despite 'no defence in law'" *The Guardian* (online ed, United Kingdom, 23 April 2021).

two days of gridlock on the M25, Judge Shane Collery KC sentenced one to three years' imprisonment and the other to two years seven months.[75]

Using the law of contempt of court to penalise people who advise jurors that they are free to acquit people according to their consciences is, it is submitted, improper. The power of jurors to return what a judge regards as a perverse verdict is well known. It has been used in trials concerned with official secrets such as *R v Ponting*,[76] a reverse for the Government which contributed to pressure to reform the Official Secrets Acts. In his classic work on the jury, the late Professor Bill Cornish (another of Tony Smith's sometime colleagues) wrote of the jury in this mode as "an unmaker of law", expressing disapproval of a law by not convicting.[77] He commented that it had been important in the 18th and 19th centuries to protect people against harsh and crude criminal law, and also noted that reluctance to convict had served, albeit fitfully, to guard against use of law to stifle political opposition, but suggested that political use of criminal law was uncommon in the 1970s and that the rationale for a jury's power to acquit despite a judge's direction was weak in a time when the criminal law had become relatively civilised.[78] In at least some trials of climate change activists, juries seem to have been expressing, not disapproval of the actual laws (criminal damage, obstructing the highway) forming the basis for charges, but support for the defendants' political goals, and a sense (reflected perhaps in the Supreme Court's proportionality assessment in *Ziegler*) that prosecutions are sledgehammers taking aim at nuts. The latter is a constitutionally respectable reason for not convicting; the former, tending towards viewpoint discrimination in criminal procedure, is less so.

X CONCLUSION

From this survey of developments in the interplay of police powers, criminal law and human rights in the context of protest I draw the following conclusions. First, in recent years freedom of expression and assembly have become more talked about and marginally easier to protect through litigation than used to be the case, largely on account of the influence of the ECHR. Secondly, however, supporters of the freedoms in the context of protests and criminal law must still swim against the tide. Politicians too readily see, in each new generation's commitments and enthusiasms, a germ of anarchy and threat to democratic law-making, and portray methods of protest as new and particularly damaging or disruptive. In reality, little has changed in the past century or more. Nevertheless, new, ever more restrictive legislation seeks to extend the powers of police and courts to interfere with protests and impose criminal and civil liability on participants. Thirdly, the mismatch between the law and spirit of the Human Rights Act 1998 and legislation against protest leaves the police with the difficult task

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75 Ben Ellery and Mario Ledwith "Years in jail for Just Stop Oil pair behind 2 days of gridlock" *The Times* (United Kingdom, 22 April 2023) at 15.

76 *R v Ponting* [1985] Crim LR 318 (Central Criminal Court).

77 WR Cornish *The Jury* (revised ed, Penguin Books, Harmondsworth, 1971) at 128.

78 At 133 and 139–158.

of making assessments of human rights to protest and balancing them against other interests, and imposes a somewhat onerous burden, often without much of the information needed to assess the significance of an interference with human rights relative to health risks in a particular place or the needs of people travelling or working in different fields. Judges have held, rightly, that the police have a duty at public law to take reasonable steps to inform themselves of what courts have decided are relevant considerations,[79] pointing out that this not inconsiderable burden is, analytically, the result of legislation made or approved by Parliament.[80]

Fourthly, that duty is especially hard to discharge when the police are too often confused by a legislative steer to restrict freedom of assembly to pursue other public interests[81] and bedevilled, especially in the COVID-19 regulations, by incoherent and inconsistent drafting and a lack of clear guidance. There is no shortage of guidance, whether from the College of Policing and the National Police Chiefs' Council or from police forces or Government, but too often the guidance has proved to be inconsistent with the regulations themselves and out of touch with prevailing scientific understanding from health authorities regarding threats to health. There has been a tendency to take discretion away from front-line officers and insist on decisions being made by more senior officers, but the result is that there is a lack of confidence among those who bear the brunt of dealing with the public as to what their duties, responsibilities and powers are in particular circumstances. In the Crown Prosecution Service, guidance issued focuses heavily on general principles, which are relatively easy to state but much more difficult to apply.

Fifthly, developments in case law and reports from His Majesty's Inspectorate of Constabulary and Fire and Rescue Services[82] have shown a need to front-line officers and more senior officers to understand the requirements of human rights, specifically in the context of protest, and domestic law on the obligations imposed on those regulating or facilitating public assemblies. When the Human Rights Act 1998 was passed and before it came into force in October 2000, there was an extensive programme of training on its implications and police services were leaders in ensuring that officers understood the responsibilities placed on them. Unfortunately, training in human rights law is no longer a priority, and the results have surfaced in recent years. Finding ways to balance conflicting rights and public interests requires effort. It is not straightforward.

Finally, people's freedoms, including freedom to gather and protest, tend to be undermined if the law itself is uncertain. There was a particular problem during the COVID-19 pandemic, when public health regulations changed with such speed and so little notice that nobody was sure what the law was

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79 See for example *Regina (Leigh) v Commissioner of Police of the Metropolis*, above n 27, at [81]–[82].

80 At [78] per Warby LJ and [121] per Holgate J.

81 At [80].

82 See for example the reports on Bobby Storey's funeral and the vigil for Sarah Everard above: HMICFRS, above n 28; and HMICFRS, above n 29.

from day to day, and guidance further confused matters because, for the police, there was no clarity as to the line between law and guidance. But the changes made to the criminal law and police powers since COVID-19, in the Police, Crime, Sentencing and Courts Act 2022 and the Public Order Act 2023 for example, are likely to throw up their own uncertainties, increase official discretion and weaken legal certainty, making human rights harder to protect and making life harder for police and courts whose duties include protecting them.

There seem to be three possible ways of limiting legal uncertainty and easing the roles of officials, including front-line police officers. One approach would be to retreat still further from the Supreme Court's decision in *Ziegler*, restricting more and more the occasions on which the police, prosecutors, judges and juries have to consider whether the exercise of Convention rights provides a "reasonable excuse" or "lawful excuse" for action which would otherwise be potentially unlawful. This would seem to be unfortunate. It would tend to weaken respect for Convention rights in our legal and political system, and would probably encourage juries (when cases reach juries) to refuse to convict defendants whose views or behaviour they respect regardless of the law. Limiting circumstances in which decision-makers have to make assessments of Convention compatibility would also (a prosaic but perhaps important consideration) make adverse judgments by the European Court of Human Rights more likely.

A second approach, favoured by a minority (at present) of United Kingdom politicians, would be to repeal the Human Rights Act 1998, denounce the ECHR, and return the United Kingdom to the position it was in before 1953, a period when a Lord Chief Justice could say that "English law does not recognize any special right of public meeting for political or other purposes".[83] This would be profoundly insular and backward-looking, weaken democracy, and have major constitutional implications, not least relating to devolution arrangements (as devolved authorities' competences all include a limitation that they are not to act incompatibly with Convention rights, a particularly important matter in Northern Ireland under the regime introduced by the Good Friday Agreement in 1998).

A third approach would be to ensure that all officers receive sufficient education in human rights law, not just at a general level but in relation to the specific circumstances they encounter in their work, for them both to appreciate the need for on-the-spot assessments of the extent to which interfering with arts 10 and 11 rights is justifiable in the particular situation they face and to make those assessments. This will not be easy: human rights law, especially in relation to qualified rights, operates in the context of, and must take account of, often complex and contested facts about, for example, the consequences to different individuals and groups of what is being done and the health or economic benefits of maintaining restrictions or upholding different freedoms. Officers therefore need to be made aware not just of human rights but of how they interact with sometimes troubling

83 See *Duncan v Jones*, above n 4.

claims and evidence. This would recognise that the law makes great demands of officers and make serious efforts to equip them, with or without supervision of more senior officers, to meet those demands conscientiously. It is a principled as well as pragmatically desirable approach, and it is to be hoped that it will be followed.