

## **Conspiracy: An alarming response to protest?**

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## CONSPIRACY: An alarming response to peaceful protest?

### ABSTRACT

The proliferation of statutory and common law powers that can be utilised to manage and control public protest gives the police a wide range of options in any given scenario, and requires a careful balance to be struck between the maintenance of order and facilitation of convention rights. This paper discusses a novel use of the criminal law of conspiracy and considers the potential benefits of this approach and the ramifications for the protection of convention rights. It is submitted that the controversial use of the criminal law against Chinese dissidents in the United Kingdom was perhaps a result of the law of unintended consequences arising from the development of a body of law that has been piecemeal and reactive.

### 1. THE PROTEST

On October 23rd 2015 during the visit of the Chinese Prime Minister to Britain two Tibetan women, Sonam Choden and Jampel Lhamo, and a survivor of Tiananmen Square, Shao Jiang, were arrested during what appeared from descriptions to have been a small, low key protest.<sup>1</sup> All three were arrested for offences of conspiracy to contravene s5 of the Public Order Act 1986. Shao Jiang was arrested first, as he neared the official vehicles heading towards Mansion Gate holding two small placards. A short while later the Tibetan women were arrested as they attempted to unfurl a Tibetan flag. No charges were brought, and Shao Jiang has now lodged a complaint with the Independent Police Complaints Commission.<sup>2</sup> Lawyers representing the activists expressed surprise at the arrest, stating that they had not encountered the use of conspiracy to contravene s5 in any previous case.<sup>3</sup> This novel use of statutory provisions designed to control public order has the potential to undermine Articles 10 and 11 of the European Court of Human Rights.

### 2. CRIMINAL CONSPIRACY

Conspiracy derives from the Latin, “con” and “spirae” which translates as “to breathe together”<sup>4</sup>. The etymology of the word, then, makes clear that this must be an offence involving more than one person. The Criminal Law Act 1977 created the statutory offence of conspiracy, abolishing most common law offences apart from conspiracy to defraud, or to outrage public decency or corrupt public morals. The charge itself is rather simple to state but somewhat harder to prove. It must be shown that the defendant agreed with one or more others that a course of conduct should be followed which, if completed, would result in one or more criminal offences being committed by any of the parties to the agreement.<sup>5</sup> It is no defence to show that the completion of the offence was factually impossible<sup>6</sup>, in keeping with the provisions regarding the inchoate offence of criminal attempt.<sup>7</sup>

Jarvis and Bisgrove have considered the complexities that can arise when charging conspiracies, and point to evidence in the authorities warning against the use of conspiracy where substantive offences are available. They note that the charge may well be attractive to prosecutors either because the substantive offences do not adequately reflect the seriousness of the defendant’s criminality, or where, if charged alone, those offences would not be sufficient to trigger the possibility of confiscation of property under s75 of the Proceeds of Crime Act 2002.<sup>8</sup> Their analysis focuses on examples concerning conspiracies arising from agreements to commit crimes which are in and of themselves indictable offences. However, in noting the temptation to utilise the statutory offence in order to achieve a secondary purpose (such as a greater sentence or confiscation proceedings), the authors identify the attribute which, it is submitted, renders conspiracy helpful to officers seeking to manage the activities of those involved in political protest.

It is not possible to indict a person for the crime of “conspiracy” any more than it is to indict them for the crime of “attempt” as no such offence exists. These inchoate offences can only arise in connection with a separate substantive offence – one conspires to commit an offence, or attempts to do it. In the case of conspiracy the effect of adding the prefix to the substantive offence may well be a way of increasing the severity of the charge the defendant faces, and of course the penalty they may anticipate. All offences charged as a statutory conspiracy are indictable only offences, crimes that must be tried in the Crown Court, and this is true even if the parties to the conspiracy have forged an agreement to carry out offences which, on their own, would only be triable in the magistrate’s court.<sup>9</sup> It should be noted, however, that a charge of conspiracy to commit summary offences must be brought either by, or with the consent of, the Director of Public Prosecutions<sup>10</sup> although interestingly, the Law Commission have recommended that this requirement be abolished.<sup>11</sup> The Law Commission report also considered the suggestion that conspiracy to commit summary offences should itself be a summary matter, but noted a division of opinion in the responses received in consultation and made no recommendation on the issue. The CPS indicated a preference for such conspiracies to be triable either way, but the Criminal Bar Association argued that the fact conspiracy was indictable only acted as a deterrent to overcharging in response to difficulty in proving the substantive charge.<sup>12</sup>

### 3. CRIMINAL CONSPIRACY AND PROTEST

The use of conspiracy as a mechanism to control the activities of those involved in protest movements and, in particular, forms of direct action, is not new. Conspiracy to commit aggravated trespass was the mechanism used to frustrate the planned protest at Ratcliffe-On-Soar power station in April 2009 by pre-emptively arresting 114 activists. Ultimately, twenty of those arrested were convicted of the offence. Press reporting of the sentencing hearings noted the judge’s commendation of the defendants for their personal commitment to the environmental cause as he imposed fairly lenient sentences of either conditional discharges or community orders. He refused to accede to the prosecution request for costs orders of £5000 per defendant (it was argued this represented a mere fraction of the total estimated costs incurred by the crown), awarding costs of £1,500 only against two defendants.<sup>13</sup> Questions of whether the costs of prosecution were justified would only be amplified six months later as the case unravelled entirely in the wake of the revelation that the crown had failed to disclose the involvement of an undercover officer, Mark Kennedy, in the planning of the protest, a failing that resulted in all convictions being overturned.<sup>14</sup> Irrespective of the view taken of making arrests that have the effect of preventing protest taking place, the rationale for doing so is evident. Policing direct action protests is a “complex, uncertain, volatile and unpredictable”<sup>15</sup> task that runs the risk of degeneration into violence. Mansley’s analysis of protests events in Britain over a decade shows that by the time of the pre-emptive arrests in the Ratcliffe case there had already been several large scale protest events across the country. Just two weeks before the planned action, a protest during the G20 summit resulted in 114 arrests, injuries to 7 police officers and 1 protester and, of course, the death of Ian Tomlinson.<sup>16</sup> Later, in October of 2009, over 1,000 activists did attempt to enter Ratcliffe-on-Soar, leading to reports of violent clashes and injuries to both officers and protesters.<sup>17</sup> If the police are in possession of intelligence which demonstrates the existence of a planned protest that would involve the commission of criminal offences then, legally at least, there is nothing controversial in the use of arrest for conspiracy. After all, it is arguable that one rationale for the existence of inchoate offences is precisely to enable proactive, rather than reactive, policing.

There have been instances where protesters have found themselves facing conspiracy charges even though it could be arguable that, as the protest had begun by the point of arrest, charges for substantive crimes were an available option. Mead notes:

“Conspiracy can be charged alongside the substantive offence, as a failsafe, and is a very common piece in the prosecutor’s toolkit when dealing with all sorts of protests.”<sup>18</sup>

Most commonly, the charge is one of conspiracy to cause criminal damage.<sup>19</sup> In some cases, protestors have faced heavy penalties: in 1986 twenty-four animal rights protesters charged in connection with a raid on a Unilever testing laboratory received custodial sentences ranging from 6 months to two years, despite the majority of the defendants having few, or no, criminal convictions.<sup>20</sup>

Of course, the protesters arrested for conspiracy to commit an offence against section 5 of the Public Order Act in October 2015 were never actually charged. They were all released on bail from the police station, and a short while later, released from the obligation to answer that bail, bringing the matter to an end. It is difficult to see how there could ever have been any realistic possibility of a charge (at least for the offence for which they were arrested) given the need for the consent of the DPP. There have been recent instances of heavy handed charging decisions, however. Academic researcher Lisa McKenzie was acquitted of a charge of criminal enterprise by joint enterprise, brought in connection with her presence on a demonstration during which another protester affixed a sticker to the window of a building.<sup>21</sup>

#### 4. FACILITATION OR PRE-EMPTIVE CONTROL?

Policing decisions may serve more than one purpose. Public order policing strategies may conceivably impact not only those present at any particular demonstration but also on individuals who may be deterred from attending future protests by concerns about containment, the use of force, or criminalisation.<sup>22</sup> Deterrent sentences (such as those imposed in the wake of the Bradford riots in 2001 or the protests against the Israeli blockade in 2009), often imposed on young people with no previous convictions<sup>23</sup>, often contain an explicit statement of that deterrent purpose.

Pre-emptive arrests could be criticised on the basis that they seem to serve an ulterior purpose of frustrating lawful protest. This seemed to be the case in the run-up to the London Olympics in 2012. On the evening of the opening ceremony, 182 participants in the regular “critical mass” cycle ride were arrested for breaching a condition imposed on them under s12 of the Public Order Act 1986. As Brander notes, despite lengthy periods of detention, only 16 of those arrested were formally interviewed. Many of those arrested, however, were released on bail with conditions precluding them from entering the London Borough of Newham on a bicycle, or going near any of the Olympic venues.<sup>24</sup> Ultimately, nine were charged with the offence and five convicted after a protracted trial.<sup>25</sup> During the same time frame, a number of graffiti artists were also arrested on suspicion of conspiracy to cause criminal damage and bailed with conditions which, again, were designed to ensure their absence from the proximity of the games.<sup>26</sup> It can be seen from these examples, and the pre-emptive arrests of individuals said to be planning protests during the royal wedding,<sup>27</sup> that the tactic can act as a means of ‘strategic incapacitation’: a policing tool argued by many to be an increasingly prevalent method of dealing with diffuse and unpredictable forms of direct action.<sup>28</sup> Waddington notes that:

“[T]he police have resorted with increasing regularity to such tactics as the creation of no-protest zones, the use of containment (‘kettling’), preventative arrests and surveillance to selectively disable and, arguably, repress collective dissent.”<sup>29</sup>

The shift from 'negotiated management' of protest<sup>30</sup> runs counter to the recommendations made by Her Majesty's Inspectorate of Constabulary's reports released in the wake of the death of Ian Tomlinson. The final report advocated an approach concentrating on facilitation rather than suppression.<sup>31</sup> A study conducted at the subsequent NATO summit appeared to indicate that whilst the language of policing public order may change, the tactics for maintaining order are broadly similar:

"Though couched very much in the rhetoric of police facilitation, the police decision to strictly demarcate the prescribed protest areas, erect barriers or 'pen-in' protesters and immediately clamp down roughly, if necessary on any violations of their 'rules' or directives were very much consistent with the strategic incapacitation approach"<sup>32</sup>

During the Chinese State visit, however, there was no attempt at facilitating effective protest. President Xi Jinping is an internationally protected person and therefore the police can point to international law as the justification for more stringent enforcement measures<sup>33</sup>. As Baker has observed:

"When economic and trade interests are at stake and when "international protected persons" are present, policing has tended to be openly coercive."<sup>34</sup>

This should not be seen as a novel development. Mansley records the "controversial" policing of an earlier visit in 1999, which led to accusations of Foreign Office pressure on the police to adopt a "hard line", and an acknowledgement that police conduct had been unlawful in the unreported judicial review case *R v Commissioner of Police for the Metropolis ex.p. the Free Tibet Campaign and others*.<sup>35</sup>

The choice of conspiracy to commit a public order offence as the arrestable offence is, however, a new development and one that is worthy of examination. After all, there are a large number of alternatives available to the police. There has been, since, the Public Order Act 1986, a steady increase in the number of responses in the "repertoires of protest control"<sup>36</sup>, and a general air of judicial tolerance for the operational decisions taken by officers engaged in public order policing (see the discussion below).<sup>37</sup>

## 5. A STRATEGIC USE OF CONSPIRACY

With regard to the arrests of Shao Jiang, Sonam Choden and Jampel Lhamo it is worth asking why, if the purpose was to contain or even curtail the protest, the police did not utilise the common law power to arrest to prevent a breach of the peace; a power with a scope so broad as to be "bewilderingly imprecise".<sup>38</sup> The Supreme Court have upheld the pre-emptive use of the power in the arrest of Hicks and others, where the arrest was designed to prevent disruption of the Royal Wedding. In that case, the court found nothing objectionable in the notion that arrest and detention primarily aimed at keeping the appellants out of central London until the wedding ended, and found it to be entirely consistent with the requirement for proportionality<sup>39</sup>. There would, then, have been nothing controversial in using the power to remove Shao Jiang and the others from the vicinity had that been the purpose of police intervention.

Reports at the time suggest that Shao Jiang was arrested as he stood near to the official vehicles headed towards Mansion House, holding two small placards. Sonam Choden and Jampel Lhamo were arrested in the same vicinity and were said to be waving a Tibetan flag.<sup>40</sup> The substantive offence at s5 of the Public Order Act 1986 is committed when a defendant engages in conduct likely to cause harassment, alarm or distress to any person(s) within sight or hearing. It is not necessary for

the crown to prove that any person was, in fact, caused harassment alarm or distress<sup>41</sup>. On the face of it, then, given that the three protesters were arrested during the small window of time in which they could conceivably have committed the offence – whilst the cars were in front of them – surely they could have been arrested for the substantive offence which would have had to have been in progress at that point if it was ever to have been committed at all.

It is submitted that the choice of offence on this occasion was a strategic device which was potentially more advantageous to the police than either an arrest to prevent a breach of police at common law, or the substantive public order offence. In this instance the ulterior objective may not have been to nullify future protests as seen in the pre-Olympic and Royal Wedding arrests, or to seek a heavy deterrent sentence. The choice of offence afforded the opportunity to utilise the search powers contained set out at s18 of the Police and Criminal Evidence Act 1984 (PACE). An arrest for breach of the peace would not have afforded that possibility. *Williamson v Chief Constable of the West Midlands*<sup>42</sup> established that use of the power was not an arrest for an “offence” within the scope of PACE and accordingly the defendant could not rely on the statutory protections offered by the Act. This was noted, with approval, in the Court of Appeal judgment in *Hicks*.<sup>43</sup> In both *Williamson* and *Hicks* the discussion of the applicability of PACE arose in context of an argument regarding the behaviour of the police towards persons in custody<sup>44</sup>. If the Police are not forced to comply with the obligations of the Act then surely it follows that they are not able to rely on the powers it confers. There is no legal authorisation for a search of premises following an arrest for breach of the peace, unless entry to the premises is made in order to effect the arrest.<sup>45</sup> In any event, any search conducted under PACE, with or without a warrant<sup>46</sup> must have the objective of obtaining evidence for the offence for which a person has been arrested (or as specified in the warrant), and is limited to the extent required to obtain such evidence.<sup>47</sup> The Divisional Court dealing with the judicial review in the case of *Hicks* also considered the linked application brought by Hannah Pearce and Stuart Golsirat.<sup>48</sup> The appellants were among a number of persons arrested the day before the Royal Wedding, on the execution of search warrants issued for the purpose of investigating suspected offences of handling stolen goods. The warrants authorised searches of three squats for suspected stolen computers, bicycles and bicycle parts. A large amount of computer equipment was seized. Alongside claims that the searches breached the appellants rights under Articles 8 and 14 of the European Convention of Human Rights, they argued the searches were conducted in contravention of ss15 and 16 of PACE as the police either had an ulterior motive, or were looking for material not specified by the warrant. As Brander observes:

“It was common ground that the police did not have sufficient wedding-related intelligence to justify entering the premises on that basis. The issue was whether prevention of disruption to the wedding had been the dominant or a collateral purpose in executing the warrants.”<sup>49</sup>

The Divisional Court relied on the plurality test deployed in the case of *Southwark* to determine that the existence of an ulterior motive would only render the search unlawful in cases where the purpose stated on the warrant was a “mere pretext”.<sup>50</sup> The finding was upheld in the Court of Appeal.<sup>51</sup>

An arrest for the substantive public order offence would similarly have failed to authorise a search without warrant. This is a possibly unintended consequence of provisions contained in the Serious Organised Crime and Policing Act 2005 (SOCPA). The Act was a wide-ranging piece of legislation which included a number of provisions restricting the rights of protesters. The Act also amended the power of arrest without warrant contained in PACE by abolishing the pre-existing distinction between arrestable and non-arrestable offences. In this way, SOCPA significantly increased the

power of the police by enabling people to be taken into custody for minor infractions provided there were grounds for doing so.<sup>52</sup> Perhaps, then, as some sort of counterbalance to offer some reassurance regarding the rights of detainees, amendments were made to PACE by Schedule 7 Part 3 para 43 which states:

“(4)In section 17 (entry for purpose of arrest etc.), in subsection (1)(b), for “arrestable” substitute “ indictable ”.

(5)In section 18 (entry and search after arrest), in subsection (1), for “arrestable”, in both places, substitute “ indictable ”.

(6)In section 32 (search upon arrest), in subsection (2), for paragraph (b) substitute— “(b)if the offence for which he has been arrested is an indictable offence, to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence.””

This legislative provision, buried in the annexes of the Act, means that the police are not entitled to conduct a search under s18 PACE for a summary only offence.

It is submitted that this may be the reason why the police in this case arrested the activists for such a serious, and evidentially problematic, offence. The homes of each of the demonstrators were searched, and computer equipment was seized. Without sight of the signed authorisation it is only possible to surmise that the stated aim was to find evidence proving conspiracy; it is difficult to think of any other reason that could realistically have been recorded.

The question arises as to whether the arrests, detention and searches carried out by the police could be said to have constituted a breach of the European Convention on Human Rights and Fundamental Freedoms, and the approach that the domestic courts would be likely to take when assessing any such claim.

## 6. PRE-EMPTIVE POWERS AND CONVENTION RIGHTS

Arrests and detentions in connections with protests can be readily understood as engaging Articles 5, 10 and 11 of the European Convention of Human Rights<sup>53</sup>. The search of premises may, in addition to Article 10, also engage Article 8<sup>54</sup>. The first three of these rights were considered by the House of Lords in *R(on the application of Laporte) v Chief Constable of Gloucestershire*<sup>55</sup> which, when it was decided, was welcomed by many civil libertarians as marking a shift away from the traditional judicial deference to operational decisions made by the police to maintain public order. Fenwick suggested that the Human Rights Act heralded “a potentially climactic break”<sup>56</sup> in the approach to articles 10 and 11. A decade later, with the benefit of hindsight, *Laporte* looks more like a historical anomaly. In that case, the divisional court, Court of Appeal and the House of Lords were all agreed that the indiscriminate use of the power to prevent a breach of the peace against 120 protesters travelling by coach towards Fairford airbase and their subsequent detention on the vehicles whilst escorted back to London could not be justified under either Article 5(1)(a) or 5(1)(b) of the Convention. The Court of Appeal was more circumspect than the Divisional Court, confirming that the decision to stop the protesters some considerable distance from the airbase was not in and of itself objectionable; drawing an analogy with *Moss v McLachlan*<sup>57</sup> in determining that proximity and imminence are not interchangeable terms when assessing the legality of steps taken to prevent a breach of the peace.<sup>58</sup> The House of Lords disagreed and dismissed the notion that there could be a situation authorising steps falling short of arrest in circumstances where an arrest would not, in fact, be justified.<sup>59</sup> They went further, and reversed the decisions of the lower courts which had rejected

the applicant's claims in respect of Articles 10 and 11, and held that the response of the police was disproportionate and therefore could not be considered a necessary means of pursuing the legitimate aim of maintaining public order.

During the same time period as the decision in *Laporte* the claims of Austin and Saxby were winding their way towards the House of Lords. The case concerned the conduct of police during a demonstration held in London on May Day 2001. The claimants were amongst approximately 3,000 people contained by a police cordon at Oxford Circus. The justification was that the police feared that the demonstration would be violent (and indeed there were violent incidents elsewhere in the capital on the day) and the containment was a necessary measure to prevent a breach of the peace. The group contained a number of people who were not attending the protest but who happened to be in the vicinity at the moment the cordon was imposed. The group were contained without shelter, access to refreshments or toilet facilities, on a cold wet day for over seven hours. The claimants argued the detention was a deprivation of liberty contrary to Article 5. In a decision which attracted considerable criticism, the House of Lords disagreed.<sup>60</sup> Feldman, in his commentary on the case, argued that the House's decision was based in part upon a misreading of Article 5 itself. The judgment noted firstly that there is a balance to be struck between the rights of the community at large and those of individuals; secondly that the assessment of "deprivation" will always require consideration of the particular context and lastly that Article 5 precludes arbitrary detention. Feldman noted:

"Unfortunately, the third consideration gave rise to a mistaken view that Article 5(1) guarantees only freedom from arbitrary deprivation of liberty. It does not. It guarantees freedom from deprivation of liberty, save in the specific circumstances listed in the Article, and even then only if the action is non-arbitrary."<sup>61</sup>

It was widely assumed that when the matter came before the European Court of Human Rights the House of Lords decision would be reversed. As Mead succinctly acknowledged; "Sadly, we were all mistaken".<sup>62</sup> The case is significant because, as Mead points out, it represented a departure from previous jurisprudence on Article 5 by emphasising context as a relevant consideration when determining whether or not the right was engaged. It should not be possible to state that because a measure of containment was a response to "volatile and dangerous conditions"<sup>63</sup> it did not constitute a deprivation of liberty.<sup>64</sup> The context, the balance of the many against the few, should only be relevant when assessing whether or not the deprivation was proportionate. In a second article, Mead suggests that the decision – the first time the Court had been asked to assess Article 5 in the context of public order policing – was a product partly of "real-politik":

"If the holding had been that kettling was a deprivation of liberty, the police would have been very hard pushed to justify the tactic with reference to any of the permitted exceptions in Article 5(1)"<sup>65</sup>

The decision in *Austin* has signalled the beginning of a gradual retreat from the kind of judicial willingness to assert the fundamentality of the right to protest that some discerned from the judgement in *Laporte*.

In this context, the likelihood of a successful Human Rights challenge in the Mansion Gate case begins to seem far-fetched. It certainly seems likely that any claim of a breach of Article 5 would be doomed to failure not simply by *Austin*, but also the older decision of *Steel and Others v UK*<sup>66</sup> in which the court found nothing offensive in lengthy periods in police custody. Closer to home, the



decision in *Hicks* also rejected the suggestion that detention aimed squarely at removing a person from a protest caused any problems in respect of Article 5.<sup>67</sup>

The final paragraphs in the judgment of Austin, however, may seem to suggest that there could be greater merit in arguing that the treatment of the Mansion Gate protesters conflicts with Articles 10 and/or 11. The chamber noted that “[t]he Court emphasises that the above conclusion, that there was no deprivation of liberty, is based on the specific and exceptional facts of this case” and that they had not been asked to consider Articles 10 and 11, stressing that “measures of crowd control should not be used by the national authorities directly or indirectly to stifle or discourage protest, given the fundamental importance of freedom of expression and assembly in all democratic societies.”<sup>68</sup>

The application of Articles 10 and 11 will be assessed together, as it is clear that when dealing with protests, there is a very close nexus between the two, as the courts will often treat the fact of an assembly for this purpose as a form of expression. In *Tabernacle v The Secretary of State for Defence*<sup>69</sup> for example, when dealing with a claim that the application of bye-laws to effectively outlaw a peace camp breached Article 10 and also 11, Lord Justice Laws stated:

“That, I think, is on the facts not so much to be regarded as an autonomous claim, but rather as underlining the mode of free expression relied on: a communal protest in a camp established for the purpose.”<sup>70</sup>

Strasbourg has repeatedly emphasised the fact that Article 11 is capable of creating a positive obligation upon a member state to facilitate protest.<sup>71</sup> In a fairly recent decision, the Court indicated that whilst it would take care not to substitute its judgment for that of the member state, its role was not limited to simply assessing the legality or otherwise of the measure in question and could include an assessment of the justifications provided<sup>72</sup>. In that case, the court found that the claimant’s arrest and detention breached Article 11 despite the fact that he was participating in an unlawful protest. The point was also made in *Faber v Hungary*<sup>73</sup> in which the Grand Chamber reminded contracting states that:

“Any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.”<sup>74</sup>

It should be remembered, however, that the weight of the jurisprudence from Strasbourg confirms that states will be given a wide margin of appreciation as long as restrictions imposed do not have the effect of preventing protest altogether. In *Chorherr v Austria*<sup>75</sup>, for example, it was held:

“[The] margin of appreciation extends in particular to the choice of the - reasonable and appropriate - means to be used by the authorities to ensure that lawful manifestations can take place peacefully...”<sup>76</sup>

Fenwick notes that, given the wide range of permissible exceptions listed at Article 10 (2) (and replicated in Article 11(2)), it is rarely difficult for a state to find a legitimate purpose served by the imposition of a restriction. She argues that Strasbourg gives a wider margin of appreciation in cases concerning expression in the form of protest;

“...viewing measures taken to prevent disorder or protect the rights of others as peculiarly within the purview of the domestic authorities, in contrast to its stance in respect of “pure” speech. Therefore, expression as protest tends to be in a precarious position”<sup>77</sup>

In 2007 Mead undertook an analysis of cases concerning protest dealt with by Strasbourg, and made the often overlooked point that decisions of cases which are heard by the Court are outnumbered by applications which are rejected at the admissibility stage.<sup>78</sup> What appears clear from his analysis is that a general approach can be discerned that suggests that the threat of public disorder can legitimise actions by the state that would in other circumstances amount to an unlawful interference. Nevertheless, both Mead and Fenwick highlight the reluctance of the Court to interfere with policing of protests that could perhaps be categorised as “direct action” – that is to say activities designed to prevent or disrupt the activities of others - whereas successful challenge to state action is far more likely where the measures taken restrict or inhibit more “traditional” forms of declaratory protest. The holding of placards signalling disagreement with the Chinese government would appear to be an example of the latter. On the information available in the public domain, it is difficult to discern any legitimate concern that the police could have had which would lead them to believe arrests were necessary to protect against public disorder. Even if it were to be found that there was a legitimate fear of disorder underpinning the decisions to make the arrests, then it is submitted that this may well be the kind of case in which the interference with rights of those protesting would be held to be beyond the parameters of proportionality.

Consideration should be given to the notion that it is possible that the form the protest took was a secondary concern, and protection of the sensibilities of the Chinese visitors may have been the primary purpose. Of course, such a suggestion is speculative, but studies of the policing of anti-globalization protests in other jurisdictions lend some weight. The authorities can, of course, point to the additional security obligations imposed by the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons<sup>79</sup>. In a post 9/11 environment, it could be suggested, concerns regarding the security of visiting heads of state have multiplied and this could be justification for a decline in tolerance of protestors. Waddington has noted the political pressure placed on police forces charged with ensuring the safety of high profile guests<sup>80</sup>. Ericson and Doyle consider the example of the policing of the APEC summit in Toronto in 1997, and quote from a Canadian newspaper article detailing pre-summit negotiations in which, it was claimed, representatives from Indonesia and China made it clear they did not want their leaders to be publicly embarrassed by protests. Their close analysis of the pattern of policing of the summit led them to conclude that the actions by the RCMP went far beyond any that could be justified by safety concerns alone and instead were aimed at “censoring any form of protest they may encounter”.<sup>81</sup>

It is submitted that the possibility of political pressures on the policing of the Mansion Gate protests cannot be discounted, particularly when it is difficult to ascertain any objective threat to public order posed by the protestors. The sense of unease is aggravated by the draconian use of conspiracy in circumstances which do not appear capable of amounting to the offence, and where the only advantage of the use of the offence would appear to be the legitimisation of post arrest search and seizure. The difficulty, of course, would be in challenging the decision, and there is very little support in the authorities for a challenge on the basis that the search itself was illegitimate. It is difficult, if not impossible, to go behind a police claim that the search was authorised for the purpose of gathering evidence of a conspiracy to cause harassment, alarm or distress. The protestors may well feel that the seizure of equipment was simply an exercise in intelligence gathering about individuals actively (and lawfully) opposed to the Chinese government, but such an assertion is speculative. In any case, the courts have been relatively relaxed about finding that a secondary purpose of this nature is acceptable, and in setting a fairly low evidential threshold to accept that a legitimate purpose existed. This was the decision in *Pearce*<sup>82</sup>, and was a point made again in the case of *Miranda*.<sup>83</sup> An argument that the deployment of s18 powers of search were, in this case, a contravention of Article 8, then, would be a difficult one to advance.

The police have extensive and varied powers that can be utilised to prevent public disorder and crime during protests and in an age of terrorist attacks an increasing reluctance to interfere with their operational decisions can be discerned. The Convention may impose some obligation on the state to facilitate protests which are peaceful assemblies and legitimate forms of political expression, but if the courts are unwilling to rigorously defend protestor's rights by examining the proportionality of state action taken in the name of protecting order, then the outcome may be censorship. It is submitted that the arrests of the protestors for conspiracy to commit a public order offence is a troubling development that does not bode well for democratic protest in the United Kingdom. It is to be hoped that, if asked to adjudicate, the Courts would agree that this was an unjustifiable infringement of Articles 10 and 11.

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<sup>1</sup> Peter Walker 'Xi Jinping protesters arrested and homes searched over London demonstrations' *The Guardian* 23rd October 2015

<sup>2</sup> Shao Jiang, Amnesty International Blog, 11<sup>th</sup> December 2015 available at <https://www.amnesty.org.uk/blogs/shao-jiang> (last accessed 6th March 2016)

<sup>3</sup> (n1)

<sup>4</sup> P. Jarvis and M. Bisgrove 'The Use and Abuse of Conspiracy' (2014) *Criminal Law Review* 4,261

<sup>5</sup> The Criminal Law Act 1977 s.1

<sup>6</sup> (n5) s.1(b)

<sup>7</sup> The Criminal Attempts Act 1981 s.1(2)

<sup>8</sup> (n4) The authors cite *Dawson* [1960] 1 W.L.R. 163 and the more recent comments of Baroness Hale in *Saik* [2006] UKHL 18

<sup>9</sup> *Blackstone's Criminal Practice* 2016 A5.48

<sup>10</sup> (n5) s4(1)

<sup>11</sup> Law Commission Conspiracy and Attempts Law Com 318 (2009) para 4.35-4.39

<sup>12</sup> (n11)

<sup>13</sup> BBC News 'Ratcliffe-on-Soar Protesters Sentenced' (5<sup>th</sup> Jan 2011) available at < <http://www.bbc.co.uk/news/uk-england-nottinghamshire-12122009>> (last accessed 2<sup>nd</sup> March 2016)

<sup>14</sup> *R v Barkshire* [2011] EWCA Crim 1885

<sup>15</sup> D. Baker 'Paradoxes of Policing and Protest' (2008) *Journal of Policing, Intelligence and Counter Terrorism* 3:2 p8

<sup>16</sup> D.R. Mansley, *Collective Violence, Democracy and Protest Policing: protest events in Great Britain, 1999-2011* (Routledge: London 2014)

<sup>17</sup> R.Booth and B.van der Zee 'Protesters arrested after clashes at Ratcliffe power plant' *The Guardian* (18<sup>th</sup> October 2009)

<sup>18</sup> Mead, D *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Hart: Oregon, 2010) p249

<sup>19</sup> For example *R v Jones (Margaret) and others* [2004] EWCA Crim 1981

<sup>20</sup> Anonymous *Against All Odds: Animal Liberation* available via The Sparrow's Nest digital archive < <http://www.thesparrowsnest.org.uk/index.php/digital-library>> (last accessed 2<sup>nd</sup> March 2016)

<sup>21</sup> J.Elgot and D.Gayle 'Lawyers criticise decision to prosecute housing protester over sticker' *The Guardian*, 22<sup>nd</sup> October 2015

<sup>22</sup> R.Brandner 'Public: Out of Order?' (2012) 162 *New Law Journal* 1311; D. Baker 'Paradoxes of Policing and Protest' (2008) *Journal of Policing, Intelligence and Counter Terrorism* 8-22

<sup>23</sup> J.Gilmore 'Policing Protest: An authoritarian consensus' (2010) 82 (1) *Criminal Justice Matters* 21-23

<sup>24</sup> (n22)

<sup>25</sup> T. Richards 'How the police criminalised the Critical Mass bike ride' *The Guardian* 18<sup>th</sup> March 2013

<sup>26</sup> (n22)

<sup>27</sup> *R. (on the application of Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 6

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- <sup>28</sup> J. Noakes and P. Gillham 'Aspects of the new penology in the policing of global justice protests in the United States' in D. della Porta, A. Peterson, and H. Reiter (eds.) *Policing of transnational protest* (Ashgate: Burlington, 2006)
- <sup>29</sup> D. P. Waddington 'Public Order Policing in South Yorkshire, 1984-2011: the case for a permissive approach to crowd control' (2011) 6(3) *Contemporary Social Science* p320
- <sup>30</sup> P. Gillham, B. Edwards and J. Noakes 'Strategic Incapacitation and the policing of Occupy Wall Street protests in 2011' (2012) 23 (1) *Policing and Society: An International Journal of Research and Policy* 83
- <sup>31</sup> Her Majesty's Chief Inspectorate of Constabulary *Adapting to protest: nurturing the British model of policing* (2009) (London, HMIC)
- <sup>32</sup> H. Gorrington, M. Rosie, D. Waddington & M. Kominou (2012) 'Facilitating ineffective protest? The policing of the 2009 Edinburgh NATO protests' (2012) 22(2) *Policing and Society* 118
- <sup>33</sup> R. Ericson and A. Doyle 'Globalization and the policing of protest: the case of APEC 1997'. (1999) 50(4) *British Journal of Sociology* 589-608
- <sup>34</sup> (n12)p13
- <sup>35</sup> (n13)p87
- <sup>36</sup> (n27)
- <sup>37</sup> See below
- <sup>38</sup> Helen Fenwick 'Marginalising Human Rights: Breach of the peace, 'kettling', the Human Rights Act and public protest.' (2009) 3 *Public Law* 737
- <sup>39</sup> (n27) per Lord Toulson at para 30
- <sup>40</sup> (n1)
- <sup>41</sup> *DPP v Orum* [1988] 1.W.L.R. 88
- <sup>42</sup> [2003] EWCA Civ 337
- <sup>43</sup> (n25) per LJ Kay para 28
- <sup>44</sup> Specifically the protections afforded to defendants by the provisions at ss34-41 imposing strict limitations on time in detention.
- <sup>45</sup> *Police and Criminal Evidence Act 1984 s.17*
- <sup>46</sup> The various powers of search are at ss.8, 17, 18 and 32
- <sup>47</sup> *Police and Criminal Evidence Act Code B* para 6.9
- <sup>48</sup> *R (on the application of Hicks and others) v Commissioner of Police for the Metropolis and others* [2012] EWHC 1947 (Admin)
- <sup>49</sup> (n22) p3212
- <sup>50</sup> (n46) at para 236
- <sup>51</sup> *R (on the application of Pearce) v Commissioner of Police for the Metropolis* [2013] EWCA Civ 86
- <sup>52</sup> S24(5) of PACE sets out the reasons which could create the necessity to arrest.
- <sup>53</sup> The Right to Liberty and Security, Freedom of Expression and Freedom of Association and Assembly.
- <sup>54</sup> The Right to Respect for a Private and Family Life.
- <sup>55</sup> [2006] UKHL 55
- <sup>56</sup> H. Fenwick *Civil Liberties and Human Rights* 4<sup>th</sup> edn (Routledge-Cavendish: London, 2007) p661
- <sup>57</sup> [1985] IRLR 76
- <sup>58</sup> [2004] EWCA Civ 1639 (paras 44-46)
- <sup>59</sup> (n54) para 50
- <sup>60</sup> *Austin v Commissioner of the Police for the Metropolis* [2009] UKHL 5
- <sup>61</sup> D. Feldman 'Containment, deprivation of liberty and breach of the peace' (2009) 68(2) *Cambridge Law Journal* 2244
- <sup>62</sup> D. Mead 'The Right to Protest Contained by Strasbourg: The case of *Austin v UK* and the constitutional pluralist issues it throws up' *Strasbourg Observers* April 17<sup>th</sup> 2012 available at <https://strasbourgobservers.com/2012/04/17/the-right-to-protest-contained-by-strasbourg-an-analysis-of-austin-v-uk-the-constitutional-pluralist-issues-it-throws-up/> (last accessed 28<sup>th</sup> April 2016)
- <sup>63</sup> *Austin v UK* (2012) 55 EHRR 14 para 66
- <sup>64</sup> (n61)
- <sup>65</sup> D. Mead 'Kettling comes to the boil before Strasbourg: is it a deprivation of liberty to contain protesters en masse?' (2012) 71(3) *Cambridge Law Journal* p475
- <sup>66</sup> (1998) 28 EHRR 603
- <sup>67</sup> (n27)
- <sup>68</sup> (n62) para 68

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<sup>69</sup> [2009] EWCA Civ 23

<sup>70</sup> (n67) para 10

<sup>71</sup> See for example *Djavit-An v Turkey* (Application 20652/92) (2003) at para 57

<sup>72</sup> *Gafgaz Mammadov v. Azerbaijan* (Application 60259/11) (2014)

<sup>73</sup> (2012) (Application no. 40721/08)

<sup>74</sup> (n71) para 37

<sup>75</sup> (1993) 17 EHRR 35

<sup>76</sup> (n71) para 31

<sup>77</sup> (n55) p686

<sup>78</sup> D.Mead 'The right to peaceful protest under the European Convention on Human Rights - a content study of Strasbourg case law' (2007) 4 European Human Rights Law Review 345-384

<sup>79</sup> United Nations, Treaty Series, vol. 1035, p. 167

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<sup>80</sup> D.Waddington, 'Policing Public Disorder: Theory and Practice' (Willan: London, 2007)

<sup>81</sup> R. Ericson and A. Doyle 'Globalization and the Policing of Protest: The case of APEC 1997' (1999) 50(4) The British Journal of Sociology

<sup>82</sup> (n51)

<sup>83</sup> *Regina (Miranda) v Secretary of State for the Home Department and another* (Liberty and others intervening) [2016] EWCA Civ 6