

**A balance of rights and protections in public order
policing: A case study on Rotherham**

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A balance of rights and protections in public order policing: A case study on Rotherham

Abstract

This article aims to discuss the difficult policing position of attempting to facilitate legitimate political protest; whilst planning to protect the public from harm arising from risk of violent protest. A kind of case study is undertaken, from this perspective, of public order policing challenges faced by South Yorkshire Police in Rotherham and elsewhere in that region, given the attention that the town and area have garnered from far-right protest groups such as the English Defence League and Britain First. Particular examination is given to the legal challenges inherent in public order policing, where the rights to lawful freedom of expressions and association for protesting groups must be balanced, in the view of the UK courts, with the rights to private and family life for members of the local community, in the face of what can sometimes boil over to become violent bigotry and racism.

The situation concerning public order policing in Rotherham in the last several years is worthy of a case study-type article such as this one for several reasons. Unique political innovations in the form of an advisory panel on protests have been created by the politicised office of the police and crime commissioner, following an uncompromising approach from the Home Office to reject calls for reform of the Public Order Act 1986. Meanwhile, the targeting of the area by far-right protesters is unlikely to cease until more accountability is forthcoming over the appalling record of public bodies in failing to address child sexual exploitation in Rotherham. Lastly, case law developments that have occurred in 2017 allow us to take an opportunity to revisit the legal framework that police commanders in Rotherham must negotiate in facilitating protests in the town.

Key words

Protest, expression, rights, public order, Rotherham, police

1. Introduction

In 2009, Her Majesty's Inspectorate of Constabulary (HMIC) released a pair of highly influential and transformative reports on public order policing in the UK, following a number of notoriously heavy-handed police operations, including the killing of Ian Tomlinson during the policing of the London G20 protest in 2009¹.

The first of these reports, *Adapting to Protest*, in the words of one of its chief authors, Jane Gordon, "analysed the relationship between the human rights obligations of the police and their public order powers", and "sought to introduce an explicitly human rights based approach to the policing of protest, defining the starting point for the policing of protest as a presumption in favour of facilitating peaceful protest, reflecting the obligations of the police under [the European Convention on Human Rights]"².

Since the landmark *Adapting to Protest* reports, British policing of public order and of protest has been rightly put under the spotlight to a greater degree than prior to this period. HMIC in 2009, in their second landmark report of that year (*Adapting to Protest - Nurturing the British model of policing*³), noted that:

"*Adapting to Protest* highlighted confusion regarding the legal framework for the policing of protest, in particular the human rights obligations of the police under Article 11 of the European Convention on Human Rights (ECHR) the right to freedom of peaceful assembly. It identified the starting point for policing protest as the presumption in favour of facilitating peaceful protest. However, this is not an absolute presumption."⁴

Such rejoinders about the guarantees for the right to peaceful protest have to be re-issued from time to time; since periodically, the police, in particular hotspots across the UK, must in practice put a balance of obligations to facilitate peaceful expression and assembly, as against the duty to protect members of the public from harm, to the test. As Lockley and Ismail have observed in a report on the policing of recent far-right protests in South Yorkshire:

"The right of protest is enshrined in the common law of England and Wales. It is also protected by the European Convention of Human Rights (ECHR). The police have powers to place conditions on marches and assemblies, and in certain circumstances, to seek to have a march prohibited. Despite the law's protection of the right to protest, that right is not unqualified. Art 11 of the ECHR – embedded in the law of the United

¹ See HMIC, *Adapting to Protest*, 2009a and HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b.

² Jane Gordon, 'A developing human rights culture in the UK? Case studies of policing', E.H.R.L.R. 2010, 6, 609-620, p.618.

³ See HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b.

⁴ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.122.

Kingdom by the Human Rights Act 1998 – allows certain restrictions to be placed on freedom of assembly, if necessary in a democratic society (among other circumstances) in the interests of public safety, the prevention of disorder and crime and the protection of the rights and freedoms of others. Additionally, Art 10 protects freedom of expression, and this too is a qualified right, subject to broadly the same restrictions as Art 11."⁵

HMIC in 2009, again in their follow-up report *Adapting to Protest* report, also noted that:

"ECHR Articles 9, 10 and 11 protect the right to manifest a religion [and other beliefs], to freedom of expression and to freedom of peaceful assembly respectively. Taken together, they provide a right of protest. The right to freedom of peaceful assembly under ECHR Article 11 places both negative and positive obligations on the police. The police must not prevent or restrict peaceful protest except to the extent allowed by ECHR Article 11 (2)..."⁶

Furthermore, HMIC also noted that it had "become clear that a number of police forces in England and Wales approach peaceful protest in terms of "is the protest lawful or unlawful?"⁷. This was rejected as an "incorrect starting point" since the "concept of 'unlawful protest' is inaccurate as a matter of law":

"Firstly, there is no legal basis in domestic law for describing a public protest as inherently unlawful: the common law offence of unlawful assembly was explicitly abolished under section 9 of the Public Order Act 1986 and neither the Public Order Act 1986 nor the law on obstruction of the highway renders a protest in and of itself unlawful. Secondly, the right guaranteed by ECHR Article 11 is the right to "peaceful assembly", not "lawful assembly". By definition, a person who is exercising the right in ECHR Article 11 to peaceful assembly is acting lawfully. In fact, it is unlawful under the Human Rights Act for a public authority, including the police, to act in a way which is incompatible with that right. But the police will not be acting in a way which is incompatible with the right if they act in accordance with the requirements of Article 11(2)."⁸

Much more recently, however, there have been some judicial reminders of the need to place public protection and the reduction of the risk of harm to bystanders and a local community back at the heart of the debate on public order policing. Duties on the police arise from the common law as well as 'counter-obligations', that is, *rival* positive obligations, under human rights law, to the positive obligations to facilitate protest. Lady Hale in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 observed at 195:

⁵ Andrew Lockley and Imam Mohammad Ismail, *Policing protests in Rotherham: Towards a new approach*, p.20, from <http://www.southyorkshire-pcc.gov.uk/Document-Library/Publications/Review-of-Police-Community-Relations.pdf> (Last accessed at 12.05.2016)

⁶ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.197.

⁷ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.198.

⁸ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.198.

"There is no doubt that the police owe a positive duty in public law to protect members of the public from harm caused by third parties... the police have a duty to take all steps which appear necessary for keeping the peace, for preventing crime and for protecting from criminal injury... a party threatened with violence from another is entitled to protection, whatever the rights and wrong of their dispute."

There is then the question as to whether an interference with any right to protest, such as this is continued in the package of rights in Articles 9, 10 and 11 ECHR, is to be undertaken by the police as a careful and proportionate balancing exercise between those particular rights, as a kind of set, and the positive obligation that exists under the qualified right to respect for private and family life under Article 8 ECHR. Lord Kerr recently observed in *R (DB) v Police Service of Northern Ireland* [2017] UKSC 7 at para. 75 that "proportionality has certainly a role to play in assessing whether police actions have fulfilled their positive obligation to protect the [community's] article 8 rights". The issue is that correctly judging the proportionality of the approaches used in the management of a protest, and its hopefully peaceful facilitation, through to and including any need arising to bring a dangerously disorderly protest (or element of a protest) to an end is a difficult job for police commanders to undertake. Judicial approaches to the question of balancing rights to protest (in a kind of package of ECHR rights) and duties to protect the public result in a mixed bag of public protest jurisprudence.

David Mead observed in 2010 that the case law at that time portrayed "a picture of protest that is very mixed":

"It is impossible to sum up succinctly or even confidently to set out its direction and trends... This really is the problem. There is little by way of an overarching scheme or an underpinning theory [of peaceful protest in England and Wales]... If we were to attempt mathematically to depict 'protest in 2010', the case law trend would be, at best, no change and would probably evince a subtle regressive shift [away from rights to peaceful protest in England and Wales]."⁹

This article aims to discuss the difficult policing position of attempting to facilitate legitimate political protest whilst protecting the public from harm arising from unlawful or violent protest. A kind of case study is undertaken, from this perspective, of public order policing challenges faced by South Yorkshire Police in Rotherham and elsewhere in that region, given the attention that the town and area have garnered from far-right protest groups such as the English Defence League and Britain First. Particular examination is given to the legal challenges inherent in public order policing, where the rights to lawful freedom of expressions and association for protesting groups must be balanced, in the view of the UK courts, with the rights to private and family life for members of the local community, in the face of what can sometimes boil over to become unlawful and violent bigotry and racism.

⁹ Mead, David. *The new law of peaceful protest: rights and regulation in the Human Rights Act era*. Bloomsbury Publishing, 2010, p.404.

2. The public order policing context in Rotherham

Rotherham is arguably on the radar of UK public consciousness for one main reason: the mass sexual exploitation of children that went on there for a number of years¹⁰, with little or nothing done by the regional police force (South Yorkshire Police, or SYP), or the local government authority (Rotherham Borough Council, or RBC), to take measures to prevent this from occurring at the time (that is, chiefly in 1997-2003)¹¹. Publicly, such widespread child sexual exploitation (CSE) was a little known-about issue¹², yet one of the gravest seriousness, until matters increasingly came to light in the late Noughties and up to a point earlier this decade¹³. Since then, and because of the considerable media reporting that has focused on the Asian ethnicity and Muslim religious affiliation of many of those known perpetrators who were eventually prosecuted¹⁴, far-right groups from across the UK have periodically descended upon Rotherham, Sheffield and other towns¹⁵ in order to agitate their political causes. These self-same causes can be challenged as racist, xenophobic, and Islamophobic¹⁶. Repeated protests in Rotherham by such groups as the English Defence League (EDL) and Britain First (BF) have been the scenes of considerable violence, and have taken place at considerable cost to the taxpayer, local business, and more importantly, at times, the safety and wellbeing of the local community¹⁷. The strength of feeling for far-right protests might be on the wane in, say, London¹⁸ - even recently, in the aftermath of the first deadly terrorist attacks in the UK capital for several years¹⁹.

¹⁰ See Jay, Alexis. *Independent Inquiry Into Child Sexual Exploitation in Rotherham: 1997-2013*. Rotherham Metropolitan Borough Council, 2014.

¹¹ See Jay, Alexis. *Independent Inquiry Into Child Sexual Exploitation in Rotherham: 1997-2013*. Rotherham Metropolitan Borough Council, 2014.

¹² Helen Pidd, 'Failures in Rotherham led to sexual abuse of 1,400 children', from <https://www.theguardian.com/society/2014/aug/26/rotherham-sexual-abuse-children> (Last accessed 02.04.2017)

¹³ BBC News, 'Rotherham abuse scandal: 1,400 children exploited, report finds', from <http://www.bbc.co.uk/news/uk-england-south-yorkshire-28939089> (Last accessed 02.04.2017)

¹⁴ See for example Allison Pearson, 'Rotherham: In the face of such evil, who is the racist now?', from <http://www.telegraph.co.uk/news/uknews/crime/11059138/Rotherham-In-the-face-of-such-evil-who-is-the-racist-now.html> (Last accessed 02.04.2017)

¹⁵ See http://powerbase.info/index.php/List_of_English_Defence_League_protests (Last accessed 02.04.2017)

¹⁶ See George Kassimeris and Leonie Jackson, 'The English Defence League's 'rational Islamophobia' is a racist discourse, but it is not confined to the EDL', from <http://blogs.lse.ac.uk/politicsandpolicy/not-racist-not-violent-just-no-longer-silent-is-the-edl-racist/> (Last accessed 02.04.2017)

¹⁷ See Andrew Lockley and Imam Mohammad Ismail, *Policing protests in Rotherham: Towards a new approach*, from <http://www.southyorkshire-pcc.gov.uk/Document-Library/Publications/Review-of-Police-Community-Relations.pdf> (Last accessed at 12.05.2016)

¹⁸ See <https://www.theguardian.com/world/2017/apr/01/far-right-demonstration-falls-flat-as-only-300-turn-up-to-london-march> (Last accessed 02.04.2017)

¹⁹ See <http://www.telegraph.co.uk/news/0/many-people-killed-terrorist-attacks-uk/> (Last accessed 18.10.2017)

The mood (and the violence) of many protests and demonstrations in Rotherham (and other towns and cities) in the period since 2012 has been exacerbated by the presence not just of far right groups, such as the EDL, but anti-fascist groups with a militant, far-left and sometimes violent contingent²⁰; while the group Unite Against Fascism (UAF) can simply mobilise larger numbers of counter-protestors that require careful policing²¹. Thousands of police officers can be required to police a single large demonstration by the EDL in Rotherham, since it can and does draw a large counter-demonstration from UAF - resulting in violent conflict and numerous public order offences being committed, and multiple arrests to be made by South Yorkshire Police²².

Local residents can be targeted by the far-right groups, or caught up in violence caused by the far-right protests. It could be argued that this a more likely consequence of those protests simply being allowed to take place as compared to protests by other groups with less unsavoury agendas. However, the police control and regulation of protest must take place in fulfilment of the logical and legal assertion that despite their unsavoury politics, the (more peaceful) members of the EDL and other groups, *prima facie*, must enjoy their *qualified* rights to freedom of assembly and association to the extent that the Public Order Act 1986 allows, as it is to be interpreted in the light of the ECHR. However, the treading of that line between the facilitation of public protest under positive obligations arising from the ECHR, and ensuring an emphasis and high regard for community safety, under both common law and statutory duties (and the ECHR), is not easy for South Yorkshire police to perform - nor would it be for any police force²³. Politically, however, SYP must operate in relation to public order policing against not only background of failures in relation to CSE in Rotherham; but also cover-ups in relation to the Hillsborough disaster²⁴, and a growing political storm over the failure by the Home Office to launch a public inquiry into the wrongdoings of police participants in the so-called 'Battle of Orgreave'^{25,26,27}.

²⁰ See <https://www.standard.co.uk/news/uk/ugly-scenes-as-edl-march-clashes-with-antifascist-protesters-in-liverpool-a3556271.html> (accessed at 24.10.2017)

²¹ See <https://www.standard.co.uk/news/london/58-arrested-as-anti-fascist-demonstrators-clash-with-bnp-in-westminster-8640650.html> (accessed at 24.10.2017)

²² See <http://southyorks.police.uk/news-syp/protest-rotherham-town-centre> and <http://www.southyorkshire-pcc.gov.uk/Document-Library/Advisory-Panel-on-Policing-Protests/2016-Report.pdf> (accessed at 30.03.2017)

²³ As the recent trial ending in the acquittal of ten of the 'Rotherham 12' demonstrates, the police must take impartial action against violence committed by individuals from either of the opposing sides of clashes in public, even if the individuals concerned go on to be exonerated by a jury trial. See Frances Perraudin, 'Call for an enquiry as Asian men who fought far-right extremists are cleared', from <https://www.theguardian.com/uk-news/2016/nov/16/asian-men-far-right-rotherham-cleared-violent-disorder> (accessed at 30.03.2017)

²⁴ David Conn, 'Hillsborough disaster: deadly mistakes and lies that lasted decades', from <https://www.theguardian.com/football/2016/apr/26/hillsborough-disaster-deadly-mistakes-and-lies-that-lasting-decades> (Last accessed 02.04.2017)

²⁵ Dan Johnson, 'Background: "The Battle of Orgreave"', from <http://www.bbc.co.uk/news/uk-england-south-yorkshire-33107090> (Last accessed 02.04.2017)

Today, South Yorkshire Police and the local Police and Crime Commissioner certainly expect the far-right to continue to exploit their traction in the region, and in Rotherham in particular²⁸. Meanwhile, hate crime incidents have been on the rise in the UK following an inflammatory vote for 'Brexit' in June 2016²⁹. This violent protest narrative is arguably matched and extended by the rise of far-right street groups and associated violent protest in other parts of Europe, outside of the UK³⁰. Broadly speaking, in other European countries it is the same human rights law framework, in the form of the European Convention on Human Rights and Fundamental Freedoms (1950) (the ECHR), which structures and regulates approaches to public order policing from a human rights perspective, and under the auspices of the European Court of Human Rights at Strasbourg. Chief amongst the relevant Articles of the ECHR in this context are Articles 10 and 11, the qualified rights to freedom of expression and freedom of association respectively.

It may be that unsavoury and unwelcome protest, including far-right and neo-fascist protest, can be engaged with and better understood by police forces who seek to build rapport, as a particular strategy, with those more widely unwelcome protestors, such as the EDL. Gorringe and Rosie have observed that 'once even 'transgressive' protestors are conceived of as rational actors who can be negotiated with rather than feared, then possibilities for dialogue open up'³¹.

In a current policy climate of the 'facilitation of protest' however, far-right groups in locations across the UK have begun to afflict local communities - even if, once such protests by groups like the EDL become disorderly, they are then heavily policed, and physically and spatially controlled. Stott et al have observed that 'the police invariably start their planning from a position of negotiated management – not least of all because they are [legally] obliged to do

²⁶ BBC News, 'Battle of Orgreave inquiry ruled out', from <http://www.bbc.co.uk/news/uk-37826507> (Last accessed 02.04.2017)

²⁷ Steven Daniels, 'New files add weight to calls for Battle of Orgreave inquiry', from <https://theconversation.com/new-files-add-weight-to-calls-for-battle-of-orgreave-inquiry-85697> (Last accessed at 23.10.2017)

²⁸ BBC News, 'Calls for Rotherham 'protest panel' to advise South Yorkshire Police', from <http://www.bbc.co.uk/news/uk-england-south-yorkshire-35698626> (Last accessed at 02.04.2017)

²⁹ Alan Travis, 'Lasting rise in hate crime after EU referendum, figures show', from (Last accessed at 02.04.2017) <https://www.theguardian.com/society/2016/sep/07/hate-surged-after-eu-referendum-police-figures-show> (Last accessed at 02.04.2017)

³⁰ See Anoosh Chakelian, 'Rise of the nationalists: A guide to Europe's far-right parties', from <http://www.newstatesman.com/world/europe/2017/03/rise-nationalists-guide-europe-s-far-right-parties> (Last accessed at 02.04.2017) and Rick Lyman, 'Once in the shadows, Europe's neo-Fascists are re-emerging', from https://www.nytimes.com/2017/03/19/world/europe/europe-neo-fascist-revival-slovakia.html?_r=0 (Last accessed at 02.04.2017)

³¹ Gorringe, Hugo, and Michael Rosie. "'We will facilitate your protest': Experiments with Liaison Policing." *Policing* (2013): pat001.

so... escalated force or strategic incapacitation [are possible] if police perceive the levels of threat, potential for criminality and disruption warrant this³².

Stott et al conclude, however, that 'interventions increase the risk [that] police will also infringe rights of peaceful assembly protected under the HRA'³³. It is of course a vital element of police legitimacy, based on the theory 'policing by consent' that predominates in the UK context, that public protest is policed impartially, and in a politically neutral manner³⁴; that is to say, based around harm reduction, public safety and the maintenance of the peace. The chief text informing this exercise in striking a balance between competing responsibilities to uphold positive obligations around public safety and freedom to protest is the Public Order Act 1986, as read in conjunction with the Human Rights Act 1998 and Articles 10 and 11 ECHR.

3. Articles 10 and 11 ECHR and the important issue of proportionality

Articles 10 and 11 have a commonality of structure. They are both qualified rights as part of the ECHR, and interferences with them must be legitimate (in the sense that those interferences must be 'prescribed by law'), necessary (with interferences responding to a recognised 'pressing social need') and proportionate (entailing a 'fair balance' between the impact on the rights of individuals, and the resulting benefits to society as a whole a result, here, of any restriction of the right to freedom of expression or association).

Lord Rodger in *R. (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 at para. 85, on the issue of such qualified ECHR rights and the concept of proportionality, that:

"To be permissible, any restriction on these essential rights in articles 10 and 11 must be necessary in a democratic society. The proportionality principle demands that a balance be struck between the requirements of the purposes listed in articles 10(2) and 11(2) and the freedom to express opinions and to assemble."

As was noted in the introduction to this piece, judging the proportionality of policing approaches to regulating protest is difficult in demanding circumstances. Issues around police resource pressures, fluid or partial police intelligence and the pressures of local politics might all be contextual distractions from purer human rights law considerations of the application of ECHR rights to the decision-making for police commanders.

³² Stott, Clifford, Martin Scothern, and Hugo Gorringe. "Advances in liaison based public order policing in England: Human rights and negotiating the management of protest?." *Policing* 7.2 (2013): 212-226.

³³ Stott, Clifford, Owen West, and Matthew Radburn. "Policing football 'risk'? A participant action research case study of a liaison-based approach to 'public order'." *Policing and Society* (2016): 1-16.

³⁴ On concepts of police legitimacy, and the view that public consent for policing is too vague a standard to explain tolerance for and compliance with policing approaches, see for example Tankebe, Justice. "Viewing things differently: The dimensions of public perceptions of police legitimacy." *Criminology* 51.1 (2013): 103-135.

Interferences with the rights of protestors can be justified according to particular aims including the prevention of crime and disorder (the most relevant in our context here, in Rotherham and in public order policing in general). However, in controlling and regulating public protest, it will be argued below, there has been fresh emphasis for the police in the UK, and in South Yorkshire, on the positive obligation not just placed upon them to facilitate protest under Articles 10 and 11 ECHR, but the positive obligation placed upon them by Article 8 of the ECHR to uphold the right to respect for private and family life of the local community; as highlighted for them by the UK Supreme Court in the recent case of *DB*³⁵. However, prior to this recent case law development came particular political innovations, which have shed light on the determination of the regional policing authorities in South Yorkshire to counter and combat the impact of far-right protests (and left-wing counter-protests) on the local community.

4. Innovation in seeking to maintain public order in Rotherham

In late February 2017, the British Broadcasting Corporation (BBC) reported that "Since 2012, 16 protests have been held [in Rotherham], the majority organized by far right groups such as the EDL and Britain First, at a cost of £4m..."³⁶ It transpires that in 2015 the Police and Crime Commissioner for South Yorkshire (SYPCC) had written to the Home Office, as the responsible department for policing matters in the UK national government, arguing for reforms to the legislation which chiefly regulates public protest and public order policing in England and Wales (the Public Order Act 1986), but the Home Office reportedly "said it had no current plans to change the law."³⁷

In a pragmatic move, it could be argued, to be seen to be taking action against the far-right protests affecting the sense of community in Rotherham, an independent report commissioned by the SYPCC, Dr. Alan Billings, recommended that a Rotherham Advisory Panel for Protests be created. This Panel would, it was thought, be able to offer input on the policing of assemblies and processions in Rotherham in spring 2016 onwards. The report recommended specifically that "...the PCC should establish an Advisory Panel for Protests...[though] such a panel would have no statutory powers, and, for example, could not itself impose or prohibit marching routes."³⁸

But in practice, and as the relevant report further details, the Panel is likely to have a distinct procedural impact on the nature of the policing of protest in Rotherham and across South Yorkshire:

³⁵ *R (DB) v Police Service of Northern Ireland* [2017] UKSC 7, discussed below.

³⁶ BBC News, 'Plea to ban repetitive Rotherham protests rejected by Home Office', from <http://www.bbc.co.uk/news/uk-england-south-yorkshire-39041084> (Last accessed at 30.03.2017)

³⁷ BBC News, 'Plea to ban repetitive Rotherham protests rejected by Home Office', from <http://www.bbc.co.uk/news/uk-england-south-yorkshire-39041084> (Last accessed at 30.03.2017)

³⁸ See <http://www.southyorkshire-pcc.gov.uk/Document-Library/Publications/Review-of-Police-Community-Relations.pdf> (accessed at 12.05.2016) - para. 8.8

"As soon as the police become aware that a protest event is being organised, the Panel should have a prompt meeting. Speed is of the essence. We envisage that the police will present proposals for handling the protest, and that the Panel will then comment. Ultimately, decisions on operational matters are of course for the police to make and be accountable for. The Panel will need to respect the operational independence of the Chief Constable at all times. However, the aim will be that police decisions are made with the benefit of advice from the Panel." ³⁹

The report also noted that the situation on the ground in Rotherham warranted creating such a panel, and in so doing, consciously borrowed a practice from Northern Ireland, with its (statutory) Parades Commission. Lockley and Ismail have observed that:

"Unlike the Parades Commission of Northern Ireland ('PCNI'), such a panel would have no statutory powers, and, for example, could not itself impose or prohibit marching routes. But we readily acknowledge the contribution made to our thinking by the success of the PCNI, and the input obtained from a past chair, Sir Anthony Holland."⁴⁰

An Independent Policing Protests Advisory Panel ('the Panel') was duly announced and put into action by the PCC for South Yorkshire in March 2016⁴¹. SYPCC Alan Billings noted, upon the launch of the Panel, that:

"The members that have been appointed represent a cross-section of our communities from across South Yorkshire and I expect them to be able to bring knowledge and expertise to make recommendations regardless of the objective of the planned protests... For some time now there have been a number of protestors travelling regularly to Rotherham to protest against the Force's handling of child sexual exploitation matters. Last Saturday members of the Panel assisted with the arrangements for the EDL protest for the first time. In the future we don't know what issues might be the subject of protests or where they might be in the county. This new panel with its diverse membership should be able to assist and advise when necessary."⁴²

However, it could be argued that as the panel, as reported, has an influence over the operational handling by South Yorkshire Police of far-right protests in Rotherham, then there is a danger of complaints, accusations and even legal challenges on the grounds of bias in relation to the role of the Panel - since it does not, however understandably, feature a

³⁹ See <http://www.southyorkshire-pcc.gov.uk/Document-Library/Publications/Review-of-Police-Community-Relations.pdf> (accessed at 12.05.2016) - para. 8.10

⁴⁰ See <http://www.southyorkshire-pcc.gov.uk/Document-Library/Publications/Review-of-Police-Community-Relations.pdf> (accessed at 12.05.2016) - para. 8.8

⁴¹ See <http://www.southyorkshire-pcc.gov.uk/News-and-Events/News/2016/March/Report-in-to-Policing-Protests-in-Rotherham.aspx> (accessed at 12.05.2016)

⁴² See <http://www.southyorkshire-pcc.gov.uk/News-and-Events/News/2016/March/Independent-Policing-Protests-Advisory-Panel.aspx> (accessed at 24.05.2016)

designated representative of the far-right. *Porter v Magill* [2001] UKHL 67 sets down the current test for 'apparent bias' as a ground of judicial review, however, as whether a fair minded and informed observer would conclude there was a real possibility of bias. But in response to this criticism, it must be noted that the SYPCC and South Yorkshire Police are in a particular position on the issue of policy in terms of protest management from a wider equality law perspective. In any area of England and Wales, the police and the PCC, as well as a local authority, are under duties under the public sector equality duty (PSED). Race and religion, for example, are 'protected characteristics' under S.149(7) of the Equality Act 2010. Section 149(1) of the 2010 Act contains the essence of the PSED, as follows:

"149 (1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

Clearly, on just one strand of the PSED for example, the Rotherham Panel would potentially be seen as a means by which, in South Yorkshire, the PCC and the police are evidencing the meeting their duty to have due regard to, amongst other things, better fostering of 'good relations' between communities in the town of Rotherham, by perhaps taking the feeling of non-involvement of the local community perspective out of the equation.

Having noted this, when it comes to the membership of the Panel itself, though, it must be said that a better model, from a democratic accountability point of view, would be a Panel made up of a number of elected local councillors, as well as other public figures in the area. Such a higher profile elected contingent of Panel membership would bring the PCC, SYP and the local authorities of South Yorkshire together in a more visible way that could be very effective and more democratically legitimate. By way of analogy, an issue currently is that the Panel (and others like it in time perhaps) has a lot more in common in terms of its membership with the role 'special advisors' in central government.

There is too the fundamental question as to whether the courts already provide enough 'steer' in the form of case law that police commanders in public order scenarios could be better or more thoroughly trained to navigate and to apply.

However, if such 'Advisory Panels on Protest' proliferated in other parts of the UK, there is a risk that newer criticisms of the further politicisation of public order policing, and of any procedural omission of right-of-centre views, would join other wider criticisms about the stifled nature of public protest in the UK. For example, Joanna Gilmore, in her comprehensive 2013 doctoral study of large parts of the UK legal framework regulating protest, has noted that there is 'an extensive legal regime that places onerous restrictions on

the activities of protestors⁴³. For this reason alone it is hoped that the Panel in Rotherham remains a special case, just as in some ways the strength of far-right protest in Rotherham in recent years has been a special case. Or perhaps such panels could at the very least be put on a statutory basis in time, with strict duties to consider a wide range of membership.

Certainly, one thing that the equivalent legal framework would struggle with in any jurisdiction is the ability to meaningfully, and without prejudice, articulate balanced and proportionate restrictions on protest *regardless of* how unsavoury or unwholesome the relevant causes and politics of demonstrators might be. This is vital since, as many would agree, a culture of effective but not harmful protest should be seen as a sign of healthy democratic values under the rule of law, with any violence occurring as part of protest then falling within the ambit of the criminal law as much as the law regulating civil liberties.

5. The framework of the Public Order Act 1986 in the light of the qualified rights to freedom of expression and peaceful assembly

As outlined above, case law on public order policing is driven by the balance between human rights duties and obligations to facilitate peaceful protest in the forms of processions and assemblies, and competing duties and obligations to keep the public date and prevent the disproportionate, imbalanced interference with the right to respect for private life, and other rights of individuals in a community where a protest may take place. A core piece of regulatory statute in this set-piece is the Public Order Act 1986.

In considering the legal framework of protests and marches, it must first be noted that there is a statutory requirement of advance notice of '6 clear days' for public processions, that is, marches and mobile demonstrations in a local authority area, under Section 11 of the Public Order Act 1986. This requirement does not apply to regular, repeated processions that take place using a similar route and format (S.11(2)), however; although it must be said that the far-right protests in Rotherham have not been so regularly present ('commonly or customarily held') in the town that this principle from the 1986 Act would apply to them. *Kay v Metropolitan Police* [2008] UKHL 69 concerned a procession in the form of a large scale cycle ride through central London that took place each month for years, with the same starting location, but very little else in common from one occurrence of the event to another. Importantly, with the House of Lords finding in *Kay* that there was no duty on any person to notify under Section 11 of the 1986 Act, the example of this 'Critical Mass' cycle ride can be distinguished from far-right marches in Rotherham. 'Critical Mass' had no leadership structure or chief organisers as such, and so nobody was identifiable as being under the notification duty in Section 11; while far-right groups such as Britain First adopt hierarchical structures as a matter of course⁴⁴. So the requirement that exists for the far-right to give

⁴³ Gilmore, Joanna Helen. (PhD thesis, unpublished), "'This is Not a Riot!': Regulation of Public Protest and the Impact of the Human Rights Act 1998." (2013).

⁴⁴ See, for example: <http://www.independent.co.uk/news/uk/home-news/britain-first-leader-threat-mps-journalists-paul-golding-jail-release-a7534126.html> and <https://www.theguardian.com/uk-news/2016/nov/03/deputy-leader-britain-first-guilty-over-verbal-abuse-muslim-woman-jayda-fransen-hijab> (Last accessed at 02.04.2017)

notices of their marches in Rotherham ensures that the regulation and control of the procession concerned should in theory always be possible to undertake in a carefully planned manner, albeit with the new influence of the Rotherham Advisory Panel on Protests, as described above.

The second HMIC *Adapting to Protest* report from 2009 has it too that police intelligence should be used to plan the management of a protest where there is no notification under Section 11 of the 1986 Act:

"Where police have prior information that an event is due to take place (even though formal notification has not been provided), they should take appropriate measures to plan and prepare for the event... Police must have information or intelligence that the protest group represents a danger to public order or public safety before imposing any conditions on a peaceful protest or taking steps to disperse the protest."

As a key regulatory power for the police under the Public Order Act 1986, Section 12(1) allows for imposing conditions on public processions, as follows:

"(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that—

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place..."

Following *R (Brehony) v Chief Constable of Greater Manchester Police* [2005] EWHC 640 (Admin), the rationale for imposing conditions (under the headings above) must be stipulated by a police commander in imposing those conditions and restrictions on a protest.

Importantly, breaches of these conditions placed on processions by the police can lead to the commission of criminal offences by demonstrators⁴⁵; aside from more violent offences they may commit as a result of disorderly and harmful protest⁴⁶. Furthermore, under Section 13 of

⁴⁵ For example, under Section 12(4) of the Public Order Act 1986, an organiser of a procession who fails to comply with a condition imposed on that procession commits an offence; unless the circumstances concerned were out of their control. In effect, knowing failure to give sufficient notice of a procession is also an offence, under Section 11(7) etc.

⁴⁶ For a cross section of the offences for which individuals were arrested at one protest in Rotherham, ranging from assault, to possession of an offensive weapon, to 'causing racially and religiously aggravated fear alarm

the 1986 Act, public processions may be prohibited in a council area for up to three months, with the consent of the Home Secretary and the relevant local authority, if the kind of conditions above would not be sufficient to maintain public order. This approach was initially tried by South Yorkshire Police, together with the Police and Crime Commissioner for South Yorkshire, and Rotherham Borough Council, in relation to the far-right protests in Rotherham and across the region of late. As Thirlaway has noted, despite these "requests from Rotherham Council and the Police and Crime Commissioner for South Yorkshire, the Home Secretary declined to approve a ban under s13, opting instead to provide a special grant of funding to meet the costs of policing"⁴⁷. In due course these continuing protests prompted their request to the Home Office that the 1986 Act be reformed, and, with no government interest in that proposal, to set up the Rotherham Advisory Panel on Protests, as noted above.

As an important overall balancing protection for the rights to freedom of expression and association under Articles 10 and 11 ECHR, given the extent to which the nature of the provisions of the 1986 Act interferes with them, Section 14 of the Public Order Act 1986 entails that directions may only be given by the police as to the duration and nature (location and size) of assemblies, should the relevant conditions concerning risk be satisfied, as above; and assemblies, importantly, cannot be prohibited outright. As noted above, there had been a November 2015 report by SYPCC (and their Independent Policing Ethics Panel) that had been sent to the Home Office, to communicate a request to consider statutory reform of the Public Order Act 1986. The SYPCC report in November 2015 highlighted that there were already very large costs of policing protests in Rotherham, by that time, but expressly, it would seem, the 2015 report rejected the idea that costs alone could be the basis of preventing otherwise lawful protests.

There was, however, a list of factors that the SYPCC felt that the Home Office might allow the police force in any given area the lawful ability under the Public Order Act 1986 to take into account, through statutory reform, however. In summary, these were the repetitive nature of protests; the seriousness of impact on community relationships and local businesses, and (although only if there were another criterion present, it was argued by the report) disproportionate costs⁴⁸. The SYPCC recommendation to Home Office was that disproportionate costs would need to be joined by one of the other factors that were relevant, including the existing ones from the Public Order Act 1986 framework, which include intimidation, and '*serious public disorder, serious damage to property or serious disruption to the life of the community..*'. This argument was rejected by the Home Office only in February 2017.

and distress', see: <http://southyorks.police.uk/news-syp/protest-rotherham-town-centre> (Last accessed on 02.04.2017)

⁴⁷ Thirlaway, V., Case Comment: "*Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB)", (2016) 22(1) *EJoCLI* (online) and Chris Burn 'Attempts to Ban Rotherham Abuse Protests Stall' *The Star* (Sheffield, 29th September 2015), from <http://www.thestar.co.uk/news/local/attempts-to-ban-rotherham-abuse-protests-stall-1-7485149> (Last accessed on 18.10.2017)

⁴⁸ See <http://www.southyorkshire-pcc.gov.uk/Document-Library/EthicsPanel/Letter-to-Home-Office-Policing-Protests.pdf> (Last accessed on 02.04.2017)

6. Newer legal powers and case law developments

Such fresh language and perspective in the Public Order Act 1986 may not be in current government plans, but there has been, in the last few years, a shift in the powers that can be deployed by the police under statute to help them control and regulate potentially violent protest and protestors. For example, Sections 34 - 42 of the Anti-Social Behaviour, Crime and Policing Act 2014 concern dispersal order powers, to be used on the authorisation of a senior police officer (Section 34(2)):

"only if satisfied on reasonable grounds that the use of those powers in the locality during that period may be necessary for the purpose of removing or reducing the likelihood of—

- (a) members of the public in the locality being harassed, alarmed or distressed, or
- (b) the occurrence in the locality of crime or disorder.

Breach of a dispersal order, by an individual given such a direction is a criminal offence under Section 39 of the 2014 Act.

In *R (Singh) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118, concerning a protest about a theatre production some deemed offensive, Lady Justice Hallett observed (at para. 58), in dealing with the previous statutory regime for police dispersal powers, that the "right to protest becomes effectively worthless if the protesters' choice of "when and where" to protest is not respected as far as possible...". The earlier statutory regime had excluded processions, but not assemblies, from the ambit of the police dispersal powers. Hallett LJ also noted (in *Singh* at para. 87) that the older statutory regime of dispersal powers could not be used by a police officer,

"unless he or she has reasonable grounds for believing that any members of the public have been intimidated, harassed, alarmed or distressed or are likely to be. There is in this situation an urgency of a kind not dealt with in sections 12 and 14 of the Public Order Act. Accordingly, in my view, the powers under s.30 must be seen as complementary to the powers in the Public Order Act and they are not inconsistent with them."

However, the new dispersal powers regime in Sections 34 - 42 of the Anti-Social Behaviour, Crime and Policing Act 2014 contain a controversial point about the exemptions from the use of the dispersal orders powers themselves. Section 36 of the 2014 entails that a police officer may not give a direction to disperse to a person who is either lawfully picketing or who is part of a notified procession for the purposes of Section 11 of the Public Order Act 1986, or where it was not reasonably practicable to give such written notice, or the procession is one commonly or customarily held. Non-notified processions, where it was reasonably practicable to give notice or which are not commonly or customarily held in the area can thus be subject to a dispersal direction given by a police officer. While Section 34 of the 2014 requires a senior police officer of the rank of inspector or above to have given the authorisation for the dispersal order and directions to be used, while having "particular regard to the rights of freedom of expression and freedom of assembly set out in articles 10 and 11

of the Convention", given the interpretive function of Section 3 of the Human Rights Act 1998 this language must also be read with regard to the positive obligation to protect the right to respect for private and family life of individuals in the local community. So a decision-making factor such as the non-notification of a public procession, which HMIC took pains to downplay as a legitimate police concern in their *Adapting to Protest* reports in 2009, can still arguably, lawfully interact in the minds of police commanders with the issue of the threshold for the use of dispersal order powers to prevent or preclude (a) members of the public in the locality being harassed, alarmed or distressed, or (b) the occurrence in the locality of crime or disorder.

In addition to these dispersal powers, as Vicky Thirlaway has highlighted, in discussing the decision in *Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB), that the 2014 Act also "makes provision for the grant of civil injunctions against persons who have engaged, or who threaten to engage, in anti-social behaviour"⁴⁹. In *Golding*, the court struck a balance between the need to protect the safety of Muslim members of the community in Luton, in the face of a protest by Britain First, with a need to protect and facilitate the protest of that far-right group itself. This need for a balanced approach led to injunctions against so-called 'mosque invasions'; against distributing materials likely to stir up racial hatred; against causing harassment, alarm or distress to any person through the use of threatening, abusive or insulting words or behaviour; and an injunction, lastly, against the carrying of banners or signs worded 'No more Mosques' or similarly in Luton on the day of the protest. But there were no injunctions against the leadership of Britain First from entering Luton and taking part in the protest they had organised.⁵⁰ As Mr Justice Knowles explained in obiter in *Golding* (at para. 37) that when dealing with extremist views: "all must strive not to inhibit the freedom to express views, the freedom to demonstrate and the freedom to organise politically. Indeed it is sometimes through allowing views to be heard, that error in views can be exposed. And it is sometimes through allowing the opportunity for support to be shown, that lack of support can be exposed."

In addition to the structure for regulation of public protest that is created by *statutory* processes for creating conditions on processions and assemblies; for allowing the potential deployment of dispersal order 'zones'; and the use of targeted civil injunctions precluding more inflammatory elements of a protest, there is still a vital range of contributions to public order policing made by 'residual' *common law* powers that contribute to the policing of protest and public order. There is, for example, under the common law a considerable scope for the retention of police intelligence on protestors, as used to calculate approaches to policing protest groups, as afforded by the decision by the UK Supreme Court in *Catt* in

⁴⁹ See Thirlaway, V., Case Comment: "*Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB)", (2016) 22(1) *EJoCLI* (online).

⁵⁰ See *Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB) at paras. 13 and 29-35, and Thirlaway, V., Case Comment: "*Chief Constable of Bedfordshire v Golding* [2015] EWHC 1875 (QB)", (2016) 22(1) *EJoCLI* (online).

2015⁵¹. However, the most vital parts of the common law dimension of the framework for public order policing ensure that arrests and actions short of arrest can be used to stop, curtail or prevent a breach of the peace so long as the relevant legal conditions are met, of course.

These conditions in the common law are amply described in *R (McClure and Moos) v Metropolitan Police* [2012] EWCA Civ 12, a case about the containment of two large groups of several thousand demonstrators on the streets of central London, and where only one of the two groups had actually become disorderly - since there was a concern on the part of Metropolitan police commanders that if the two groups met on their march, as had been initially planned, there would be even greater disorder in the spread of violent behaviour from the one group to the other, more peaceable one. And so both groups were thus contained or 'kettled' to a standstill for several hours by the police - giving rise to a judicial review challenge to the lawfulness of the police approach on the day in question.

According to Lord Neuberger in the Court of Appeal in *McClure and Moos*, an apprehended breach of the peace must firstly be *imminent* i.e. likely to happen; while the concept and the nature of 'imminence' itself, of course, depends upon the exact circumstances facing the police at the time the relevant decision is taken. If steps such as arrests for breach of the peace or containment, as an actions short of arrest, are to be justified, they must be *necessary* (i.e. only in extreme and exceptional circumstances), as well as *reasonable* and *proportionate*. With specific reference to the police tactics under scrutiny, in *McClure and Moos* the Court of Appeal found that the prolonged separation of assembled groups or processions (one of which may be protesting much more peacefully than the other) using static cordons or containment tactics can be lawful if the above tests are met; entailing that preventative action short of arrest taken against those not actively involved in the imminent breach of the peace (the more peaceable group, that is) may also be lawful in the same specific context.

A key examination of the tensions inherent in the qualified rights under Articles 9, 10 and 11 ECHR took place in the case of *Redmond-Bate v DPP* (2000) 7 BHRC 375, which followed soon after the creation of the Human Rights Act 1998, and was a chance for a new emphasis on the role of the ECHR in balancing the duty of preserving public order and allowing the exercise of freedom of expression in public places. The case featured an unlawful arrest for breach of the peace; since those who were acting in a disorderly manner in response to religious preaching outside Wakefield Cathedral should have been those to be arrested for creating an imminent or actual breach of the peace, not the preachers themselves. Arresting the preachers was for the police officers concerned a way of removing the potential for disorder 'at source'. *Redmond-Bate* serves as a twin reminder of principle: firstly and simply, that proper regard must be had to freedom of expression in carrying out the policing of protest and public order; while secondly, that sometimes the harder operational choice is the correct, lawful path for the police to take, and the decision may have to be made to allow the source of a disturbance of public order to continue (lawfully) expressing themselves.

⁵¹ *R (Catt and T) v Commissioner of Police of the Metropolis* [2015] UKSC 9, as discussed in Grace, J. and Oswald, M. " 'Being on our radar does not necessarily mean being under our microscope': The Regulation and Retention of Police Intelligence", (2016) 22(1) EJoCLI.

These twin principles from *Redmond-Bate* do not sit easily with the recent decision of the UK Supreme Court in the case of *R (Hicks) v Metropolitan Police* [2017] UKSC 9, concerning the preventative arrest of several individuals for imminent breaches of the peace, prior to protests in London held to coincide with the 'Royal' wedding of William Wales and Katherine Middleton (as she then was)⁵².

In *Hicks*, the Supreme Court ruled that necessary arrests for an imminent breach of the peace may be reasonable and proportionate even if they are undertaken with a view to releasing an individual before they are charged, taken together with possible burdens on police resources in dealing with large volumes of protestors arrested for (imminent) breaches of the peace. Toulson LJ noted in *Hicks* (at para. 36) that:

"It would be perverse if it were the law that in such circumstances, in order to be lawfully able to detain the person so as to prevent their imminently committing an offence, the police must harbour a purpose of continuing the detention, after the risk had passed, until such time as the person could be brought before a court with a view to being bound over to keep the peace in future. This would lengthen the period of detention and place an unnecessary burden on court time and police resources."

The Supreme Court also determined that a purposive approach to removing a (potentially) problematic protester from the streets for several hours, with no ultimate goal of pursuing a conviction, is no procedural breach of Article 5 ECHR (the right to liberty and security of the person). In his unanimous judgment in *Hicks* in the Supreme Court, Toulson LJ wrote that (paras. 29 and 30):

"[29] The fundamental principle underlying article 5 is the need to protect the individual from arbitrary detention, and an essential part of that protection is timely judicial control, but at the same time article 5 must not be interpreted in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others. These twin requirements are not contradictory but complementary... [30] In balancing these twin considerations it is necessary to keep a grasp of reality and the practical implications. Indeed, this is central to the principle of proportionality, which is not only embedded in article 5 but is part of the common law relating to arrest for breach of the peace."

The Supreme Court in *Hicks* was very much concerned with the realities and practicalities of public order policing in challenging circumstances (paras. 31 and 40):

"[31] In this case there was nothing arbitrary about the decisions to arrest, detain and release the appellants. They were taken in good faith and were proportionate to the situation. If the police cannot lawfully arrest and detain a person for a relatively short time (too short for it to be practical to take the person before a court) in circumstances where this is reasonably considered to be necessary for the purpose of preventing imminent violence, the practical consequence would be to hamper severely their

⁵² See: <https://www.theguardian.com/uk/2011/apr/29/royal-wedding-police-criticised-protesters> (Last accessed 02.04.2017)

ability to carry out the difficult task of maintaining public order and safety at mass public events. This would run counter to the fundamental principles previously identified... [40] There are also practical considerations. The police may find it necessary to take action to prevent an imminent breach of the peace in circumstances where there is not sufficient time to give a warning. An example might be a football match where two unruly groups collide and the police see no alternative but to detain them, or the ringleaders on both sides, immediately for what may be quite a short time."

A crucial issue for the police force dealing with a Rotherham-type situation of far-right protest and counter-protests that, according to intelligence, are more than likely to grow disorderly and violent during their course, is the need to consider how a strategic approach might be informed by human rights law and ECHR rights of both protestors and the local community. So how might a police force best structure and plan their approach to using statutory approaches to regulating what they know will be, on the basis of their risk assessment models and their intelligence analysis, a protest engendering some degree, or a great amount of public disorder? What rationale should most centrally inform the use of conditions on processions and assemblies, where necessary, under the Public Order Act 1986, say - or the use of dispersal powers and civil injunctions, as noted above, if the relevant criteria are met using provisions of the Anti-Social Behaviour, Crime and Policing Act 2014? The common law on arrests and actions short of arrest with a view to preventing or curtailing breaches of the peace, places an understandable and vital emphasis on the *imminence* of the potential breach of the peace concerned. But how best to take proportionate prior steps, which are still conscious of finite resources, to have the best chance of actually precluding any imminent risk of a breach of the peace?

South Yorkshire Police, as has been explained above, are faced with the difficult task of either adequately 'facilitating' the protest of (what their past experience and garnered intelligence has shown to be) violent far-right groups, or running the risk of judicial criticism of their failure to uphold Article 10 and 11 'packaged' rights of protest. As such, the force responsible for the safety and wellbeing of all communities in Rotherham might well welcome some elements of the unanimous judgment of the UK Supreme Court in the recent decision of *R (DB) v Police Service of Northern Ireland* [2017] UKSC 7.

7. A reminder in *DB* of the importance of other qualified ECHR rights

In something of a re-balancing act, Lord Kerr has recently given a judgment in *DB* which suggests Articles 10 and 11 ECHR would not entail a requirement to 'facilitate' any type of sufficiently *illegal* protest (that is, perhaps, protest in some way in breach of conditions under Section 12 or 14 of the 1986 Act in England and Wales). In *DB* itself, the illegal protests under analysis had been a parade in Northern Ireland that had taken place without the required permission of the Parades Commission. In going ahead in an atmosphere of hostility, sectarianism and harassment, these parades had sufficiently interfered with the right to respect for private and family life of local residents in a Nationalist area, through which the Unionists had been passing, to the extent that *DB* should have been able, in the view of the Supreme

Court justices, to rely on the positive obligation of the police to protect their Article 8 ECHR rights by better controlling and even preventing the repeated parades.

Furthermore, there was a strong suggestion from the UK Supreme court in *DB* that the positive obligations to protect the Article 8 ECHR rights of bystanders/the local community may be more important than contrasting rights of protest, depending on the circumstances. As Lord Kerr explains in the text of his (unanimously supported) judgment (para. 62):

“The parades in this case were far from peaceful. The police had no obligation to facilitate them. To the contrary, they had an inescapable duty to prevent, where possible, what were plainly illegal parades from taking place and to protect those whose rights under article 8 of ECHR were in peril of being infringed. Meeting those obligations had to be tempered by operational constraints, of course. Stopping the parades without taking account of what further violence that might provoke was not an option. But the operational difficulties required to be assessed in the correct legal context.”

What was so 'plainly illegal' (in the words of Lord Kerr) about the parades in *DB* in any event? The difference is that everyone taking part in an un-notified parade in Northern Ireland commits an offence, while only the organisers of a qualifying procession in England and Wales commits an offence if no notification occurs under the requirements of Section 11 of the Public Order Act 1986. As Lord Kerr explained in *DB* (at para. 9):

"A key part of the scheme of the Public Processions (Northern Ireland) Act 1998] was that control of parades would be achieved by conditions imposed by the commission. In order for that vital element to work, a statutory duty (section 6(1)) was placed on those proposing to organise a public procession to give advance notice of that proposal to a member of the police force. By section 6(7) it was made a criminal offence to organise **or to take part in a public procession which had not been notified**. It was also an offence to fail to comply with any conditions imposed. None of the flags parades in Belfast was notified to the commission." [Emphasis added.]

And what of plainly 'far from peaceful' marches in Rotherham by the EDL, or Britain first, or any other far-right group? If the procession concerned was embarked upon without the statutorily required notice period of six days (if this were reasonably practicable), or if the conditions placed upon the procession by police under the Public Order Act 1986, according to the relevant criteria, were actually breached, in a manner where the organisers were responsible, then what? There is probably a distinction to be made first of all, as to the distinction between the non-notification offence committed by organisers of a procession alone, and something like the offence committed by all those who knowingly breach conditions placed upon an assembly, say, under the 1986 Act.

As the *Adapting to Protest - Nurturing the British Model of Policing* report published by HMIC explained in 2009: "An organiser of a procession may commit a criminal offence

under the Public Order Act 1986 in failing to notify the police of a public procession but this alone does not justify an infringement of ECHR Article 11..."⁵³, and in addition:

"The Public Order Act 1986 requires organisers to give advance written notice to the police of any proposal to hold a public procession, unless it is not reasonably practical to do so. A breach of the notification requirement in section 11 of the Public Order Act does not render a protest 'unlawful' under the Public Order Act 1986 or mean that an otherwise peaceful procession falls outside the ambit of ECHR Article 11. Firstly, the section applies only to public processions and not to other assemblies. Secondly, it does not make criminal the mere participation in such a procession: only the organisers will commit an offence."⁵⁴

However, as cited in *DB* by Lord Kerr at para. 60, the Strasbourg Court noted in *Molnar v Hungary* (Application 10346/05) at para. 37 that the idea that Article 11 ECHR requires the facilitation of un-notified protests (and in the UK context, specifically un-notified processions):

"cannot be extended to the point that the absence of prior notification can never be a legitimate basis for crowd dispersal. Prior notification serves not only the aim of reconciling, on the one hand, the right to assembly and, on the other hand, the rights and lawful interests (including the right of movement) of others, but also the prevention of disorder or crime. In order to balance these conflicting interests, the institution of preliminary administrative procedures is common practice in member states when a public demonstration is to be organised. In the Court's view, such requirements do not, as such, run counter to the principles embodied in article 11 of the Convention, as long as they do not represent a hidden obstacle to the freedom of peaceful assembly protected by the Convention..."

Weighing non-notification in the balance as a single factor amongst several in deciding to use common law powers to take 'action short of arrest' in curtailing a procession that, on the basis of police intelligence applied in good faith, presents a risk of public disorder, violence and a breach of the peace, is a stance which would be the subject of a subsequent claim for judicial review by protestors. But the very existence of judicial review as a safeguard, along with requirements to be met in putting conditions on an assembly or procession, or the restraints on the use of statutory powers to give dispersal orders, might actually sufficiently secure and render lawful, in a *systemic* sense, the decision of the police to interfere with Article 11 ECHR rights in such an eventuality. To draw on the phrasing of David Mead, such a clear weighing of competing interests that includes non-notification/non-authorisation in that

⁵³ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.193.

⁵⁴ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.193.

balancing exercise "does not normally encroach unnecessarily on the right" found in Article 11 ECHR, for example⁵⁵.

Of course it is important to recognise that on-notification might only be a single factor in a balancing exercise, say between Article 8 versus 10 and 11 ECHR rights. As David Mead has reminded us on this point, Section 11 of the 1986 Act only creates a criminal offence for *individuals* involved in *organising* a procession that is not notified to the police (unlike the legislation for Northern Ireland as discussed above), and so it is wrong to talk of inherently unlawful marches and so on⁵⁶. But there is something qualitatively different about the risk of violence and disorder that may arise if a group of protestors do not follow the conditions set down upon their protest under Section 12 or Section 14 of the Public Order Act 1986.

In terms of a severity of a breach of the law, if Public Processions (Northern Ireland) Act 1998 offences help to make the parades in *DB* 'plainly illegal', would the 'knowing' breach of a S.12 or S.14 POA 1986 condition by a majority of a group of demonstrators render a protest in England 'plainly illegal' in the same way? These offences can be committed by both the organisers and the participants in a procession (S.12(4) and (5)), and at an assembly (S.14(4) and (5)). As the *Adapting to Protest - Nurturing the British Model of Policing* report notes:

"Of course, if lawful restrictions have been imposed on the right to peaceful assembly in accordance with ECHR Article 11(2) (for example, in accordance with sections 12 or 14 of the Public Order Act 1986), it will not be a lawful exercise of the right to peaceful assembly to fail to comply with those restrictions."⁵⁷

Proportionality is of course key. Procedural non-compliance by protestors may create only tokenistic criminal liability - while outrageous breaches of conditions lawfully imposed on protestors under the 1986 Act could result in the most serious disorder and harm. So there must be a careful application of contextual factors in police commander decision making. The approach by the courts to formulating a test on proportionality assists police commanders in this regard. Reflecting the now-standard four-part proportionality test adopted in case law from the UK Supreme Court, the *Adapting to Protest - Nurturing the British Model of Policing* report has it that:

"The principle of proportionality requires that:

- (i) the purpose is sufficiently important to justify the restriction;

- (ii) the means chosen are rationally connected to that purpose;

⁵⁵ Mead, David. *The new law of peaceful protest: rights and regulation in the Human Rights Act era*. Bloomsbury Publishing, 2010, p.81.

⁵⁶ Mead, David. *The new law of peaceful protest: rights and regulation in the Human Rights Act era*. Bloomsbury Publishing, 2010, p.182.

⁵⁷ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.199.

(iii) other less restrictive means would not be as effective in achieving that purpose; and

(iv) a fair balance must be maintained between the rights of the individual and the general interest of the community."⁵⁸

Contextual factors will abound in the notion of what is, and what could be said not to be a 'fair balance' in taking actions short of arrest' in the face of an imminent breach of the peace, for example. What about the length of the 'unlawfulness' of the protest? Mr Justice Males in *Sheffield City Council v Fairhill and Others* [2017] EWHC 2121 (QB) at para. 88 writes clearly and usefully that:

"...the lawfulness of a protest may change with time. In some circumstances it will be impossible to justify a restriction on freedom of expression or freedom of peaceful assembly which is of limited duration, even if it involves conduct which is tortious or which amounts to a criminal offence, and even if the conduct in question affects adversely the rights of others or – as in this case – prevents others from going about their lawful business. That is something which public authorities and others may have to put up with in view of the importance of these rights in a democratic society. However, a protest which starts as a legitimate exercise of Article 10 or 11 rights may become unlawful if it continues for a more extended period. The more serious the tortious or criminal conduct in question and the greater the impact on the rights of others, the shorter the period is likely to be before the initially legitimate protest becomes unlawful."

When Males J uses the term 'unlawful' to apply to protest here, he can really be taken to mean a protest which should no longer be respected and indeed facilitated by the police, on the grounds that in a legitimate, reasonable and proportionate basis there is a pressing need for an interference by the police with the package of Article 10 and 11 ECHR rights as being exercised by demonstrators.

Lord Kerr notes that another factor to be weighed in the balance would be the likelihood of any violence or disorder if a procession or march were to be stopped entirely. But here we must bear in mind the differences in potential risk over flashpoints between two (still, sadly sometimes very) divided communities in Belfast, say, and the situation of inflammatory, repeated visits by a few hundred far-right protestors to the heart ordinarily peaceable community of tens of thousands in Rotherham. However, even saying this, South Yorkshire Police are under political and social pressures to be all things; facilitators of protest and guardians of public safety. The courts would surely afford them some latitude if they acted with tolerance with regard to continued far-right protests targeting Rotherham, even where there might be a lawful case for more rigorous intervention and treatment of a right-wing group, since the situation in Rotherham has been pretty unique, outside of Northern Ireland, in the last several years. As the European Court of Human Rights observed in *P.F. and E.F. v. the United Kingdom* (2010) no. 28326/09 at para. 41:

⁵⁸ HMIC, *Adapting to Protest - Nurturing the British model of policing*, 2009b, p.199.

"... the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them."

8. Conclusion

It can be first concluded that following the recent case law developments such *DB*, and the added powers to regulate and control risk over public disorder, using newer statutory approaches concerning dispersal powers and civil injunctions, from the Anti-Social Behaviour, Crime and Policing Act 2014⁵⁹, then police all over the UK have grounds for a strategic re-assessment of the manner in which the rights of expression and assembly of far-right groups engaging in public protest work in practice, as against the right to respect for private and family life of members of the local community, as impacted upon by the protests concerned.

Nothing may change in terms of specific police policy, as the newest case law is on subtle points of law, and fairly recent legislative changes are not a grand scheme of reform but tweaks to sets of pre-existing police powers overall. But police forces in the UK, and certainly South Yorkshire Police, might learn lessons from a reconsideration of the recent legal changes in their professional development and training of public order commander-level officers.

It may well be that in future there is no need for the spread of bodies such as the Rotherham Advisory Panel on Protests to continue around other parts of England and Wales. This may be no bad thing - as Rotherham is a specific case study of sorts, with its own context - and given the concerns that might be raised over potential anti-protest bias and the politicisation of the policing of protest that such a panel might engender. But in Rotherham the Panel may continue to have a place for its work, particularly given matters of equality law that apply to the work of the police in South Yorkshire, in the form of strands of the public sector equality duty. The evidence that the model of the Panel is a useful tool for upholding the rights to protest, along with assuaging community concerns that the right to peaceful respect for private and family life is being protected, is yet to be overwhelming, but would be very welcome indeed.

⁵⁹ It should also be recalled that the lines of case law on arrests and actions short of arrest to prevent breaches of the peace, including containment or 'kettling' tactics, as well as police surveillance at protests, are after all supportive of appropriately justified and proportionate interferences with Article 5, 8, 10 and 11 ECHR rights of protestors where reasonable and necessary in the face of an imminent risk of a serious breach of the peace.