

Standing in the Way of Control

Introduction.

The Public Order Act 1986 provides a framework for the policing of public assemblies and protest marches. The Act uses the capped fining structure set out at s.122 of the Sentencing Act 2020 to sanction offenders. The Sentencing Act 2020 requires the financial background of a defendant to be considered when quantifying the fine. However, the use of a capped fining structure means that there is insufficient discretion for these fines to have an equal impact on those convicted. The structure disproportionately penalises lower socio-economic groups by preventing fines from being scalable across higher levels of wealth. This in turn has the effect of disproportionately penalising marginalised groups, such as ethnic minorities, who are more likely to fall within the lower socio-economic bracket. The disproportionate sanctioning of lower socio-economic and minority groups strengthens the ‘deterrent effect’ experienced by these groups. Given the manifold circumstances in which a condition might be breached under the Act, it will be argued that the current sanction structure may deter potential attendees from participating in legitimate, condition-compliant, protests. This gives rise to a separate, more general equality and diversity issue. Dissuading already marginalised groups from organising and attending legitimate protest removes a vital tool that can be used to challenge structures which discriminate. The problems identified within this essay are magnified by the widening of police powers contained within the Police, Crime, Sentencing and Courts Bill 2021. This essay proposes that the current sanction structure is removed from the Public Order Act 1986. In place of this structure, the ‘fine bands’ approach, devised by the Sentencing Council, should be adopted. Crucially, this structure does not cap the maximum value of a fine, thereby ensuring that fines have an equal impact across all socio-economic groups.

The law.

Part II of the Public Order Act 1986 sets out rules which establish how the police can control protest events. S.12 of the Act empowers the senior police officer¹ to place conditions on protest marches. S.14 of the Act empowers the senior police officer to place conditions on static protest assemblies. The Act creates no specific offence of conducting an unlawful protest. Instead, the Act creates the offence of failing to comply with a condition made under this Act.

Either of two requirements must be met for a condition to be placed on a protest event. The first is that the senior police officer must reasonably believe that the protest event ‘may result in serious public disorder, serious damage to property, or serious disruption to the life of the community.’² The second is that the senior police officer must reasonably believe that the purpose of the persons organising the protest 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.’³ Where this is the case, under s.12, the senior police officer can impose any condition on a protest march. In contrast, under s.14, only conditions as to the location of the assembly, the duration of the assembly or the number of persons at the assembly can be imposed. All conditions imposed on protest events must be necessary to ‘prevent such disorder, damage, disruption or intimidation’⁴.

When a condition is breached, the sanction is determined by reference to the fining structure set out in s.122 of the Sentencing Act 2020. Where an organiser of a protest event breaches a condition, they face imprisonment for up to three months and/or a Level 4 fine⁵. Where an attendee of a protest event breaches a condition, they face a Level 3 fine⁶. Under the current

¹ This term is defined in s.12(2) and s.14(2) of the Act. Where the protest event is in the future, this term refers to the chief officer of police. Where the protest event is happening in the present, this term refers to the most senior in rank of the police officers on the scene.

² Public Order Act 1986 s.12(1(a)), s.14(1(a)).

³ *ibid*, s.12(1(b)), s.14(1(b)).

⁴ *ibid*, s.12(1), s.14(1).

⁵ *ibid*, s.12(8), s.14(8).

⁶ *ibid*, s.12(9), s.14(9).

sentencing guidelines⁷, a Level 3 fine has a maximum value of £1,000. A Level 4 fine has a maximum value of £2,500. There is a great deal of discretion at the quantification stage, with the values given acting as a cap. The Sentencing Act gives guidance as to how the quantification stage is to be approached. Primarily, the amount of a fine must reflect the seriousness of the offence⁸. However, the court must also consider the financial circumstances of the defendant. This consideration may have the effect of increasing or reducing the fine.⁹ Whilst the fine must reflect the financial circumstances of the defendant, it can never be greater in value than the cap.

Critique of fining structure.

The Sentencing Council state, in their guidance to approaching the assessment of fines, that ‘the aim is for the fine to have an equal impact on offenders with different financial circumstances.’¹⁰ This essay questions whether the current structure can provide this equality in practice.

The current structure cannot accommodate all socio-economic groups. The cap means that the fine cannot be scaled up to ensure a proportionate impact on higher socio-economic groups. For the wealthy, even a fine of the maximum value may not represent any hardship. This is particularly likely to be the case where a Level 3 fine, with a maximum value of £1,000, is given. In contrast, whilst it is true that those who suffer financial hardship are unlikely to receive the maximum fine, for such groups, any fine is likely to represent a serious sanction. The only practical effect the cap has is to reduce the impact of the sanction on wealthy offenders. The result of this is that the fining structure has a disproportionately punitive effect on lower socio-economic groups.

The full consequences of this structure are highlighted by taking an inter-sectional approach. Intersectionality refers to the cumulative way that effects of different types of discrimination,

⁷ Sentencing Act 2020, s.122.

⁸ *ibid*, s.125(1).

⁹ *ibid*, s.125(2) and (3).

¹⁰ <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/fines-and-financial-orders/approach-to-the-assessment-of-fines-2/1-approach-to-the-assessment-of-fines-introduction/> accessed 05/09/2021.

such as sexism, racism, and classism, combine. Groups who suffer from financial hardship are often members of one or more marginalised groups. This has been demonstrated in several recent empirical studies. For instance, people from ethnic minority backgrounds are more likely to live in households with persistent low income. 28% of people in Black households are on persistent low income, the highest of all groups, compared with 25% of Asian households and 12% of White households.¹¹ The median total wealth data makes this disparity even more stark. An ONS survey between 2016 and 2018 found that medians ranged from £34,000 for households with a Black African head to £314,000 for the White British group.¹² With these studies considered, the Public Order Act 1986 can be said to not only disproportionately sanction those in financial difficulty; it also disproportionately sanctions minority groups.

This gives rise to a secondary equality and diversity issue, made visible through exploring the deterrent effect of punishment. The deterrent effect is ‘the inhibiting effect of sanction on the criminal activity of people other than the sanctioned offender.’¹³ If ‘punishment is before all things deterrent,’¹⁴ it follows that as the sanction increases in magnitude, the deterrent effect that the sanction has increases. That this is the case has been demonstrated in several empirical studies, for instance those undertaken by Ball (1955)¹⁵, Lewis (1986)¹⁶, and Abrams (2012)¹⁷.

Following this, the disproportionately strong sanctioning of low socio-economic groups under the Act means that these groups suffer a far stronger deterrent effect. Of course, the deterrent effect refers only to the action which prompts the sanction. In the context of the Public Order

¹¹ <https://www.ethnicity-facts-figures.service.gov.uk/work-pay-and-benefits/pay-and-income/low-income/latest> accessed 05/08/2021.

¹² UK Government, (March 2021), ‘Commission on Race and Ethnic Disparities: The Report.’

¹³ A Blumstein, J Cohen and D Nagin, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978) 3.

¹⁴ J Salmond, *Jurisprudence* (10th edn Sweet and Maxwell 1947) 111.

¹⁵ J C Ball, ‘The Deterrence Concept in Criminology and Law’ (1955-1956) 46 *Journal of Criminal Law* 347, 348.

¹⁶ D E Lewis, ‘The General Deterrent Effect of Longer Sentences’ (1986) *The British Journal of Criminology* Vol. 26, No. 1, 47-62.

¹⁷ D S Abrams ‘Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements’ (2012) *American Economic Journal. Applied Economics* Vol 4 Issue 4.

Act 1986, this action is the breaching of a police condition. However, it is important to note just how minor the conditions imposed might be (for instance, that a particular zebra crossing might not be used¹⁸), and how easily they might be breached. In *Jukes v DPP* [2013] EWHC 195 (Admin), two participants left a march against cuts in the education budget to join an entirely different march elsewhere in London. A condition had been imposed on the education march which dictated the route that march was to take. They were held to be in breach of this condition by leaving the initial march route to attend a separate protest. This wide construction of breach of condition suggests that an individual who attends a protest is at risk of breach. This risk is magnified by alleged police misuse of powers under the Act.¹⁹ As such, the deterrent effect of punishment can reach beyond deterring breach of condition by deterring attendance.

It is this ancillary deterrence which results in the secondary equality and diversity issue. From the 1381 Peasants' Revolt to the 2017 Women's March on Washington and the 2020 Black Lives Matter protests, protest events have long been the vehicle to effect change. Dissuading already marginalised groups from organising and attending legitimate protest events removes a weapon used to challenge structures which discriminate. Protest marches and public demonstrations are a 'vital tool and mechanism available to citizens of democratic countries to stand up to the State and make their voices heard.'²⁰ Deterring marginalised groups from attending these protests through disproportionate sanctioning inhibits the demonstration of equality and diversity issues.

These concerns are well illustrated by the lack of diversity²¹ within the Extinction Rebellion Movement. The tactics employed by this organisation include asking volunteers to 'deliberately get arrested to cause maximum disruption.'²² These arrests frequently follow the breach of police

¹⁸ *James v DPP* [2016] WLR 2118.

¹⁹ <https://www.theguardian.com/media/2009/apr/17/g20-police-photographers-nuj> accessed 01/09/2021.

²⁰ 'Liberty's Briefing on the Police, Crime, Sentencing and Courts Bill for Report Stage in the House of Commons' (2021), 7.

²¹ <https://www.theguardian.com/commentisfree/2019/oct/19/extinction-rebellion-white-faces-diversity> accessed 01/09/2021.

²² <https://www.bbc.co.uk/news/uk-48968947> accessed 06/08/2021.

conditions made under the Act, the hallmark weapon of the largely white middle-class group.²³ Extinction Rebellion volunteers are frequently reported as having the financial resources to repeatedly pay fines given under the Act.²⁴ That this tactic is viable demonstrates that the sanction structure within the Act does not adequately penalise those in higher socio-economic brackets.

The proposed reform.

This essay contends that the use of the 'level' fines should be stopped. In place of these fines, a more appropriate scaling mechanism should be used. The Sentencing Council already has one such fining mechanism, the 'fine bands'.²⁵ The banding approach uses the severity of the offence to identify the applicable band. The bands use the percentage of the relevant weekly income of an offender to quantify the value of the fine. In Fine Band A, the fine is 50% of the relevant weekly income of an offender. At the most serious level, Fine Band F, the fine will be between 500-700% of the relevant weekly income of an offender. The relevant weekly income excludes income received from tax credits, housing benefit, child benefit or similar. Most importantly, under this mechanism, there is no limit on the magnitude of the fine at the quantification stage. These measures ensure that the fines remain proportionate across the socio-economic scale.

²³ <https://www.newscientist.com/article/2248729-extinction-rebellion-were-not-veteran-protesters-new-analysis-shows/> <https://edition.cnn.com/2019/11/24/uk/extinction-rebellion-environment-diversity-gbr-intl/index.html> both accessed 14/08/2021.

²⁴ <https://www.getreading.co.uk/news/reading-berkshire-news/extinction-rebellion-activist-fined-public-17059828> accessed 23/08/2021.

²⁵ <https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/fines-and-financial-orders/approach-to-the-assessment-of-fines-2/2-fine-bands/> accessed 05/09/2021.

The interplay between this reform and current legal reforms taking place.

The Police, Crime, Sentencing and Courts Bill 2021 underpins the case for the reform of the sanction structure contained within the Act. The Bill proposes the broadening of police powers to impose conditions on protest events. When passed, the Bill will amend the Public Order Act 1986 in four distinct ways.²⁶ The first is that it lowers the legal test that must be met for conditions to be imposed on protests under the Act. This is through the introduction of the ‘significant impact’ test. This test enables conditions to be imposed where police believe a protest event may be likely to produce noise which ‘intimidates, harasses or causes serious unease or distress.’²⁷ In the context of protest events, it seems this requirement will often be made out. The second amendment is that the Bill widens the types of conditions that the police can impose on static protests under s.14 of the Act. It brings s.14 in line with s.12 by authorising the senior police officer to impose any condition necessary on a static protest. The third is that it changes the mens rea component of the offence of failing to comply with a condition issued by the police on a protest. Offenders must currently ‘knowingly’ breach a condition.²⁸ The proposed reform changes this requirement to ‘known or ought to have known.’ The fourth amendment is that the Bill allows the police to issue conditions even on single person protests.

The Bill makes the case for the reform of the inadequate sanction structure more pressing in two ways. The first is that where police powers are broadened, the number of convictions made under the Act will increase. Through widening the mens rea requirement, for instance, the Bill increases the circumstances under which an offence will have been committed. The increased number of convictions made will exaggerate the current unequal treatment of low socio-economic status offenders. The second is that the proposed increase in the power the police have to impose conditions on protest is likely to further dissuade potential attendees from participating in legitimate, condition-compliant protests. In combination with the proposed reform to the mens rea component, attendance at protest events in and of itself becomes riskier. This risk is felt most strongly by those in the lower socio-economic bracket. This will magnify the secondary equality and diversity issue outlined.

²⁶ J Brown and D Mead, ‘Police Powers: Protest’ (2021) House of Commons Briefing Paper 5013, 26.

²⁷ *ibid.*

²⁸ Public Order Act 1986 s.12(4), (5), s.14(4), (5).

Conclusion.

This essay has argued that the current sanction structure under the Public Order Act 1986 is discriminatory. It disproportionately sanctions lower socio-economic groups. This is due to the capping mechanism applied to the quantum of a fine which may be given under the Act. The use of this capping mechanism prevents the wealthy from receiving a proportionate sanction. The sanction structure has the secondary effect of dissuading already marginalised groups from attending or participating in protest events. Reforming the sanction structure by adopting the ‘fine bands’ structure, rather than the ‘levels’ structure, will alleviate the identified problems.

Cassandra Somers-Joce
Oxford Law Finalist 2020-21