Giving Offence is no Offence

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Apocryphally we know that if "voting changed anything, they'd abolish it." In the case of a hereditary Monarchy, that of course is never an option – the transition in power is smooth, seamless and speedy. It is something that has not happened in the UK in 70 years, and so, may well be something that few had turned their minds to. The death of Queen Elizabeth II last week, and thus the accession to the throne of King Charles III marked such an opportunity for reflection. However, what some have found here in the UK is that expressing republican sentiment in public has been met with a policing intervention – arrest or warning. This post considers the legality of expressing such views, and thus of the police response too, as well as some wider issues about the policing of protest, dissent and free speech. Some of my views can be found here and here.

There have been a variety of contexts in which people have expressed such sentiments, but what unites those that have made the news is that they have all occurred in the presence of many others, at organised events such as public processions across the capitals of the four nations, or the UK-wide public proclamations of the new king. There have been no reports of people arrested or spoken to 'simply' for having anti-Monarchist banners or placards outside their houses or on shops. That is important for two reasons I think. First, as University of Manchester Law Professor Geoff Pearson pointed out on Twitter this morning, the members of the public attending those royal events have their own Article 11 rights to associate. This makes the balancing with the free speech rights, under Article 10, of republican protesters more acute. I think though a court would favour – that is rank more highly or as more valuable – the instrumentality of the protester's political message. It is reasonably well accepted that the European Court at Strasbourg adopts a hierarchy of protection for free speech under Article 10, with political speech at the top, and consequentially affords it a much narrower margin of appreciation – discretion – within which to operate. That said, I think a court too would acknowledge the social, collective nature of the (mass) national mourning, a collective outpouring of grief – expressive content too – from many, many thousands if not millions of citizens. As Geoff Pearson suggests, that brings with it possibly unforeseen consequences – for, say, the policing of football: if those mourning the death of the Queen have Art 11 or even Art 10 expressive rights, why do sports fans not do so? Second, it is also important that the reported arrests etc. have all happened at large-scale public events because so much public order law depends on audience reaction – and so the greater number who (likely) witness something, the likelier it will be that someone will react badly, that is by threatening violence, making it likelier the police have grounds to intervene. We will come onto this soon. The heightened emotion – on both sides – of these particular public events – the death of a Monarch after 70 years on the throne – makes a reaction by some likelier, or makes the impact greater. This is after all not just a Summer carnival procession

through a town centre. The law rightly takes account of context within which disputes and tensions occur.

The one thing that any of these protesters cannot be arrested for in domestic law is for having offended anyone. There is no offence either wholly or in part dependent on or triggered by "offensive language" – no offence of "giving or causing offence". Such would cause a massive carve-out in the protection offered to free speech, so value-laden and subjective would it be. That is not to say that existing legal regime – to which we are about to turn – is not devoid of subjectivity; it is just that "causing offence" would be a very much greater intrusion. I think it is also clear that arrests of the protesters under what has become the standard public order power in England – s.5 of the Public Order Act 1986 – would not stand up to scrutiny. The Act is premised on use of "threatening or abusive" words or behaviour. If so, then there must be someone who is likely harassed, alarmed or distressed. That latter is not the sticking point for the police. It is the need to show either threats or abuse. It is very hard to conceive of placards saying "Not my King" or someone shouting "Who voted for you?" as fitting either of those two terms. Before 2013, the situation would have been different, and perhaps easier for the police, as there was a third trigger – insulting. That was removed under the 2010-2015 Coalition Government precisely because the risks to free speech had been well documented.

Not all of the utterances this past week would have fallen so easily. It is much easier to consider someone shouting or holding a placard saying "Fuck the Monarchy" to be abusive. Here, not only might the differential 'reach' – of a placard as against shouting – be important but crucially the context. Unlike a comedy club that we all enter knowing we might hear words much worse than 'fuck' or turning on the TV after the 21:00 watershed, those attending to watch the royal procession probably did not think as they left the house that day "attending and exposing my ten year-old son to rude words is a risk I'm prepared to take". That said, if we are arresting and prosecuting all those who say 'Fuck the Monarchy" rather than "Boo Hiss to the King", prisons here will be fairly full. The wider issue then is as much one of differential policing, of political speech than 'simply' of lads' banter outside a pub on a Saturday night. There is another trigger in s.5, using disorderly behaviour that harasses, alarms or distresses. In brief, I do not think as a matter of statutory interpretation this has any application here. "Behaviour" is not apt to cover shouting – since it is hard to see this as behaviour – or indeed a placard slogan. The fact that the section talks of "threatening or abusive" words or behaviour yet only disorderly behaviour suggests the omission of words from the scope of behaviour. If I am wrong, and if the various "Not Our King" placards and chants can be seen as abusive, there is still little chance of successful prosecution. There is a specific defence in s.5(3) of "reasonable conduct". It is now established as a matter of Supreme Court case law in *Ziegler* that peacefully protesting, albeit disruptively (not the case here) through a sit-in on a main road, is capable of constituting a "reasonable excuse" for the purposes of the offence of obstructing the highway. The onus is then on the police, and charging authorities, to show that the arrest/charge is proportionate. I think that would be very hard to make good here, despite the heightened tensions. It is not the greatest of leaps from that to a "reasonable conduct" defence.

More problematic is the potential for breach of the peace to found the basis for police intervention. It is well settled in case law that the police have power to intervene, even arrest (as well as to move on or direct) in order to prevent what they reasonably believe will be an imminent breach of the peace. There is no offence of breach of the peace – the first strange aspect to the concept – yet it founds a host of preventive, pre-emptive power. Second, the definition and scope are not to be found in statute – Parliament has never pronounced. It is and remains a common law power, but one of quite considerable ambit and affording extensive latitude to officers on the ground. The standard definition is in *Howell* (1982): "harm is actually done or likely to be done to a person or, in his presence, his property or is put in fear of being harmed". Third, and this arises here, it is also entirely lawful for officers to arrest X for their utterances based on Y's presumed violent response. There is now a lot of case law but perhaps the most salient is *Redmond Bate* in 1999. Three Christian fundamentalists were preaching on the steps of a cathedral and the crowd became increasingly agitated. They were asked by officers to stop and move on, on grounds that the police feared a breach of the peace, but refused and so were arrested for obstructing officers in the execution of their duty. Their appeals against conviction were upheld. The key was this: were the preachers being so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence? Or were passers-by were taking the opportunity to react so as to cause trouble? If we map that onto the sorts of arrests we have seen this week, I do not think, as I said in the iNews piece, would it be wholly unreasonable for somebody to threaten violence against someone at their Queen's funeral, saying 'boo, hiss to the new King? That said, there would need to be violence threatened – that has not been the case in all of the various incidents, certainly. Of course, a whole host of other questions quite properly throw themselves up here: should my free speech depend so much – even or at all – on your propensity to exercise, or demonstrate that you might turn to violence…what is sometimes called a 'hecklers charter'? This is the age-old problem that illustrates the ability a heckler has to disrupt, even bring to an end, a rally or political debate. It raises the question of how far and for how much longer in a liberal democracy should we tolerate policing powers that are if not open-ended, then very wide and over which Parliament has had no say. Further, they might be powers the exercise of which might defeat Parliament's carefully crafted balance when passing legislation like s.5: should we allow the police a common law fall-back for a deliberately created legislative lacuna?

The various arrests this week have yet again thrown light onto the policing of protest and dissent in the UK, though in all honesty it has not been out of the spotlight these past 18 months, given the extent of XR and Insulate Britain protests across the UK and the response by Parliament in the form of Part 3 of the Police, Crime, Sentencing and Courts Act 2022. Indeed, there is further legislation before Parliament, the Public Order Bill, aiming to plug some of the gaps left by that 2022 Act; amendments voted down during its passage have been reinstated in this current Bill. I'll finish with a point about that Act, as a springboard to something wider on public order policing and the state of protest in the UK. Initial reports of one of this week's arrests were that he "had been arrested under the Police, Crime, Sentencing & Courts Act 2022 … for actions likely to lead to 'harassment or distress'". Later reports indicate the arrested person was charged under s.5. That officers could

even think of turning to the new Act shows a worrying lack of familiarity with the new provisions. Public nuisance turned from a common law offence to one created in s.78 of the Act but harassment is not a trigger for that at all… though serious distress is listed. Harassment and distress are triggers for the new noise powers but these do not create an offence – they simply empower officers to impose conditions on protesters. Further, and more worrying, if creating noise is going to be interpreted as "emitting sound from your mouth" rather than "volume", that goes against all the policy proposals and debates which were premised on empowering police to regulate noisy protests, with amplifiers or foghorns. Such a reading of the new powers would risk exposing countless protesters to intervention, the worry expressed by many commentators that this ushered in an existential threat to protest. This all shows that at heart, our ability to exercise rights to free speech and to dissent are functions not solely of the formal wording of the law but as much (and quite possibly far more) of police understandings, their training, the political mood music, our legal consciousness – are we aware of what we can and cannot do? – and of the ineffectiveness of contemporary challenge. Being able to go to court some weeks later and have my rights vindicated is not the same as being able to stand for a prolonged period and make my point in sight and sound of my target. It is those matters we need to address, not simply "what does the law say?"