

‘Should the right to protest have any limits?’

Protest is a fundamental right in any democratic nation. Yet protest is becoming increasingly controversial in the United Kingdom. It is argued that to determine what restriction is justified on the right to protest, why protest is so fundamental must be understood. It will be put forward that protest has both instrumental and intrinsic value. Whilst using these values as a guide, this essay will then address different categories of restrictions on the right to protest. First, it looks at restrictions on the subject matter of the protest. It is argued that this should only be restricted in the most extreme circumstances. Secondly, it moves onto restrictions on the time and location of the protest. In the interests of public safety and protecting the rights of others, it is suggested these can be restricted, but only when strictly necessary. Lastly, restrictions on the means of protest will be looked at. Here the focus is on direct action. Although limitation on means is justified in a peaceful society, it is argued that the domestic approach, as exemplified by the Public Order Act 2023, is too heavy-handed. Thus overall, it will be argued that there are situations where the right to protest should have limits, but these limits must be strictly proportionate.

The fundamental importance of the right to protest

To determine whether the right to protest can be restricted, we must pinpoint why it is so valuable. Indeed, it is recognised in a plethora of international conventions.¹ It is argued that protest has an instrumental and an intrinsic value. Instrumentally, protest can be the vehicle of public change. History is rich with examples to prove this, from the suffragettes to the civil rights movement. Further, even if the protest doesn't achieve the desired ends, it still generates visibility for the cause. This can be clearly seen with the recent climate movement which has undoubtedly raised the public profile of the cause. Protest can be one of the best ways to signal to the government. For example, Parry argues that the ‘not in my name’ slogan of the Iraq war protests sent a clear message to the government that they cannot use the safety of British people to justify their campaign.² Therefore, protest is instrumental in achieving certain ends. However, it is suggested that protest also has an often-overlooked intrinsic value. The act of protesting is valuable in and of itself. Vestegren notes 19 different personal consequences of protest.³ For example, the learning of new skills, empowerment, gaining friendships and changing consumer behaviour. It is suggested that the self-affirming aspect is of particular importance. As Cherry argues the 2020 Black Lives Matter Protests enabled black participants to express their dignity and moral worth in the face of a society that denies it.⁴ Therefore, when analysing if and how protest should be limited, it is crucial that both the instrumental and intrinsic value of Protest are considered.

Restrictions on the subject matter of the protest

¹ Most relevant to the UK is Article 11 ECHR

² <https://www.lse.ac.uk/philosophy/blog/2023/02/15/whats-the-point-of-protest/>

³ <https://blogs.sussex.ac.uk/crowdsidentities/2019/05/12/can-protesting-be-good-for-you/>

⁴ <https://philpapers.org/go.pl?aid=CHEVPS>

If the subject matter of a protest is restricted, both the instrumental goal of persuasion and intrinsic value of empowerment in the message and taking action are lost. Therefore, it is argued that such a restriction should be subject to only the most extreme situations.

This links to the importance of free speech. As the European Court of Human Rights (ECtHR) proclaimed in *Handyside v UK*, freedom of speech is not restricted to ideas supported, but also ‘to those that offend, shock or disturb the state or any sector of the population ... without which there is no “democratic society”’.⁵ When you think of Countries which shut down protest due to subject matter e.g., anti-Putin protests in Russia, it becomes evident why caution should be exercised. However, despite the fundamental importance of pluralism, there can be situations where the subject matter of the protest causes harm which outweighs the benefits of free speech. The ECtHR has used article 17 ECHR as the test. To shut down an organisation or protest for the mere expression of unfavourable views it must be ‘aimed at the destruction of the rights and freedom’⁶ in the convention. For example, in *Kasymakhunov and Saybatalov v Russia*⁷ - Article 17 was held to be applicable to an organisation that professed pro-violent and antisemitic views. It is suggested that a similar threshold should be applied in the UK. When say, the threshold of hate crime is not met⁸, the protest should be allowed to continue. For protests which are still liable to cause great offence but not reaching this threshold, they could be restricted with the methods below. For example, the Supreme Court in 2022 upheld the ‘safe access zones’ legislation in Northern Ireland which restricts protest around abortion clinics.⁹ This represents how a protest with a potentially offensive subject matter can still be facilitated.

Restrictions on the time and location protest

The example just given with the abortion safe access zones represents why restrictions on time and location can be incredibly impactful on the protest. The anti-abortion protestors, wanted to be able to protest outside the abortion clinics in order to dissuade women from going through with the service. Thus, the location was key for achieving the desired end of the protest. So, moving the location of the protest makes the protest a less effective instrumental means. Yet, when balancing the protestors article 11 rights, with the women seeking services, article 8 rights, moving the protest away from the immediate vicinity was found to be the most proportionate result. It is argued this is a sensible framework for deciding whether it is just to restrict the time and location of the protest. Time and location can have a clear symbolic value¹⁰, so should only be restricted when it is necessary to do so. This can also be seen with public safety. Having very large assemblies in already busy areas could create crushes and injuries. Thus, it may be right for the police to intervene. Indeed, the police have the common law power to intervene to prevent a breach of the peace. But as acknowledged in *Laporte v Chief Constable of Gloucestershire*, these powers should only be used when the breach is

⁵ Application no. 5493/72 (1976), para 49.

⁶ Article 17 ECHR

⁷ Application nos, 26261/05 and 26377/06 (2013)

⁸ See Crime and Disorder Act 1998, s66 Sentencing Act 2020

⁹ *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill*, [2022] UKSC 32

¹⁰ Acknowledged by the ECtHR in *Sáska v. Hungary*, Application. No. 58050/08 (2012), para 21.

imminent or already happening.¹¹ It is argued that the overall goal should be the facilitation of protest at the desired location and time. As the Joint Committee on Human Rights has commented in relation to the police powers to restrict protests around parliament¹², these powers should be used ‘sparingly and only when necessary’.¹³

Restrictions on the means of protest

There are a wide variety of methods of protest, from assemblies and marches to occupations and disruptions. Here the focus will be on direct action, given its increased controversy. When looking at the intrinsic and instrumental value of protest, both are impacted by restrictions to direct action. Instrumentally, direct action hit the headlines and thus raises awareness for the cause. The actions of groups such as Just Stop Oil have led to political and media debate about the environment.¹⁴ Intrinsically, direct action can be a crucial way of achieving social realisation and empowerment. For example, a protestor witnessing the toppling of the Colston statue stated, ‘I never thought I would witness such an empowering moment that I can tell my children about’.¹⁵ Yet, it is accepted that restrictions on extensive property damage, disruption and riots can be justified in the wider interests of public safety and the need to maintain the rule of law. But it is argued that the UK approach is too heavy handed. The ECtHR have emphasised the importance of tolerance on behalf of the state, suggesting that the state should only intervene after protestors have made their views known for a sufficient amount of time.¹⁶ Yet, the Public Order Act 2023 has introduced offences of preparing for certain types of direct action e.g., locking-on¹⁷. Prohibiting the preparation of such acts does not indicate tolerance. It is also noted that these offences carry a maximum of six months imprisonment, a fine, or both, which again seems excessive. It is argued a more balanced approach should be struck. Damaging acts may be ended with imminence, but when the impact is merely disruptive, more leeway should be given to the protestors. Furthermore, criminal liability for exercising the fundamental right to protest should be exercised with caution. It is argued this should apply even when there is damage created. As suggested by the Supreme Court in *DPP v Ziegler*¹⁸, under article 11 it is possible to separate the justified ending of a protest, and the later prosecution.

To conclude, it has been argued that protest is a fundamental right in a democratic society, and that any restriction on this should be considered in light of the intrinsic and instrumental value of the right. However, it has been advanced that restrictions on this right to protect rights of others, public safety and other valuable causes can be justified. It is suggested that such restrictions should be strictly necessary and should be publicly scrutinised.

¹¹ [2006] UKHL 55

¹² Note that these powers have been extended by the Police, Crime, and Sentencing and Courts Act 2022

¹³ <https://committees.parliament.uk/publications/6367/documents/69842/default/>, para 120.

¹⁴ See e.g., https://www.theguardian.com/commentisfree/2024/feb/21/labour-tories-carbon-parties-just-stop-oil-mps-parliament?CMP=share_btn_url

¹⁵ <https://www.bbc.co.uk/news/uk-england-bristol-52965803>

¹⁶ *Balçık v Turkey*, Application no 25/02 (2007)

¹⁷ Section 2

¹⁸ [2021] UKSC 23