‘BAD’ DISRUPTION: RULE CHANGES THAT THREATEN THE RIGHT TO PROTEST

Human rights law professor **David Mead** argues that new legal restrictions on disruptive protest must be reversed

There has been an obvious shift in recent years in the way campaigners protest. While there is still room for the large-scale march and demo – think of those in support of Palestine – many activists have turned towards disruption as the key towards unlocking either greater public sympathy or highlighting current iniquities. Whether such tactics are likely to backfire and elicit not greater support but less is not my concern. Instead, my focus is on the ways in which disruption as part of political activism is increasingly subject to legal regulation. I will argue, first, that disruption is a necessary element of a working democracy. Secondly, that we tacitly recognise and accept forms of ‘good disruption’ without much question. Finally, I will show the various recent ways in which ‘bad disruption’ has been outlawed and de-legitimised, and suggest that this is a (very) unwelcome development.

Staged mass demos have the capacity to play a role in changing if not the world then at least parts of it. Assemblies serve varied purposes: giving vent to frustrations, empowering us to feel we make a difference, providing witness and, through numbers or noise, catching the eye of the serendipitous shopper. History is replete with examples of disruptive direct action leading to socio-political change. It is not a recent phenomenon, but it is very much on the rise. People feel they are not being listened to, see that more formal outlets for protests are increasingly restricted, or they consider the threat, in the case of climate change, is too pressing and too real to feel bound by the historic niceties of placards, petitions and presence.

Police and politicians who speak of being fully supportive of ‘lawful protest’ but against protesters who ‘disrupt the hard working individuals who are trying to keep this country moving forwards’[1] misrepresent what the law actually is. Human rights law protects not simply lawful protests but peaceful protesters. It must be this way or else human rights protections could never protect a protest from being criminalised. The key to protection is whether the organisers or participants have violent intentions, incite violence or otherwise reject the foundations of a democratic society[2]. This explains why the thousands so far arrested and charged with violent disorder this summer, arising from the protests against immigration instigated by the far right, will have no protection in human rights terms.

1 Former home secretary Priti Patel in an article written for the Daily Mail, 6 September 2020
2 Kudrevičius v. Lithuania ECHR

This means that there is a human right to engage in disruptive protests; those who participate will be protected unless it is proportionate on wider social interest grounds to limit it, and even then, only as narrowly as possible to achieve that aim. A long line of court decisions has held that road sit-ins, occupations, and obstructing construction works all come under the rubric of protection. This means that imposing blanket restrictions on such forms of disruptive political activism will almost certainly be unlawful in human rights terms.

Disruptive protest is a necessary part of the democratic political contest of ideas. Simply by being out of place through their lack of everyday mundanity, disruptive assemblies force us into confronting our existing understandings of the world. Protest needs to have an element of necessary disruption if it is to have any chance of being effective.

This is not to suggest that, as part and parcel of a healthy free society, I recommend everyone be forever exposed to such levels of disruption that life becomes intolerable. However, we have fallen victim to a successful campaign by the former government and its (generally) responsive press that we should expect never to be disrupted. I would argue that not only should we have to put up with views we do not like and campaigns we do not agree with, but we should in a democracy welcome and facilitate them – it shows maturity and offers the possibility of progress, not stasis and decline.

It takes bravery to espouse the value of peaceful but disruptive protest – valuable not just to those exercising it but of wider social utility and public value: to those whose minds might be changed, or to you tomorrow who might want to protest about something dear to your heart. We need to tackle Protest NIMBYism. Media discussions about protests in the past few years have generally been to personalise the narrative – individual portrayals of activists as entitled and wealthy, individual stories of harm suffered by a slow walk – whereas the true story is of protest, and disruption, as a collective good.

Even if that were not so, it is undeniably true that in our everyday lives we are expected to tolerate a whole host of public disruptive gatherings with little question ever asked about 'Should we have to?' or 'Why should I have to miss a GP appointment for this?' These are 'good disruptions'. Those, like me, who live near football grounds are expected, on alternate Saturdays from August to May to give way to thousands of fans being disgorged from the stadium, wending their way through slowly moving traffic back to their cars or to the train station. We might also think, in the good old days, of people queuing overnight and round the block for the first day of the January sales, or the winding, snaking queue of people just south of the Thames, waiting to pay individual respects to the late Queen as she lay in waiting. Of course, that's different, you say – but why is it, and how? What is it about one thousand people coming together with placards and megaphones that means that, under English law, they need to give six days' notice to the police of their intention to hold a 'public procession' but none of the same one thousand people strolling along at the same pace, shopping on the same street needed to? Where and why is the harm greater? Why are the police increasingly and speedily coming down on more recent tactics – slow walking and sit ins – whereas double parking and traffic jams are just an incident of trying to get around a city? We may, again, not agree on this but I hope I have highlighted that a simple binary is mistaken, and that this is the more so when we realise that marching expressively with others is the exercise of a protected human right, under Article 11 of the ECHR, whereas queuing for a TV reduced to £50 is not.

All that runs counter to the recent trajectory of the law. The focus of the two recent pieces of public order legislation has been aimed at curbing 'serious disruption'. It is the key term in the Public Order Act 2023, which has created a raft of new offences – locking on, tunnelling, obstructing major transport works, and interfering with the use or operation of key national infrastructure – and powers, such as serious disruption prevention orders (SDPOs).

'Serious disruption' has existed as a trigger since 1986, allowing the police to impose restrictions on marches and assemblies if serious disruption to the life of the community is reasonably believed to be likely, but its meaning has been greatly expanded by the 2023 Act. 'Serious' is defined as anything 'more than minor'. It does not take a lawyer to suggest that in ordinary language, there would usually be some distance between 'serious' and 'more than minor'. Someone hindered for say 10, maybe 15 minutes, from making a single journey can now be said, under the new definition, to have suffered 'serious disruption'. On top of this, the powers can be used on a predictive basis, essentially the police's view of what might happen in the future. Again, it does not take a lawyer to see the increase in police discretion this permits; officers may now impose whatever conditions appear necessary to prevent 'more than minor disruption'.

There is a host of other concerns with the new legislation: were the new offences needed, or does the Act simply duplicate? Does a trigger that permits conditions based on significant or seriously disruptive noise have the potential to strike at the very existence of protests? Do we relish being lumped in with Turkey, Philippines, Belarus, Russia and Egypt, the only countries with similar protest banning orders to our SDPOs (and in fact none of them allows as long a duration as our two years) each underpinned by the now expanded concept of 'serious disruption'? The combination of uncertainty combined with width heralds considerable police discretion, and that leads to this last point; the chronic lack of effective mechanisms to constrain police use of these broad powers. There is very little opportunity to make a timely challenge in advance. Many, faced with a demand from an officer will simply accede or return home, their rights 'chilled'. Anyone who persists will likely be arrested, yet a successful defence some months later before magistrates will not help. The time to protest will have been lost.

Respect for the right to peaceful protest and an acceptance that within the human rights framework protests can be disruptive, is essential to a healthy, free society. The new government must make this a reality, by ending the criminalisation of peaceful protest and rolling back laws which undermine these rights.

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