Collective punishment and pre-emptive policing in times of riot and resistance

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Anti-austerity protests and the revolts of August 2011 have led to the introduction of increasingly draconian forms of policing. Individuals involved in these demonstrations face severe collective punishments by the courts for the combined effect of what is done en masse.

If austerity is our destiny, as UK Chancellor George Osborne would insist, we should anticipate that some of us will not embrace our fate quietly. The student demonstrations of early 2011 and the revolts which followed the police killing of Mark Duggan clearly demonstrated as much. The anticipation of further revolts, in the face of a deliberate drive through austerity to maintain the creditworthiness of British capital at the expense of the working class, has led state agencies to reconsider the form of policing adopted as part of the machinery of austerity. What is particularly interesting is that the model they chose is that which was adopted in the Six Counties [of Northern Ireland] to repress the nationalist community. Arming police with a range of weaponry has been prioritised. The new commissioner of the Metropolitan police (Met), Bernard Hogan-Howe, said that every police car should have a Taser.[1] There are already 2,000 Met officers authorised to carry Tasers and Hogan-Howe's plan would lead to Tasers being carried in 6,500 police cars.[2]

[1] The Guardian 22.11.11

[2] Ibid

Pre-empting the student demonstrations

Prior to the November 2011 student demonstrations in London, Hogan-Howe made clear that he had pre-authorised the use of baton rounds.[1] During the demonstration an "operational decision" was made to restrict the time students were allowed to gather at the London Wall assembly point and keep them on the agreed route of the march (this power is afforded to police under the Public Order Act 1986, sections 12 and 14). Anyone leaving the route of the demonstration or overstaying the two-hour time period imposed for gathering at London Wall was liable to be arrested for a public order offence. Prior to the march a letter was sent to individuals who had been arrested on a previous anti cuts protest. Signed by Simon Pountain, the Met commander leading the policing operation, it stated: "It is in the public and your own interest that you do not involve yourself in any type of criminal or antisocial behaviour. We have a responsibility to deliver a safe protest which protects residents, tourists, commuters, protesters and the wider community. Should you do so we will at the earliest opportunity arrest and place you before the court."[2] Since the revolts the Met has increased training for police officers in the use of baton rounds and is planning to purchase three water cannons.

The Met's interim report on the August revolts[3] makes clear that chief among the police's "failings" was their inability to control people's movements. The report seeks to address "the level of resource required under mobilisation plans and how officers can be deployed in a more agile way." As was the case in the Six Counties, the fundamental response will be an increase in the use of force alongside the techniques of control:

> Reviewing alternative tactics to deal with large scale disorder, including options for the use of water cannon. The MPS has increased the number of officers trained to deploy with baton gun teams so that teams can be deployed more flexibly if and when required...Developing a CCTV strategy that will cater for any future London wide incident and exploring what can be developed, with appropriate financial investment, regarding further CCTV and facial recognition technology...Considering whether a request

[1] The Guardian 9.11.11

[2] The Guardian 8.11.11

[3] Operation Kirkin "Strategic Review Interim Report" Opera

> for additional public order powers or a review of other legislation may be beneficial in dealing with large scale disorder.[4]

As the report makes clear, what went wrong for the Met, and the police nationwide, was that their policing techniques were designed only for "pre-planned protest" before which the police would be "able to themselves prepare a policing plan with a contingency for disorder." In August 2011, the spontaneous, mobile, dynamic, geographically diverse nature of the revolts meant the Met was outflanked. This showed quite simply that the society of control only works if we acquiesce to such control. Owen's report states that "When confronted with a scene of serious disorder, public order officers are faced with four basic options; to isolate, contain, arrest or disperse the crowd." In August this system of policing broke down because the decision to contain or disperse was taken away from the police by the simple refusal of the rioters to treat protest as something that is required by the police to be "pre-planned", with permission granted and location fixed.

[4] Ibid

Punishing the "mob"

In Gilmour–v-R (2011) EWCA Crim 2458 the Court of Appeal considered the appeal against the sentence of a middle class student (the adopted son of the Pink Floyd guitarist Dave Gilmour) who had been convicted for his part in the December 2010 student protests - specifically the "mob disorder" in Oxford Street and the attack on the car convoy containing the Prince of Wales. The sum total of Gilmour's actions was that he sat on the bonnet of the car, kicked a window and stole a mannequin. He received a 16 month custodial sentence. The court rejected the appeal and made it clear that the basis for the decision was that the sentence had to reflect not the individual act alone but the "inflammatory context" as per Hughes LJ at para 16:

> It is an unavoidable feature of mass disorder that each individual act, whatever might be its character taken on its own, inflames and encourages others to behave similarly, and that the harm done to the public stems from the combined effect of what is done en masse.

Thus the sentence reflects not the actions of the individual but the combined effect of what is done en masse.

It is hard to avoid the conclusion that individuals had been punished for the actions of the mass as part of a sentencing process designed to collectively punish all those involved, regardless of their actual level of participation. This could be seen again in the conviction of 10 people for aggravated trespass in the Fortnum and Masons UK Uncut protests where the trial judge determined that the defendants were guilty on the basis of joint enterprise – that as a group they had intended to intimidate. This was despite the fact that none of the defendants were shown to be doing anything intimidatory. The judge effectively ruled that the simple act of "demonstrating" is intimidatory and therefore a crime.[1]

According to the review of post-riot sentencing contained in the combined appeals in *R-v Blackshaw et al (2011) EWCA Crim 2312* as per Lord Justice Judge, the Lord Chief Justice, "There can be very few decent members of our community who are unaware of and were not horrified by the rioting which took place all over the country between 6 August and 11 August 2011. For them, these were deeply disturbing times. The level of lawlessness was utterly shocking and wholly inexcusable." (para 1)

The review continues:

[1] www.fortnum145.org

> There is an overwhelming obligation on sentencing courts to do what they can to ensure the protection of the public, whether in their homes or in their businesses or in the street and to protect the homes and businesses and the streets in which they live and work. This is an imperative. It is not, of course, possible now, after the events, for the courts to protect the neighbourhoods which were ravaged in the riots or the people who were injured or suffered damage. Nevertheless, the imposition of severe sentences, intended to provide both punishment and deterrence, must follow. It is very simple. Those who deliberately participate in disturbances of this magnitude, causing injury and damage and fear to even the most stout-hearted of citizens, and who individually commit further crimes during the course of the riots are committing aggravated crimes. They must be punished accordingly, and the sentences should be designed to deter others from similar criminal activity.

By defining the rioters as apart from "the public" any attempt to identify the police actions as a trigger for the revolt is excised from consideration. In his confirmation of the sentences handed down in the aftermath of the riots, Judge refers to *R v Caird [1970] 54 Cr. App. R 499* at 506:

> When there is wanton and vicious violence of gross degree the court is not concerned with whether it originates from gang rivalry or from political motives. It is the degree of mob violence that matters and the extent to which the public peace is broken...Any participation whatever, irrespective of its precise form, in an unlawful or riotous assembly of this type derives its gravity from becoming one of those who by weight of numbers pursued a common and unlawful purpose. The law of this country has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers. When there is wanton and vicious violence of gross degree the court is not concerned with whether it originates from gang rivalry or from political motives. It is the degree of mob violence that matters and the extent to which the public peace is broken...

Dealing with "imminent threats"

The case of *The Queen (on the application of Hannah McClure and Joshua Moos) v Commissioner of the Metropolitan Police [2012] EWCA Civ 12* dealt with judicial review proceedings brought by two claimants, who challenged a number of policing decisions made in handling the crowd which attended the Royal Exchange and Climate Camp demonstrations. The case is noteworthy for the referencing of *R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55, [2007] 2 AC 105* by the Master of the Rolls (at this point Lord Neuberger of Abbotsbury – who had already authorised the clearance of the Democracy Village protest from Parliament Square) and the development within the case of the discussion around the question of "imminence": "If police action is to be justified where no actual breach of the peace has occurred, it is therefore essential that the police reasonably apprehend an imminent breach of the peace."

Imminence was described at [2007] 2 AC 105, para 141, by Lord Mance in these terms:

> The requirement of imminence is relatively clear-cut and appropriately identifies the common law power (or duty) of any citizen including the police to take preventive action as a power of last resort catering for situations about to descend into violence. That is not to suggest that imminence falls to be judged in absolute and purely temporal terms, according to some measure of minutes. What is imminent has to be judged in the context under consideration, and the absence of any further opportunity to take preventive action may thus have relevance.

Lord Rodger of Earlsferry said at [2007] 2 AC 105, para 69, that there was no need for the police officer "to wait until an opposing group hoves into sight before taking action," as that would "turn every intervention into an exercise of crisis management." Lord Carswell said about imminence at [2007] 2 AC 105, para 102:

> [I]t can properly be applied with a degree of flexibility which recognises the relevance of the circumstances of the case. In particular it seems to me rational and principled to accept that where events are building up inexorably to a breach of the peace it may be possible to regard it as imminent at an earlier stage temporarily than in the case of other more spontaneous breaches.

Thus, the "preventive action as a power of last resort" is based on a political judgement that "where events are building up inexorably to a breach of the peace it may be possible to regard it as imminent at an earlier stage temporarily than in the case of other more spontaneous breaches." The Master of the Rolls goes on to recite:

> At [2007] 2 AC 105, para 29, Lord Bingham of Cornhill made the point that a constable has a 'duty' as well as a 'power' to 'seek to prevent...any breach of the peace occurring in his presence..., or any breach of the peace which is about to occur.' Secondly, Lord Rodger said at [2007] 2 AC 105, para 84, that a police officer could stop potential protesters from proceeding further, 'even if they were entirely peaceful', provided 'there was no other way of preventing an imminent breach of the peace'.

These are the same arguments that have been used to justify the police tactic of "kettling" (the police containment or corralling of protesters). Lord Neuberger resolves that the kettling of demonstrations at the Climate Camp was lawful:

> "We have concluded that a decision to contain a substantial crowd of demonstrators, whose behaviour, though at times unruly and somewhat violent, **did not of itself justify containment**, was justifiable on the ground that containment was the least drastic way of preventing what the police officer responsible for the decision reasonably apprehended would otherwise be imminent and serious breaches of the peace, as a result of what he reasonably regarded as the immediate risk of the crowd being joined by dispersing demonstrators from another substantial crowd, which had itself been contained, as its behaviour had been seriously violent and disorderly." (emphasis added)

The obvious danger is that the concept of "imminence" becomes so elastic that in effect the police in the first instance and the judiciary in the second, can retrospectively justify any action to restrict assembly, regardless of the facts on the ground.

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