

The Public Order Bill can expect a rough Parliamentary ride. It proposes wider “stop and search” powers for the police; even searches where the police have no suspicion of an offence having been committed. Are its policing measures a step too far or as presented by the Government, a proportionate response to active protest?

“A little inconvenience is more acceptable than a police state.”¹ You could be forgiven for thinking that this comment originated from a Liberty press release, the Joint Committee on Human Rights or even Orwell’s *Animal Farm*. But you would be mistaken. This poignant warning about the dangerous scope of the power to stop and search without suspicion came from a police officer consulted about the Public Order Bill. It pinpoints the dangerously disproportionate effect of powers that would indiscriminately affect all those actively protesting, disruptively or not.

Imagine, you are peacefully participating in a protest in Trafalgar Square. Protests at such historic landmarks are not uncommon. You walk with the crowd, holding your sign high and chanting loudly with fellow protesters. The protest has resulted in heavy congestion and road blockages. All of a sudden, a police officer blocks your path and demands that you submit to a stop and search. “On the basis of what?” you ask the police officer, “I’m committing no crime”. If the Public Order Bill is passed, the police officer is at liberty to respond “That doesn’t matter, I don’t need to suspect you of anything.” You submit to the search and the officer finds the padlock for your bike. Unfortunately, you are informed by the officer that this will now be seized as a prohibited object. You may even be subsequently arrested for the new proposed offence of “being equipped for locking on”.

Imagine now if alternatively, you felt uncomfortable with the request, and emboldened by the response issued by the Metropolitan Police in the aftermath of Sarah Everard’s murder², you refuse to submit immediately. You question the officer’s identity and intentions. As a result, you are charged with the offence of intentionally obstructing a constable in the exercise of their stop and search powers. You could be facing anything from a level 3 fine to 51 weeks’ imprisonment, or both.

¹ HC Deb 23 May 2022, vol 715, cols 65-66.

² Metropolitan Police, ‘Our response to issues raised by the crimes of Wayne Couzens’
<<https://www.met.police.uk/notices/met/our-response-to-issues-raised-by-the-crimes-of-wayne-couzens/>>
See also: HC Deb 23 May 2022, vol 715, col 69.

The Public Order Bill as brought from the House of Commons to the House of Lords on 19th October 2022³, would make this imaginary scenario a frightening reality. Clause 11 of the Bill would confer a power on police officers to stop and search people without the need for suspicion of any kind, anywhere in a specified locality and for a specified period of up to 24 hours.⁴ The power would operate specifically in relation to protest, as is clear from the reference to protest-related offences in clause 11(1)(a).⁵ These include the proposed new offences of locking on and obstruction of major transport works.

The parameters of clause 11 are drawn very widely, giving rise to three main proportionality issues. Firstly, the clause 11 power could be used equally against peaceful protesters and people going about their everyday business in possession of commonplace items.⁶ The Explanatory Notes provide that items as innocuous as glue or a padlock would constitute a prohibited object for potential use in “locking on.”⁷ Secondly, the stop and search power is accompanied by clause 14, which criminalises the conduct of intentionally obstructing a constable using this power.

Thirdly, the threshold for use of the clause 11 power is very low. A police officer of the rank of inspector or above need only have “reasonable belief” that offences listed in clause 11(1)(a) may be committed, or that persons are carrying prohibited objects in any locality within their area (s. 11(1)(b)). The power would be ripe for misuse. It is likely that any planned public protest in a police inspector’s area would give rise to a reasonable belief in terms of clause 11(1)(a).

The only other condition for authorisation of the power is contained in sub-clauses 11(4)(a)-(c). The police officer must “reasonably believe” that “authorisation is necessary to prevent the commission of offences within subsection (1)(a) or the carrying of prohibited objects.”⁸ The specified locality must be no greater than is necessary to prevent such activity⁹ and, the specified period must be no longer than necessary to prevent the same.¹⁰ Clause 11(4)(a) deals with the permissibility of the authorisation whereas the latter two subsections deal more with scope of an

³ Public Order Bill, HL Bill 61.

⁴ Ibid, cl 11(3), (6) and (7).

⁵ A point made in: Liberty, ‘Public Order Bill Explainer: What happened in the Lords and what happens next’ (16 February 2023) <<https://www.libertyhumanrights.org.uk/issue/public-order-bill-explainer-what-happened-in-the-lords-and-what-happens-next/>>

⁶ HL Deb 7 February 2023, vol 827, col 1098.

⁷ Explanatory Notes to the Public Order Bill, 19 October 2022 (HL Bill 61), para 23. See also HC Deb 23 May 2022, vol 715, col 97.

⁸ Public Order Bill, HL Bill 61, cl 11(4)(a).

⁹ Ibid, cl 11(4)(b).

¹⁰ Ibid, cl 11(4)(c).

authorisation. Therefore it is highly likely that once clause 11(4)(a) is met, authorisation will follow. Clause 11(4)(a) adds very little to 11(1)(a) and (b). Once it is reasonably believed that someone somewhere in the locality may commit any of the offences in 11(1)(a) or be carrying a prohibited object, it is very easy to argue that authorisation is necessary. Given the pre-emptive nature of clause 11, there is significant scope for policing measures to be taken too far on the basis of politicised or sweeping judgments.

The rough Parliamentary ride began in February 2023. Battle lines were drawn when the House of Lords dramatically gutted the Bill of clauses 11 – 14, all dealing with the power to stop and search without suspicion. Clause 11 was removed from the Bill by the House of Lords with a powerful majority of 284 against 209.¹¹ The Bill was sent back to the House of Commons, signalling that a lengthy game of Parliamentary ping pong may well follow. Unless and until a Bill is agreed by both Houses, it cannot be passed.

The Government struck back, passing a motion to disagree with the removal of clause 11, achieving a majority of 281 votes in favour and 236 against.¹² It appeared unlikely that the House of Lords would roll over on clause 11 given that it defeated an almost identical provision in the Police, Crime, Sentencing and Courts Act 2022 with a crushing majority of 212 to 128 votes.¹³ In addition, the reason given by the House of Commons for re-insertion of Clause 11 was wholly inadequate: “because... [the power] is appropriate”.¹⁴

However, on 14th March 2023, Lord Coaker, who led the charge against clause 11, announced that he would not insist on removal of clause 11. By introducing a motion intending to restrict clause 11, he argued that it faced up to the reality of the Government’s persistence and made clause 11 less disproportionate.¹⁵ The motion was passed.¹⁶ The so-called restricted version of clause 11 does not make any material difference to proportionality. It simply increases the rank of the officer permitted to authorise use of the power and removes one of the offences from clause 11(1)(a). The other proposed amendments focus on attempting to mitigate the general effect of the clause 11 power once authorised, as opposed to narrowing the circumstances in which it can be used. For example the chief superintendent would be obliged to “take reasonable steps” to make the

¹¹ HL Deb 7 February 2023, vol 827, cols 1115-1117.

¹² HC Deb 7 March 2023, vol 729, cols 251-254.

¹³ HL Deb 17 January 2022, vol 817, cols 1460-1464.

¹⁴ Public Order Bill, HL Bill 116, Commons Disagreement, reasons and amendments in lieu (8 March 2023), 6A.

¹⁵ HL Deb 14 March 2023, vol 828, cols 1217-1218.

¹⁶ *Ibid*, cols 1227-1229.

public aware that powers “are in active use”.¹⁷ This latter amendment may increase the chilling effect already threatened by the proposed power.

Peaceful protest is not a criminal offence. It is a protected activity under Articles 10 and 11 of the ECHR. The power in clause 11 is dangerous because it would treat protest on the same basis as the most serious criminal offences in our jurisdiction. Powers to stop and search without suspicion exist already, but only in relation to serious violence, terrorism and articles with a blade or point and offensive weapons. Given the pre-emptive nature of stop and search, and the lack of suspicion required, the exercise of these powers has always been controversial and reserved for the most serious perceived harm to members of the public.

The judgment of the European Court of Human Rights in *Gillan v United Kingdom* (2010) 50 EHRR 1105 strongly indicates that stop and search powers relating to protest should be approached with serious caution. In finding that similar powers under section 44 of the Terrorism Act 2000 violated article 8 of the ECHR, the Court was persuaded by the risk of a broadly framed stop and search power being “misused against demonstrators and protestors in breach of article 10 and/or 11 of the Convention”.¹⁸

The Government’s primary justification for clause 11 is prevention of disruption caused by locking on and targeting of major infrastructure.¹⁹ A scaremongering rhetoric has been adopted by the Secretary of State for the Home Department, who relies on extreme examples of protesters whose actions have prevented people from getting to hospital.²⁰ This has been followed by other Conservative MPs, who have relied on Extinction Rebellion protesters deciding “who was worthy to pass ...[a] blockade and get urgent medical treatment.”²¹ Using this rhetoric to justify a power which does not discriminate between extreme conduct and peaceful protest is dangerous and has serious consequences for proportionality.

It may be argued by the Government, that responding to the obstruction of emergency services could amount to a pressing social need in terms of the proportionality assessment. However, the power contained in clause 11 is inherently disproportionate, as it is not sufficiently focused on the

¹⁷ Public Order Bill, Bill 270, Lords non-insistence and amendments to words restored (15 March 2023), 6B-6F.

¹⁸ *Gillan v UK*, § 85.

¹⁹ HC Deb 23 May 2022, vol 715, cols. 53-54.

²⁰ *Ibid*, Col 49.

²¹ HC Deb 23 May 2022, vol 715, col. 70.

obstruction. It could be used against all active protestors, disruptive or not. The Strasbourg Grand Chamber (“GC”) has dealt with Article 11 in relation to “serious disruption”. In *Kudrevicius and others v Lithuania*, it was held that States are afforded a wider margin of appreciation to restrict “disruption to ordinary life and other activities” caused by protestors where the disruption exceeds the level which is “inevitable in the circumstances”.²² However, the GC also emphasised that any public demonstration might result in some degree of disruption, for example to traffic.²³ It was emphasised that States are not only bound by the obligation not to impose “unreasonable indirect restrictions”, they may also be under a duty to ensure individuals can effectively enjoy rights protected under article 11.²⁴ The GC found that the imposition of a custodial sentence for those erecting unauthorised roadblocks was not disproportionate.²⁵ This decision was made in relation to a post-conviction criminal penalty imposed by a Court, not a pre-charge police measure. The latter, by its nature, is pre-emptive, and carries a clear risk of arbitrary interference with the Article 11 rights of peaceful protestors.

The use of existing stop and search powers has already come under attack from within the establishment. His Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (“HMICFRS”) has found that the disproportionate use of these powers in relation to Black, Asian and Minority Ethnic people has surged since 2010/11. In 2019/20, Black people were found to be 8.9 times more likely to be stopped and searched than White people.²⁶ Moreover, in 2018/19, close to one in ten arrests following a stop and search related to public order offences, wherein no prohibited object was found.²⁷ Therefore, stop and search powers are already being used disproportionately and without any real success. The level of disproportionate interference with rights holders threatened by clause 11 may be exacerbated, as HMICFRS has been told anecdotally that handcuffs are a regular feature of stop and search.²⁸

Just over 100 years ago, amidst demonstration (and no doubt disruption) outside Parliament, Muriel Matters and Helen Fox locked onto the grille of the House of Commons “Ladies Gallery”. They did so in protest of the grille which obscured their view of the House of Commons

²² *Kudrevicius and others v Lithuania* (2016) 62 EHRR 34, §156.

²³ *Ibid*, §155.

²⁴ *Ibid*, §158.

²⁵ *Ibid*, §178.

²⁶ HMICFRS, *Disproportionate use of police powers: A spotlight on stop and search and the use of force* (26 February 2021) p. 28.

²⁷ *Ibid*, p. 32.

²⁸ *Ibid*, p. 25 & 5.

Chamber.²⁹ The efforts of suffragettes and the injustice they protested against, is now recognised by Parliamentary exhibitions and archives. There may be some who disagree about how they sought to achieve their aim, but suffragettes are frequently celebrated in popular culture and women now have the right to vote. This example highlights the dangers of extending the power to stop and search without suspicion in response to conduct which is capable of providing a subjective, mixed response from the public over time. Like disruptive protest, the latter stands in stark contrast to terrorism and serious knife crime, providing yet another reason why clause 11 is a step too far.

Sophie Nandy,
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²⁹ UK Parliament, 'The Grille Incident' <<https://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/womenvote/parliamentary-collections/ladies-gallery-grille/grille-incident/>> ; Robin Fell (Former Principal Doorkeeper), 'And everywhere she is in chains!' (UK Vote 100, 1 March 2017) <<https://ukvote100.org/2017/03/01/and-everywhere-she-is-in-chains/>>