

The Policeman's Kettle: arguing for the reform of Article 5 of the European Convention on Human Rights

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Introduction

This essay aims to explore the law in England regulating public protest, specifically the powers given to the police to contain or 'kettle' protesters. It will explore the issues created by the leading European Court of Human Rights case of *Austin* and will argue that the precedent it set was *per incuriam*. It will conclude by offering a solution in the form of statutory reform and it will give reasons why this change is not only desirable but necessary in a democratic society.

Protest in England

Protest is an important aspect of any democracy; it allows opinion to be expressed outside of an election period to stimulate governmental change. A democratic society also relies upon stability, peace and safety, factors which are inevitably eroded if protest is allowed to proceed unfettered and without restriction. It is therefore somewhat obvious that the freedom to protest cannot be absolute and so there must be limits imposed. These limits are the topic of this essay; for a democracy to prevail they must be certain, clear and understood, especially by those in positions of authority. Arguably, in England, the current law controlling protest is far from satisfactory.

The police are the body historically tasked with maintaining order within society. Modern policing has had to adapt to deal with mass protests in an increasingly urban environment, balancing the

rights to protest with the duty to prevent crime¹ and breaches of the peace.² Kettling is the most commonly used term to refer to the police's containment methods. It can be described as 'a method for management of large demonstrations' whereby 'cordons of police contain a crowd within a limited area'.³ Officers block routes around protests, limiting movement until the area is surrounded. This inevitably involves the detention of peaceful bystanders as well as those committing crimes such as criminal damage or assault. The tactic has been used in the UK, Canada,⁴ Denmark⁵ and the United States of America.⁶ It has been used by the police in London on at least four occasions in the last fifteen years, resulting in three litigated cases: *Austin*,⁷ *Moos & McClure*⁸ and *Castle*.⁹

Breach of the peace and The European Convention on Human Rights

Kettling relies upon the power of detention to prevent a breach of the peace that exists in the common law. It allows for a 'police constable [to] take any reasonable action to stop a breach of the peace which is occurring, or to prevent one which the constable reasonably anticipates will occur in the near future'.¹⁰ Importantly, breaching the peace is not a crime and is therefore not punishable by

¹ *R v Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1987] EWCA Civ 5

² *Albert v Lavin* [1981] UKHL 6

³ Scorer, 'Kettling matters' [2011] NLJ Vol 161, Issue 7452

⁴ The Canadian Civil Liberties Association, 'CCLA welcomes Toronto police's rejection of future "kettling"' <[http://ccla.org/2011/06/23/ccla-welcomes-toronto-police's-rejection-of-future-\"kettling\"/](http://ccla.org/2011/06/23/ccla-welcomes-toronto-police's-rejection-of-future-\)> accessed 10 July 2013

⁵ Kevin Rawlinson, 'Anti-corporate demonstrators arrested' The Independent <<http://www.independent.co.uk/environment/climate-change/anticorporate-demonstrators-arrested-1838760.html>> accessed 10 July 2013

⁶ Matt Wells, 'Police crack down on 'Occupy Wall Street' protests' The Guardian <<http://www.guardian.co.uk/world/blog/2011/sep/25/occupywallstreet-occupy-wall-street-protests>> accessed 10 July 2013

⁷ *Austin & another v The Commissioner of Police of the Metropolis* [2009] UKHL 5

⁸ *The Queen on the application of Joshua Moos and Claimant Hannah McClure v The Commissioner of Police of the Metropolis* [2011] EWHC 957(Admin)

⁹ *Adam Castle, Rosie Castle, Sam Eaton v Commissioner of Police for the Metropolis* [2011] EWHC 2317 (Admin)

¹⁰ Stone, 'Breach of the Peace: the Case for Abolition' [2001] 2 Web JCLI <<http://webjcli.ncl.ac.uk/2001/issue2/stone2.html>> accessed 4 July 2013

any sentence.¹¹ It purely provides the legal basis for taking preventative measures, which is why its use is most prominent during large scale protests.

The law was altered substantially with the passing of The Human Rights Act 1998, applying from 2000 to give domestic effect to the European Convention on Human Rights. This imported a number of provisions which directly affected the law on public demonstrations. Citizens were given a collection of rights which, albeit with certain restrictions, gave a positive right to protest. The police, as a public authority,¹² became bound to act consistently with the Convention rights.

Article 5 of the ECHR provides the right to liberty. Any enforcement of this right must survive a two-stage test. Firstly, is liberty deprived? Secondly, is there an exception which renders the deprivation lawful? Crucially after *Austin*¹³ the latter stage is moot as the courts ruled kettling does not deprive liberty but merely restricts movement; however, the judgements pre-*Austin* give insight into how the courts have perceived kettling. Furthermore *Austin* has been heavily criticised both by the dissenting judges in the case (3 of 14) and academics. This will be addressed in detail later, but if the judgement does not stand up to logical analysis and ‘betrays the internal integrity of Article 5’,¹⁴ it follows that the alternative position should be considered: if *Austin* was decided *per incuriam* would kettling be lawful?

The exceptions in Article 5

Crucially, once engaged, this right can only be restricted in limited situations which are

¹¹ *Williamson v Chief Constable of the West Midlands Police* [2003] EWCA Civ 337

¹² Human Rights Act 1998 s6

¹³ *Austin and others v the United Kingdom* [2012] ECHR 459

¹⁴ Michael Hamilton, ““Kettling” and Article 5(1) ECHR: *Austin and Others v UK* (2012)” (23 March 2012) <<http://echrblog.blogspot.co.uk/2012/03/guest-post-on-austin-and-others-grand.html>> accessed 6 July 2013

exhaustively listed within the Article.¹⁵ There are six exceptions: after conviction by a court, due to a breach of a court order, to bring the person before a court on reasonable suspicion that a criminal offence has been committed, a minor is avoiding school, physical and mental health concerns and immigration control. Clearly neither the latter three nor the first are applicable to breach of the peace. This leaves two potential exceptions.

Article 5(1)(b): [T]he lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

Article 5(1)(c): [T]he lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

It is unlikely that 5(1)(b) would apply. That ground involves the ‘fulfillment of any obligation prescribed by law’ but this duty must be on the detainee and logically cannot be a ‘requirement to submit to the deprivation of liberty itself’. Both the Court of Appeal and the House of Lords in *Austin* considered the arguments but did not feel it necessary to give a detailed decision, stating that ‘since it is not necessary . . . to decide whether, if there had been, it would have been justified under Article 5(1)(b), we prefer not to do so, and to leave that question to another day, and to a case in which it has to be decided’. Nevertheless it appears unlikely that the police could rely upon the imprecise duty on all citizens to assist in the prevention of breach of the peace as a justification for detaining those very same citizens.

¹⁵ *A and Others v the United Kingdom* [2009] ECHR 301 [163]

The 5(1)(c) exception covers detention ‘for the purpose of bringing *him* before the competent legal authority’ or detention ‘when it is reasonably considered necessary to prevent *his* committing an offence’ (*emphasis* added). Neither of those limbs appear to allow for the detention when it is necessary to prevent *others* committing offences. Although the courts in *Austin* did not consider it necessary to rule on the application of any of the subparagraphs in Article 5, the Court of Appeal did state that ‘The basis of the case that the police were entitled to deprive the appellants of their liberty under that paragraph is that, in each case, ‘it was reasonably considered necessary to prevent his committing an offence’. In the light of our conclusion . . . above that the answer to the question whether the appellants appeared to be about to commit a breach of the peace was ‘No’, we do not at present see how the respondent can successfully rely upon Article 5(1)(c)’.

It follows that if detaining peaceful bystanders at a protest is a deprivation of liberty, then it would not be easily justified under any of the Article 5 exceptions. Kettling would be an illegal infringement, but for the existence of the *Austin* judgement.

The case of Austin

Austin is an English case of kettling from the May Day protests in 2001. Between 2000 and 3000 people, protesters and innocent bystanders, were contained within a cordon set up at Oxford Circus. This kettle was maintained for around 7 hours. The history of the civil case through the domestic courts has been explored in detail by Helen Fenwick¹⁶ and Genevieve Lennon.¹⁷ In summary, both the Court of Appeal and the House of Lords found that there was no deprivation of liberty because

¹⁶ Fenwick, ‘Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest’ (2009) P.L. 737, 744

¹⁷ Lennon, ‘The purpose of the right to liberty under the ECHR, Article 5’ [2012] 3 Web JCLI <<http://webjcli.ncl.ac.uk/2012/issue3/lennon3.html>> accessed 4 July 2013

‘the purpose of the interference with liberty could be viewed as relevant . . . a balance to be struck between what the restriction sought to achieve and the interests of the individual’.¹⁸

That judgement was subsequently appealed to the European Court of Human Rights. They rejected the claim on the same basis; that the purpose of the detention was a factor when establishing if the threshold for deprivation of liberty had been met. The court ruled that ‘the context in which action is taken is an important factor to be taken into account’ and in limited situations ‘the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good’.¹⁹ They listed a number of factors that would indicate no deprivation of liberty: ‘commonly occurring restrictions on movement’, ‘unavoidable as a result of circumstances beyond the control of the authorities’, ‘necessary to avert a real risk of serious injury or damage’ and ‘minimum required for that purpose’.

That majority decision has been critically analysed in great detail by David Mead,²⁰ Michael Hamilton²¹ and Helen Fenwick.²² Specifically, the lack of adherence to previous precedent was criticised by David Mead: ‘There is no warrant in any previous decision for the balancing that the Court adopted. Indeed as is clear from *A v UK*, it flies in the face of precedent, such as it is at Strasbourg’. Clearly previous decisions such as *Gillan v United Kingdom*²³ were not considered, where the claimants were subjected to a stop-and-search for 30 minutes and this was ‘indicative of a

¹⁸ Fenwick (n 19) 746

¹⁹ *Austin* (n 16) [59]

²⁰ Mead, ‘The Right To Protest Contained By Strasbourg: An Analysis of *Austin v. UK* & The Constitutional Pluralist Issues it Throws Up’ (16 March 2012) <<http://ukconstitutionallaw.org/2012/03/16/>> accessed 1 July 2013

²¹ Hamilton, ‘“Kettling” and Article 5(1) ECHR: *Austin and Others v UK* (2012)’ (23 March 2012) <<http://echrblog.blogspot.co.uk/2012/03/guest-post-on-austin-and-others-grand.html>> accessed 1 July 2013

²² Fenwick, ‘An appeasement approach in the European Court of Human Rights?’ (5 April 2012) <<http://ukconstitutionallaw.org/2012/04/05/>> accessed 1 July 2013

²³ *Gillan and Quinton v the United Kingdom* [2010] ECHR 28

deprivation of liberty within the meaning of Article 5 § 1'.²⁴ It is unclear how the two cases should be reconciled. The literal effect of the judgement was also attacked. In lay terms, 'if we temporarily put pure legal analysis to one side, it is hard not to see how being held for up to seven hours without access to food or water, without shelter or perhaps suitable clothing on a wet, windy day was not depriving someone of their liberty. In common sense terms, what more was needed?'.²⁵ Clearly the courts felt that the meaning of individual liberty can depend upon the intentions of the state, albeit only in emergency situations. Furthermore, Michael Hamilton attacks the dangerous nature of arbitrarily separating cases that do or do not engage Article 5.²⁶ The judgement 'suggest[s] that certain deprivations of (or restrictions upon) liberty are intuitively beyond the scope of Article 5'. Instead of judging the engagement on the purpose of the detention, which for the reasons listed above is problematic, he is 'in favour of a test which examines all cases by applying objective factors such as type, duration, effects and manner of implementation'. It would then fall upon the state to legitimise the interference under one of the prescribed exceptions.

The minority judgement in the case is strong and well argued. They state that 'the majority's position can be interpreted as implying that if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty. This is a new proposition which is eminently questionable and objectionable'.²⁷ Indeed *prima facie* deprivation of liberty is a factual matter; was the person contained to the degree and extent that he was not free?²⁸ If not, was the state exercising an exception? There now appears to be further 'exceptions' imposed at the engagement stage: 'States would be able to "circumvent" the

²⁴ *Gillan* (n 26) [57]

²⁵ *Mead* (n 23)

²⁶ *Hamilton* (n 24)

²⁷ *Austin* (n 16) 28 [3]

²⁸ *Engel and others v the Netherlands* [1976] ECHR 8

guarantees laid down in Article 5 and detain people for a whole range of reasons going beyond the provisions of Article 5 § 1 (a) to (f), as long as they could show that the measure was necessary'. Furthermore, the minority rebut the 'public good' argument stating that 'the wording of Article 5 in itself strikes the fair balance inherent in the Convention between the public interest and the individual right to liberty'.²⁹ The exceptions were worded to be an exhaustive list of situations where the public benefit would outweigh the individual's rights, hence the reason for the exception existing. This interpretation of the 'threshold test' essentially 'creates a new, very broad, exception to Article 5, while purporting to avoid doing so by relating the public interest argument to the issue of ambit'.³⁰

Potential reform

The law has been left in an unsatisfactory state. There is now the necessary power under breach of the peace for kettling. It is legal in English law to detain peaceful bystanders if it is necessary to prevent widespread disorder under *Austin*; however, it is entirely likely that 'a significant motivation in both the HL's and the ECtHR's judgements to exclude the measures taken by the police from the ambit of Article 5(1) was the difficulty the police would otherwise have in bringing their actions within one of the justifiable exceptions under Article 5(1)'.³¹ If this was the case then it suggests the court read down the wording of the Convention in favour of the state over the citizen. How long can this position be maintained and what are the alternatives?

Firstly, it is possible for *Austin* to be overruled by the court. Unfortunately there are a number of barriers to overcome before this could happen. Most problematic is the simple fact that there may never be another case that reaches the European Court; any challenge would require a claimant to

²⁹ *Austin* (n 16) 28 [4]

³⁰ Fenwick (n 19)

³¹ Lennon (n 20)

possess sufficient resources to lose in each domestic court in the hope that the European Court would acknowledge their previous mistake. Even if a claimant were to reach Strasbourg the court would still have to be convinced that the earlier judgement was wrong.

Statutory reform is the alternative: the ECHR and the HRA could be redrafted through the use of a Protocol to correct the failings of *Austin*. This route comes packaged with its own political problems, namely that history shows us that the ECHR is not easily or speedily altered. Once those hurdles are overcome, the solution becomes relatively easy: the insertion of a seventh exception in Article 5 could cover cases of public disorder and safety. The freedom of movement provision found in the ECHR Protocol 4 Article 2 provides an example, allowing restriction for: 'public safety', 'for the maintenance of ordre public', and 'for the protection of the rights and freedoms of others'. Although any such subparagraph would be open to interpretation by the courts, it would at least give the police an arguable case for depriving liberty when it is necessary to prevent widespread disorder.

Human rights should be clear and available to all; to be effective, extensive legal training should not be a prerequisite. *Austin* offends this principle by ruling that a situation which quite clearly involves a complete loss of liberty is not covered by the literal wording of the ECHR. This proposed reform would allow the courts to acknowledge that kettling does restrict liberty (to claim the opposite as in *Austin* simply flies in the face of logic and common sense) whilst also providing the means by which kettling remains a legal method of policing. The alternative is the watering down of human rights in an attempt to correct what appears to be a drafting error and a failure to recognise the need for deprivation of liberty where public order is threatened.