PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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not hear evidence and is not familiar with many of the policy considerations that may be relevant. Also, on the normative side, Sullivan J clearly thought that this was entirely as it should be, because the regulatory framework was designed in such a way that some of the questions which go to make up the Article 8 question are decided at an earlier stage. The planning enquiry process ensures that arguments as to whether there really is a pressing social need and whether a refusal would be proportionate can all be addressed in detail in an appropriate forum. The elaborate plan-making process meant that full account was taken of conflicting social needs when policies were being framed; and then on an individual appeal the inspector, applying the conventional approach to development in the Green Belt, conducted a balancing exercise in determining the appeal. This, Sullivan J thought, was enough. As he said in relation to one of the joined appeals[79]:

> the statutory process must enable Article 8 rights to be addressed, but it does not follow that they must be addressed in full at each and every stage of the process so that finality is never achieved.[80]

The approach to deference adopted in *Buckland and Boswell*, focusing primarily on questions of institutional competence, will inevitably lead to an unduly submissive stance by courts in the planning context. It is to be contrasted, however, with the approach adopted by the Court of Appeal in *Porter v South Bucks District Council*,[81] which is much closer to the due deference approach advocated in this chapter. The Court of Appeal in *Porter* had to grapple directly with the question of how its former approach to the availaibility of a particular remedy in the planning context now had to change as a result of the HRA where Article 8 rights were engaged. Local authorities wishing to evict Gypsies from unauthorised encampments have increasingly been resorting to the power in the planning legislation to apply for an injunction to restrain a breach of planning control.[82] Before the HRA, the well established approach of the courts when dealing with such applications

[79] *Ibid* at para 135.

[80] *Wychavon District Council v Smith* (one of four conjoined appeals with *Buckland and Boswell*), [2001] EWHC Admin 524 at paras 135–36. The *Wychavon* case was a local authority's appeal by way of case stated against a decision by magistrates that certain occupiers of Gypsy caravans were not guilty of failing to comply with a breach of condition notice under TCPA 1990, s 187A . The issue was whether the magistrates were entitled to conclude that the Gypsies had made out the statutory defence that they had taken all reasonable measures to secure compliance with the Notice on the ground that they did not have a suitable site to remove their caravans to. Applying the same approach of looking at the regulatory framework overall to see if there were adequate procedural safeguards to protect the applicants' Article 8 rights, Sullivan J held that the magistrates were not entitled so to hold: 'an interpretation of the subsection [giving the statutory defence] which does not enable the magistrates to consider questions of need and availability of suitable alternative sites is not in breach of the Convention, because the magistrates' court is not the stage in the regulatory framework where such questions should be addressed.'

[81] [2001] EWCA Civ 1549; [2002] 1 All ER 425.

[82] TCPA 1990, s 187B which provides: '(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part. (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.'

for injunctive relief was to treat the court's discretion as being narrowly circumscribed by the fact that the planning authorities had already decided what constitutes a breach of planning control.[83] The courts in such cases regarded the planning authorities as having already struck the balance between the general public interest and the interests of the individuals who were to be evicted, and saw any role for the courts in considering questions such as the availability of alternative sites, or the hardship which would be caused by an injunction, as a usurpation of that policy-making function, and contrary to the will of Parliament which had entrusted those powers to the planning authorities. In other words, like Sullivan J in *Buckland and Boswell*, they adopted an entirely submissive approach to the decisions of the planning authorities, subject only to a residual power to correct manifest errors or perverse decisions.

The justification for this submissive approach was again rooted largely in a formalistic notion of the separation of powers, premised on there being respective areas of responsibility of the courts and the political branches within which each has exclusive competence. It is exemplified by the decision of Hoffmann J at first instance in *Mole Valley*:

> There can be no doubt that requiring [the Gypsies] to leave the site would cause considerable hardship. This court, however, is not entrusted with a general jurisdiction to solve social problems. The striking of a balance between the requirements of planning policy and the needs of these defendants is a matter which, in my view, has been entrusted to other authorities.[84]

The invocation of Parliament's 'entrusting' the functions to the planning authorities demonstrates again the attraction of the rhetoric of parliamentary sovereignty to justify judicial restraint.

The central issue in *Porter* was whether this approach survived the coming into force of the HRA, or whether the fact that Article 8 was engaged in such cases meant that the court now had to make an independent judgment in deciding whether or not to grant an injunction. In each case, the judge below had granted the injunctions sought, and the question for the Court of Appeal was therefore whether those judges had directed themselves correctly about the approach they should take to the exercise of their discretion. The arguments made to the Court of Appeal covered

[83] The leading authorities were two Court of Appeal decisions, *Mole Valley District Council v Smith* [1992] 3 PLR 22 (decided under the predecessor power to grant injunctions) and *Hambleton District Council v Bird* [1995] 3 PLR 8.

[84] Cited with approval in the Court of Appeal in the same case [1992] 3 PLR 22 at 31. See to similar effect Lord Donaldson MR at 32 ('it is not for the courts to usurp the policy decision-making functions of the Secretary of State ... by a side-wind') and Balcombe LJ at 33 ('the court is being asked to reverse the decisions of the authorities to whom Parliament has entrusted the relevant decision, not on grounds of illegality, but on grounds of policy'). The reasoning of Pill LJ in *Hambleton* [1995] 3 PLR 8 at 15 was to precisely the same effect: the fact that the granting of an injunction is dependent on the court's discretion 'does not however entitle a judge ... to act as a court of appeal against a planning decision or to base a refusal to grant an injunction upon his view of the overall public interest.' The judge below in that case was criticised for having taken upon himself the role of assessing the benefits and disbenefits to the public as a whole, thereby 'taking upon himself the policy function of the planning authorities and housing authorities and their powers and duties.'

the entire spectrum of possible positions identified above.[85] At one extreme, it was argued on behalf of some of the authorities that the court ought not to interfere with the balance struck by the planning authority between the interests of the Gypsy and the interests of the wider community, unless that balance had been struck in a *Wednesbury* unreasonable way: in other words, the court should submit to the planning authority's striking of the balance, subject only to the court's conventional public law jurisdiction to interfere with manifestly perverse decisions. At the other extreme, it was argued on behalf of some of the appellants that the court was bound to consider afresh all facts and matters, including all issues of policy as to whether planning permission should be granted and all questions of hardship for the Gypsies concerned were they to be removed. Between these two extremes, the other appellants argued for the 'due deference' approach: accepting that *some* deference had to be paid by the courts to the planning judgments arrived at by the planning authority, but very much less than had hitherto been thought appropriate. On this approach, the question for the court faced with an application for such an injunction was how to decide what degree of deference was due in the circumstances to the determinations of the planning authorities.

The Court of Appeal in *Porter* had no hesitation in rejecting the two extreme positions, that the court itself was now the primary decision-maker, or that the court was required to submit to the balance struck by the planning authorities subject only to review for *Wednesbury* unreasonableness.[86] It held that the court considering whether or not to grant an injunction which would have the effect of evicting Gypsies from land is not entitled to reach its own independent view of the planning merits of the case: it is required to take these as having been decided within the planning process. However, in deciding whether or not to grant the injunction, the Court of Appeal held that the court must consider for itself a variety of factors which must be weighed in the balance. These factors include, for example, questions of hardship for the defendant and his family, including the impact on the family's health and education; the availability of alternative sites; the planning history of the site; the need to enforce planning control in the general interest; the degree and flagrancy of the breach of planning control; whether other enforcement measures had been tried in the past; whether there was any urgency in the situation; health and safety considerations; previous planning decisions; the local planning authority's decision to seek injunctive relief; and the degree of environmental damage resulting from the breach of planning control.

The Court of Appeal also recognised that the weight to be given to these considerations in the balancing exercise may vary depending on a number of other factors. For example, the relevance of previous planning decisions will depend on matters such as how recent they are, the extent to which considerations of hardship and availability of alternative sites were taken into account, and the strength

[85] They are summarised at [2002] 1 All ER 425 at para 4 of the Court's judgment.

[86] The approach which is to be taken by a court considering an application for an injunction under TCPA 1990, s 187B is set out at [2002] 1 All ER 425, paras 38–42.

of the conclusions reached on land use and environmental issues.[87] Similarly, the relevance and weight of the local planning authority's decision will depend on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the Article 8(2) questions as to necessity and proportionality.[88]

Having identified these various factors as being relevant to the striking of the necessary balance between the competing interests, the Court of Appeal held that the approach to section 187B contained in the Court of Appeal's decision in *Hambleton,* which precluded consideration by the judge of questions of hardship, was not consistent with the court's duty to act compatibly with Convention rights contained in section 6(1) of the HRA.[89] It held that proportionality requires that the injunction not only be appropriate and necessary for the attainment of the public interest objective sought (the safeguarding of the environment), but also that it does not impose an excessive burden on the individual whose private interests (the Gypsy's private life and home and retention of his ethnic identity) are at stake. The court's task in answering that question was acknowledged not to be an easy one, involving as it inevitably does the striking of a balance between competing interests of a very different character, but the task was unavoidable under the HRA, and 'provided it is undertaken in a structured and articulated way, the appropriate conclusion should emerge.'[90]

The Court of Appeal in *Porter* therefore adopted an intermediate position on the question of deference, explicitly rejecting both the 'primary judgment' approach of those who would have the courts substitute their own decision on the merits, and at the same time the crudely submissive approach of those who would regard the questions to be decided as having been 'entrusted' to the local planning authority and the planning inspector. Although the language of 'due deference' is not explicitly used by the court in *Porter,* it avoids altogether the use of the spatial metaphor in any of its forms, and is therefore liberated to articulate the range of factors which need to be taken into consideration when deciding the appropriate degree of deference to be paid, as well as the considerations which affect the weight which is to be given to the various reasons for deferring. The Court of Appeal's decision in *Porter* therefore contains the seeds of an approach to deference which offers a promising route towards realising the full potential of the House of Lords decision in *Daly.*[91]

[87] *Ibid* at para 38.

[88] *Ibid* at para 39.

[89] *Ibid* at para 41.

[90] *Ibid* at 42. Applying the new approach to the facts of the particular cases, the Court of Appeal held that in three of the four cases the judges below had determined the applications for an injunction by reference to the old approach which involved them in deferring excessively to the planning authorities' own views as to how the balance between the competing interests fell to be struck.

[91] The Court of Appeal's approach has now been unanimously approved by the House of Lords, [2003] UKHL 26, [2003] 3 All ER 1.

Social and Economic Policy

In the context of what might be broadly described as 'social and economic policy,' courts have recently begun to scrutinise more carefully claims for deference based solely on the fact that the decision being challenged is one taken within such a context. In *Poplar Housing Association v Donoghue*, the Court of Appeal came close to treating this fact as determinative of the question whether the statutory procedure obliging a court to make an order for possession of an assured shorthold tenancy if the appropriate notice had been given was in breach of the right to respect for private life, family life and home in ECHR Article 8.[92] Although Lord Woolf CJ expressed his conclusion in terms of degrees of deference to Parliament, his reasoning was based primarily on the need for courts to recognise that the legislation represented the striking of a balance by Parliament between those in the position of the person resisting possession and the needs of those dependent on social housing as a whole. The economic and other implications of any policy in this area were said to be extremely complex and far-reaching, and the question of whether the restrictions on the court's powers were legitimate and proportionate were said to be 'the area of policy where the court should defer to the decision of Parliament,' on the basis that the correctness of that decision was more appropriate for Parliament than the courts.

In *Wilson v First County Trust*, however, which concerned the compatibility with ECHR Article 6 of a provision of the Consumer Credit Act 1974 imposing a statutory bar on a lender enforcing an agreement in certain circumstances, the Court of Appeal rejected a similar claim for deference on the basis that the legislation was concerned with social issues, and the issues fell within an area in which courts should be ready to defer, on democratic grounds, to the considered opinion of the elected body or person. The Court of Appeal's response was a robust and significant statement of the distinction between deference as submission and deference as respect, and of the centrality of reasons in a culture of justification:

> We recognize the force of those arguments. But, unless deference is to be equated with unquestioning acceptance, the argument that an issue of social policy falls within a discretionary area of judgment which the courts must respect recognizes, as it seems to us, the need for the court to identify the particular issue of social policy which the legislature or the executive thought it necessary to address, and the thinking which led to that issue being dealt with in the way that it was. It is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based on policy; it is quite another thing to be required to accept, without question, an opinion for which no reason of policy is advanced.[93]

Similarly, in *Mendoza v Ghaidan*, in which the Court of Appeal were required to re-visit, in light of the coming into force of the HRA, the House of Lords' interpre-

[92] [2001] EWCA Civ 595, [2002] QB 48 at paras 69–72.

[93] [2001] EWCA Civ 633, [2002] QB 74 at 93–94, para 33. See, however, the unanimous criticism by the House of Lords of the use made of Hansard in support of this approach: [2003] UKHL 40 at paras 51–67, 110–18, 139–45.

tation of the term 'spouse' in the Rent Act 1977 as excluding same-sex partners,[94] an argument based on *Poplar* that the court ought to defer to Parliament's striking of the balance between a number of competing interests was given short shrift by the Court of Appeal.[95] The argument was made in the context of whether there was an objective and reasonable justification for treating same-sex partnerships differently from other-sex partnerships in relation to Rent Act protection: it was argued that it fell within the legitimate ambit of the state's discretion or judgement to arrange its housing schemes and the disposition of its housing stock by doing so.

A unanimous Court of Appeal held, however, that any principle of deference to the will of Parliament could not assist in this case, for three reasons. First, because once discrimination had been established, it was not enough to discharge the burden of objective and reasonable justification to claim that what had been done fell within the permissible ambit of Parliament's discretion: a much more positive argument was required to discharge the burden that arose. Secondly, while courts should only enter with trepidation on questions of social or economic policy such as the general organisation of housing policy, the court had no hesitation in saying that issues of discrimination have high constitutional importance and are issues that the courts should not shrink from: in such cases deference has only a minor role to play. Thirdly, once it was accepted that the court is not simply bound by whatever Parliament has decided, the court had to scrutinise the justifications offered, including to see whether the means chosen to achieve the end are logically related to forwarding that end. It found that they were not, and held that the statutory term was to be interpreted in such a way as to include same-sex partners in order to avoid a breach of ECHR Article 14 in conjunction with Article 8.[96]

CONCLUSION

The above practical examples taken from the three specific contexts of immigration, planning, and social and economic policy, demonstrate how the two different

[94] In *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27.

[95] [2002] EWCA Civ 1533, [2003] 2 WLR 478 at paras 16–21. The decision is under appeal to the House of Lords.

[96] See also *Gurung, Pun and Thapa v Ministry of Defence* [2002] EWHC Admin 2463 (27 November 2002), concerning the exclusion of Gurkhas from the scheme of ex gratia payments made to former Japanese Prisoners of war, in which the Ministry argued (at para 40) that it would not be constitutionally legitimate for the courts to alter the criteria on the basis of which the payments were made, because the court was not properly equipped to undertake the task of balancing conflicting claims to scarce resources, and this would be a usurpation of the functions of Parliament in the control and approval of public expenditure. That argument was rejected by McCombe J who held that the exclusion of the Gurkha claimants from the compensation arrangements on the basis of a distinction based on race was irrational and inconsistent with the common law principle of equality that is 'the cornerstone of our law' (para. 55). Cf the decision of Stanley Burnton J in *Carson v Department of Work and Pensions* [2002] EWHC. Admin 978, concerning the non-payment of annual pension uprate to UK pensioners resident abroad, at paras 68–70, that questions concerning the allocation of scarce resources and foreign relations are non-justiciable. The Court of Appeal in the same case, however, [2003] EWCA Civ 797, considered that the case had nothing to do with foreign relations (para 66) and treated the allocation of scarce resources as going to the degree of deference rather than justiciability (paras 72–73).

approaches to the question of deference can make a very real difference to the outcome of cases. It is not a question of one approach leading to deference and the other to interference; it is a question of how to ensure that Lord Steyn's first insight in *Daly*, that unlawful decisions can only be identified if the process of review for justification is properly carried out, is not lost by adopting an approach to deference which pre-empts such review.

Despite the persistence of the language of discretionary area of judgment and margin of discretion, there are some encouraging signs in some recent cases that courts are beginning to feel their way towards a concept of due deference and to leave behind some of the surrogates for this issue which dominated the early days of HRA adjudication, including the spatial metaphor. The lesson of this review, it is suggested, is that, in place of the language of discretionary area of judgment, or margin of discretion, or latitude, English courts should now adopt, as an integral part of their assessment of legality, an explicit due deference approach, premised on the assumption that power in our Constitution is shared amongst the various actors rather than to be parcelled out according to some inflexible and outdated idea of the separation of powers and co-existing supremacies.[97] This will require the explicit articulation of a number of matters which at present are too often buried beneath inappropriate doctrinal tools: the sorts of factors that might warrant a degree of deference from a judicial decision-maker; the specific factors which are in play in a particular case; why the court considers that they require a degree of deference to a particular decision, or an aspect of it; and just how much deference the court considers to be due in the circumstances.

The argument which has been made in this chapter is part of a much wider need for a thoroughgoing reconceptualisation of public law, in response to the modern landscape of power, and the manifest inadequacy of the existing conceptual framework in contemporary conditions. Until this is done, the development of a coherent and mature system of public law fit for a modern constitutional democracy will continue to be blighted by our collective failure to understand the nature of our inheritance and move beyond its paralysing confines. The explicit adoption of a 'due deference' approach to determining the limits of the judicial role should help to facilitate the reconfiguration of our public law around the concept of justification, at the same time as building meaningful democratic considerations into a theory of deference which does not depend on crude notions of sovereignty and authority for its underlying conception of legality. If such an approach is adopted, it may yet be possible to avoid the perpetual lurching between democratic positivism and liberal constitutionalism to which Dicey committed us and from which we have yet, despite the significant institutional reforms of recent years, to make a very convincing escape.

[97] See Lord Hoffmann in *R v BBC ex p Prolife Alliance* [2003] UKHL 23 at paras 74–77 for an example of how an approach rooted in a formalistic notion of the separation of powers turns complex questions of deference into bright-line jurisdictional questions for the courts to decide as a question of law. This explains the apparent paradox that an approach which leads inexorably to the submissiveness of Lord Hoffmann's judgment in *Rehman* above can at the same time be critical of the deference approach for 'its overtones of servility or gracious concession' (Prolife, para 75).

14

Civil Liberties and Human Rights

CONOR GEARTY

INTRODUCTION

THE IDEA OF civil liberties is old fashioned and perhaps also unfashionable, especially in contrast to the energy generated by its younger, newly arrived sibling, human rights law. The purpose of this chapter is to show that it would be wrong to write off the concept as a relic of a past, pre-human rights age. The argument here is that the subject of civil liberties stands on the brink of a remarkable renaissance, precisely (albeit perhaps also paradoxically) because of the enormous breadth, depth and range of the Human Rights Act 1998 (HRA). Civil liberties law is capable of being presented as a coherent set of ideas rooted in an underlying political philosophy which in turn reflects a particular way of looking at the world. While the European Convention on Human Rights (ECHR) is clearly far more broadly based than is civil liberties law, it is the latter that gives that Convention its main theoretical integrity.

An awareness of civil libertarian principles greatly assists in identifying the appropriate way in which the courts should go about interpreting the HRA. It also allows a signalling to the judges, in a far more coherent fashion than has yet properly emerged, about when they can afford, indeed when they are obliged, to take an activist approach and when in contrast a certain restraint is called for. With the topic of civil liberties in this way retrieved from the margins, the chapter will conclude with some thoughts on the subject's perceived vulnerabilities. It was these alleged weaknesses which gave rise to the perception of the need for the new discourse rooted in human rights in the first place, and so—having attempted freshly to rediscover the old subject within the new—the time is right in this chapter to revisit these supposed difficulties. It will be argued that these problems are in fact more apparent than real, and that they are in any event rather less severe than the difficulties that also circumscribe the concept of human rights.

CIVIL LIBERTIES, 'HUMAN RIGHTS' AND THE ECHR

We start with the setting of parameters. Civil liberties is a discipline primarily engaged with the law and practice concerned with those freedoms which are essential to the maintenance and fostering of our representative system of government.[1] At the very centre of such freedoms, the entitlement upon which the utility of the remaining liberties depend, and which gives them added zest and meaning, is the right to vote. Here we have an example of a civil liberty, indeed we would say the key civil liberty, which is realisable only through positive state action: our right to vote cannot exist in the abstract; it requires a large state machinery to make it work. Furthermore, a properly functioning representative democracy will insist that each vote carries a broadly equal weight, and will not permit certain affluent electors to buy the power to be heard at the expense of other interests; the electoral playing field should be an equal one. In contrast, other civil liberties are particularly valuable in that they make meaningful the exercise of this core right to vote, but they are reliant more on state inaction than action.

The freedom to think for oneself, to believe what one wishes and to say what one wants are essential if a democratic assembly is going to be truly and properly representative. Their importance is, however, broader than this. Such civil liberties affect the general political atmosphere, the democratic health of the community, in a way which matters whether or not a vote is imminent or a voter likely to be influenced one way or the other. The right to associate with others and to assemble together are essential for the same reasons. Access to relevant information can also be seen to be an important civil liberty, both because the uninformed vote is a less effective one and because the discourse upon which a properly functioning democracy depends should be a well-informed one. Finally, it surely goes without saying that a state which arbitrarily kills, imprisons or tortures its citizens so chills the political atmosphere that it cannot be described as democratic, regardless of how free speech formally is or how regularly secret votes are polled: freedom cannot be constructed on such authoritarian foundations. Adherence to these core civil liberties produces an assembly that is both representative and accountable (through the ballot box and through the political energy that the prospect of the vote inspires) for the power that it exercises. It also guarantees a vibrant political community even at those times (the great majority) during which a vote is not imminent. Civil liberties also requires as a matter of basic principle that the relationship between the individual and the state be regulated

[1] See on this point the work of K D Ewing whose recent writings have elaborated on the nature of the British constitution and on the place of civil liberties (and social rights) within it: see especially his 'Human Rights, Social Democracy and Constitutional Reform' in CA Gearty and A Tomkins (eds), *Understanding Human Rights* (London, Mansell, 1996), ch 3; 'The Politics of the British Constitution' [2000] *PL* 405; 'Constitutional Reform and Human Rights: Unfinished Business' (2001) 5 *Edinburgh Law Review* 1; and 'The Unbalanced Constitution' in T Campbell, K D Ewing and Adam Tomkins (eds), *Sceptical Essays in Human Rights* (Oxford, Oxford University Press, 2001), ch 3. Also valuable is the work of J Griffith: see in particular his 'The Common Law and the Constitution' (2001) 117 *LQR* 42.

by law, so some principle of legality is as essential to the subject as is a commitment to representative government.

The degree of synchronisation between the content of civil liberties law that has just been delineated and the ECHR will be immediately apparent to those with even the broadest sense of what the latter document contains. Under Article 3 of the First Protocol, the 'High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' The basic essentials for a properly functioning democratic society are established in the body of the ECHR itself, with Article 2 declaring that 'Everyone's right to life shall be protected by law,' Article 3 prohibiting in absolute terms 'torture' and 'inhuman or degrading treatment or punishment,' and Article 4 forbidding 'slavery,' 'servitude,' and the performance of 'forced or compulsory labour'. The 'right to liberty and security' in Article 5 is necessarily more complex and qualified than the prohibitions that appear in Articles 2 to 4, but a clear consequence flowing from it is that persons cannot consistently with the ECHR be held without trial, or with no expectation of a trial, on the basis of their political beliefs. Any trial that does occur must satisfy the procedural requirements of Article 6, which among other safeguards, guarantees defendants a 'fair and public hearing ... by an independent and impartial tribunal established by law.' Having ensured that there should be no drastic punishment lurking in the shadows of a seemingly free society, the ECHR then goes on to consolidate its vision of an 'effective political democracy' with a series of guarantees dealing with the civil liberties of thought, conscience and religion (Article 9), expression (Article 10) and assembly and association (Article 11). The provisions are widely drawn and intended to complete the spectrum of rights which underpins the democratic state from the moment an idea is first hatched, through its articulation, translation into a political platform and thence, via the right to vote, into a legislative assembly where, if it can command sufficient support, it will be translated into law.

A consequence of thinking about liberty, expression, assembly and so on, and also the entitlement to vote, as civil *liberties* rather than human *rights* is to focus attention away from the possibility of these being absolute entitlements vested in human beings as such and to divert the analytical spotlight instead on to their utility as part of the essential fabric that goes into the making of our democratic tapestry. This is where civil liberties can make its most important contribution to political and legal reasoning, for the absence of any assertion of absolutism is the most powerful (non) claim that the subject makes on our attention. As we have seen, civil liberties are defined by reference to an underlying political philosophy rooted in representative democracy, which definition at the same time permits, also by reference to that same underlying ideological premise, exceptions to be made to them. With this singular intellectual swoop, civil liberties law rises above the endless debates provoked by rights-talk, about when this kind of reckless speech should be allowed and when not, about why this assembly should be restricted and this other not: human rights law has no coherent way of answering

these questions without drawing on some deeper set of principles. Civil liberties law, in contrast, has the benchmark of democratic necessity readily to hand. If it has an intuition, then it is not the quasi-religious concept of respect for human dignity but rather the robustly tangible notion that we should belong to a self-governing community of equals.

The exceptions to and derogations from rights that feature so prominently in many of the ECHR Articles can now be seen in their proper context. The ECHR is far from being a simplistic statement of rights in an unqualified form. An 'effective political democracy' (as the recitals to the ECHR call it) is not required to prove its worth by committing suicide, so '[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'[2] and provided also that torture, slavery, servitude or retrospective punishments are not deployed.[3] The taking of life is also not permitted in any circumstances other than, significantly and again rightly from the point of view of principle, 'in respect of deaths resulting from lawful acts of war.'[4] In the same vein is Article 17, prohibiting 'any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

While not all Convention rights are explicitly qualified, each of the freedoms of thought, conscience, religion, expression, assembly and association set out in Articles 9 to 11 is subject to a variety of widely drawn exceptions all of which must, however, be 'in accordance with' or 'prescribed by' law and also be 'necessary in a democratic society' for the realisation of the aim in question. The principle of legality is as we earlier mentioned a key part of civil liberties. The idea that a right, which is itself necessary in a democratic society (if it were not it would not be in the ECHR in the first place) being restricted on the basis of an overriding and somehow deeper democratic necessity is contradictory only if the question is addressed solely as one of human rights. If we see these fundamental freedoms as civil liberties, we are guided to look at them not as individual rights standing alone but rather as the building blocks of a democratic society; on this basis we can recognise them as political freedoms rather than personal entitlements. Once understood like this, it becomes clear that they may on occasion have to yield to the greater good of the political community as a whole.[5] Of course this focuses attention on the tricky questions of when such qualifications should be made and who should make them, but these are practical difficulties rather than principled objections. The problem of the partisan exercise of discretion—a key area in any analysis of civil liberties practice—is, however, explicitly addressed in Article 14,

[2] ECHR Article 15(1).
[3] ECHR Article 15(2).
[4] *Ibid.*
[5] See Murray Hunt, ch 13 above.

under which the 'enjoyment of the rights and freedoms set forth in this Convention' is guaranteed against 'discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

When we turn to the case law of the European Court of Human Rights we find a bench of judges that has generally been alive to the deep civil libertarian roots in the charter that it is their responsibility to interpret.[6] In its first judgment on the guarantee of free elections, the European Court described the Article as one which 'enshrines a characteristic principle of democracy' and therefore as 'of prime importance in the Convention system.'[7] Dismissing an argument that because the Article began with a reference to the obligations of the High Contracting Parties it could not therefore empower ordinary people in the way that other Convention rights did, the Court described the construction of the Article as derived from 'the desire to give greater solemnity to the commitment undertaken' and to 'the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections.'[8] The European Court noted that Article 3 'applies only to the election of the "legislature," or at least of one of its chambers if it has two or more' but remarked that the 'word "legislature" does not necessarily mean only the national parliament, however; it has to be interpreted in the light of the constitutional structure of the State in question.'[9] These words were to prove particularly prescient in light of the Court's later holding, by 15 votes to two, that the inability of a British citizen resident in Gibraltar to vote in elections to the European Parliament involved a violation of Article 3 of the First Protocol by the UK Government.[10]

The European Court has been just as principled and robust in its defence of freedom of expression in the political sphere, an area in which it has had many more cases through which to develop its views. The leading case remains the 1986 decision in *Lingens v Austria*.[11] The applicant was the publisher of a magazine in Vienna which printed a couple of pieces critical of the then Austrian Chancellor and accusing him of protecting former members of the Nazi SS for political reasons and of aiding their participation in Austrian politics. At the private suit of the Chancellor, the publisher was convicted of criminal defamation, fined, and issues of his magazine were confiscated. The relevant law under the Austrian Criminal Code was extremely broad, covering:

> [a]nyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or

[6] See generally A Mowbray, 'The Role of the European Court of Human Rights in the Protection of Democracy' [1999] *PL* 703; C A Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: an Overview' (1993) 52 *Cambridge Law Journal* 89.

[7] *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1, at para 47.

[8] *Ibid* at para 50.

[9] *Ibid* at para 53.

[10] *Matthews v United Kingdom* (1999) 28 EHRR 361.

[11] (1986) 8 EHRR 407.

morality and of such a nature as to make him contemptible or otherwise lower him in public esteem.[12]

There were more severe punishments if the defamation was printed or broadcast and, though there was a defence where truth could be proved, the nature of the crime made this very difficult in most circumstances. In unanimously condemning as a breach of ECHR Article 10 the intimidatory action launched by the Chancellor, the Court laid down some important general principles which have acted as its key benchmarks in subsequent cases:

> [t]he Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'
>
> These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, *inter alia*, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them....
>
> Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.
>
> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[13]

This is the European Court at its most principled, and therefore most fearless. The case law which has followed in the years since *Lingens* bears testimony to the robustness of the Court's conception of political liberty.[14] One decision, *Jersild v Denmark*,[15] is particularly of interest from a theoretical perspective. The applicant was a journalist working for the Danish Broadcasting Corporation. He made a programme which featured a group of self-avowedly racist youths, who were living in the Copenhagen area. During the interview with them that was broadcast, the youths made several derogatory and racist remarks about black people in general and immigrant workers in particular. Under the Danish Penal Code, racially insulting remarks were prohibited by law, and the public prosecutor subsequently instituted proceedings against both the three youths and the applicant, together with the latter's head of department, for having aided and abetted the making of

[12] See Austrian Criminal Code, art 111.
[13] *Lingens*, above n 11, paras 41–42.
[14] See especially *Castells v Spain* (1992) 14 EHRR 445.
[15] (1994) 19 EHRR 1.

the remarks. All five were convicted before the local courts. The applicant and his boss appealed to the Danish Supreme Court where, however, their convictions were upheld. The journalist then took his case to Strasbourg.

The European Court held by 12 votes to seven that the applicant had been a victim of the violation of his Article 10 rights. While recognising 'the vital importance of combating racial discrimination in all its forms and manifestations'[16] the majority nevertheless saw the case as one primarily concerned with press freedom. 'Although formulated primarily with regard to the print media,' the principles the Court had developed in earlier cases 'doubtless appl[ied] also to the audio-visual media.'[17] Having regard therefore to the particular nature of the medium before it, and taken as a whole, 'the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas.'[18] The item 'was broadcast as a part of a serious Danish news programme and was intended for a well-informed audience' and did not require a counter-balancing point of view to that of the youths within the programme itself, particularly when 'the natural limitations on spelling out such elements in a short item within a longer programme' were taken into account.[19] The *Jersild* decision is rightly celebrated for the depth and maturity of its commitment to media freedom. Its civil libertarian roots are evident not only in its ringing endorsement of the role of the broadcasting media in our political culture, but also in its recognition that speech of this nature has limits. The European Court had 'no doubt that the remarks in respect of which the [youths] were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10.'[20] The freedom of expression protected by Article 10 was qualified by its underlying role in a liberal democratic state, and the unfocused apolitical stirring up of hatred could not hide under its tolerant umbrella.

The civil liberties guaranteed in ECHR Article 11 have tended to be overshadowed by the breadth the European Court has accorded to Article 10. Thus in *Steel and others v United Kingdom*,[21] a case involving a number of persons who were involved in political 'direct action' of various sorts, was analysed as raising a series of Article 10 freedom of expression issues rather than the right to assembly under Article 11. Of the three kinds of action before the European Court, however, the conduct that came closest to the peaceful communication of political views was the type that secured the Court's sympathy and ultimately a favourable ruling. These were the three applicants who had been arrested for handing out leaflets outside a conference devoted to the sale of fighter helicopters. The protest had been 'entirely peaceful' with there having been no significant obstruction or attempt to obstruct those attending the conference or to take any other kind of

[16] *Ibid* at para 30.
[17] *Ibid* at para 31.
[18] *Ibid* at para 33.
[19] *Ibid* at para 34.
[20] *Ibid* at para 35, citing earlier Commission decisions in *Glimmerveen and Hagenbeek v The Netherlands* (1979) 18 D & R 187 and *Künen v Germany* (reported as *X v Federal Republic of Germany*) (1982) 29 D & R 194.
[21] (1998) 28 EHRR 603.

action that might have provoked those attending to violence.[22] The Court was unanimous that their arrest had infringed their Article 10 rights.[23] The remaining two applicants were not so lucky; their noisy and intrusive protests (obstructing a grouse shoot and breaking into motorway construction sites) had not been without any risk of disorder and had interfered markedly with the rights of others, and the Court accordingly found against them. The Strasbourg judges seem to have got the civil libertarian balance right; the more the communication of political ideas is achieved through conduct rather than words, then the greater the interest of the state in controlling that expression is bound to be. Where the action is not peaceful, the chances are that it is not protected by Article 10 (or 11). The European Court is not saying that there is no (moral) right to engage in disruptive direct action, merely that there is no civil liberty to do so if the price a democracy must pay for such tolerance is legal anarchy.

Where Article 11 undoubtedly comes into its own as a discrete civil libertarian protection is in relation to its guarantee of freedom of association. This is a civil liberty that is analytically more clearly distinct from freedom of expression than is freedom of assembly. Its importance lies in its protection of one of the key attributes of a healthy democratic culture, the political party. The point has become important recently in relation to Turkey, where the attempt to ban domestic political organisations opposed to the government has brought the country before the European Court. The first and most important of these cases was *United Communist Party of Turkey and others v Turkey*.[24] The Turkish Constitutional Court had by order dissolved the Communist Party and transferred its assets to the Treasury, with the founders and managers of the Party being banned from holding like offices in any other political body. In Strasbourg, the Government argued that it was faced with 'a challenge to the fundamental interests of the national community, such as national security and territorial integrity'[25] and that this justified the action it had taken, which it admitted was draconian. The European Court was unanimous in its disagreement. The safeguards set out in Article 10 and 11 applied 'all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.'[26] Furthermore, '[t]he fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.'[27] The free expression of opinion implicit in the guarantee of the right to vote in Article 3 of the First Protocol would be 'inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population.'[28] It followed that 'only

[22] *Ibid* at para 64.

[23] *Ibid* at para 110. Article 5 was also infringed: see para 64.

[24] (1998) 26 EHRR 121. See also *Socialist Party and others v Turkey* (1998) 27 EHRR 51. Cf *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1.

[25] *United Communist Party v Turkey*, above n 24, at para 49.

[26] *Ibid* at para 43.

[27] *Ibid.*

[28] *Ibid* at para 44.