

**European University Institute  
Department of Law**

**ARGUING FOR THE APPLICATION OF THEORY TO THE  
LEGAL PROTECTION OF CIVIL LIBERTIES:**

**A STUDY OF CERTAIN ASPECTS OF THE LIBERTY TO ASSEMBLE IN  
FRANCE AND ENGLAND**

**by**

**Cyril Adjei**

**Thesis submitted for assessment with a view to obtaining the  
Degree of Doctor of the European University Institute**

**Florence, 11th April 1994**

**Examining Jury:**

**Prof. Antonio Cassese (European University Institute)**

**Prof. Luis María Díez-Picazo Giménez (European University Institute),  
(Supervisor)**

**Prof. David Feldman (University of Birmingham)**

**Prof. Avrom Sherr (Centre for Business and Professional Law, University of  
Liverpool), (Co-Supervisor)**

**Prof. Michel Troper (University of Paris, X)**

**LIBRARY USE ONLY**

European University Library



3 0001 0015 7432 8





69  
HERO

**European University Institute  
Department of Law**

**ARGUING FOR THE APPLICATION OF THEORY TO THE  
LEGAL PROTECTION OF CIVIL LIBERTIES:**

**A STUDY OF CERTAIN ASPECTS OF THE LIBERTY TO ASSEMBLE IN  
FRANCE AND ENGLAND**

**by**

**Cyril Adjei**

**Thesis submitted for assessment with a view to obtaining the  
Degree of Doctor of the European University Institute**

**Florence, 11th April 1994**

**Examining Jury:**

**Prof. Antonio Cassese (European University Institute)**

**Prof. Luis María Díez-Picazo Giménez (European University Institute),  
(Supervisor)**

**Prof. David Feldman (University of Birmingham)**

**Prof. Avrom Sherr (Centre for Business and Professional Law, University of  
Liverpool), (Co-Supervisor)**

**Prof. Michel Troper (University of Paris, X)**

THESES  
Ggsr9  
ADJ



For the jurist:

*The philosopher believes that the value of his philosophy lies in the whole, in the building: posterity discovers it in the bricks with which he built and which are then often used again for better building: in fact, that is to say, that that building can be destroyed and nonetheless possess value as material.*

(F. Nietzsche, 'Assorted Opinions and Maxims' 1879)

For the comparatist:

*Pie en la patria casual o eligida; corazón, cabeza en el aire del mundo*  
(Keep your feet on your native or chosen homeland and your head and heart  
in the air of the world)

(Juan Ramón Jiménez, quoted in B. Grossfeld, 'The Strengths and Weakness of Comparative Law' (1990), pg.40).





## ACKNOWLEDGEMENTS

I would firstly like to thank my two supervisors, Professors Luis María Díez-Picazo and Avrom Sherr for their constant guidance and comments over the last three and a half years. They have been exhaustive and generous with both their time and wisdom. I must also express my gratitude to John Stanton-Ife for his helpful suggestions and comments as regards human rights theory and Frédéric Rolland for his kind and skilful aid with the French texts. Alison Tuck, Secretary of the Law Department, provided her customary wealth of practical advice and help for which I am most grateful. I owe especially warm thanks to Sylvie Aubry who brought France to life, whereas I had previously only really encountered it via the medium of the law book. To the recently departed Prime computer, on which the majority of this thesis was written, I wish a fond farewell. I have been fortunate to have had the city of Florence and the European University Institute as a backdrop against which to carry out my research, my thanks go to friends and colleagues in both these places who have shared their company with me during work and play.

Lastly, it is to my family that I am especially indebted for the unswerving tenacity with which they have supported (and often suffered) the vagaries in humour of a doctoral researcher.



## TABLE OF CONTENTS

<i>LIST OF PRINCIPAL ABBREVIATIONS</i>	i
INTRODUCTION	iii

### PART ONE THE NEED FOR THEORY

<b>CHAPTER I</b>	<b>HUMAN RIGHTS THEORY AND THE LEGAL PROTECTION OF CIVIL LIBERTIES</b>	10
Section I	Reform Without Theory: The Bill of Rights Debate	11
Section II	Introducing A Theory of Human Rights	27
Section III	Exploring Origins and Development	32
<b>CHAPTER II</b>	<b>COMPARATIVE THEORY AND THE LAW RELATING TO THE PROTECTION OF CIVIL LIBERTIES</b>	65
Section I	Comparative Theory and Method	66
Section II	A Relationship Between England and France	72
Section III	Another Practical Concern: The Protection of Human Rights in the European Union	113
<b>CHAPTER III</b>	<b>A SPECIFIC CIVIL LIBERTY: THE LIBERTY TO ASSEMBLE</b>	121
Section I	The Importance of The Liberty To Assemble	122
Section II	Defining The Liberty To Assemble	133

### PART TWO THE LIBERTY TO MEET AND THE LIBERTY TO PROCESS IN FRANCE

<b>CHAPTER IV</b>	<b>THE LIBERTY TO MEET IN FRANCE</b>	144
Section I	A Definition	144
Section II	The History of Legal Regulation	153
Section III	The Current Legal Framework	171
<b>CHAPTER V</b>	<b>THE LIBERTY TO PROCESS IN FRANCE</b>	203
Section I	A Definition	203
Section II	The History of Legal Regulation	209
Section III	The Current Legal Framework	230

**PART THREE  
COMPARATIVE REGULATION**

<b>CHAPTER VI</b>	<b>COMPARATIVE CRITERIA, LEGAL STATUS AND STRUCTURE</b>	<b>263</b>
Section I	Comparative Criteria	264
Section II	The Legal Status of The Liberty	275
Section III	Structure: The Liberties To Assemble	287
<b>CHAPTER VII</b>	<b>COMPARING REGULATION OF THE LIBERTIES: BEFORE MEETINGS AND PROCESSIONS</b>	<b>299</b>
Section I	The Location of Assemblies	299
Section II	Bans Before Assemblies	321
Section III	Conditions Before Assemblies	335
<b>CHAPTER VIII</b>	<b>COMPARING REGULATION OF THE LIBERTIES: DURING MEETINGS AND PROCESSIONS</b>	<b>350</b>
Section I	The Position in England	350
Section II	France and England Compared	359
Section III	Higher Standards: The USA and the ECHR	368
<b>CHAPTER IX</b>	<b>COMPARING REGULATION OF THE LIBERTIES: AFTER ASSEMBLIES</b>	<b>379</b>
Section I	The Position in England	379
Section II	France and England Compared	383
<b>CHAPTER X</b>	<b>CONCLUSIONS: A RE-EXAMINATION OF TWO PRACTICAL CONCERNS</b>	<b>388</b>
Section I	Six Conclusions	388
Section II	The Bill of Rights Debate: A Compromise	391
Section III	Human Rights in the EU: Towards Common Traditions	402
<b>BIBLIOGRAPHY</b>		<b>410</b>

## LIST OF PRINCIPAL ABBREVIATIONS

A	European Court of Human Rights: Judgments and Decisions: Series A
A.C.	Appeal Cases Law Reports
A.J.D.A.	Actualité juridique-Droit administratif
All E.R.	All England Law Reports
Bull.crim	Bulletin des arrêts de la Cour de Cassation
c.	contre
Cc	Conseil constitutionnel
C.E.	Conseil d'État
C.E. Ass.	Assemblée générale du contentieux
C.E. sect.	Section
C.L.P.	Current Legal Problems
Cass. ch. mixte	Cour de Cassation: Chambre mixte
Cass. civ	Cour de Cassation: Chambre civile
Cass. crim.	Cour de Cassation: Chambre criminelle
chr.	Chronique
C.L.J.	Cambridge Law Journal
C.M.L.R.	Common Market Law Reports
C.M.L.Rev.	Common Market Law Review
Cox CC	Cox's Criminal Cases
Cr.App.Rep.	Criminal Appeal Reports
Crim.L.R.	Criminal Law Review
D.	Recueil Dalloz
DC	Decision du Conseil constitutionnel
D.H.	Recueil Dalloz hebdomadaire de jurisprudence
D.P.	Dalloz périodique
D & R	Decisions and Reports of the European Commission of Human Rights
doctr.	doctrine
E.C.Bull.Suppl.	Supplement to the Bulletin of the European Communities
E.D.C.E.	Études et Documents du Conseil d'État
E.C.R.	European Court Reports
E.L.R.	European Law Review
éd. G.	édition générale
Gaz.Pal.	La Gazette du Palais
HC	House of Commons
H.L. Deb.	House of Lords debates
H.M.S.O.	Her Majesty's Stationary Office
Harv.Civ.Lib.Rev.	Harvard Civil Rights Civil Liberties Law Review
Harv.L.Rev.	Harvard Law Review
I.C.L.Q.	International and Comparative Law Quarterly
I.C.L.R.	Irish Common Law Reports
I.R.	Irish Reports
I.R.L.R.	Industrial Relations Law Reports
J.-Cl.	Juris-Classeur
J.C.P.	Jurisclasseur périodique (La Semaine Juridique)

J.L.& Soc.	Journal of Law and Society
J.O.	Journal Officiel de la République Française
J.P.	Justice of the Peace and Local Government Review
J.P.N.	Justice of the Peace Journal
K.B.	King's Bench Law Reports
L.	Loi
L.Ed.	United States Supreme Court Reports, Lawyer's Edition
L.Ed. 2d.	United States Supreme Court Reports, Lawyer's Edition (Second Series)
L.G.R.	Knight's Local Government Reports
L.J.M.C.	Law Journal Reports, Magistrates' Cases
L.Q.R.	Law Quarterly Review
L.R.Ir.	Law Reports, Ireland
L.T.	Law Times Reports
Law Cont.Probl.	Law and Contemporary Problems
M.L.R.	Modern Law Review
Mich.L.Rev.	Michigan Law Review
N.E.	Northeastern Reporter
N.I.J.B.	Northern Ireland Judgement Bulletin
N.I.L.Q.	Northern Ireland Legal Quarterly
Nat. Assem.	Assemblée Nationale
Ox.J.L.S.	Oxford Journal of Legal Studies
P.L.	Public Law
Q.B.	Queen's Bench Law Reports
R.D.P.	Revue de droit public
R.F.D.A.	Revue française de droit administratif
R.F.D.C.	Revue française de droit constitutionnel
Rec.	Recueil des décisions du Conseil d'État
Rec. des lois	Recueil général des lois, décrets et arrêtés
Rec.Leb	Recueil des décisions du Conseil d'État
S.	Recueil Sirey
S.Ct.	Supreme Court Reporter
S.D.N.Y.	Southern District of New York
Stan.L.R.	Stanford Law Review
Trib. civ.	Tribunal civil
Trib. corr.	Tribunal correctionnel
Tul.L.Rev.	Tulane Law Review
U.Missouri at K.C.L.Rev.	University of Missouri at Kansas City Law Review
U.S.	United States Supreme Court Reports
W.L.R.	Weekly Law Reports
Wash.L.R.	Washington Law Review
Yale L.J.	Yale Law Journal

## INTRODUCTION

This essay attempts to apply two theories to the legal protection of civil liberties in the process of comparing the liberty to assemble in France and England.<sup>1</sup> This is attempted in order to show that theory can be of relevance to the formulation of legal measures to protect civil liberties. The two theories that are applied are jurisprudential and comparative, and it will be shown that when employed they point to concrete reforms of the protection of the liberty to assemble. These concrete reforms will then be applied to resolve two practical problems: the Bill of Rights debate in the UK and the protection of civil liberties in the European Union (EU). In effect, an attempt will be made to apply theory to practice. This recourse to theory in order to resolve practical legal problems is presented as an example of what theory can achieve. More particularly, it should be seen as a reason for utilising theory as regards the law regulating civil liberties, that has hitherto not generally been the case in England. Accordingly, the general background of this study is a view that theoretical perspectives concerning civil liberties are not used to their fullest in the formulation of legal protection and that this is to the detriment of English civil liberties.

Given this aim of trying to show the practical benefits of theory, it can be asked why the liberty to assemble is focused upon. The response to this question is dealt with in detail below (chapter III) but can be briefly stated here. This liberty is claimed to be of historical and contemporary significance, whilst at the same time its nature is of a complex and uncertain kind, which would benefit from the clarification that theory is claimed to provide. Lastly, it is claimed that its exercise makes particularly explicit the types of decisions and difficulties that the legal regulation of civil liberties has to grapple with.

A second question concerns the choice of France as a legal system with which to compare the English regulation of this liberty. The justifications for this choice are theoretical. It is claimed that according to the jurisprudential view of civil liberties that is formulated in this study (chapter I) and comparative theory (chapter II), France presents an excellent example of a jurisdiction that adopts this jurisprudential view, along with England. Briefly stated, a

---

<sup>1</sup> This study, as will presently be explained, will be solely concerned with the law of England and Wales. References to English law therefore also refer to Wales.

political conception of civil liberties is argued for on the basis of a jurisprudential theory of civil liberties. This theory also happens to support the dominant view of civil liberties in England. By then using comparative theory, the generally overlooked similarity of the French conception of civil liberties is revealed and the comparison with France is therefore justified. The two theories therefore work in partnership.

It should be underlined that this choice of France is based upon a particular jurisprudential viewpoint. Consequently, it is not denied that other theories of civil liberties can be formulated. Indeed, it is accepted that another theory of civil liberties would indicate other comparisons, by utilising comparative theory to search for characteristics, other than a political conception of civil liberties. Thus, the theory of civil liberties that is applied here is not claimed to be the single true theoretical conception of civil liberties. Such a claim would be tantamount to stating that other conceptions in other countries, for example, those in Germany and the United States of America should be replaced by the conception formulated in this essay. This somewhat universalistic and strong claim for the theory is not made here. Instead, it is asserted that all communities construct certain fundamental values, that in current times are increasingly referred to as civil liberties. Typically, they involve political and social questions and choices but the degree to which this is reflected in the particular legal methods for their regulation varies according to different underlying jurisprudential views, political and social experiences and cultures.

Therefore, in a sense, all civil liberties are political because they are constructed by political communities but the theory advocated here also stresses this political nature in the way the law is used to protect these fundamental values. This essay presents a particular theory of civil liberties whose claimed benefits are that it would be supported by both critics and advocates of civil liberties and that it provides a reason to protect civil liberties; in that they are claimed to be the social and political values of particular communities. The existence of other views which explain these social and political values is therefore not denied. As a final related consequence, if the theory that is put forward is objected to, such an objection must be based on theoretical grounds. It will hence not be an objection to the application of theory in *general* but rather to the application of this *particular* theory.



Following these brief remarks on the two theories that will be applied in this study, attention will turn to the two practical issues to which they will be applied. As regards the Bill of Rights debate in the UK, it is argued that the jurisprudential theory here developed points to particular methods of protecting civil liberties, including a focus on specific civil liberties; hence the study of the liberty to assemble. Comparative theory is then used and as a result it is seen that very similar methods are generally found in French law and in the regulation of the liberty under study in particular. As a consequence, possible reforms in the protection of civil liberties in England can be taken from the example of France, given that *protection* has been the main concern behind the Bill of Rights debate.

As regards the protection of civil liberties in the European Union, comparative theory shows that comparisons between the Member States of the kind undertaken in this study will be needed in the future in order to protect civil liberties in the EU on the basis of commonly agreed standards. Thus, by concentrating on the liberty to assemble as an example of what can be achieved for this one particular liberty, it is hoped to provide the beginnings of a comparative method for all civil liberties in the context of the EU. In accordance with the aim of this study, it will be argued that the fruitful application of theory to these issues provides a powerful reason for a more theoretical approach to the regulation of civil liberties in the in England.

It will be immediately noted that these two practical concerns have ramifications that go beyond the English legal system. The Bill of Rights debate has consequences for the entire United Kingdom and not simply English law, while evidently the protection of civil liberties in the European Union also involves its other Members States, as well as the Union institutions themselves. However, it must be underlined that this study moves outwards from the perspective of a tendency not to advert to theory in England and that even given the wider scope of the practical issues, the application of theory to them is still claimed is used as an example of what can be accomplished by theory, if only it is adverted to more often in the English law on civil liberties.

This last point leads on to the origins or background of this study which have only been briefly mentioned up to now and deserve a more detailed

explanation. This study can thus be seen as a response to two general tendencies in the legal study of civil liberty in England: firstly a failure to have regard to the jurisprudential issues that concern civil liberties and secondly, a tendency to make comparisons with other common law systems, as opposed to those belonging to other legal families. Both these tendencies are claimed to have a common cause: the failure to have regard to theory - in the one case jurisprudential, in the other comparative.

The application of theory to the legal protection of the liberty to assemble results in a series of practical measures and proposals to protect that liberty. Firstly, it indicates that detailed and specific statutes will be of more use in protecting the liberty than a general and somewhat brief enactment in a Bill of Rights. This is not to say that a Bills of Right would serve no purpose but rather that the bulwark of protection should be more detailed provisions. Secondly, the jurisprudential theory supports legal mechanisms that allow for changes in what are considered to be the civil liberties of a community and the values that they protect. This results in a preference for statutory protection, as opposed to what would be the relatively more fixed and constitutionally entrenched Bill of Rights that has traditionally been called for. Thirdly, comparative theory reveals that France and England have certain traditions and legal methods in common, as far as both civil liberties in general and the liberty to assemble. By reason of these similarities, comparisons between the two systems in the area of civil liberties should be undertaken despite the fact that they belong to different legal families. Protection of civil liberties in the EU, in particular, is claimed to necessitate a comparative analysis of this type for all the Member States and for other civil liberties, if the claim by the European Court of Justice to protect them using common traditions is to be taken seriously.

These measures and proposals are therefore generated by theory and they also provide the comparative criteria by which to compare and evaluate the legal regulation of the liberty to assemble in France and England (chapters VII-IX). The capacity of theory to produce practical methods of protection will consequently be shown. However, other comparative criteria and measures will also be drawn from the United States of America and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). This is because firstly, these systems are generally considered to provide high standards of protection and thus they provide a

standard with which to compare some of the reforms suggested in this study. Secondly, on certain occasions they provide other measures that are not provided for by the theory of civil liberties but are nevertheless compatible with it. This shows that even in those systems that do not share the conception of civil liberties that is adopted in this study, there are still legal measures that because of the high degree of protection that they accord, deserve to be enacted. This point ties in with the one made earlier as to the existence and value of other theories of civil liberties and furnishes another reason why this theory does not claim to be the sole possible conception of civil liberties. Nevertheless, as already stated, the legal mechanisms derived from outside the theory are compatible with it and as a result their use is not an adoption of their underlying theories of civil liberties. On the contrary, they are used because they add a further dimension of protection that is not at odds with a political conception of civil liberties.

The challenge of transforming theoretical perspectives into concrete institutional mechanisms is claimed not to be an insurmountable one. On the contrary, it is claimed to be a challenge that once taken up promises the reward of revealing new avenues or shedding new light on possible paths for legal regulation that have for long lain forgotten.

\*\*\*\*\*

Lastly, and before commencing, a word will be said about the methodological structure of the argument made here. This study adopts a three-stage approach that is itself derived from comparative theory. More precisely, this is an approach suggested by Zweigert and Kötz,<sup>2</sup> according to whom comparative analysis should first set out the legal problems to which the analysis is addressed. Secondly, it should set out a description of the law in each of the jurisdictions to be compared. Thirdly, a comparison should be made, before fourthly, an evaluation is carried out. In this study, comparison and evaluation are carried out at the same time and correspondingly, the study is divided into three, rather than four, substantive **Parts**.

**Part I** provides a more detailed explanation of the tendencies and problems to which the study responds, the theories that underlie comparison and the two areas of practical concern to which theory is applied. Consequently, the

---

<sup>2</sup> K. Zweigert and H. Kötz (trans. T. Weir), 'An Introduction to Comparative Law' (Vol. I) (1987), 31-46.

alleged lack of theory in the English approach to civil liberties is investigated further and then jurisprudence and comparative theory are examined in order to show how they may be applied as regards the two practical concerns. Moreover, the characteristics of the political conception of civil liberties are explained. The reasons for choosing the liberty to assemble are also presented here, as well as a definition of what is meant by this liberty. Definition will be seen to be very important in order to try to set out a subject of comparison that does not at the outset impose an English conception of the liberty.

**Part II** provides a description of the law regulating the liberty to assemble in France. Since, as has already been mentioned, the study moves from the perspective of problems concerning English civil liberties and given the constraints of space, English law will not be set out here, although succinct explanations will be given when comparison is made with France.

It is this comparison that is undertaken in **Part III**, along with evaluation. As already noted, evaluative criteria will be drawn from both the theory of civil liberties formulated in the study and methods of protection in the United States and the European Convention. Conclusions will be drawn as to firstly, the protection of the liberty to assemble and secondly, the Bill of Rights debate and the protection of civil liberties in the EU. Finally, some general conclusions are drawn. These concern the reforms revealed by comparison and the relevance of theory to the law relating to civil liberties in England, of which, to once again underline, this essay seeks to be an example.

\*\*\*\*\*

# PART ONE

## THE NEED FOR THEORY

The three chapters in this section introduce the theoretical foundations of this work. In **Chapter I**, the need for jurisprudential theory to resolve the practical problem of protecting civil liberties is argued for, as well as an analysis that concentrates on specific civil liberties. It will also be shown that these theoretical issues are generally not addressed in England. **Chapter II**, on the other hand, argues for the need and relevance of comparative theory to legal protection and shows how this theory is also not fully utilised in England. It also provides a more detailed justification for comparison with France and a general overview of the French methods of protecting civil liberties, before finally arguing that comparative theory should be applied to another practical issue: that of the legal protection of civil liberties in the European Union. **Chapter III** sets out the reasons why the liberty to assemble has been chosen as an example of a liberty to which theory can be applied in order to indicate practical reforms, as well as defining it for the purposes of the comparison between France and England.

# CHAPTER I

## CIVIL LIBERTIES THEORY AND THE LEGAL PROTECTION OF HUMAN RIGHTS

### INTRODUCTION

The aim of this chapter is two-fold. First an attempt will be made to bring to the surface the jurisprudential issues that underlie the legal protection of human rights<sup>1</sup> and to argue that in England there is tendency to ignore them. This is attempted by linking jurisprudence to an aspect of this body of law that centrally concerns the reform of human rights protection: the Bill of Rights debate. It will be seen that behind many of the disagreements and proposals in the debate there are conflicting philosophical positions as to what are the values and content of human rights. Essentially, there is no overall agreement as to why human rights are protected and furthermore different human rights seem to be supported by alternative theoretical arguments. While not holding out the promise of resolving all the disagreements, jurisprudential theory provides reasons for seriously questioning whether reform via the enactment of a Bill of Rights would be the best way of increasing the protection of civil liberties in England, given both the noted disagreements and the differences between specific human rights that a jurisprudential enquiry also reveals.

A second aim is to formulate a jurisprudential theory of human rights which can take account of these disagreements. This is a theory that accords an importance to political forces (in the widest sense of pertaining to a community of citizens) in the regulation of civil liberties. Furthermore, this theory justifies the study of a specific liberty, such as the liberty to assemble. Finally, it will be seen that the theory is eclectic because it is composed of insights and areas of possible agreement between both supporters and critics of human rights. More precisely, it is argued that there is a consensus that human rights are the constructed values of communities, which in turn suggests reasons why supporters and critics of human rights should favour their protection. While there is disagreement as to what these particular

---

<sup>1</sup> From henceforth, the terms 'human rights' and 'civil liberties' are used interchangeably in this study. The reason for this is based upon the jurisprudential theory and is consequently set out below. However, it is recognised that the two are different concepts.

values are, the consensus nevertheless provides a basis for searching for reforms that permit human rights to be respected, while at the same time leaving them open to changes in the values of the community that has constructed them. The jurisprudential theory that is formulated in this chapter is therefore centrally concerned to allow for change and not to fix civil liberties in such a way that they are placed beyond change by the community; in other words, political change. For the sake of convenience, this theory will sometimes be referred to as the 'political conception' of civil liberties but it should be underlined that the emphasis of the political is but one aspect of this theory.

Finally, this chapter constitutes the *first step* in explaining the reasons for comparing the liberty to assembly in France and England: it presents arguments for looking at specific human rights and for developing methods of protection that take in account their particularity, as opposed to general methods, such as a Bill of Rights.

## SECTION I

### REFORM WITHOUT THEORY: THE BILL OF RIGHTS DEBATE AS A PRACTICAL EXAMPLE

In order to argue for the relevance of theory to the protection of human rights the Bill of Rights debate will be used.<sup>2</sup> The reasons for this choice are that firstly, this debate is centrally concerned with the practical means by which human rights are protected in England, secondly, it is an issue that has for the last twenty-five years attracted the attention of many legal commentators and thirdly, it provides an example of an area of civil liberties law in which the underlying jurisprudential questions concerning human rights are present but not generally adverted to.

It will be contended that the result of not adverting to jurisprudence is that there is a lack of clarity as to the nature of disagreements in the debate and a

---

<sup>2</sup> As was noted above, this study concerns the law regulating the liberty to assemble in England and Wales but clearly the Bill of Rights debate has implications for all parts of the United Kingdom. However, the debate is used here to illustrate the problems behind the dominant approach of English law, although the possible relevance to other legal systems in the Union of the conclusions that are drawn is not denied.

tendency to opt for reforms that ignore the jurisprudential qualities of human rights. Indeed, the very argument in favour of the enactment of a Bill of Rights will be revealed to be based on a contested theoretical view. The history and arguments of the Bill of Rights debate have been comprehensively set out elsewhere<sup>3</sup> and so they will not be rehearsed in detail here, instead attention will be focused on its little noted nature and underlying philosophy.

Three jurisprudential questions will be shown to lie behind the debate as to whether to enact a Bill of Rights. Firstly, that behind the debate there are different theoretical views as to what human rights are. It is argued that there cannot be a coherent call for the greater protection of civil liberties via the enactment of a Bill of Rights while there is still such radical disagreement as to what are human rights. Revealing this jurisprudential uncertainty, also reveals that a Bill would fix a particular conception of rights, as opposed to others. By fixing a particular conception, the adoption of different conceptions and therefore political change would become more difficult.

Secondly, it will be shown that a Bill would often privilege human rights against other interests. In order to justify this privileging it must be clear what the importance and value of human rights are and, at the same time, how far they can be protected as opposed to other values. It will be seen that there is also wide jurisprudential disagreement as to the value of human rights and that it may consequently be asked whether they should override other interests, as would generally be the case with a Bill of Rights.

Thirdly, it will be claimed that the effect of the enactment of a Bill of Rights would be to introduce a very general form of protection for all the diverse rights included in the Bill. It is argued that on the contrary, in order to protect civil liberties, specific mechanisms that are tailored to the specific and particular needs of each liberty will need to be formulated. This reflects a theoretical interest in bringing to the fore difference on the basis that difference is often obscured by generality.

These issues may be somewhat simply summarised as *what* are human rights, *why* protect them and *how* should they to be protected. They will each be dealt

---

<sup>3</sup> See for example, J. Jaconelli, 'Enacting a Bill of Rights' (1980), M. Zander, 'A Bill of Rights?' (1985) and P. Wallington & J. McBride, 'Civil Liberties and a Bill of Rights' (1976).



with in turn, but first the way in which the Bill of Rights issue is claimed to be generally treated will be briefly presented.

## THE GENERAL APPROACH

It is only recently that participants in the debate have had regard to jurisprudence. An important example of this recent interest in theory is an article by Waldron in which he questions the wisdom of enacting a Bill of Rights, given the wide jurisprudential disagreements that concern them.<sup>4</sup> This article will be referred to in greater detail below but it is mentioned here in order to show that it is very much the exception to the general approach in the literature on this subject.<sup>5</sup> More often than not, theories of civil liberties are simply not adverted to.<sup>6</sup>

Indeed, the approach to the Bill of Rights question may be seen as indicative of the general approach to the law of human rights which is not to advert to theory.<sup>7</sup> However, recently, as in the Bill of Rights debate, there have been signs of a change in this general approach. This is instanced by Feldman's, analysis of civil liberties in England and Wales, which begins with a detailed examination of the theoretical justifications of human rights.<sup>8</sup> Nevertheless, it should be underlined that the dominant approach is not to apply theory to practice.

The approach to the Bill of Rights debate can therefore be seen as a particular example of a more general approach to human rights in England. It will now be shown that behind the debate there are important and problematic jurisprudential issues, suggesting that such a protection would not be the best way of protecting civil liberties and that this results in an argument for

---

<sup>4</sup> 'A Right-Based Critique of Constitutional Rights' Ox.J.L.S. 13 [1993] 18.

<sup>5</sup> Another notable exemption is the study by E. Barendt of the right to free speech; 'Freedom of Speech' (1987), especially, 8-23.

<sup>6</sup> Among the many examples, see I.N. Stevens & D.C.M. Yardley, 'The Protection of Liberty' (1982), chp.6, R. Dworkin, 'A Bill of Rights for Britain' (1990) and A.J.M. Milne, 'Should We Have A Bill of Rights?' [1977] 40 M.L.R., 389. An exception is provided by J. Finnis, 'A Bill of Rights for Britain?: The Moral of Contemporary Jurisprudence', Proceedings of the British Academy (1985).

<sup>7</sup> As examples of this see, S.H. Bailey, D.J. Harris and B.L. Jones, 'Civil Liberties: Cases and Materials' (1991), where a comprehensive analysis of the legal regulation concerning different civil liberties is undertaken but with no reference to theories of jurisprudence and similarly, the study by G. Robertson, 'Freedom, The Individual and the Law' (1989).

<sup>8</sup> 'Civil Liberties and Human Rights in England and Wales' (1993), 3-34.

improving the protection of human rights via other measures, which have generally been neglected in the debate.

## WHAT ARE HUMAN RIGHTS?

Those who have argued for and against the enactment of a Bill of Rights have come from all sides of the political spectrum. Thus, some have argued for a Bill of Rights in order to protect individual rights from encroachment by legislation from the Left<sup>9</sup> and in similar terms some have argued that human rights need to be protected from the laws enacted by a government of the Right.<sup>10</sup> What becomes clear is that human rights are not a politically neutral category. Put at its simplest, they mean different things to different people.<sup>11</sup> Some commentators have recognised this political disagreement and argued for a Bill of Rights based upon a broad political consensus<sup>12</sup>, often by basing the text on the European Convention of Human Rights and Fundamental Freedoms 1950 (ECHR).<sup>13</sup>

However, behind these ostensibly political differences are deep theoretical disagreements as to the nature of human rights. The first reflects the jurisprudential debate as to whether human rights should be positive (as with social and economic rights) or negative (as with civil and political liberties).<sup>14</sup>

---

<sup>9</sup> For example, Sir Keith Joseph, 'Freedom Under the Law' (1975).

<sup>10</sup> C. Thornberry, 'A Charter of Human Rights' (1976).

<sup>11</sup> Wallington & McBride, *op. cit.*, 7, go even further;

'...essentially a Bill of Rights is one of those conveniently elastic concepts which mean whatever their proponents want them to mean.'

<sup>12</sup> P. Wallington, 'What Does A Bill of Rights Mean In Practice?' in C. Campbell (ed.), 'Do We Need A Bill of Rights?' (1980), 38 notes;

'There is in fact a fundamental paradox about Bills of Rights, in that there is little value in introducing a Bill which serves to accentuate or perpetuate divisions within the community or between communities - whether it be between the trades unions and the others over an issue like the "closed shop", or between the communities in Northern Ireland - but a Bill of Rights that commands united support is unlikely to extend much beyond a platitudinous affirmation of what is already the position.'

<sup>13</sup> See for example, Lord Scarman, 'Human Rights: The Current Situation' in Campbell, *op. cit.*, 2 at 8, K.D. Ewing & C. Gearty, 'Freedom Under Thatcher: Civil Liberties in Modern Britain' (1990), 263 *et. seq.*, P. Thornton, 'Decade of Decline: Civil Liberties in the Thatcher Years' (1989), 93-6, Zander, *op. cit.*, 83, Liberty (formerly the National Council for Civil Liberties), 'A Bill of Rights', Briefing no.13, (1989), Robertson, *op. cit.*, 397 *et. seq.* and the Bill of Rights in the draft constitution for the UK by the Institute For Public Policy Research, 'The Constitution of the United Kingdom' (1991).

<sup>14</sup> For this distinction, see Wallington & McBride, *op. cit.*, 11. For a discussion of the development of these different kinds of human rights, see C. Palley, 'The United Kingdom and Human Rights' (1991), 1-106; for a philosophical explanation of the differences, see I. Berlin, 'Two concepts of Liberty' in 'Four Essays on Liberty' (1969), 118 and it is noted by L.

(Footnote continues on next page)

Another relevant jurisprudential debate is that as to whether human rights are natural rights (as being founded on some universal and unchanging quality that is found in nature)<sup>15</sup> or whether they are constructed by different communities, thus being part of the positive law of that community.<sup>16</sup>

These debates have been dealt with by theorists at length and so will not be rehearsed here but it will be claimed that the responses to these questions will affect the content of the human rights that are enshrined in a Bill. Divergent positions in the debate can be seen to be based on theoretical grounds, which themselves are sites of disagreement.

Given the political differences as to what human rights are, it then may be asked what improvement the addition of jurisprudential disagreements would have. The response to this question is that the addition of theory to the Bill of Rights debate acts as a reminder that controversial choices will and are being made as to which rights to enact. The fact that philosophers of law do not agree as to the nature of human rights means that the choices that are made between these views are therefore political. If human rights are about political choices, it may then be asked if it is legitimate to seek to protect them from other political choices, as a Bill of Rights would seek to do. The connection with jurisprudence also acts as a reminder that in enacting a Bill of Rights no moral high ground is being claimed because any list of rights reflects a choice of particular political conceptions, in which no particular conception has been shown to be more morally legitimate than the others. However, a Bill would seek to protect human rights by placing a certain conception of human rights, and therefore a certain political choice, beyond the reach of ready change on the part of the community.

Most commentators in the debate assume a large degree of consensus, when in fact it does not seem that such exists. For example, Wallington and

---

M. Díez-Picazo & M.C. Ponthoreau ('The Constitutional Protection of Human Rights: Some Comparative Remarks' (1991) EUI Working Paper No.91/20, 6) that between these two traditional categories reference is now increasingly made to rights characterised by 'the collective nature of the interests at stake..', for example the environment and artistic patrimony (c.f. M. Cranston, 'What Are Human Rights?' (1973) and D.D. Raphael (ed.), 'Political Theory and the Rights of Man' (1967), chps.4, 5, 8 & 9).

<sup>15</sup> J. Finnis, 'Natural Law and Natural Rights' (1980), 198-230 and H.L.A. Hart. 'The Concept of Law' (1961), 181-207.

<sup>16</sup> See for example, Feldman, *op. cit.*, 20-33.

McBride, whilst noting that there are divergent views as to what human rights are and consequently what activities and interests they protect, state that it would be wrong and dangerous to place one particular political ideology in stone.<sup>17</sup> Therefore, the Bill of Rights should protect human rights

within the framework of the broad political consensus of the liberal democratic tradition. It is not an agency of revolution or counter-revolution.<sup>18</sup>

The authors claim that a Bill of Rights should protect rights which are part of a consensus that exists around liberal democracy.<sup>19</sup> However, the existence of divergent views, as was shown above, within this consensus means that at most the degree of consensus is small.<sup>20</sup> At the same time there is also a tendency to assert that the Bill of Rights would enshrine rights that were somehow beyond the political *mêlée*; rights that would be neutral as between the different political, and therefore jurisprudential, options;

Civil liberties are not rights in opposition to any particular kind of political or economic system, but rights apart; indeed the essential precondition to the free flow of political ideas and the development of political groupings.<sup>21</sup>

It is not claimed that this view of human rights as a precondition to political activity is to be rejected and indeed it will be seen in the next section that it is similar to the conception of human rights adopted in this study, but it is rather claimed that there is no neutral or objective conception that lies beyond political and philosophical choices.

---

<sup>17</sup> *op. cit.*, 13.

<sup>18</sup> *op. cit.*, 13.

<sup>19</sup> *op. cit.*, 13.

<sup>20</sup> This point seems to be conceded at *op. cit.*, 42;

'In principle there should be no difficulty in sitting down and writing out a list of the rights that should be protected as fundamental, and the situations in which these rights should be curtailed in the interests of the state, or of others. In practice, this is by no means straightforward. If it is accepted that a Bill of Rights should be based on a reasonable consensus of opinion, some rights immediately become controversial. Ought there to be a right to belong to a Trade Union as in the Universal Declaration of Human Rights, which Britain has endorsed? How should the right to own property be balanced against claims of compulsory purchase or of nationalisation measures? It would be easy to multiply the examples of potential difficulties. If it were possible to draft a Bill of Rights that would satisfy the demands of civil liberties activists, it would most likely be too strong meat for a proportion of the population. Conversely a Bill satisfactory to the Whitehall axis would seem small beer in the quest for adequate protection of civil liberties.'

<sup>21</sup> *op. cit.*, 13.

Other commentators tend not to advert to these jurisprudential differences, thus both of the studies of civil liberties by Robertson and Bailey, Harris and Jones<sup>22</sup> begin without investigating what human rights are. The former study commences with a few examples of recent restrictions of rights and then in the later more in-depth studies that constitute the main body of the work, no inquiry is made as to the theoretical basis of these rights and indeed, whether they are in fact human rights. What therefore seems to be assumed is that there is an agreement as to what they are. On the other hand, the latter study begins with an analysis of how human rights are protected in England, this leads to the observation that the dominant conception of human rights is one of negative liberty,<sup>23</sup> which is commonly attributed to the constitutional theory of A. V. Dicey.<sup>24</sup> However, there is no further discussion of the existence of alternative or competing conceptions. This negative conception has been much criticised because it does not provide for positive rights<sup>25</sup> but by not adverting to theory in this criticism, no attention is paid to the problem that there is no general agreement as to what positive human rights are or should be - once again the jurisprudential difficulties reveal themselves.

---

<sup>22</sup> see n.7, *supra*.

<sup>23</sup> The authors, *op. cit.*, 1-2, quote from the Home Office's 'Legislation on Human Rights. With Particular Reference to the European Convention. A Discussion Document' (1976), paras.2.01-05).

<sup>24</sup> For example, E. Barendt, 'Dicey and Civil Liberties' P.L. [1985] 596, Ewing & Gearty, *op. cit.*, 7-13 and more generally, see I. Harden & N. Lewis, 'The Noble Lie: The British Constitution and the Rule of Law' (1986).

<sup>25</sup> Ewing & Gearty, *op. cit.*, 11. It should be noted that the English conception of negative rights and the negative conception of liberty that is commonly seen to underlie civil and political liberties are not the same. The former refers to the manner in which rights appear in English law; predominately as a sphere of liberty around the individual in which he/she is free to act but the degree of liberty can be restricted by the operation of law. It is essentially a right to non-interference and approximates to a Hohfeldian privilege (see W.N. Hohfeld, 'Fundamental Legal Conceptions As Applied In Judicial Reasoning' (1919)). This concept is commonly referred to in English law as a liberty (see, D. Feldman, *op. cit.*, 8 *et. seq.* and the remarks by Sir Robert Megarry V-C in Malone v Commr. of Police (No.2) [1979] All E.R. 620 at 630). Civil liberties secure activities that one is free to do or not to do; they only impose duties of non-interference.

On the other hand, the negative conception of liberty is an expression of value and is associated with the theory of Isaiah Berlin (*op. cit.*, 118-72). It expresses the value of individual autonomy and is traditionally supported by liberals and indeed the Western political tradition. It is freedom from, as opposed to freedom to, in which the individual can develop according to his or her own desires and choices (see I. Berlin, *op. cit.*, 122-31 and A. Arblaster, 'The Rise and Decline of Western Liberalism' (1984), 42-66). Essentially, the former is a legal category, whereas the latter is philosophical. Despite their differences, the two are related, in that whether a legal system emphasises liberties or rights will depend on the whether it adopts a generally negative or positive philosophy as regards liberty, however, even where a negative philosophy predominates, there may well be significant emphasis on the use of positive rights to give effect to liberty in the law (Feldman, *op. cit.*, 9-10).

New human rights, or at least, those that are not immediately within the civil and political/negative conception of human rights are sometimes asserted but once again without adverting to the fact that they reflect a choice.<sup>26</sup> For example, in his pamphlet detailing the alleged decline of civil liberties in Britain under Margaret Thatcher, Thornton details the increase in race and sex discrimination and the growing intolerance towards homosexuals, trade unions and travellers.<sup>27</sup> However, these are not rights that are commonly found in the type of 'consensus' Bill of Rights that Wallington and McBride envisaged above and it is unclear that the Bill of Rights based on the European Convention that he later advocates would encompass these rights.<sup>28</sup> Indeed, Thornton implicitly acknowledges this by asserting that specific statutes should be enacted to deal with these human rights.<sup>29</sup> This shift away from the Bill of Rights towards other forms of protecting human rights is made possible once it is clear that there are different and strongly contested conceptions of human rights. It is then realised that these different conceptions may not be best protected by a Bill Rights.<sup>30</sup> Once again, by making the uncertain jurisprudential, and thus the political, position clear, it can be asked whether a Bill of Rights is a suitable means to protect such contested and controversial values.

As mentioned earlier, Waldron has recently posed similar questions as regards the Bill of Rights from the point of view of liberal jurisprudential theory. More specifically, two of his arguments are of relevance here. In the first place, he claims that the entrenchment of human rights in a document that seeks to fix them against ready change shows a mistrust for the views of

---

<sup>26</sup> See for example, M. Rosenbaum, 'Children's Rights', 'C. Heginbotham, 'Mental Health and Civil Rights' and S. Shaw, 'Prisoners' Rights' in P. Sieghart (ed.) 'Human Rights in the United Kingdom' (1988), 7-17, 29-39 & 40-9, respectively and see generally, the rights analysed in R. Blackburn (ed.), 'Rights of Citizenship' (1993).

<sup>27</sup> Thornton, *op. cit.*, 73 *et. seq.*

<sup>28</sup> *op. cit.*, 93 *et. seq.*

<sup>29</sup> *op. cit.*, 96 *et. seq.*

<sup>30</sup> Indeed, Wallington & McBride, *op. cit.*, 11 claim that it is not possible to effectively enshrine economic and social rights in a Bill of Rights. M. Loughlin, 'Public Law and Political Theory' (1992), 221-4 notes that the Bill of Rights contained in the Charter drafted by Charter 88 (see *New Statesman & Society*, 2nd Dec. 1988) exhibits a tension between its concentration on civil and political liberties and ambiguous references to social and economic rights. The Charter can therefore be seen to be indicative of the problems of enacting the latter kinds of rights.

others who might seek to challenge those rights.<sup>31</sup> This mistrust is claimed to be incompatible with a view that the autonomy and responsibility of the individual should be respected, which underpins human rights.<sup>32</sup> A second argument is that at present there is much disagreement concerning human rights, as is instanced by the many rival theories that exist.<sup>33</sup> In this context of disagreement, decisions as to which human rights deserve protection should be subject to change and be democratic.<sup>34</sup>

His conclusion is that a Bill of Rights would be unsuitable because firstly, it would give judges more say in the decisions to be taken as regards human rights than the legislature, which despite its imperfections, acts as the representative of the people. The result is claimed to be that it would significantly disenfranchise ordinary citizens.<sup>35</sup> Secondly, a Bill of Rights would place the decisions of some beyond the easy challenge of others, even though there is intense theoretical and hence political disagreement as to these choices.<sup>36</sup> This second point links to the first because a Bill of Rights would not resolve the conflict of views via democratic procedures that seek to involve the whole community but rather by a small, undemocratic elite - the judiciary.<sup>37</sup> Thus the starting point of Waldron's criticisms can be said to democracy.

---

<sup>31</sup> *op. cit.*, 27;

'To think that a constitutional immunity is called for is to think oneself justified in disabling legislators...(and thus, indirectly, in disabling the citizens whom they represent). It is, I think, worth pondering the attitudes that lie behind the enthusiasm for imposing such disabilities. To embody a right in an entrenched constitutional document is to adopt a certain attitude towards one's fellow citizens. That attitude is best summed up as a combination of self-assurance and mistrust...'

<sup>32</sup> *op. cit.*, 27;

'This attitude of mistrust of one's fellow citizens does not sit particularly well with the aura of respect for their autonomy and responsibility that is conveyed by the substance of the rights which are being entrenched in this way.'

<sup>33</sup> *op. cit.*, 29-31.

<sup>34</sup> *op. cit.*, 31-9 and at 48;

'The idea of a society binding itself against certain legislative acts in the future is particularly problematic in cases where the members of that society disagree with one another about the need for such bonds, or if they agree abstractly about the need, disagree about their content or character. It is particularly problematic where such disagreements can be expected to persist and to develop and change in unpredictable ways.'

<sup>35</sup> *op. cit.*, 41-6.

<sup>36</sup> *op. cit.*, 49-50.

<sup>37</sup> *op. cit.*, 42 and at 44;

'It is true that judges are appointed by elected officials. But the courts are not, either in their ethos or image, elective institutions, whereas parliament - whatever its imperfections - obviously is.'

## WHY PROTECT HUMAN RIGHTS?

If human rights concern political choices, it may be asked why they should be protected from revision by other political choices. What, it may be asked, is so special about human rights that justifies their being privileged as against other political choices?

Before presenting the theoretical response to this question, the way in which this issue manifests itself in the Bill of Rights debate will be looked at and it will be seen that once again the underlying jurisprudential element is commonly ignored.

A Bill of Rights is sometimes objected to on the grounds that it is anti-democratic,<sup>38</sup> in that it would either infringe parliamentary sovereignty or would hand over power to the judiciary.<sup>39</sup> As a consequence, it has been argued that Parliament should remain sovereign because this provides a democratic means for achieving change where there is sufficient support for it. If there is pressure to change values, this process should not be hampered by values that claim to be at worst unchangeable or at best changeable only after the most arduous political effort.<sup>40</sup> In response, advocates of a Bill assert that certain values are beyond change, no matter how democratic. It is claimed that these reflect more fundamental choices. A Bill of Rights would place certain values in such a position that they could not easily be changed by the vicissitudes of opinions of the community. They would be relatively fixed against social and political forces that might seek to override them.<sup>41</sup>

---

<sup>38</sup> For example, Lord Lloyd of Hampstead, 'Do We Need A Bill of Rights?' M.L.R. [1976] 121 at 125.

<sup>39</sup> This view is expressed by Lord McCluskey in his 1986 Reith lectures; 'Law, Justice and Democracy' (1987) in which he, *inter alia*, argues against the enactment of a Bill of Rights on the grounds that

'It turns judges into legislators and gives them a finality which our whole tradition has hitherto professed to withhold from them.' (*op. cit.*, 34).

<sup>40</sup> Although a Bill of Rights would not be completely immune to change, Waldron, *op. cit.*, 41 notes that change would only be effected with some difficulty;

'As a matter of fact, the enactment of a Bill of Rights need not involve the entrenchment of one particular view of individual rights beyond the reach of challenge or reform. A Bill of Rights can specify procedures for amendment...However, even if the efforts of rights-proponents fall short of absolute entrenchment, there is a temptation to make the amendment process as difficult as possible, a temptation often motivated by the...self-assured mistrust of one's fellow citizens...'

<sup>41</sup> Waldron, *op. cit.*, and Lloyd, *op. cit.*, 126.



Arguments against enacting a Bill of Rights on the grounds of parliamentary sovereignty and democracy are given extra weight by what has been called the 'political' nature of the British constitution.<sup>42</sup> Although this point will be dealt with at greater length in Chapter II when dealing with comparative theory, it must be noted that one of the characteristics of the constitution is claimed to be the central part played by political processes. Thus, the role and functions of Parliament are paramount and limits that are placed on the supremacy of Parliament are political; that is via political understandings that are referred to as conventions.<sup>43</sup> Human rights are therefore primarily protected by political processes and pressure.<sup>44</sup> In such a system, attempts to reduce political change via civil liberties are viewed with suspicion, as the statement by Griffiths highlights;

One danger of arguing from rights is that the real issues can be evaded. What are truly questions of politics and economics are presented as questions of law.

But paradoxically, arguments advanced avowedly for the protection of human rights are often concealed political propaganda. Those for a written constitution, a Bill of Rights, a supreme court, and the rest are attempts to resolve political conflicts in our society in a particular way, to minimise change, to maintain (so far as possible) the existing distribution of political and economic power<sup>45</sup>

Therefore, the British constitution places a high premium on the political. This is manifested in a preference for flexibility<sup>46</sup> even in the face of civil liberties.

Behind the practical difficulties of reconciling parliamentary sovereignty and the protection of human rights there are therefore two jurisprudential issues. Firstly, the relative values of fixing certain choices beyond ready change as compared to those of flexibility and change. According to some

---

<sup>42</sup> J.A.G. Griffiths, 'The Political Constitution' M.L.R. 42 [1979] 1.

<sup>43</sup> See G. Marshall, 'Constitutional Conventions: The Rules and Forms of Political Accountability' (1984), chps.8, 9 & 11, C. Munroe, 'Studies in Constitutional Law' (1987), 35-60 and concerning the convention of ministerial responsibility, see C. Turpin, 'Ministerial Responsibility: Myth or Reality?' in J. Jowell & D. Oliver (eds.) 'The Changing Constitution' (1989), 53.

<sup>44</sup> Feldman, *op. cit.*, 62-3 states;

'The Constitution has always been predominantly political rather than legal. To restrain parliamentary legislation which might interfere unduly with people's rights, the UK has generally been content to rely on the good sense of politicians and the conventions and social properties which they are expected to observe.'

<sup>45</sup> *op. cit.*, 16.

<sup>46</sup> See J.B.D. Mitchell, 'The Flexible Constitution' [1960] P.L. 332 and A. Lester, 'The Constitution: Decline and Renewal' in Jowell & Oliver, *op. cit.*, 345.

jurisprudential theories, the lack of objective truth and therefore the possibility that any one set of choices is better than another, means that the choices that are made as regards human rights should be subject to revision; a Bill of Rights is therefore criticised as placing serious obstacles in the way of such change.<sup>47</sup>

Secondly, there is disagreement as to what it is that makes human rights such special choices. This disagreement is another application of the differences that have been pointed out. Thus, for example, it has been seen that some claim that human rights merely reflect the particular choice of particular communities, whilst others feel the choices are based on some enduring nature or reason that goes beyond a community. If the former is regarded as true, it will be difficult to argue that human rights should enjoy a more privileged position as compared to other choices. If, on the other hand, the latter is chosen, it will be easier to isolate reason or nature as the qualities that distinguish these choices from others which are not privileged. Nevertheless, what is once again clear is that there is no agreement over these issues.

How, if at all, are these jurisprudential issues adverted to in the debate? A brief response can be given to this question; the jurisprudential issues remain in large part hidden behind a surface discourse that is overwhelmingly in terms of parliamentary sovereignty, democracy and the need to protect minorities and individuals from the will of the majority. These arguments are routinely marshalled against one another, with the result that there is no sign of a resolution to the debate. By having regard to jurisprudential theories of civil liberties, however, it is seen that these positions are backed by powerful theoretical positions and that the resolution of what appears to be political deadlock can only be achieved by making a choice as between the different jurisprudential options. The choices that are made will be at the expense of other choices and will be political in the sense that there can be no resort to some neutral choice.

Once again, applying theory to the debate reveals the disagreements and controversy over rights and then allows questions to be posed as to whether a particular choice should override others via a Bill of Rights. Therefore, the

---

<sup>47</sup> See Waldron, *supra.*, n34.

arguments put forward by Waldron that were outlined above also have force here - essentially, should human rights be protected by means that assume certainty and infallibility, when in fact human rights prove to be sights of fundamental uncertainty?

## HOW SHOULD HUMAN RIGHTS BE PROTECTED?

The Bill of Rights debate has also assumed that all human rights should be protected by the same mechanisms and procedure; namely a Bill of Rights. It should, nevertheless be recalled that what the debate is about is the protection of human rights.<sup>48</sup>

The assumption that appears to be made in the debate is that human rights are a homogenous category and because of this nature a single homogenous solution is required. However, given the jurisprudential disagreements as to what human rights are and why they should be protected, that have been pointed to above, it is claimed that each right is usually enshrined in very general terms in order to minimise the privileging of one conception of human rights over another.<sup>49</sup> What such a method is claimed to imply is that each human right has different problems and needs; thus different laws will be needed to protect freedom of the press as opposed to freedom of movement, for example. But to enter into this degree of detail a contested choice as to a particular conception of civil liberties will need to be made.

Some commentators who advocate a Bill have recognised the differences between specific civil liberties and claimed that a Bill of Rights must be supplemented by specific statutes.<sup>50</sup> However, this point is invariably made in passing while the focus of calls for reform in legal protection remains squarely on the enactment of a Bill of Rights.<sup>51</sup> Furthermore, this approach

---

<sup>48</sup> This is implicit in the remarks made by Lord Boston of Faversham, 'Arguments Against A Bill of Rights' in Campbell *op. cit.*, 23;

..none of us, whether we are in favour of a Bill of Rights or whether we are against it, has (or has claimed) a monopoly of enthusiasm for promoting human rights. Equally, nobody on the one side will say of anybody on the other side that he or she is wanting, when it comes to furthering those aims...'

<sup>49</sup> As instanced by the provisions in Charter 88, *op. cit.*, and those of the draft Bill of Rights by the Institute of Public Policy and Research (IPPR), *op. cit.*

<sup>50</sup> For example, D.G.T. Williams, 'Civil Liberties and The Protection of Statute' (1981) 34 C.L.P. 25, Thorton, *op. cit.*, 96-102 and the IPPR, draft constitution, *op. cit.*, 13;

'Both kinds of changes are needed: they are not mutually exclusive.'

<sup>51</sup> See Lloyd, *op. cit.*, 128, Wallington & McBride, *op. cit.*, 39.

merely postpones the need to decide what specific mechanisms and procedures each right needs and how each is to be best protected - once again jurisprudential issues concerning the specific nature of each human right will have to be addressed. Without adverting to these issues, even those who recognise the differences as between different rights and call for specific remedies, are left with rather vague suggestions for reform which lack the detail to accord adequate protection.

A paradoxical situation reveals itself in many studies according to which particular human rights are investigated and analysed, thus providing useful details of the way in which rights are exercised and regulated<sup>52</sup> but these insights are then neglected when at the end of this exercise the Bill of Rights issue is discussed and the enactment of such a Bill is claimed to be a reform that would enhance the protection of human rights.<sup>53</sup> Such a claim patently ignores the specificity of the prior analysis in favour of an extremely broad response that would not ameliorate the specific and detailed problems that have been presented.

The jurisprudential issue that underlies this aspect of the debate is claimed to be that of the value of difference and local, as opposed to grand, all-encompassing, narratives. The analysis of specific human rights can be said to be an exercise in looking at what is different and particular to each liberty, whereas the Bill of Rights debate overwhelmingly emphasises generality and reduces the differences between different liberties in order to embrace a common solution. Therefore, the aspect of the debate concerning how human rights should be protected- whether by specific statutes or a Bill of Rights- can also be seen to be a debate founded upon a jurisprudential base.

### **A RETURN TO THE PRACTICAL**

A final feature of the debate that is of practical importance concerns what strategies reformists should adopt in order to secure the improved protection of civil liberties. This is clearly a practical question and it will be claimed that a central strategy should be that of compromise.

---

<sup>52</sup> As with for example, Ewing & Gearty, *op. cit.*, Robertson, *op. cit.*, and Bailey *et. al.*, *op. cit.*

<sup>53</sup> For example, Robertson, *op. cit.*, 387 *et. seq.* and Stevens & Yardley, *op. cit.*, 168. \*

Earlier in the debate compromise solutions were suggested. The logic behind these strategies was to seek support from all sides in the debate so that human rights could be protected, whilst at the same time not privileging a particular conception of rights and allowing for political change and the workings of democratic choices. An example of such an attempt at compromise was the suggestion that a 'United Kingdom Commission of Human Rights' should be established,<sup>54</sup> to which UK citizens could report violations of human rights protected under the European Convention of Human Rights (ECHR). However, this body would have no power to enforce these rights, thus leaving intact the scope for political change and democratic processes, whilst at the same time according a value and degree of protection to human rights. Alternatively, Lester<sup>55</sup> suggested a temporary compromise in the form of a 'Constitutional Council' with powers to make recommendations to Parliament as far as the conformity of legislative and executive measures with an enacted British Bill of Rights. The Bill of Rights would not, however, have been enforced by the judiciary. The compromise here would have been to have left parliamentary sovereignty intact but also to have provided political mechanisms by which attention could be drawn to the need to protect human rights when legislating.

These earlier attempts at compromise contrast sharply with what is claimed to be the present polarised nature of debate. The earlier compromise proposals have given way to a debate constituted by diametrically opposed positions, in which those advocating a Bill of Rights invariably demand a judicially enforceable Bill (usually via incorporation of the Convention) against those opposed to any such enactment. The contemporary nature of the discussion is one in which arguments for and against are ritually marshalled against each other. What results is an arid dichotomy and deadlock. There seems little hope of a resolution to the debate in its current terms because the available proposals are of an all or nothing nature.

However, a focus on compromise directs efforts towards seeking arrangements by which the demands of parliamentary sovereignty and

---

<sup>54</sup> As proposed by Sam Silkin Q.C. in his 'Protection of Human Rights' Bill 1971 (c.f. S. Silkin, *The Rights of Man and The Rule of Law* (1977) 28 N.I.L.Q. 3, Zander, *op. cit.*, 8, Jaconelli, *op. cit.*, 32-4 and most recently the IPPR draft constitution, *op. cit.*, 5).

<sup>55</sup> *Democracy and Individual Rights* (1968) and Zander, *op. cit.*, 3.

human rights can be reconciled. This may not be possible via a Bill of Rights. Thus attention is shifted to other mechanisms, instead of being fixed on a Bill of Rights, as has been seen to be the case.

A pertinent example of the above tendency can be drawn from the recent developments in the debate. This concerns the attempt by Lord Scarman and Sir Edward Gardner QC (Con.) to incorporate the European Convention into UK law by virtue of the 'Human Rights and Fundamental Freedoms' Bill. After having passed all its legislative stages in the House of Lords, it was defeated on a closure motion on 6th Feb. 1987.<sup>56</sup> If the parliamentary debate on this Bill is analysed, the same arguments for and against a Bill of Rights that have been present for the last twenty years can be identified.<sup>57</sup>

The broad and brief analysis above has shown that the Bill of Rights issue has historically been a locus of political struggle. It has also shown that there is no apolitical conception of a Bill of Rights,<sup>58</sup> it can be a tool or a weapon; a political shield, or conversely, a sword.<sup>59</sup> The increasingly polarised nature of the debate has also been pointed to, notwithstanding earlier attempts to formulate compromise solutions.

Therefore, two points can be made from this brief analysis of the Bill of Rights debate. Firstly, it takes place against the background of a profound disagreement as to human rights, while at the same time it does not advert to this theoretical uncertainty. Secondly, by bringing these uncertain jurisprudential aspects to the surface, doubts are raised as to the aptness of a Bill of Rights.

---

<sup>56</sup> See Hansard Parliamentary Debates vol. 109, 6th Feb. 1987, cols. 1223-89 and see, The Times, Feb. 4th, pg.1, Feb. 5th, pg.13, Feb. 7th, pg.1, Feb. 9th, pg.16 1987 and The Sunday Times, 'Freedom Crushed by Stayaway MPs' Feb. 8th, pg. 30, 1987. The Bill fell on a closure motion, being six votes short of the required number to pass on to the next legislative stage.

<sup>57</sup> These arguments are set out by Zander, *op. cit.*, 27-83, Jaconelli, *op. cit.*, 155-211 and P. Norton, 'The Constitution in Flux' (1982), 244-60 and so will not be presented in detail here

<sup>58</sup> Wallington and McBride, *op. cit.* 7.

<sup>59</sup> Norton, *op. cit.*, 246-7 brings the party-political content of the Bill of Rights debate to the fore, when he analyses the traditional sources of support and opposition to a Bill of Rights; 'Constitutional lawyers with their attachment to the rule of law view with increasing horror the encroachment of government (via its parliamentary majority) upon rights they consider should be protected. Conservatives seek to limit what they perceive to [be] the Socialist threat of increasing government encroachment in the lives of citizens; and, from the perspective of the House of Lords, a Bill of Rights would serve as a limit upon government which the Upper House can no longer effectively provide.'

## SECTION II INTRODUCING A THEORY OF HUMAN RIGHTS

Having criticised both the enactment of a Bill of Rights and the way the debate concerning it has proceeded, it may then be asked whether by introducing jurisprudential theory to this practical legal problem, one set of problems is not merely being replaced by another - in this case the practical by the theoretical? More to the point, how does such an approach improve the chances of formulating reforms that will lead to the better protection of human rights in England?

In this section a particular jurisprudential theory will be presented which will be used throughout this study and which will provide comparative criteria for the comparison of the liberty to assemble between France and England. The theory will be boldly stated here in order to more clearly show its features and the consequences it has for the Bill of Rights debate, before exploring its theoretical basis in the next chapter. It will be seen that it supports a particular compromise as a solution to the political and jurisprudential differences that were highlighted in the previous section. In the next chapter, via the additional use of comparative theory, France will be claimed to be a concrete example of some of the proposals that the jurisprudential theory will now be shown to suggest. It follows that although jurisprudence raises many problems in the area of human rights law, and indeed on occasion is actually hostile to human rights, at the same time it can point to important means for their protection.

### THE THEORY

The best way to explain the features of this theory is to apply them to the jurisprudential questions that have been seen to underlie the Bill of Rights debate; what are human rights; why should they be protected; and finally, how should they be protected?

#### *What?*

The theoretical conception of human rights that will be adopted here asserts that human rights are the values of political and social communities. They are considered in their different ways to constitute activities, actions and interests

that have such high value that they should be accorded greater protection than that accorded to other activities, actions and interests. This conception of human rights sees them as social constructs; they are the values that society believes are important. As a consequence of this status they can override other values and must be privileged before other competing activities and considerations. However, limits are invariably placed on them, as when they threaten or actually contravene what can be seen as meta-values, such as human life or peace. Human rights thus have limits and are not absolute because at times they conflict with other values.

This conception is formulated at an abstract level, where human rights are seen as the constructed values of communities. All the diverse categories of human rights that are normally distinguished are encompassed within this conception. Therefore, negative and positive rights, political and civil and economic and social rights, political rights and even international human rights are all claimed to be socially constructed categories that represent values. By reason of this communality, the terms human rights and civil liberties are henceforth used interchangeably and previous references to 'civil liberties' have also referred to this abstract category. This is not to deny that there are differences between them, but rather to make clear that for present purposes they are all values of a constructed nature, by which human agency and socio-political processes play a central role.

In the previous section human rights were seen to be based upon choices. The theory that is formulated here is claimed to accommodate these choices and does not privilege once choice over others. Therefore, it affirms that at a theoretical level there is no agreement as to the nature of human rights by claiming that these choices represent the chosen values of particular groups and communities. They are no more fundamental than the value they are given when they are constructed by these social and political forces.

It is because human rights are socially constructed categories that they are contingent (i.e. subject to change) and not universal across different times and places. It might be claimed that the existence and expanding scope of a body of international human rights across a growing number of countries disproves this point. The theory of human rights does not refute the *possibility* that at a particular time the same civil liberties might be commonly recognised around the world but rather that this can be attributed to anything



in the nature of civil liberties. On the contrary, insistence is placed on the fact that different countries, when seen as political and social communities have generated these rights and that their present universality is due to those same social and political forces that today act on an international, rather than a national level.

The role of social and political forces leads to a final point: human rights are the socially constructed values that are often but not exclusively imposed by the dominant group or groups in society. It should be underlined that this does not mean that these groups necessarily oppress but rather that they can often decide which values are of such importance as to be considered human rights. Therefore, those in power may enshrine their own values, those of others or even those that they feel benefit the entire community, even where they may not share those values. It follows that human rights are intimately linked to power. At the same time, less powerful groups often have recourse to human rights in order to challenge existing structures of power but in using human rights in this way they seek to exercise power. Thus, by making arguments in terms of human rights an attempt is being made to alter, establish or reinforce values.

By way of summary, it can be stated that civil liberties are socially constructed and contingent values that are neither absolute nor universal, and are linked to the exercise of power. This response cannot be said to have resolved the question that jurisprudence raised as to what are the precise human rights in a particular community, such as England but it provides a partial response by showing that choices will need to be made: the content of the Bill will reflect the choices of the powerful but these choices will in turn be subject to challenge from other but weaker groups. Moreover, these choices will very much reflect the particular circumstances of the period in which they are made. The revealed nature of rights points to legal mechanisms that allow for changes in these choices. Therefore, the theory accepts all the reasons that are put forward by seeing them all as being claims that human rights are *values*.

### *Why?*

In much the same way, the theory gives a general response to this question by accepting (with one exception that will be dealt with presently) the different reasons why human rights are seen as values. These reasons have been

claimed to be political and because of their consequent socially constructed nature they can be expected to exhibit similar characteristics to those that were seen above as regards the inquiry as to what are human rights; viz. contingency and a relation with power.

Human rights should therefore be protected because they are the values of a particular community. This will normally be reflected in the reasons that are put forward in favour of protection. The theory assumes that the reasons that are given are not substantially flawed in the sense of being clearly illogical, or insufficient but that they at least present a support for the protection of human rights; in other words, that they at least act as reasons. It does not deny that often this might not be the case and that there will be intense debate and challenges to these reasons but it does assert that the arguments or reasons for protecting civil liberties that are accepted in a community are those of that community and for these reasons human rights should be protected. However, where reasons run out and simply cannot justify a choice, it is argued that human rights become accepted by the wider community by reason of exercise of ideology backed up ultimately by power. Once again these choices are open to challenge by other groups, who will also resort to reasons but may also have resort to ideology and power.

There is this one exception to the generality of theory in response to the question why human rights should be protected. The theory embraces one substantive reason, which follows on from the role that power is claimed to play as regards civil liberties. More precisely, this reason is linked to the *potential* of human rights. The theory states that no matter what the immediate reason(s) given for protecting human rights, (be it equality, liberty, moral autonomy etc.) they can act as a means of challenging power; they can challenge the dominant values of the powerful and thus the status quo and as a result they can, and have led, to political and social change in communities. However, to use them against those in power is at the same time to exercise power. A successful challenge involves the replacement of the values of one dominant group by those of another. The potential for this kind of change is valued by the theory and consequently it is claimed that a fundamental reason for protecting human rights is their potential to act as instruments of change.

In the context of the Bill of Rights debate, the theory, *prima facie*, accepts all reasons that seek to justify the protection of human rights but it also claims that these reasons should be analysed in order to discover how far they leave open the possibilities for social and political change and how far they offer to the less powerful in a community an opportunity of having their opinions and values adopted by the community. As a consequence, reasons given in the debate can be judged according to the degree to which they support the potential for human rights to act as the means for social and political change. In this sense, the theory presents social and political change as a kind of 'meta-reason'.

*How?*

The response to this question has already been hinted at above in the context of the Bill of Rights debate. Thus, the theory of human rights that is adopted here places emphasis on the specific needs of specific civil liberties. It focuses on what theorists term 'local narrative'. This involves looking at the different civil liberties in order to tailor methods of protection to their differing and particular needs. This approach is claimed to redress the tendency to obscure difference which follows from over-generalisation or the preference for the 'grand narrative'.

Bringing differences to the fore leads to the conclusion that civil liberties can best be protected by specific legal frameworks formulated to suit the specific contexts of each civil liberty. It therefore grants a less prominent role to a Bill of Rights and re-focuses reforming strategies away from the present concentration on such a Bill. Essentially, the theory serves as a reminder of the importance of legal reform in order to enhance the protection of civil liberties and that a Bill of Rights is only one possible way of achieving this. It then states that a Bill of Rights on its own is too general a measure to secure this objective.

The preferred specific mechanisms for protecting human rights must also allow for the political and social change that was stated above to be the fundamental reason for protecting human rights. It follows from this that methods of protection must as far as possible be open to forces that push for change and that measures that seek to place human rights beyond these forces or to secure their continued presence in the face of pressure for change are at a disadvantage as compared to those which are more responsive to

change. As far as the Bill of Rights debate is concerned, this requirement provides an argument against enacting a Bill because of the greater difficulty of altering or repealing it. Clearly, no Bill of Rights can remain immune to all forces of change but one of the arguments most often put forward in support of the Bill has been seen to be that it would entrench certain rights to a greater extent than is presently the case. The challenge that the theory throws out is to develop methods of protection that reduce entrenchment to a minimum whilst at the same time securing the protection of human rights because they represent the values of the community.

The jurisprudential theory of human rights that has been formulated here has built on the theoretical insights that were revealed to underlie the debate in section I. The theory can accommodate all the diverse views as to what human rights are because they are seen to assert that they are values. In addition, apart from insisting on their being vehicles for social and political change, the theory allows for civil liberties to be protected for many different reasons. As regards the third issue; that of how human rights should be protected, the theory has pointed to certain approaches; namely specific mechanisms that are formulated to protect and guarantee specific human rights, as well as constituting compromises between parliamentary sovereignty and human rights. By employing comparative law in chapter II, concrete mechanisms in France that allow for and are suited to these claimed characteristics of human rights will be pointed to.

Having presented the main features of the jurisprudential theory of human rights that is applied in this study, the next section looks in detail at its origins and the theoretical foundations of its claims.

### **SECTION III EXPLORING ORIGINS AND DEVELOPMENT**

As was earlier stated, the theory is claimed to be derived from the theories of both advocates and critics of human rights. Its theoretical foundations are eclectic because they draw on the views of these two broad groups. The theory therefore claims that human rights are commonly viewed as values, even though advocates and critics of human rights conceive of those values in fundamentally different ways. Human rights are seen as very different values

but a consensus is argued to exist that they are seen as values. On the basis of this consensus view, it is argued that important guidelines can be laid down as to the legal protection of human rights, such as were just outlined above in section II.

The specific features of the theory will be more clearly understood once the theories of supporters and critics are set out. These two groups will be taken to be broadly represented respectively by liberals and critical scholars. Although their theoretical positions are familiar, they will be recounted here so as to point to the gradual development of common elements and the gradual diminution of points of difference that it is claimed has led to a convergence of views and upon which the theory is based. Therefore, what follows is the presentation of well known narratives but with the stress on elements that are claimed to be of great importance to the jurisprudential theory of human rights that is formulated in this study.

This section also aims to show that both supporters and critics of rights have sought to reformulate them in order to harness their potential to challenge the status quo, despite their observed jurisprudential weaknesses. Therefore, although adverting to jurisprudence may initially seem to weaken human rights, it can alter them in order to present a strong and radicalised conception, as was seen in the above section.

## THE LIBERALS' NARRATIVE

Although today contemporary liberal theorists<sup>60</sup> support human rights, this has not always been the case. Liberals have in the past been sceptical as to the existence of human rights and have attacked them. This can be seen as part of a more general attack that sought to expose the theoretical weaknesses of

---

<sup>60</sup> It is not possible to define what is meant by liberalism, given the constraints of space and although this section does not touch on all the features of what is an extremely broad movement, it is hoped that the main theoretical orientation of this group will be grasped from the account of the development of their theories of rights and the attacks of their critics. However, for an introduction to liberal thought, and its numerous and often conflicting features, see Arblaster, *op. cit.*, especially, 55-91. It is claimed that liberalism, like any movement can only be understood across a historical perspective (i.e. in action) and this will be one of the functions of this section. This claim is supported by Arblaster, *op. cit.*, 91; '...liberalism is not reducible to a set of general and abstract propositions. It is a historical movement of ideas and a political and social practice.' (c.f. M. Loughlin, *op. cit.*, 84-101).

natural law. However, two developments eventually led liberals to support human rights.

Firstly, liberal theorists altered the jurisprudential nature of human rights by placing them on a humanistic footing. Secondly, they came to see them as an instrument of progressive reform and as providing a means by which each individual could make his or her own moral choices in circumstances of moral uncertainty. Having adopted this position, liberals then had to defend human rights against philosophical attack. It will be claimed that as part of an attempt to meet these theoretical difficulties, liberal theorists have founded rights upon consensus. It is the belief in their capacity to effect change and that they are products of consensus, as well as their belief in moral uncertainty that will be seen to have in turn provided a point of possible convergence between liberals and certain critical scholars.

### *Initial hostility*

It is within natural law that the modern conceptions of human rights first developed.<sup>61</sup> Natural rights were theocratic and derived their claim to truth from God and a divinely inspired natural order. They developed from the Middle Ages through to the eighteenth century. However, in the seventeenth-century, this theocratic theory was modified into a theory of natural limitations on government authority.<sup>62</sup> Locke, in his 'Two Treatises of Government'<sup>63</sup> asserted that government authority was not naturally ordained, rather it was as a result of human choice that persons had agreed to submit themselves to this form of authority. Humans created civil society upon the basis of an agreement that imposed duties on both authority and citizens. Citizens maintained certain natural rights and could revoke their support for government if the latter failed in its duty to secure liberty and the other benefits of civil society. Essentially, Locke claimed civil society was a contingent set of arrangements; power held on trust. It was a trust that could be revoked by the people, who were born free and bearing natural rights, which they had temporarily and conditionally agreed to limit for the purposes of achieving a more peaceful and co-operative existence. The presence of God has historically been central to natural law theory,<sup>64</sup> since man is subject to a nature which is fashioned by God and so even in civil society ultimate subjection to the divine will continues. Therefore, natural rights were derived from God, as were the liberties and rights of the citizen - civil liberties were concepts with divine foundations.<sup>65</sup>

---

<sup>61</sup> A comprehensive history of the developments of natural rights can be found in R. Tuck, 'Natural Rights Theories: Their Origin and Development' (1979), A.P. d'Entrèves, 'Natural Law: An Introduction to Legal Philosophy' (1970) and Palley, *op. cit.*, 14-24.

<sup>62</sup> Waldron sums up the theory of natural rights during this period as follows;

'In its classic form the theory of natural rights may be seen as an attack on two quite different approaches to the defence of political absolutism: it is a response to the theory of natural hierarchy, and it is a response to theories of contractual subjection to absolute authority.'

(J. Waldron (ed.), 'Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man', (1987), 7) and c.f. Palley, *op. cit.*, 21.

<sup>63</sup> (1689), P. Laslett (ed.) (1960).

<sup>64</sup> However, for a modern reformulation that does not claim to be founded on the existence of God, see Finnis, (1980), *op. cit.*

<sup>65</sup> See, M. MacDonald, 'Natural Rights' in J. Waldron (ed.), 'Theories of Rights' (1984), *op. cit.*, 26 and Waldron (1987), *op. cit.*, 18-19;

'The claim was not only that humans had certain rights which could not be alienated in society, but also that existing political relationships were in fact founded on an original agreement among the people in a given territory to establish institutions and procedures for the better preservation of these rights. People were supposed to have met together and agreed to pool their resources and entrust their common power to specialised agencies - princes, magistrates and legislators.'

(Footnote continues on next page)

It was with the secularisation of natural law theory in the eighteenth century that modern human rights developed. It was the philosophy of the Enlightenment, with its stress on rationalism and humanism that exposed the weakness in the philosophical foundations of theocratic natural rights. At the same time, the philosophical scepticism of the eighteenth century encouraged the development of secular conceptions of rights - human rights. Henkin,<sup>66</sup> for example, has described how the revolutions in the United States of America and France secularised natural rights by declaring rights to be rational, universal and attached to the individual. The divine origins of natural rights were, *inter alia*, replaced by Rousseau's secular social contract.<sup>67</sup> These human rights were asserted by the bourgeoisie in their political struggles with monarchical authority.

---

However, it should be noted that despite the fundamental role accorded to God in Locke's conception of natural law, he also conceived a key role for humans. Thus, it was envisaged that certain principles were self-evident to people of reason and that reason was a gift from God. For an explanation and criticism of Lockean intuitive reason, see M. White, 'The Philosophy of the American Revolution' (1978). This duality of a divinely created general framework in which mortals must exercise their moral reason occurred prior to the humanism of the Enlightenment and can be traced as far back as Thomas Aquinas, 'Summa Theologicae' (1267-1273);

'...of all others, rational creatures are subject to divine providence in a very special way; being themselves made participators in providence itself, in that they control their own actions and the actions of others. So they have a certain share in the divine reason itself, deriving therefrom a natural inclination to such actions and ends as are fitting. This participation in the eternal law by rational creatures is called the natural law.'

(s.5 'The Various Types of Law' (Qu.91), art.2, concl.)  
and concerning human law;

'...human reason has to proceed from the precepts of natural law, as though from certain common and indemonstrable principles, to other more particular dispositions. And such particular dispositions, arrived at by an effort of reason, are called human laws...'

(s.5 'The Various Types of Laws' (Qu.91), art.3, concl.).

This tradition in Natural law reasoning continues today in, for example, the work of J. Finnis, (1980), *op. cit.* The main attack on this form of reasoning was made by D. Hume, 'A Treatise of Human Nature' L.A. Selby Bigge (ed.), vol. III, i, 1-2 (1978), who asserted that reason could not resolve moral choices. Reason could merely reveal the choices available but could not be used in the actual process of choosing between various moral possibilities. In making moral choices people were stated to be exercising perceptions and sentiments (qualities in the mind, not in reality but which are taken to be real) which are apart from reason. Essentially, the Humean attack on natural law and its account of reason, which has been claimed to be one of the important antecedents of positivism (see, for example, N. MacCormick, 'Natural Law Reconsidered' (1981), Ox.J.L.S. 9), is that the 'is' revealed by reason cannot be used to derive 'ought' which is the subject of morality and human rights.

<sup>66</sup> L. Henkin, 'The Rights of Man Today' (1979), 5-13 and Waldron (1987), *op. cit.*, 13-18, also describes the process and effect of moral scepticism on natural rights.

<sup>67</sup> J-J Rousseau, 'The Social Contract' (1762), Books I & II.



This adoption by the bourgeoisie may be seen as one of the factors that is responsible for the decline in human rights in the nineteenth century. As the bourgeoisie moved out of opposition and into control the radical potential of human rights was dulled as the ruling bourgeois class sought to secure its power and dominance and consequently, human rights came to be seen as instruments of domination. However, more radical elements within society continued to challenge authority. The attacks on human rights that followed were from diverse directions; some highlighted their bourgeois nature<sup>68</sup> and others, their enduring philosophical weakness. Liberal attacks can generally be placed in the latter category.

One of the most celebrated of liberal attacks on human rights comes from Bentham. His criticisms are levelled at the claimed philosophical weaknesses of human rights.<sup>69</sup> He saw human rights as based on erroneous philosophical foundations whose endurance was an obstacle to what he saw as the theoretical veracity and reforming potential of utilitarianism.<sup>70</sup> As a liberal reformer, Bentham believed that people were governed by the principle of the maximisation of pleasure and the avoidance of pain. From this 'felicific' principle, he formulated a theory of individual, institutional and governmental action, that resulted in the general principle that a policy or action was good (and should be carried out) if it maximised the total sum of pleasure in society. The principle directs that the pleasure caused to the many by a policy or decision outweighs the pain or harm that may be caused to the few. Human rights, however, make claims to certain enduring principles that

---

<sup>68</sup> See K. Marx, 'On The Jewish Question' (1844) in D. McLelland (ed.) 'K. Marx: Selected Writings' (1977) 39. According to this critique, civil liberties prevented people from achieving a consciousness of their economic conditions; they encouraged them to focus on individual self-interest, instead of the inequalities that existed in society. As a result Marx claimed, at *op. cit.* 54;

'...none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual separated from the community.'

<sup>69</sup> 'Anarchical Fallacies: Being An Examination of the Declaration of Rights Issued During the French Revolution' (1843) in J. Bowring (ed.), 'The Works of J. Bentham' (1843), vol.III., 491 For another example of Bentham's attack on natural rights, see the extract from 'Pannominal Fragments', *op. cit.*, 217.

<sup>70</sup> For Bentham's utilitarian philosophy, see J. Bentham, 'An Introduction to the Principles and Morals of Legislation' Chps.1-5, (1789), in J.H. Burns & H.L.A. Hart (eds.), 'The Collected Works of Jeremy Bentham' (1970).

are stated not to be subject to this calculation. Bentham therefore saw them as obstacles to utilitarian reforming policies.<sup>71</sup>

The emergence of utilitarianism can be seen as part of the development of legal positivism, which claimed a clear separation between law and morality and factual and normative spheres. Philosophically, it was not seen as possible to derive norms from descriptive facts concerning human nature, which was precisely the claim of civil liberties.<sup>72</sup> It is suggested that these attacks on human rights by liberal theorists in the nineteenth-century are strongly linked to how those groups which advocated human rights were perceived. As was observed above, human rights were asserted by the dominant social group and as a consequence they were no longer seen as tools and justifications for radical social change and claims for social justice, instead they were perceived as actually impeding social reform. Originally they had been used to justify the usurpation of government power from the monarchy by the bourgeoisie but bourgeois interests had a limited radical content, especially when faced with a growing and increasingly more articulate and organised labour movement. In this context human rights were viewed as mechanisms that maintained an unjust status quo.

What can therefore be identified here is a liberal interest in mechanisms for achieving political and social change, as well as a hostility towards what were seen to be obstacles that frustrated change. It follows that liberals were hostile towards human rights.

---

<sup>71</sup> The incompatibility of utilitarianism and non-goal based human rights has been much discussed, see for example, H.L.A. Hart, 'Essays on Bentham: Jurisprudence and Political Theory', (1982) and D. Lyons, 'Utility and Rights' in J.R. Pennock & J.W. Chapman (eds.), 'Ethics Economics and the Law: Nomos XXIV' (1982), 107. Utilitarians have attempted to accommodate human rights and this has produced a vast body of literature. The issues are discussed and summarised in D. Lyons, *op. cit.*, and J.J.C. Smart & B. Williams, 'Utilitarianism: For and Against' (1973). One of the most famous attempts to reconcile utilitarianism and human rights was made by J.S. Mill in 'On Liberty' (1859). An interesting discussion of the Millian attempt at accommodation can be found in W.E. Conklin, 'In Defence of Fundamental Rights' (1979), 125-59.

<sup>72</sup> For an example of a general positive law theory, see J. Austin, 'The Province of Jurisprudence Determined' (1832), H.L.A. Hart (ed.) (1954), c.f. the Hart-Fuller debate; H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv.L.Rev. 593 and L. Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1959) Harv.L.Rev. 630.

### *Adopting human rights*

Given this hostility, how is it that today liberal theorists can be found supporting human rights? The answer lies in the so-called 'revival of natural law', although this is a humanistic conception that will presently be explained. It is this that has led to the contemporary popularity of human rights. The natural law revival is stated to be manifested in the ECHR and the United Nations Declaration of Human Rights 1948 (UNDHR).<sup>73</sup> The Second World War, the expansion of government activity and the increase in economic and social instability have been pointed to as crucial factors in the resurgence of human rights.<sup>74</sup> Human rights discourse has become pervasive and has expanded its scope to include the actions of states (thus it now appears as an integral part of international law).<sup>75</sup> However, between the terms 'natural law', 'natural rights' and 'human rights' there is contended to be a considerable amount of slippage in terms of meaning. For Pennock, the three terms are distinct and the distinctions between them are of crucial historical import;

The phrase 'human rights' or 'rights of man' seems to go back no more than two centuries and has come into common parlance only since World War II. It has, however, obvious affinities to the older expression, 'natural rights'. In fact, some writers treat them as synonymous....Although the term 'natural rights' has a close blood relationship with 'natural law', it is generally held that the distinction between the two marks a major turning point in the history of western political thought.<sup>76</sup>

For this writer, the crucial historical change is the shift from *law* to *rights*; from duties owed by the citizen to *obligations* imposed upon the state in favour of the citizen. What is meant by the claim that the twentieth-century has witnessed a 'revival in natural law'? It is claimed that it is *secular* natural

---

<sup>73</sup> See for example, S. Davidson, 'Human Rights' (1993), 29.

<sup>74</sup> For example, Lord D. Lloyd of Hampstead & M.D.A. Freeman, 'Introduction to Jurisprudence' (1985), 127 state that;

'..the idea of an overriding law expressing a higher truth and a higher justice than that embodied in man-made law is not easily extinguished. The decline in social and economic stability in the present century, the expansion in government activity, as well as the growth of weapons of destruction and policies of genocide coupled with reviving doubts as to the method of empirical sciences affording the sole avenue of truth, have led to a resurgence in favour of natural law thinking.'

<sup>75</sup> See for example, A. Cassese, 'International Law in A Divided World' (1986), 287-316, 'Human Rights in a Changing World' (1990), 29-32 and c.f. J.J. Shestack, 'The Jurisprudence of Human Rights' in T. Meron (ed.), 'Human Rights in International Law' (1984) vol.85-8.

<sup>76</sup> J.R. Pennock, 'Rights, Natural Rights and Human Rights - A General View' in J.R. Pennock & J.W. Chapman (eds.) 'Human Rights' (1981), 1.

law that has enjoyed a revival, therefore natural rights have come to be spoken of as being based on some enduring feature or features of the *human* condition. As a result, human rights have become a humanistic concept.<sup>77</sup> Nature is considered to be human and not divine and the revival in natural law can be seen as a move by liberal theorists to embrace human rights but in the process to also change the theoretical foundations upon which they are based.

However, this shift to the secular has already been seen to have occurred as part of the eighteenth century Enlightenment and so it cannot be the only factor that explains the adoption of human rights by liberals. Therefore, this change of view was also greatly supported by a perception that human rights could be used to effect reform and change, as opposed to merely maintaining the status quo. However, the resolution that grounding human rights in human nature seemed to provide was only temporary as liberal thought continued to discover theoretical problems with human rights. While disagreements flared as to the functions of human rights,<sup>78</sup> the relationship between rights, duties and rights-bearers<sup>79</sup> and the enforcement of rights,<sup>80</sup> the major issue became that of the foundation or ontology of human rights.<sup>81</sup>

#### *The ontological attack*

While some liberal theorists remain attached to the notion that human rights are embedded in some innate natural quality in human beings,<sup>82</sup> others have

---

<sup>77</sup> See, once again, L. Henkin, *op. cit.*, 5-13 and Waldron *op. cit.*, (1987), 13-18.

<sup>78</sup> See, for examples of different functions, J. Donnelly, 'Universal Human Rights in Theory and Practice' (1989), 36, R. Nozick, 'Anarchy, State and Utopia' (1971), Conklin, *op. cit.*, 149, and see also, H.L.A. Hart, *op. cit.*, (1982), Essay 4 and Lyons, *op. cit.*

<sup>79</sup> See H.L.A. Hart, (1982), *op. cit.*, Essay 7, where Bentham's theory is also analysed and c.f. N. MacCormick, 'Legal Right and Social Democracy: Essays in Legal and Political Philosophy', (1982), chp.8 and J. Raz, 'Right-Based Moralities' in Waldron, *op. cit.*, (1984), 182.

<sup>80</sup> See, T. Campbell, D. Goldberg, S. McLean & T. Mullen (eds.), 'Human Rights: From Rhetoric to Reality' (1986), especially chps.1-5 and T.R.S. Allan, 'Constitutional Rights and Common Law' *Ox.J.L.S.* 11 [1991] 453.

<sup>81</sup> See R. Dworkin, 'Taking Rights Seriously' (1978), 171-2 and Conklin, *op. cit.*, 4 & 13-116 for examples of different foundations.

<sup>82</sup> Donnelly, *op. cit.*, 17 provides a contemporary example;

The source of human rights is man's moral nature, which is only loosely linked to the "human nature" defined by scientifically ascertainable needs. Human rights are "needed" not for a life but for a life of dignity; as the International Human Rights Covenants put it, human rights form "the inherent dignity of the human person." Violations of human rights deny one's humanity; they do not necessarily keep one from satisfying one's needs. We have

(Footnote continues on next page)

doubted the existence of an unchanging and universal human nature and consequently preferred to found human rights on various forms of consensus. In order to understand these arguments based upon consensus, the ontological attacks upon human rights must be explored.

The ontological nature of human rights has been frequently investigated and it has often been claimed on the basis of these inquiries that human rights do not exist, in the sense of being a part of any verifiable, empirical reality. As a result, it is said that human rights are merely illusions, metaphysical nonsense and subjective constructs. Claims to self-evidence and universal applicability are therefore stated to be false. Two examples of the attacks on the foundations of human rights, which proceed by a rejection of empirical reality are moral scepticism and Scandinavian Realism.

The theory of J.L. Mackie<sup>83</sup> provides an example of moral scepticism. Moral scepticism is generally the claim that there are no objective values, whereas ethical realists claim that there are no necessarily universal values, instead there are differences between communities and persons as to values. Mackie sees the latter as being an example of the former. He asserts that the argument that there are no absolute truths or values can be manifested in the further claim that claims to objective truth and value are really subjective and therefore relative as between persons. He, however, concedes that the concept of objective values is built into ordinary moral thought and language (which he takes for his purposes to be constituted by the European tradition of moral philosophy) but that this ingrained belief is an error.

---

human rights not to the requisites for health but to those things "needed" for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights. The human "nature" that grounds human rights is a moral posit, a moral account of human possibility. The scientist's human nature sets the "natural" outer limits of human possibility. The moral nature that grounds human rights says that beneath this we may not permit ourselves to fall.'

(c.f. L.J. MacFarlane, 'The Theory and Practice of Human Rights' (1985), 3.).

A. Gewirth, 'Human Rights: Essays on Justification and Applications' (1982), 3, 15, 21, 41-66 provides a complex theory of the foundation of human rights. Space precludes a detailed analysis but essentially, he asserts that human rights function to secure the necessary conditions of human action - they are generic conditions. The foundation of human rights, according to this theory, lies in their function.

<sup>83</sup> 'Ethics: Inventing Right and Wrong' (1977), chp.1.

He attempts to expose the error by virtue of two arguments. The first is the argument from relativity - this is a factual claim that points to the fact that different societies have different moral codes, which reflect their adherence to and participation in different ways of life. The second argument is made from 'queerness': if civil liberties, as objective moral values existed, their existence would be quite simply 'queer'. This second claim breaks down into two points; firstly, that the metaphysical nature of objective human rights would make them entities that would be very much different from anything else in the universe; they would somehow have a 'not-to-be-doneness' built into them which could be perceived by everyone. Put more precisely, a consequential link would need to exist between the fact that an act has a certain effect (i.e. it causes pleasure or pain) and the consequence that this act is therefore right or wrong. For Mackie, the causal link comes from different and particular social environments and not from any metaphysical qualities of a claimed objective value.

The second point is epistemological. Mackie poses the question of how we would be aware of entities of objective value. He claims that to perceive these objects a special faculty, moral perception or intuition would need to be possessed that would be markedly different from ordinary ways of cognising objects. Behind this claim is the belief that objects are normally perceived using empirical methods. Given that civil liberties cannot be said to exist empirically, they must be perceived by virtue of an extraordinary sense. He concludes that to perceive objective values/truths would require a special intuition but that this intuition is subjective.<sup>84</sup>

According to Mackie, objectivisation, as the error of western thought can be understood as part of what Hume called the mind's 'propensity to spread itself on external objects'.<sup>85</sup> When this process is aggregated across a community, it is seen that what is objectified is determined by society; moral judgements are sought to be made authoritative for the entire community by making claims to their objective validity. In short, human rights lack any objective foundation.

---

<sup>84</sup> For the problems of intuitionism and self-evidence, see M. White, *op. cit.*

<sup>85</sup> *op. cit.*, 42.

Another source of attack on the existence of civil liberties is that of empiricism. Mackie's version of moral scepticism is based upon empiricist cognitive assumptions but the belief that the only reality that exists is that which can be empirically verified, manifests itself in other schools of thought that deny the existence of human rights.

Human rights were also criticised by the Scandinavian Realists. This school of thought can be seen as a fusion of behaviourist and verificationist linguistic theories<sup>86</sup> with realist legal philosophy. Once again there was an insistence on the existence of an empirical world. It was felt that the only linguistic entities that had meaning were descriptions; descriptions of empirical facts. This belief can be seen as the continuing referential and realist element but Scandinavian Realists went on to assert that meaning was also *causal*. The possibility that events in the legal world could have effects in the real world could be verified empirically because since it was a real world (and necessarily, empirical), real changes were manifested by an alteration in the state of affairs in this empirically verifiable sphere.

The acknowledged father of this movement, Axel Hägerström,<sup>87</sup> criticised legal rights as being sham concepts, since they had no correspondence to reality. He went on to add that there was a psychological explanation for the belief that legal rights existed. This resulted from the feelings of strength, power and security that a right holder had as a result of his/her beliefs about what it meant to possess a right. A notion like that of human rights would therefore have been seen as merely another sham concept behind which lay an empirical reality.

In the work of later Scandinavian Realists, the importance that Hägerström accorded to psychology remains but more attention is given to what the actual empirical facts behind the stated illusionary legal entities actually are. For Olivecrona, legal words, such as contract and rights can be seen as 'imperative performatives'; they bring about changes in the empirical sphere not because they exist (in the sense of having an empirical referent) but because of a continued belief in their existence, feelings of obligation,

---

<sup>86</sup> See C. Morris, 'Signs, Language and Behaviour' (1946), A.J. Ayer, 'Language, Truth, Logic' (1936) and I. Berlin, 'Concepts and Categories: Philosophical Essays' (1980), 12-31.

<sup>87</sup> 'Inquiries into the Nature of Law and Morals' (1953), chp.1 & 315-24.

coercion, in other words, by virtue of *psychological* factors. This psychological belief results in otherwise mystical and illusory linguistic entities, such as human rights, appearing as real. In fact, human rights can have no affect in the real world, what lies behind them is the fact of psychological and social indoctrination. Behind law and therefore civil liberties is the fact of coercive power: human rights do not exist and are merely instruments of social control backed up by force. The key element to note about Scandinavian Realism is the reduction of linguistic meaning to facts; the only words that have meaning are those that describe an existing empirical state of affairs. Human rights fail to meet such requirements. Therefore, in exercising human rights, people are in reality making use of the social force and coercion that backs up the law.<sup>88</sup>

### *Responding with consensus*

In the face of these attacks on the existence of truth and objectivity, liberal theorists sought to place human rights on firmer ground. But where could such ground be found? The answer was to be located in the moral agreements within communities - social consensus.<sup>89</sup> This approach will be shown by taking as examples the work of three major liberal theorists; Jeremy Waldron, Ronald Dworkin and Alan Gewirth.

According to Jeremy Waldron, the fundamental element of contemporary liberal philosophising about civil liberties is that it is carried out despite the doubts that surround the existence of a meta-ethics and objectivity;

To that extent the theory of rights is participating fully in what is undoubtedly the great achievement of modern moral philosophy - to show how argument and justification are possible and may proceed, even while the meta-ethics of realism and objectivity remain controversial, problematic and unclear.<sup>90</sup>

---

<sup>88</sup> See, K. Olivecrona, 'Law as Fact' (1939), Introduction & chp.1 and 'Legal Language and Reality' (1962), 177-181. The performative linguistic theory was first systematically elaborated by J.L. Austin, see 'Philosophical Papers' (1970), 233-52. For further examples of Scandinavian Realist thought, see A.V. Lundstedt, 'Legal Thinking Revised' (1956) and A. Ross, 'Tû-tû' (1957) 70 Harv.L.Rev. 812, 'On Law and Justice' (1958) and 'Directives and Norms' (1968).

<sup>89</sup> See Palley, *op. cit.*, 12 and D. Gauthier, 'Morals by Agreement' (1986).

<sup>90</sup> (1987), *op. cit.*, 165-66.



He characterises contemporary theories of rights as no longer seeking to claim that human rights exist empirically. Rather, he feels that debate as to the ontology of human rights, and moral foundations in general, has shifted;

Moral justification is no longer the search for knock-down arguments, irresistible to human reason: it is a quest for *shared foundations*, and so it becomes important to find out what the foundations of our rights-claims really are.<sup>91</sup> (emphasis added).

Waldron can be seen to be stating that the existence or foundation of human rights is no longer sought in some realm of truth/falsity. Instead, the contemporary shift in the direction of human rights theorising is towards a search for foundations around which a consensus may be achieved, irrespective of whether or not civil liberties are grounded in empirical reality. If there is agreement as to the ontological nature of human rights, then this constitutes a sufficient foundation. Essentially, Waldron asserts that human rights exist because they are founded on consensus.<sup>92</sup>

Dworkin's theory of rights also provides a good example of this approach. In 'Law's Empire',<sup>93</sup> he claims that civil liberties are part of an interpretative concept of law.<sup>94</sup> Dworkin argues that a *concept* of law must justify, on the basis of the requirements of human rights, the use of collective force and coercion.<sup>95</sup> He then claims that there are rival *conceptions* of law; conventionalism, pragmatism and integrity.<sup>96</sup> Dworkin critically analyses each of these rival conceptions and finally adopts integrity as the best conception of law. His reasons for such a decision are not of relevance here but rather what is of interest is his concept of law. This, he claims, is taken from *existing* and *common* assumptions of a particular interpretative

---

<sup>91</sup> (1987), *op. cit.*, 165.

<sup>92</sup> Waldron, (1984), *op. cit.*, 3;

'Even if it is true....that moral judgements are nothing but expressions of attitudes, it does not follow that it is mistaken or fallacious to express the attitudes we have, nor does it follow that it is wrong to give vent to an attitude which is categorical and implicitly universal in the scope of its application....If meta-ethical realism is untenable, then rationally resolvable disputes in ethics become possible only between those who share certain fundamental values or principles in common.'

<sup>93</sup> (1985) *op. cit.*

<sup>94</sup> *op. cit.*, 45-86.

<sup>95</sup> *op. cit.*, 93;

'Law insists that force not be used or withheld, no matter how beneficial or noble the ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.

<sup>96</sup> *op. cit.*, chps.4, 5 & 6 deal respectively with each of these rival conceptions.

community<sup>97</sup> - it is suggested that this community can be equated with modern liberal society.

The criteria for judging which is the best conception of the concept of law are two-fold; first, the conception must be the best fit and secondly, the best justification of existing practices and arrangements. Dworkin, therefore takes existing practice and a consensus as to the ideals and goals that law sets out to achieve as his starting point or the foundation of law.<sup>98</sup> It is within this area of consensus that rival conceptions are debated. It is contended that human rights, within such a scheme of law are treated as creatures of social and political consensus and that they are made more precise by interpretations as to their 'weight' (and consequent applicability) to different factual circumstances. Dworkin's theory of rights as acting as trumps over policy and utility considerations, and as formulated in 'Taking Rights Seriously',<sup>99</sup> is therefore claimed to be the best interpretation (according to the criteria of best fit and justification) of human rights in *contemporary liberal societies*.

---

<sup>97</sup> Dworkin claims that an interpretative concept goes through three stages. It is at the first 'pre-interpretative' stage that an interpretative community formulates a commonly accepted concept of law; (1986) *op. cit.*, 70-6 and at 90-1 the idea of consensus is made more explicit; 'Law cannot flourish as an interpretative enterprise in any community unless there is enough initial agreement about what practices are legal practices so that lawyers argue about the best interpretation of roughly the same data. That is a practical requirement of any interpretative enterprise...I do not mean that all lawyers everywhere and always must agree on exactly which practices should count as practices of law, but only that the lawyers of any culture where the interpretative attitude succeeds must largely agree at any time. We all enter the history of an interpretative practice at a particular point; the necessary preinterpretative agreement is in that way contingent and local.'

<sup>98</sup> (1986) *op. cit.*, 164;

The great classics of political philosophy are utopian. They study social justice from the point of view of people committed in advance to no government or constitution, who are free to create the ideal state from first principles. So they imagine people living in a pre-political state of "nature" writing social contracts on blank slates. But real people in ordinary politics act within a political structure as well as on it. Politics, for us, is evolutionary rather than axiomatic; we recognise, in working toward a perfectly just state, that we already belong to a different one.

Ordinary politics shares with utopian political theory certain political ideals of a fair political structure, a just distribution of resources and opportunities, and an equitable process of enforcing the rules and regulations that establish these. I shall call those for brevity, the virtues of fairness, justice, and procedural due process.'

This long quotation is claimed to highlight Dworkin's claim that practices and institutions formed by consensus are a starting point for theorising about law, and ultimately, it is contended, human rights.

<sup>99</sup> *op. cit.*

The social consensus foundation can also be located in Dworkin's 'one-right answer' thesis. The one-right answer or best interpretation is claimed to exist within each conception of law; he does not claim that there is one right answer that will unite all conceptions. Essentially, Dworkin can be seen as advocating different right answers according to different starting points or background facts. Seen from another viewpoint, the best interpretation/one right answer is not a claim to an objective truth but rather to an interpretation that best fits and justifies existing and commonly accepted social practices and arrangements. What results are controversial answers or interpretations that will always be open to challenge and must be seen as specific and particular to different communities.

For Dworkin, human rights are seen as part of the existing consensus of politico-legal practices within Western liberal society. They exist insofar as these practices exist. Gewirth's theory of rights can also be interpreted as proceeding from consensus assumptions. On a *prima facie* reading, this assumption is less easy to identify but is nevertheless fundamental to his logical reasoning, which is based upon persons treating others consistently (the 'principle of generic consistency').<sup>100</sup>

Gewirth asserts that human rights are *moral* but he assumes that there is a rational consensus as to the nature of morality. In this way he seeks to overcome the problems raised by ethical relativity and moral scepticism. Accordingly, he formulates a certain 'core' or consensus concerning morality;

Amid the various divergent moralities with their conflicting substantive and distributive criteria, a certain core meaning may be elicited. According to this, a morality is a set of categorically obligatory requirements for action that are addressed at least in part to every actual or prospective agent, and that are intended to further the interests, especially the most important interests, of persons or recipients other than or in addition to the agent or the speakers.

...moralities differ with regard to what interests of which persons they view as important and deserving of support. But amid these differences, all moralities have it in common that they are concerned with actions. For all moral judgements, including rights-claims, consist directly or indirectly in precepts about how persons ought to act toward one another.<sup>101</sup>

Gewirth claims that human rights are justified because their objects are the generic necessary goods of human action and activity, including morality;

---

<sup>100</sup> *op. cit.*, 3.

<sup>101</sup> *op. cit.*, 45-6.

Human rights...are normative relations to Objects which one must have in order to be an agent. It is for this reason that human rights are uniquely and centrally important among moral concepts: they are the necessary basis and focal point of all morality, since no morality, together with the goods, virtues, and rules emphasised in diverse moralities, is possible without the necessary goods of action which are the Objects of human rights.<sup>102</sup>

Using what is termed the 'dialectically necessary method', he demonstrates that all persons, must logically hold or be committed to human rights, if this were not the case that person would be denying his or her capacity to act as a 'prospective purposive agent'.<sup>103</sup> Human rights are therefore a rational necessity and the consensus is consequently a rational one.<sup>104</sup> Having founded morality upon a consensus, in which it is agreed what are the basic conditions for human action, and thus morality, these basic conditions are then said to be guaranteed by two human rights; freedom and well-being;

where freedom consists in controlling one's behaviour by one's unenforced choice while having knowledge of relevant circumstances, and well-being consists in having the other general abilities and conditions required for agency.<sup>105</sup>

The human rights that, according to Gewirth, exist as a result of a consensus as to what is required for human action are less contingent than Dworkinian human rights. For Gewirth, the scope of the consensus stretches beyond a particular political community, it covers the whole of humanity. Gewirth asserts that it is this basic agreement as to the concept and ontology of morality that makes rival conceptions of morality possible.<sup>106</sup> At this level, human rights can be claimed to be universal. However, this is a claim to a weak form of universality; it is claimed that morality has the same foundation everywhere and thus human rights, as a means to secure particular conceptions of morality are found everywhere but Gewirth should not be seen to be stating that specific human rights, nor indeed a specific morality, are universal. On the contrary, the two rights he proffers are so general that they encompass a wide range of possible human rights and for this reason

---

<sup>102</sup> *op. cit.*, 6.

<sup>103</sup> *op. cit.*, 20.

<sup>104</sup> *op. cit.*, 21 *et. seq.* and at 25;

The method achieves a kind of rational necessity in the form of truths relevant to agency, including affirmations of rights, which no agent can deny without self-contradiction. Thus the initial moral dissensus is brought to a halt by truths that every agent logically must accept.'(c.f. M. Moore, Foundations of Liberalism (1993), 11-32).

<sup>105</sup> *op. cit.*, 47.

<sup>106</sup> *op. cit.*, 6.

they may be more fruitfully seen as constituent elements of a morality arrived at via rational consensus.<sup>107</sup>

Therefore, it is claimed that contemporary liberal theories of rights are characteristically consensus based, despite variations in how this consensus is claimed to be constituted. Waldron, Dworkin and Gewirth present but three examples of this approach.<sup>108</sup> However, they highlight a common feature of liberal consensus theories, which is that consensus is usually implicit. The reason for this would seem to lie in the fact that the dominant view of human rights remains that which sees them as universal natural rights which persons hold by virtue of some quality that is innate to their human condition<sup>109</sup> and not this jurisprudential view as to consensus. This view is therefore made rather implicitly in the face of the dominant view. Paradoxically human rights have been universally accepted in the fora of national and international politics, whilst their jurisprudential weaknesses continue to be exposed.<sup>110</sup> It is claimed that liberal theorists are caught on the one hand between exposing these weaknesses and denying the progressive reforms that can be effected

---

<sup>107</sup> Although, in Chapter 13 Gewirth makes the argument for specific civil liberties, it is suggested that from the same starting point, arguments can also be made in favour of other liberties.

<sup>108</sup> For another example, see T. Mullen, 'Constitutional Protection of Human Rights' in T. Campbell *et. al., op. cit.*, 29. Mullen asserts that civil liberties are based upon consensus. This consensus is stated to be objective but the form of objectivity is a 'weakened' one, since it is based on a rationally informed consensus, which he sees as approximating to the weak objectivity that in contemporary times is perceived to exist in the philosophy of science; 'Objectivity resides in the procedures and the methods adopted and their consensual acceptance by the scientific community rather than in a direct correspondence to independent reality. Given that the objectivity of science is being viewed in a less transcendental or absolute sense, it seems reasonable to apply a similarly qualified standard to moral reasoning.' (pg.29).

This concept of weak objectivity has already been encountered in the context of Gewirth's theory but it is formulated here using arguments from Rawlsian 'wide reflective equilibrium' and the Habermasian concept of an 'ideal speech situation' (see, pgs.23-9).

<sup>109</sup> See Donnelly, *op. cit.*, 17, Conklin, *op. cit.*, 189-211 and MacFarlane, *op. cit.*

<sup>110</sup> Tuck, *op. cit.*, 1 makes this point;

'The thirty years since the war have witnessed a curious phenomenon: the language of human rights plays an increasingly important part in normal political debate, while academic political philosophers find it on the whole an elusive and unnecessary mode of discourse.'

The same observation is made by many commentators, see, for example, T. Campbell, 'Realising Human Rights' in T. Campbell, *et. al., op. cit.*, 13;

'Human rights have emerged since the adoption of the Universal Declaration of Human Rights as a central rallying point for many who seek to champion morality in politics. This has occurred despite the absence of any adequate philosophical vindication of the idea of universal rights.'

via human rights and on the other, minimising these theoretical difficulties and lending their voices to calls to protect human rights.

Nevertheless, implicit as it may be, what has been seen is that contemporary liberal theorists now support human rights and ground them in consensus. It will be argued that as a consequence, liberals can support the position taken up by the theory that is adopted here but this claim will be developed as part of the narrative of the approach to human rights by the critical school of law.

### **THE NARRATIVE OF THE CRITICAL SCHOOL**

What will be attempted to be shown here is that an important element within the critical legal school has moved away from attacking human rights in order to support them. In making such a move, however, they have insisted upon seeing human rights as social constructs and whilst accepting their potential to improve the position of the weak and oppressed, they have also placed strong emphasis on the use of power and dominance that lies behind consensus and which thus involves human rights.

If liberalism is an extremely broad movement, the same can certainly be said of the critical legal school and, as will be seen, the diversity of approaches may put into question attempts to characterise them as a single movement. Given these factors and the less well known history, aims and jurisprudential beliefs of critical thinkers, their narrative will be somewhat more detailed than that of the liberal theorists.<sup>111</sup>

---

<sup>111</sup> The claims of K. Llewellyn, Some Realism About Realism (1931) 44 Harv.L.Rev. 122, as to there being a *movement* but not a *school* of American Realists could be applied to critical legal theorists.

### *A broad church*

Critical legal theorists attack liberal legality using a number of different strategies and draw inspiration from diverse schools of thought.<sup>112</sup> There is a claimed communality of purpose which roughly unites these disparate approaches;

Advocates of critical legal studies may not all share the same rank ordering of dissatisfactions but all are reacting against features of the prevailing orthodoxies in legal scholarship, against the conservatism of the law schools and against many features of the role played by law and legal institutions in modern society.<sup>113</sup>

Critical legal theory claims to be politically committed, it rejects the view that legal scholarship is value neutral and this therefore affirms its commitment to activism.<sup>114</sup> This political commitment is fleshed out by Grigg-Spall and Ireland,<sup>115</sup> who claim that the central focus of critical legal scholarship is to explore how law supports a pervasive system of oppressive, non-egalitarian relations, which lies behind the claim on the part of liberal legalism to value neutrality. Goodrich sees the present movement as the latest example in a series of theoretical challenges to the claimed value and objectivity of the law. He claims that theories of modernity, postmodernity, discourse, deconstruction, difference and decay (which are here, as far as their application to theories of law, subsumed under the heading of 'critical legal theory' or 'scholarship') are reactions against modernity. These reactions produce particular experiences or powerlessness, irrationality and loss of faith;<sup>116</sup>

It is a century later, towards the close of the twentieth century and in the context of renewed pessimism most obviously associated with the various forms of nuclear power and pollution, with the renewed intensity of the technological revolution and with the perceived failure of reformist and revolutionary movements in the western industrialised economies, that the legal institution is most likely to be affected by a general tide of cultural defeat.<sup>117</sup>

---

<sup>112</sup> There are a large number of perspectives which have been grouped under this umbrella heading, including modern pragmatist philosophy, deconstruction and post-structuralism (A. Hunt, 'The Critique of Law: What is "Critical" About Critical Legal Theory' in P. Fitzpatrick & A. Hunt (eds.), 'Critical Legal Studies' (1987), 6) and critical theory, feminism and post-modernism are added by I. Grigg-Spall & P. Ireland (eds.), 'The Critical Lawyers' Handbook' (1992), x.

<sup>113</sup> Hunt, *op. cit.*, 5.

<sup>114</sup> *op. cit.*, 6.

<sup>115</sup> *op. cit.*, ix.

<sup>116</sup> See P. Goodrich, 'Law and Modernity' [1988] M.L.R. 545 at 548.

<sup>117</sup> *op. cit.*, 547.

For Goodrich modernity is about the experience of a broad and pervasive nihilism; a nihilism which rejects the nineteenth century rationalist tradition and Christian moral culture. Essentially, critical legal theory is informed by a disbelief in rationality and objectivity.<sup>118</sup> Hutchinson<sup>119</sup> sees this disbelief in rationality and objectivity as an attack on legal formalism, which is claimed to have put forward a natural and true view of the condition of human existence. This in turn is claimed to be part of the universalism, humanism and foundationalism of the Enlightenment Project. This mode of thought is stated to be centrally concerned with a search for a foundational and rational mode of theorising and this process has continued in contemporary liberal thought. He criticises the Enlightenment Project because contrary to its claims, it has no position of theoretical innocence or political neutrality. Instead, it is a theory produced in specific historical circumstances, thus it is neither universal, nor neutral.<sup>120</sup>

The diverse influences and variations in methodology have been seen as a liberating aspect of critical legal scholarship, in that there is a refusal to put forward one common truth or theory, which in turn has been one of the criticisms levelled at the rationalist/Enlightenment/liberal legal system and

---

<sup>118</sup> *op. cit.*, 549;

'Nihilism may be provisionally defined as a combination of elements, as a sense of the absurdity of existence and of the unwarranted pretension of social life, as a perception of the nothingness to which all things lead and as a consequent realisation of the contingency of all values and the fragility of all claims to objectivity.'

The incorporation into law of insights from other disciplines is noted in a series of essays edited by P. Fitzpatrick ('Dangerous Supplements: Resistance and Renewal in Jurisprudence' (1991)), who himself criticises the partial application of these insights by legal scholars in order to bolster, instead of to challenge the status quo, *op. cit.*, 1-33. He asserts that once these developments have been even partially allowed to enter the sphere of law they become *dangerous supplements*, which threaten to subvert the claim of legal jurisprudence to being real, true, posited, rational and universal. His essay mainly consists of an exploitation of the linguistic philosophy contained in the Hartian concept of law, by treating and exposing linguistic philosophy as a dangerous supplement. Goodrich's claim cannot be explored here but what should be noted is the influence of critical social theories on critical legal theorists. Perhaps Goodrich's point may be seen as a criticism that despite their radicalness, critical legal theorists have once again only partially and selectively incorporated these developments into legal theory.

<sup>119</sup> A. C. Hutchinson, 'Dwelling on the Threshold: Critical Essays on Modern Legal Thought' (1988).

<sup>120</sup> *op. cit.*, 32;

The great systems of philosophy and styles of theorising about the human condition are not fixed nor immutable. The Enlightenment is a phase, albeit an extended and durable one.'



society.<sup>121</sup> However, as a result, of these various inspirations and approaches there are tensions between different schools of thought. The diverse approaches to civil liberties explain the tensions that will be observed between the different philosophies, as well as the disagreement as to whether human rights should be rejected outright or if they can be of use, once reformulated.

### *Approaches to human rights*

As part of the bicentennial celebrations of the French Declaration of the Rights of Man, a collection of essays entitled 'Post-Modern Law: Enlightenment, Revolution and the Death of Man'<sup>122</sup> was published. As the title suggests, these essays were inspired by post-modern thought, which was stated to be directed

against the most complete modern legal project, that produced by the French Revolution.<sup>123</sup>

As regards human rights, the central claim of postmodernism,<sup>124</sup> is that they are aspects of a false secular rationalism. The Enlightenment Project is said to have failed in its own terms because it claims to have dispensed with the mysterious, irrational and superstitious but instead it is alleged that the religious/metaphysical are incorporated into modern thought.<sup>125</sup> Despite chaos, diversity and ambiguity, modernity (Enlightenment thought) puts its faith in an enduring reason and rationality. In deconstructing this secular rationalism,<sup>126</sup> the starting point is the death of 'Man'. By this is meant the centring and fundamental role of the individual and rational subject in contemporary thought. It is then claimed that with the death of the subject, the Rights of Man must also fall.<sup>127</sup> The de-centring of the subject/individual

---

<sup>121</sup> A. Thomson, 'Foreword: Critical Approaches to Law: Who Needs Legal Theory?', in Grigg-Spall & Ireland, *op. cit.* 3-4.

<sup>122</sup> A. Carty (ed.) (1990).

<sup>123</sup> *op. cit.*, viii.

<sup>124</sup> For a general introduction to legal postmodernism, see C. Douzinas, R. Warrington & S. McVeigh, 'Postmodern Jurisprudence: The Law of Text in The Texts of Law' (1991), Introduction & chp.1 and C. Douzinas & R. Warrington, 'The (Im)possible Pedagogical Politics of (the Law of) Postmodernism' in Grigg-Spall & Ireland, *op. cit.*, 31.

<sup>125</sup> *op. cit.*, 18.

<sup>126</sup> *op. cit.*, 5.

<sup>127</sup> *op. cit.*, 4;

'It is not necessary to deconstruct or ridicule the Rights of Man. They will fall apart of their own accord, because death is at the heart of them. "Modern" thought seems to suppose itself infinite. This is not simply wrong. It is silly - hence the derision.'

and the claim that the individual subject is not real but rather a social construct is one of the main features of postmodernism.<sup>128</sup>

Furthermore, the rationality of Enlightenment law is attacked and as a consequence so are human rights. Goodrich<sup>129</sup> critically analyses Rousseau's social contract, seeing it as an attempt to challenge the finitude of the human condition by presenting it as an object that endures beyond and defers the death of any human being.<sup>130</sup> He shows how Rousseau presents the social contract as a rational foundation for modern society but also how his theory fails to address the way in which the individual subject is constructed by the contract (the enjoyment of freedom, rationality and choice is as a result of the social contract; these being qualities that constitute the Enlightenment concept of individuality), whilst at the same time being repressed (those who refuse to obey the general will, as manifested by the contract, are either compelled to do so, or punished).<sup>131</sup> The social contract constructs the individual, there is no prior or real individual subject that enters into the contract because the contract, like society, creates and communicates to itself. There is no real world or real individuals outside it. Essentially, law is its own creation and it excludes other ways of thinking and conceiving of law.<sup>132</sup> Carty comes to the conclusion that law does not communicate or relate to a real world; everything has been constructed and invented. However, the aim of the claim to objectivity, truth and the real is to ward off death - to achieve immortality. He celebrates the return of postmodernist theory to the finite circumstances of the individual subject which modernist thinkers (he cites Rousseau and Durkheim) sought to deny.<sup>133</sup> What is revealed to lie behind the claim to rationality is irrationality.

---

<sup>128</sup> See R. Gaete, 'Postmodernism and Human rights: Some Insidious Questions' *Law & Critique* 2 [1991] 149 at 153.

<sup>129</sup> 'Contractarians: Rousseau in the Year Two Thousand' in Carty, *op. cit.*, 40.

<sup>130</sup> *op. cit.*, 44.

<sup>131</sup> *op. cit.*, 58.

<sup>132</sup> *op. cit.*, 61.

'Such is the nature of our contract, it is that which binds us to discourse and ties us to the institution and to law. Equally, the contract is that which excludes, it is that which immunises us against other discourses and precludes that we even think of any other law.'

<sup>133</sup> 'Post-Modernism in the Theory and Sociology of Law, or Rousseau and Durkheim as read by Baudrillard' in Carty, *op. cit.*, 71 and at 87;

'In order to be assured of his identity [that of the individual], the latter has need of a myth of origins and of destiny. Nevertheless, reality is pure panic. The subject is never there.'

Therefore, critical theorists claim to identify a tendency to attempt to give meaning and authority to human existence by looking beyond the human condition and its irrational and finite context.<sup>134</sup> As a result of a fear concerning the nature of this condition, there has been a continued attachment to the infinite and immortal; in the form of constructed, rational structures that endure beyond the existence of individuals. It is these qualities that are absorbed and are central to the law. These criticisms will be further illustrated by briefly looking at the work of two theorists whose work has inspired critical legal scholars: Jacques Derrida and Michel Foucault, before then showing the consequences these theories have had for human rights.

Carty<sup>135</sup> presents Derrida and Foucault as key thinkers whose theories have de-centered the subject. Foucault is seen as showing how 'Man', contrary to what is claimed, is not an autonomous, self-determining agent. According to Foucault, 'Man' is once again the subject of forces which he no longer controls nor understands; 'Man' is merely a part of the pervasive production process in modern capitalist society and is constructed by pervasive power relations in society. Derrida is seen as presenting law as a metaphor for an absence of direction. 'Man' is seen as once again spellbound by myth even in his intellectual endeavours and is subject to a 'white mythology' which the Enlightenment had claimed to have exorcised.<sup>136</sup>

Both theorists can be characterised as attacking modernist/Enlightenment claims to objective foundations/truth/reality. For Derrida, there is no *presence*, no real, or at least, perfect way to communicate with a supposed reality. Derrida asserts that the cognition of the objectively real is never achieved, it is indefinitely postponed, indefinitely deferred and perpetually delayed because it must always be approached or mediated using the subjective viewpoints of each person. It is a myth to therefore suppose that there is a prior presence or foundation of meaning before other corrupting mediations, such as language, are applied. There can therefore be no objective truth because in order to approach it, substitutes for it must and always are employed, which are referred to as 'dangerous supplements'.<sup>137</sup> Within texts

---

<sup>134</sup> Hutchinson, *op. cit.*, 4.

<sup>135</sup> *op. cit.*, 4.

<sup>136</sup> The study by P. Fitzpatrick, 'The Mythology of Modern Law' (1992), is an example of the application of this approach to law.

<sup>137</sup> R. Boyne, 'Foucault and Derrida: The Other Side of Reason' (1990), 94 and at 97;

(Footnote continues on next page)

and, ultimately, within Western thought, the claim to a foundation, to presence, is stated to be the privileging of a particular and logocentric conception. Derrida's work has shown that such privileging is always dependant on what it purports to exclude.<sup>138</sup> The prioritising is revealed and that which has been excluded but never entirely destroyed is brought to the surface. An important aim of this approach is to re-centre, or re-emphasise the excluded or marginalised.

Foucault's approach, on the other hand, does not work with texts. He sees society as consisting of relations of power and knowledge. These relations are not dominated by one particular group but are instead pervasive throughout society. He illustrates these relations in areas such as mental illness, punishment and sexuality. Human existence is shaped by these power-knowledge relations; the individual subject is itself a construct of such relations and as a result, the individual, as both the subject and object of knowledge, is investigated. Structures, institutions, beliefs, truths and reality are revealed to be historically specific and contingent. Foucault also stresses the importance of local knowledge; an emphasis on that which is different, specific and particular and on what can be termed the micro-level of analysis. He eschews grand theories and narratives that claim to expound truth or reality. In this connection, he observes that a consequence of power is resistance and he asserts that this should be carried out on the local level. Another crucial aspect of Foucaultian thought is that by virtue of resistance, marginalised and excluded groups and beliefs can be revealed.<sup>139</sup>

---

'Within the main tradition of Western metaphysics, what is important is the original presence. The original presence is held to determine its empirical manifestations, its signs, marks, language, writing. The philosophical prejudice has been continually to disparage the phenomena subsequent or supplemental to that presence.'

(c.f. M. H. Kramer, 'Legal Theory, Political Theory and Deconstruction: Against Rhadamanthus' (1991), 1-35).

<sup>138</sup> This approach is echoed in the context of legal deconstruction; J.M. Balkin 'Deconstructive Practice and Theory' (1987) 96 Yale L.J. 743, 763 states;

'...the goal of deconstruction is not the destruction of all possible social visions. By revealing the elements of human life relegated to the margin in a given social theory, deconstructive readings challenge us to remake the dominant conceptions of our society.'

<sup>139</sup> See B. Smart, 'Michel Foucault' (1985), G. Turkel, 'Michel Foucault: Law, Power, and Knowledge' [1990], Jo. of Law and Soc. 170, Hutchinson, *op. cit.*, chp.9 and R. Boyne, *op. cit.*, chp.1.

### *A dilemma*

The consequences of these approaches to human rights is a dilemma. Perhaps human rights could be used as means to secure resistance but this would involve an acceptance of their role in the continuing fiction and domination of the Enlightenment. This point can essentially be seen as the tension and disagreement between critical scholars as regards human rights: should they be rejected or utilised? This dilemma will now be more closely examined, as well as the responses by theorists.

From a structuralist-inspired standpoint, Hunt<sup>140</sup> claims that human rights may be used positively in progressive politics, without succumbing to the 'myth of rights'. He advocates their use by disadvantaged groups on the basis that these groups must exercise and seek to defend civil liberties as part of a Gramscian counter-hegemonic struggle. It is claimed that human rights allow the interests and ideologies of other subordinate groups to be incorporated into a political struggle to challenge those in power. He asserts that it is only by incorporating these other interests that hegemony can be challenged. Human rights allow groups to move away from particular to universal interests that unite others in the struggle for change. However, Hunt in no way asserts that for this reason they are universal, merely that their universalist claims can secure beneficial effects for political movements.<sup>141</sup> What Hunt suggests is effectively the pragmatic utilisation of the mythical claims of human rights in order to secure political and social change and reforms.

Hunt's structuralist assumptions are clear and they provide the context which explains his views. He views society as constituted by structures of power-relations and he adopts a Gramscian theory of power relations. According to Thomson,<sup>142</sup> theorists that utilise structuralist approaches within the critical legal theory movement, *inter alia*, highlight how dominant groups use the legal system to further their own interests. More importantly, another important feature of structuralist approaches is said to be the dilemma of

---

<sup>140</sup> 'Rights and Social Movements: Counter-Hegemonic Strategies' *J.L. & Soc.* 17 [1990] 309.

<sup>141</sup> *op. cit.*, 321;

'The discourse of rights provides a key exemplification of the movement to the plane of the universal; rights are contestable and comparable, and they are capable of articulating social norms that are general and capable of sustaining legitimation.'

<sup>142</sup> Grigg-Spall & Ireland (eds.), *op. cit.*, 5.

using law to secure reform or even the downfall of the present system because it is commonly held that it is the very use of law that maintains the status quo.<sup>143</sup> It can be seen that Hunt's strategy is proffered in the context of scepticism about the use of rights<sup>144</sup> and is therefore an attempt to argue for the pragmatic use of human rights by making use of the very qualities for which they have been criticised.<sup>145</sup>

The dilemma as to the use of human rights can also be located in postmodernist approaches. While legal structuralists tend to begin with the affirmation of a deep and dominant structural hegemony so that any approach that advocates operating within that structure must justify itself from this starting point,<sup>146</sup> postmodernists approach this question from a different starting point.

---

<sup>143</sup> From a particular structuralist perspective, that of Marxism, H. Collins, 'Marxism and Law', (1982) at 125 discusses this predicament at length;

'An erroneous interpretation of the legal form, a false perception of the function of the law, a mistaken challenge or acceptance of the legal system could cost the revolutionary movement many years delay. If a law is obeyed when it should be openly flouted in order to increase class consciousness, the progress towards a revolution will be retarded. Conversely, if it is demonstrated that obedience to the established legal order and pursuit of reforms in the law favouring the working class will bring a revolutionary situation closer, then unlawfulness will be counterproductive. It is therefore essential for Marxism to develop a precise understanding of the correct response to the legal system as part of the strategy of revolutionary politics.'

He advocates (at pg.142) that those human rights that increase class-consciousness should be supported, defended and utilised;

'In certain cases...there will be a relatively clear choice for the radical. Taking the touchstone of Marxist strategy to be the heightening of class-consciousness, it is evident that certain legal conditions increase the opportunities for a working-class movement to gain cohesion. The kinds of rights which will be useful are freedoms to join political associations, to hold meetings and demonstrations, and to disseminate literature.'

<sup>144</sup> Hunt, *op. cit.*, 309;

'In their most general form the core of these criticisms consist of a warning against the illusions generated by the liberal faith in rights. The liberal "myth of rights" is the view that those suffering disadvantage should seek redress by striving to have their grievances protected by securing legal recognition of their claim as a right. Once a right is recognised, whether by constitutions, legislation, or judicial decision, all those whose rights are threatened or denied may approach the relevant court and have their rights enforced...'

<sup>145</sup> For a recent trenchant defence of the use of human rights in order to achieve improvements in American race-relations, see P.J. Williams, 'Alchemical Notes: Restructuring Ideals From Deconstructed Rights' in M.V. Tushnet, (ed.) 'Constitutional Law' (1992).

<sup>146</sup> I. Grigg-Spall & P. Ireland, 'Afterword: Law's (Un)spoken (Pre)sumptuous (Pre)suppositions' in Grigg-Spall & Ireland (eds.), *op. cit.*, 126 at 127 clearly state that they are putting forward a structuralist account of law which seeks to defend itself against postmodernist and anti-structuralist attacks. They criticise post-structuralist accounts on the grounds that the appearance of freedom, choice and diversity that results from their analysis, is really the surface appearance of the dominant social hegemony (in their case, capitalism). They further argue that society is constituted by domination and hierarchy and given that

(Footnote continues on next page)

It will be recalled that the central features of postmodernism are a belief that power and resistance are ubiquitous and that power is not in the sole possession of dominant groups, to be utilised solely against subordinate groups.<sup>147</sup> Their starting point is that power is pervasive and not merely a top-down relation. This is combined with a strong criticism of modernist characteristics such as rationality, truth claims, progress, the individual subject, autonomy and grand narrative theories because of the exclusion and subordination they are claimed to cause.<sup>148</sup>

The dilemma as to whether and how to use human rights can be seen as part of a general disagreement as to how to treat and use law. This has been claimed by Boyne to have been reflected in a debate between two of the leading exponents of postmodernism; Derrida and Foucault. He sees Foucault's early studies, more precisely, his analysis of madness, as entailing

---

their approach is Marxist, they claim this to be a capitalist underlying structure. It is submitted that the majority of American critical legal scholars work from a structuralist perspective; Fitzpatrick, 'Law as Resistance' in Grigg-Spall & Ireland, *op. cit.*, 44 notes how critical legal scholars in the US view law as manipulable and indeterminate and thus tending to favour the dominant interests in society. As examples of structuralist approaches within CLS, see A.D. Freeman, 'Anti-Discrimination Law: A Critical Review', K.E. Klare, 'Critical Theory and Labor Relations Law' in D. Kairys (ed.), 'The Politics of Law' (1982), 96 & 65 respectively and M.J. Horwitz, 'The Rule of Law: An Unqualified Good' (1977) 86 Yale L.J. 561.

<sup>147</sup> Thomson in Grigg-Spall, *op. cit.*, 6 stresses the postmodernist belief in relational power; '...to conceive power as something which some possess and use to repress others is to fail to see that power is not just the localised possession of a few, but a ubiquitous feature of social life which it positively constitutes, including for example, us as individuals.'

<sup>148</sup> Douzinas *et. al.*, *op. cit.*, 28 equate poststructuralism and postmodernism and assert; 'Poststructuralism has pronounced the end of all grand narratives and references, whether of God, truth or form, and has insisted on the death of man as a creative author and centred subject of history and representation. The task of postmodern jurisprudence is to bring out the consequences of this for the legal subject, possessor of abstract rights and duties, and for the legal system of principles, forms and reason. Jurisprudence goes postmodern in order to retain and redraw its old commitment to plural and open forms of reason(s) and communities.'

and at pg.15;

'If modernity is viewed with Weberian optimism as the project of rationalisation of the life-world, an era of material progress, social emancipation and scientific innovation, the postmodern is derided as chaotic, catastrophic, nihilistic, the end of good order...When, on the contrary, with Weberian pessimism, its Frankfurt descendants and Foucault, we view modernity as an iron cage of bureaucratisation, centralisation and infinite manipulation of the psyche by the 'culture industry' and the disciplinary regimes or power and knowledge, postmodernity is celebrated as an exhilarating moment of rapture. It defies the system, suspects all totalising thought and homogeneity and opens spaces for the marginal, the different and the 'Other'. Postmodernism is here presented as the celebration of flux, dispersal, plurality and localism.'

the claim that it was possible to go beyond the present liberal form of reasoning and return to a form of reason that was less exclusionary of other discourses and differences, such as madness. Foucault criticised contemporary Western thought for marginalising and denying the validity of these other discourses.<sup>149</sup> As an example, he critically analysed Descartes. Foucault demonstrated that although Descartes had subjected everything to doubt, he had not doubted that he was capable of reasoning (i.e. that he was not insane).<sup>150</sup>

Derrida's response focused on Foucault's reading of Descartes and claimed that Descartes had in fact considered the possibility of being insane as part of his reasoning.<sup>151</sup> More importantly, he denied there was a possibility of escaping the current form of thought and reasoning and its repressive effects. To assert such a position, he claimed, was to commit the very error of asserting presence, privileged position and an objective truth that was being criticised.<sup>152</sup>

Boyne claims that Foucault tacitly accepted the force of Derrida's criticisms and that in his subsequent work, which shifted its focus from discourse to power-knowledge relations, he investigated strategies of resistance *within* existing arrangements and forms of thought. Difference and the excluded 'other' within society become the focus of Foucault's subsequent work, while Derrida attempts a similar process by virtue of textual interpretation. Both accept there is no going beyond existing practices and modes of reasoning, instead there can only be resistance, and irritation from within.

This approach, indeed the inevitability of working from within lends support to those who claim that the purposes of the Enlightenment Project should be

---

<sup>149</sup> Boyne, *op. cit.*, 33-4 notes of Foucault;

'From the beginning, his work has been a protest against the violence that is levelled against others so as to force them to become the same as us. The fact that such forced assimilation is in all probability a basic aspect of our reason, of our form of being, provides more than sufficient justification for trying to push beyond our form of reason, our form of being in the hope that difference will be allowed to be what it is on the other side.'

<sup>150</sup> *op. cit.*, chp.2.

<sup>151</sup> *op. cit.*, 69-71.

<sup>152</sup> *op. cit.*, 67;

'...Derrida sought to show that there can be no privileged space outside of reason, no higher reason, no other reason, no unreasonable reason outside of the confines of reason itself. To think of escape is impossible.'



continued by critical theorists. This approach views the Enlightenment as being centrally concerned with de-mystification, the removal and continual questioning of claimed certainties and dogmas and the revealing of uncertainty and contingency.<sup>153</sup> The task then becomes one of continuing the Project by putting forward alternative strategies to achieve the above stated goals and therefore working *within* the present arrangements, which cannot in any case be escaped.<sup>154</sup>

Legal postmodernism, has like legal structuralism, and indeed liberalism, faced a dilemma concerning human rights. Some postmodernists have thus felt that rights should be used pragmatically because there is no complete escape from them and the liberal legalism of which they form a part.<sup>155</sup> On the other hand, others have felt that they must be rejected.<sup>156</sup> The former approach will be followed up here, along with similar approaches by other critical theorists. It will be seen that even if human rights are adopted, this involves their being radically reformulated.

#### *A resolution*

Those critical theorists that support human rights, lend their support to a radically different conception to that of liberal theorists. Firstly, they place emphasis on 'small scale, provisional, open stories'<sup>157</sup> and therefore reject grand theories/narratives which claim truth. Human rights are consequently not founded upon some truth, be it nature or reason. The result is that rights are to be used pragmatically in order to allow the weaknesses and oppression of the existing arrangements, and thus the reforms that need to be made, to be exposed; this is part of a strategy of 'critique'.<sup>158</sup>

---

<sup>153</sup> Gaete, *op. cit.*, 170.

<sup>154</sup> Hunt in Fitzpatrick & Hunt, *op. cit.*, 5 & 10, Fitzpatrick in Grigg-Spall & Ireland, *op. cit.*, 44 & 48 and Hutchinson, *op. cit.*, 38-9 & 268-71

<sup>155</sup> Douzinas & Warrington in Grigg-Spall & Ireland, *op. cit.* 30.

<sup>156</sup> Carty in Carty (ed.), *op. cit.*

<sup>157</sup> Douzinas & Warrington in Grigg-Spall & Ireland, *op. cit.* 31.

<sup>158</sup> Hunt in Fitzpatrick & Hunt, *op. cit.*, 14;

'By 'critique' I understand an approach which starts with internal criticism of existing theories in terms of their own criteria and then proceeds to generate the conceptual equipment necessary to overcome the deficiencies and closures discovered in the theories examined, and at the same time to understand the social origins of the influence wielded by the theories criticised.'

Secondly, rights secure freedom, but not for the autonomous individual, as liberals generally claim but rather they allow the previously powerless to exercise power in order to establish alternative truths.<sup>159</sup>

Thirdly, human rights are social constructs. This process of construction is brought about by power; any consensus as to the exercise of human rights or their foundation may be built on consensus but critical theorists insist that in the background there is the ubiquitous play of power, domination and counter-struggle.

### A SYNTHESIS AND PERHAPS A CONSENSUS

The jurisprudential theory that will be used in this study and which was set out in the previous section, can be seen as a synthesis of liberal and critical theories of human rights. Thus, from liberalism the theory draws its belief in the reformative potential of rights and this is a feature which, as has been seen, some critical theorists agree with. The theory also embraces the view that human rights are social constructs. Liberalism provides for this view but a powerful corrective that is adopted in the theory is that of the role of power, domination and counter-struggle behind consensus. This corrective originates in critical theories. Critical theories also deny a separation between rationality and subjective value judgements. In this way, the theory sees human rights as intimately linked to political and social forces. Therefore human rights are not objective categories, they are based upon social agreement but this is often constituted by the values of the powerful. It follows that when they are exercised, violated or challenged, social and political power is at play. These two views of consensus are combined in the theory formulated in this study because they each provide reasons to support human rights by seeing them as values. However, the value that is seen by the critical theorists tends to be *instrumental*, whereas for liberals, it tends to be an *intrinsic* value.

Liberals have generally spent time dealing with the capacity of human rights to act as 'trumps'<sup>160</sup> and the theory values rights because of this potential. However, there is an emphasis in the theory on the different needs and problems that each human right faces in achieving this priority over other

---

<sup>159</sup> Hutchinson, *op. cit.*, 246.

<sup>160</sup> See Dworkin, *op. cit.*, (1978), particularly ix, 232-38, 272-8 & 357-8 and as an example of an exception to his tendency, see J. Raz, 'The Morality of Freedom', (1986), 186-8.

considerations. This is inspired by an emphasis on difference and local narratives that is asserted by critical theorists. This emphasis leads in turn to a concentration on the particular and specific means by which human rights can be protected. The theory accepts that because of the role of power and social construction, human rights can serve a number of purposes but it does insist that a primary purpose is to 'trump' other considerations and values in order to provide a means of challenging existing configurations of power and domination and that the formulation of specific mechanisms to protect each right will be judged first and foremost on the basis and the degree to which this is achieved. Therefore, the achievement of political and social change is viewed as a paramount function of human rights. This view is particularly suited to a system, such as that in England, where human rights are rendered more contingent because of the dominant role played by political forces in their regulation but the aim has not been to justify English theories of human rights. On the contrary, it has been to criticise them, therefore while the theory that is formulated here exhibits great affinity with the English *conception* of civil liberties, as will be seen, it more importantly provides a basis upon which to criticise their legal protection in England and also general guidelines for improvement.

The theory and the positions of both liberals and some critical theorists have shown that theoretical inquiries into the nature of human rights do not necessarily need to be avoided because of the theoretical problems that they reveal. It was seen that by confronting these difficulties and applying the insights of theorists, a jurisprudential theory was formulated that provides for and supports human rights, whilst at the same time radically reformulating the way they are conceived. Both groups of theorists have sought ways in which they can tap the rich potential of human rights despite their traditional hostility.

The study of the liberty to assemble can be seen as partially justified by the theory because it supports an analysis of particular human rights in order to elucidate legal methods of protection that are best suited to the specific and different needs of each human right.

Having presented the theory of human rights that underpins this study and explained its relevance to the protection of human rights, it will be seen in the next chapter that the jurisprudential theory and comparative theory point to

the France, as a legal system that can take account of the claimed jurisprudential nature of human rights. Consequently, the next chapter also concentrates on comparative theory and on a second practical issue to which it is claimed it can be beneficially applied: the protection of human rights in the European Union.

## CHAPTER II

# COMPARATIVE THEORY AND THE LAW RELATING TO THE PROTECTION OF CIVIL LIBERTIES

### INTRODUCTION

Having thus set out this jurisprudential theory of human rights, which informs the legal methods for their protection, this chapter examines and employs comparative theory<sup>1</sup> in order to suggest that possible reforms of the English system in this area can be gained from the example of France. This is because the French legal system seems to have a jurisprudential conception of civil liberties that is very close to that adopted in this study and furthermore, it has a very similar notion of parliamentary sovereignty to that of England, which strongly conditions the legal methods by which human rights are protected. The choice of France is one based upon jurisprudential theory but also upon comparative theory, which reveals similarities that are hidden behind the differences that are normally claimed to exist between common law and civil law legal families, to which England and France respectively belong. Accordingly, the French tradition of civil liberties and the general mechanisms of protection will be described to see how they seek to resolve the problem of according importance to human rights on the one hand, whilst having a sovereign legislature, on the other. In short, this chapter provides the *second* justification for this study, by justifying comparison with France.

---

<sup>1</sup> The terms 'comparative method', 'comparative law' and comparative theory' will be used interchangeably. This is in recognition of the debate that continues as to its nature. Therefore, the term 'comparative law' is widely seen as problematic because it connotes a body of rules, or even a separate branch of law, when in fact nothing of this nature can be pointed to (see, A. Watson, 'Legal Transplants: An Approach to Comparative Law' (1974), 1 and M.A. Glendon, M. W. Gordon and C. Osake, 'Comparative Legal Traditions: Text, Materials and Cases on Civil Law, Common Law and Socialist Law Traditions, with special reference to French, West German, English and Soviet Law' (1985), 1).

At the same time, the term 'comparative method' (or methods, in order to accommodate O. Khan-Freund's view; 'Comparative law - this has almost become a common place - is not a topic, but a method. Or better: it is the common name for a variety of methods of looking at law, and especially of looking at one's own law.' - 'Comparative Law as an Academic Subject' [1966] L.Q.R. 40 at 41) would not be accepted by those who support the comparative theory view (this group includes R. David & J.E.C. Brierley, 'Major World Legal Systems in the World Today' (1985), 5 and K. Zweigert and H. Kötz (trans. T. Weir), 'An Introduction to Comparative Law' (Vol. I) (1987), 14). H.C. Gutteridge, 'Comparative Law: An Introduction to the Comparative Method of Legal Study and Research' (1971), 1-5, notes that the question of whether there is a method or theory is linked to the issue of function. The issue of function is in turn related to the question of the value of comparative law.

The view that the debate concerning science versus methodology is really a question of philology, is endorsed here (Gutteridge, *op. cit.* 5 and Watson *op. cit.* 2).

However, it will be claimed that relatively few comparisons between France and England as regards public law subjects, such as human rights, have been undertaken based on the view that useful comparisons can usually only be made between legal jurisdictions from the same legal family. This view will be challenged by looking more closely at comparative theory. This 'defence' of comparative theory is undertaken first (section I), followed by an examination of the main legal methods of protecting human rights in France (section II).

This chapter also introduces the second practical area concerning the protection of human rights and to which comparative theory, and thus the kind of comparison undertaken here, are claimed to be of use. This is the protection of human rights in the EU. It will be suggested that the approach adopted by the European Court of Justice to the protection of civil liberties requires an interpretative comparison of the traditions of Member States. Consequently, by concentrating on France and England, as two important Member States, it will be attempted to elaborate the content of a common tradition of the liberty to assemble, as an example of the kind of analysis that is required in order to take seriously the claim to protect human rights in the EU (section III).

## SECTION I COMPARATIVE THEORY AND METHOD

The previous chapter argued that specific civil liberties should be focused on and that they are protected because they represent the values upon which there is a consensus in the community. It was argued that the particular values might differ as between communities and different groups within these communities. However, a jurisprudential question was not given a detailed response by the theory: how should human rights be protected. The general response to this question was that this should be achieved via mechanisms that were tailored to meet the needs of specific civil liberties and which did not immunise human rights from social and political change. It is suggested that by using comparative theory, such mechanisms can be found in French law.

However, it will be seen here that comparisons between England and France in the area of public law are often not seen as useful by some because of their different legal traditions. It will be argued in response that this view cannot prevail if attention is paid to what the comparative method entails and so with this in mind, the theory and method is investigated.

### *A comparative method*

As was noted above,<sup>2</sup> this structure of this study adopts a particular comparative method as well as arguing that this method should be applied to civil liberties law. The structure of the study therefore concerns and is a *product* of comparative theory. Hence the three parts of the thesis each have a grounding in this method. It will be recalled that the comparative theory that underpins this study closely resembles that put forward by Zweigert and Kötz.<sup>3</sup> Whilst noting that little time is spent on analysing comparative methodology,<sup>4</sup> they present a method that begins by stating the problem to which a response is sought.<sup>5</sup> This can be seen to the purpose of Part I of this study. Next, a description should be made of the different laws that are to be compared,<sup>6</sup> this is carried out in Part II. Finally, a description of similarities and differences should be undertaken before making an evaluation. This is partly the aim of Part III, where an evaluation of the legal regulation is carried out and will also constitute the conclusions that are made there, along with more general conclusions as to the benefits that have sought to be argued for in applying theory to practice.

### *The purpose value and limits of the comparative method*

David and Brierley<sup>7</sup> suggest that the comparative method has three values/purposes and these are claimed to be applied in this study. The first

---

<sup>2</sup> See Introduction.

<sup>3</sup> *op. cit.*, chap.III.

<sup>4</sup> *op. cit.*, 29;

'..there has been very little systematic writing about the methods of comparative law.'

<sup>5</sup> *op. cit.*, 31. This strategy is also supported by H. W. Erhmann, 'Comparative Legal Cultures' (1976), 11-12, as part of the strategy of comparativists;

'What he needs to study instead are the *functional equivalents* in various cultures. He must start with a legal problem of social significance...and seek to discover the rules or institutions by which these problems are resolved from one system to another.'

<sup>6</sup> *op. cit.*, 41;

'for all individual legal problems the researcher should first produce an objective statement of the law of each jurisdiction.'

<sup>7</sup> *op. cit.*, 4.

relates to the benefits to historical, philosophical and legal knowledge. This could be said to be a purely scientific or epistemological purpose. It is hoped that the conclusions of this study will add to the body of legal knowledge. Secondly, there is the value gained in understanding and improving a legal system. This purpose is reflected in the aim of contributing to the Bill of Rights debate in order to suggest mechanisms for improving the protection of human rights in England and also, as will be seen below, that in the EU.<sup>8</sup> By so doing, it is also hoped to elucidate particular means of protection that will lead to a better understanding of not only French law but also the relationship between French and English constitutional law. The third value is that of fostering the greater understanding of other peoples, which in turn fosters international relations. This purpose will be most clearly seen in the context of the protection of human rights in the EU case-law, which seeks an understanding of the constitutional traditions of Member States. More particularly, any attempt to ensure that Member States accept the supremacy of EU law is now dependant on the Union being seen to be adopting and applying commonly recognised standards of human rights protection. The elucidation of these standards, using comparative theory, therefore facilitates relations between Member States and the EU institutions. The purpose of this study can therefore be said to incorporate this third value.

However, comparative theory has been stated to have a limitation that would seem to present problems for this study.<sup>9</sup> It has been claimed, as was touched on earlier, that comparison can only be undertaken where a relationship exists between the legal systems in question, thus Watson has stated;

---

<sup>8</sup> The belief that comparative law can be used to improve law (i.e. law reform) is often seen as one of the causes for the development of comparative law. As such it is linked to the unification of law movement, which was stimulated by ideas of an inevitable evolution and progress, that were current at the turn of the nineteenth-century, see Gutteridge, *op. cit.*, chap.2, particularly 13-20, Zweigert & Kötz, *op. cit.*, chp.2. David & Brierley, *op. cit.*, 4 note how

'...it became fashionable in the nineteenth-century in the light of Darwinian theory and the ideas of progress then current, to trace vast historico-philosophical tableaux of the evolution of law. The legal systems of various peoples were studied in order to demonstrate, in an historical perspective, the progress of humanity.'

<sup>9</sup> For other criticisms of the comparative method that are however not of relevance here, see Watson, *op. cit.*, chp.2, Gutteridge, *op. cit.*, 29 and B. Grossfeld, 'The Strength and Weakness of Comparative Law' (trans. T. Weir) (1990), 39.



except where the systems are closely related the differences in legal values may be so extreme as to render virtually meaningless the discovery that systems have the same or a different rule.<sup>10</sup>

This would seem to therefore present a problem in that France and England are commonly classified as being members of two different legal families; civil law and common law. What appears to be lacking is a relationship as between France and England. This section will next be concerned to reveal the existence of a relationship upon which comparison can be made but first the theory of legal families will be shown to be open to the criticism that it is too narrowly drawn.

At the heart of this classification is the assumption that there exist certain recurrent themes and styles between legal systems and these are employed in order to place a legal system within a particular legal family. It is these criteria that are therefore crucial in determining the constituents of each of the legal families and which have traditionally been adopted. Notwithstanding, they have been criticised as being 'one-dimensional' by Zweigert & Kötz, who state;

The theory of legal families has so far proceeded as if the only law worth taking into account were what European lawyers call private law. This is partly because comparatists have hitherto concentrated on private law, and partly because it is only private lawyers, so far as one can see, who have been interested in the theory.<sup>11</sup>

They continue by asserting that the classification of legal systems should not be carried out using one criterion but rather a number of criteria that can be seen as representing the *style* of a legal system.<sup>12</sup> However, it should be underlined that Zweigert & Kötz do not propose the abandonment of the classification of legal systems but simply a change in the classificatory method;

The following factors seem to us to be those which are crucial for the style of a legal system or a legal family; (1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive institutions, (4) the kind of legal sources it acknowledges and the way it handles them, (5) its ideology.<sup>13</sup>

---

<sup>10</sup> *op. cit.*, 5.

<sup>11</sup> *op. cit.*, 66.

<sup>12</sup> *op. cit.*, 68.

<sup>13</sup> *op. cit.*, 69.

It is submitted that the above broader criteria should be used to group legal systems, rather than those concentrating on private law characteristics. This will be the strategy that is adopted here as regards what is a comparison of public law subjects. Furthermore, it is in these areas mentioned above that, as regards human rights, a relationship is claimed to exist.

It is argued that comparative theory has not been applied to its full potential in the Bill of Rights debate. This is because comparisons have overwhelmingly been made between England and other common law jurisdictions, especially that of the United States of America.<sup>14</sup> This can be seen to have been justified by the theory of legal families, which points to a relationship between common law jurisdictions. However, as Waldron has pointed out, there are specially serious problems with the manner in which human rights are regulated in the US. He criticises the way in which the judiciary are permitted to override democratic choices, the attempt to fix certain liberties beyond easy democratic change, despite their jurisprudential uncertainty and the large degree of disagreement that they engender.<sup>15</sup> Another problem with looking to the US for possible legal reforms is that it may be doubted whether these arrangements fit the emphasis on political procedures in England's political constitution.<sup>16</sup> The US system on the other

---

<sup>14</sup> A. Ryan, 'The British, the Americans, and Rights' in 'A Culture of Rights: The Bill of Rights in philosophy, politics and law - 1791-1991' (M.J. Lacey & K. Haakonssen (eds.)) (1991), 366 observes as regards the Bill of Rights debate that

'Comparisons with the theory and practice of American politics have been deployed as weapons on both sides of the contest..'

J.S. Wright, 'The Bill of Rights in Britain and America: A Not Quite full Circle' Tul.L.Rev. 55 (1981) 291 at 293 concurs that American experience is being drawn upon 'as an example to follow' but in a comic aside, he sees this influence as having a less well known basis;

'It is probably no accident that some of the principals in the debate have an American connection: Anthony Lester, an American law school education; Lord Hailsham, an American mother; Michael Zander, an American wife. No doubt, the last mentioned women deserve much credit.' (pg.325).

For examples of comparisons made with the US, see Ewing & Gearty, *op. cit.*, particularly, 263 & 269-70, Bailey *et. al.*, *op. cit.*, 14, (and for Canada, pgs.23-7), Roberston, *op. cit.*, particularly, 38, 144, 259, 264, 271 and Dworkin (1990), *op. cit.*, 46, 48-50, 52-55.

<sup>15</sup> See generally Waldron(1993), *op. cit.*, and at 44;

'On any account of the activity of the US Supreme Court over the past century or so, the inescapable duty to interpret the law has been taken as the occasion for serious and radical revision. There may not be anything wrong with that, but there is something wrong in conjoining it with an insistence that the very rights which the judges are interpreting and revising are to be put beyond the reach of *democratic* revision and reinterpretation.'

<sup>16</sup> As has been recently noted by S. Dubourg-Lavroff, 'Pour une constitutionnalisation des droits et libertés en Grande-Bretagne?' R.F.D.C. 15 [1993] 479 at 480;

(Footnote continues on next page)

hand appears to emphasise *legal* procedures, in that the judiciary play the predominant role in the protection of human rights. Useful comparison between the two jurisdictions may consequently be doubted;

It is difficult to draw any conclusions from the American Supreme Court. Its impact has been tremendous; there can hardly be another country where judges can so profoundly affect the fabric of society or the pattern of human relationships. It gives us a glimpse of just how powerful a tool a Bill of Rights, widely drawn, constitutionally entrenched and operating in a federal state, can be. Yet the differences in almost every aspect of the legal, constitutional and social background between Britain and the United States make it really of limited value to pursue the comparison any further.<sup>17</sup>

This is not to suggest that the North American experience is totally irrelevant to human rights law in England. On the contrary, US law will be used as a criterion for comparative evaluation in Part III of this study, but it is suggested that the tendency to make comparisons with America is at the expense of other jurisdictions, that while not belonging to the same legal family, share similar traditions and approaches to human rights. This is claimed to be the case with France, whose relevance is sometimes noted in passing<sup>18</sup> but is normally subordinated to a comparison of US law. By

---

'...la nature du régime politique britannique dresse à l'encontre d'un tel projet de nombreux obstacles juridiques, politiques et culturels. Dans cette situation délicate, aucune réforme n'aboutira si elle n'est pas soucieuse de respecter la tradition et la Constitution britanniques dont surtout le principe de souveraineté de la loi.'

and Feldman, *op. cit.*, 86;

'Any constitutional arrangement regarding rights must be reasonably well in tune with the prevailing dominant ethos as it defines the legitimate expectations of citizens, since it will depend on that ethos to sustain it and will, in turn, be expected to make it possible for those who wish to organise their lives according to that ethos to do so.'

<sup>17</sup> Wallington & McBride, *op. cit.*, 32.

<sup>18</sup> Feldman, *op. cit.*, 59-60. The relevance of French constitutional law to the British context, has also been noted by J.S. Bell, 'French Constitutional Law', (1992), 1; he observes how '...United Kingdom lawyers have tended to look to other common law jurisdictions for examples of the ways in which our constitutional system might be changed and what the potential consequences of this might be.'

However, he sets out to offer

'...an exposition of an alternative model that is, in many ways, far closer to the United Kingdom than many common law jurisdictions, particularly those of federal countries. France is a unitary State that, until recently, was a fervent believer in parliamentary sovereignty and the unacceptability of judicial review of legislation. Protection of fundamental rights and principles of good government were matters of political obligation and could not be legally enforced against Parliament. The rule of law involved simply the subjection of the executive and citizens to the laws made by Parliament, and did not involve legally enforceable limits on Parliament's powers.' (pg.1).

Bell appears acutely aware of the element of compromise in contemporary French arrangements and their consequent relevance for the UK;

'Such developments in very recent years demonstrate the way in which a country wedded to many of the fundamental constitutional principles that currently prevail in the United

(Footnote continues on next page)

revealing the relationship between France and England it will be seen that perhaps greater attention ought to be paid to France, despite the fact that it is a civil law jurisdiction.

## SECTION II A RELATIONSHIP BETWEEN ENGLAND AND FRANCE

It is contended that a relationship between England and France can be found on two levels. At one level, there is a common tradition that results from the fact that they are both part of the Western legal tradition.<sup>19</sup> The second level concerns constitutional traditions regarding the protection of human rights. The first level is more general than the second which is more pointed to the subject of study and justifies the application of comparative theory. For these reasons attention will be devoted to the relationship on this level.

This relationship will be most clearly seen when the tradition and protection of civil liberties is presented. It will then be seen that both jurisdictions have similar approaches to human rights that not only make comparison possible but also justify looking to France for possible solutions as far as the protection of civil liberties in England. This section will concentrate on the general context of human rights regulation in France in order to provide the context in which the regulation of the liberty to assemble exists and to introduce themes that will be seen to have affected its legal environment.

---

Kingdom can move in new directions. To some extent, this was the result of a break with the past, marked by the adoption of the Constitution of the new Fifth Republic in 1958. But many of the changes have really come about as a result of new attitudes and new interpretations of the French Republican tradition.' (pgs.1-2).

<sup>19</sup> As regards the Western legal tradition, see H.J. Berman, 'Law and Revolution: The Formation of the Western Legal Tradition' (1983), 7-10, D.R. Kelly, 'The Human Measure: Social Thought in the Western Legal Tradition' (1990), Fitzpatrick, (1992), *op. cit.* For the history of the development of civil law, see A. Watson, 'The Making of the Civil Law' (1981), 8, J.H. Merryman, 'The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America' (1985) and A.T. von Mehren & J.R. Gordley, 'The Civil Law System: An Introduction to the Comparative Study of Law' (1977). For a comparative history of the history of the common law, see R. C. van Caenegum, 'Judges, Legislators and Professors: Chapters in European Legal History' (1987).

## THE TRADITION OF CIVIL LIBERTIES IN FRANCE

Civil liberties<sup>20</sup> are situated within French public law<sup>21</sup> and therefore, any investigation of civil liberty will touch upon this area. It is submitted that the presentation of French human rights can be more clearly made by concentrating on two themes or aspects of French public law. Although the two overlap, they may be separated, somewhat artificially, into (i) a tradition of parliamentary sovereignty and, consequently, no judicial review of laws (and certainly not according to a body of supra-legal standards) and (ii) a traditional uncertainty as regards the legal status of human rights. These two themes condition how human rights are conceived, defined and regulated and bear a close resemblance to the political conception of civil liberties in England.

### *The tradition of Parliamentary Sovereignty*

This tradition, dating from the Revolution, is widely stated to have been inspired by Rousseau and, more particularly, his claim that the general will was politically supreme.<sup>22</sup> The general will was seen to be manifested by 'loi': parliamentary legislation (statute). Therefore, it might be more accurately claimed that it was the norms issuing from parliament, and not parliament

---

<sup>20</sup> The term 'civil liberties' will here be used to refer to the French term 'libertés publiques'. It will be seen below that occasionally the term 'libertés publiques' is used interchangeably with the term 'Droits de l'Homme' (the Rights of Man). However, given that the two are sometimes distinguished and that 'libertés publiques' are treated as legal entities, it is this term that will be retained here. For example, J-P. Costa ('Libertés publiques en France et dans le monde' (1986), 16), has claimed that the Rights of Man are creatures of natural law, whereas *libertés publiques* are positive law categories. Much the same point is made by J. Morange, 'Droits de l'Homme et Libertés Publiques' (1989), 10;

"A certains égards, les deux expressions apparaissent comme synonymes! Tout dépend d'ailleurs de la définition que chaque auteur donne des termes employés. Ce n'est cependant peut-être pas par hasard si l'expression "Droits de l'Homme" attire les préférences de non-juristes. Son actualité, qui n'enlève rien à sa valeur, tient à son caractère plus subjectif, et, par voie de conséquence, plus flou. Plus mobilisatrice, la défense des droits de l'homme est aussi plus incertaine. Plus ternes, les *libertés publiques* sont en revanche, plus réelles. Leur étude consiste à préciser le régime juridique des droits et libertés dont disposent les ressortissants d'un Etat donné à un moment donné de son histoire."

C-A. Colliard 'Libertés Publiques' (1989), 19, observes that the term *libertés publiques* was slow to appear in French law; he claims that it was first heard in the demands of the people on the walls of Paris in the coup d'état of 1851 and then first appeared in a legal sense in art.25 of the Constitution of 14th January 1852.

<sup>21</sup> This may be instanced by the fact that *Libertés Publiques* have been taught as part of the French university Law degree since 1954. They became a core subject in 1962, as part of Public Law (see Colliard, *op. cit.*, 1).

<sup>22</sup> Rousseau's influence has been noted by, for example, P. Braud, 'La notion de liberté publique en droit français et ses implications en droit français' (1967), 279-81 and Morange, *op. cit.*, 76.

itself, that were traditionally sovereign. This position of supremacy justified the decision by the revolutionaries to prohibit the judiciary from reviewing statutes.<sup>23</sup> At the same time, the exclusion of the judiciary was also supported by Montesquieu's doctrine of the separation of powers.<sup>24</sup> This was interpreted by the revolutionaries as requiring that the law-making power (Parliament) should be free from interference from the judicial, hence the latter were forbidden to review the legislation of the former. In short, Rousseau and Montesquieu inspired the subordination of the judiciary to statute and to Parliament, seen as the sole institution that could legitimately express the will of the people and exercise law-making power.<sup>25</sup>

Of the consequences that flow from this tradition, two are crucial for human rights. Firstly, the judiciary are traditionally seen as merely applying the law. They are seen as civil servants, carrying out the will of Parliament.<sup>26</sup>

---

<sup>23</sup> See, for example, Braud, *op. cit.*, 280, concerning the general will; 'Elle est la volonté du peuple s'appliquant à tout le peuple et non à des objets particuliers. Dans cette mesure, elle acquiert les mêmes caractères que la volonté générale dont elle consiste en la formulation juridique. La loi est toujours droite et tend nécessairement à l'utilité publique. Elle ne peut être inéquitable ni empiéter inutilement sur la liberté individuelle.'

See also, A. Stone, 'The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective' (1992), 24;

'From the first moments of the Revolution, the Rousseauian identification of legislation with the general will, and the legislators with popular sovereignty, were constitutionally enshrined, producing a separation of powers doctrine which rigidly circumscribed judicial authority.'

The Rousseauian principle was constitutionally enshrined in arts.3 & 6 of the Declaration des Droits de l'Homme et du Citoyen 1789 (herein referred to as the 1789 Declaration), which reflected a general trust in parliament, as G. Burdeau 'Les Libertés Publiques' (1972), 262 notes;

'Du législateur, on croyait ne rien avoir à redouter puisqu'il exprimait la volonté générale et bénéficiait de l'infalibilité de la souveraineté du peuple.'

<sup>24</sup>For an explanation of the role of Montesquieu's theory in the Revolution, see M. Cappelletti, 'The Judicial Process in Comparative Perspective' (1989), 190-4.

<sup>25</sup> This principle was enshrined in the Law of 16-24 August 1790, Title II, art.10;

'The judicial tribunals shall not take part, either directly or indirectly, in the exercise of the legislative power, nor impede or suspend the execution of the enactments of the legislative body...'

(translation taken from Cappelletti, *op. cit.*, 194).

It became a constitutionally enshrined principle beginning with the 1791 Constitution, chp. V, art.157(3) and its violation became a crime by virtue of art.127 of the 1810 Penal Code. This article, although in somewhat modified form, still exists today.

<sup>26</sup>The severity of this principle is instanced by the way that the revolutionaries even prohibited judges from interpreting the law; Title II, art.12 of the 1790 Law;

'[The judicial tribunals] shall refer to the legislative body whenever they find it necessary either to have a statute interpreted or to have a new statute.'

(translation taken from Cappelletti, *op. cit.*, 195).

(Footnote continues on next page)

Secondly, parliamentary legislation is traditionally viewed as securing the public interest or acting for the common good.<sup>27</sup> Accordingly, to allow the judges to review statutes would be seen as a return to the practices of the Ancien Régime, in which the judiciary were widely seen as obstructing the reforms that it was attempted to introduce.<sup>28</sup> Within this tradition, civil liberties are subordinate to the law, they cannot be used to review, and ultimately, strike down statute. The status of civil liberties therefore becomes uncertain and it will be seen below that this is a traditional feature of public law in France.

Although parliamentary sovereignty is the dominant tradition in French constitutional law, there is a subordinate tradition that claims that statute is subordinate to higher principles that can be found in the Constitution. It has been claimed that France's present constitution represents a significant victory for this subordinate tradition. This point will be elaborated when the existing protections of human rights are presented below.<sup>29</sup> Suffice it to say

---

Stone, *op. cit.*, 25 puts the position of the judiciary in its wider Revolutionary context; 'The modern French judicial system (which would fully emerge by 1804) was constructed on the principle - itself a virtual corollary of popular sovereignty - that judges must not directly, or indirectly through interpretation, make law....The law was, following Rousseau, to be codified in "simple, non-technical, and straightforward" language. As a consequence, politics would be made transparent, the legitimacy of the new social compact assured, and the multitude of intermediate institutions and social practices separating the people from the State, and obscuring that fundamental relationship, could be cleared away or fatally undermined. *Le droit* was thought to be one of the more mystifying of these institutions, and it was hoped and expected that lawyers, and their penchant for doctrinal commentaries and formalist discourse, would gradually obsolesce. Judges could then proceed in a straightforward manner, as civil servants applying the codes.'

(c.f. Capelletti, *op. cit.*, 193-4).

The principle was upheld in the decision of the Tribunal de Cassation, Decision 18 Fructidor, an V (4th Sept. 1797).

<sup>27</sup> See, Braud, *op. cit.*, *supra*.

<sup>28</sup> For details of the role of the judiciary in the *Ancien Régime*, see P-C. Timbal & A. Castaldo, 'Histoire des institutions publiques et des faits sociaux' (1990), 404-8 & 522-6 and J. Gicquel, 'Droit constitutionnel et institutions politiques' (1991), 483-4.

<sup>29</sup> A few points by way of introduction may be made here; Stone, *op. cit.*, makes explicit reference to the existence of a dominant and subordinate tradition in French public law. He isolates a dominant ideology of '*la loi*' and a subordinate ideology of '*le droit*';

'...*la loi* ("statute" or "legislation") - the product of public politics - is a concrete expression of sovereignty, sovereignty to which *le droit* (a "subject matter", things "judicial") - the work of the judiciary and of legal science - is an obedient, if at times creative servant.' (pg.23).

The ideology of *la loi*, or the general will dominated from the Revolution up until around 1890, when French law professors, as part of a movement to secure a body of autonomous public law, began to assert *le droit*, or constitutionalism. This ideology is constituted by;

'...the belief that statutes must conform to a judicially elaborated higher law if they are to be valid and therefore legally binding.' (pg.17).

(Footnote continues on next page)

here that although the doctrine of parliamentary sovereignty was and is without serious challenge, contemporary arrangements can be seen as placing limits on the sovereignty of statute. However, the existence of these limits are themselves conditioned by the continued influence of the dominant tradition. The peculiarities and compromises of the contemporary arrangements may therefore be explained by the need to reconcile the tensions caused by these dominant and subordinate traditions and achieve a compromise between these conflicting traditions. It is here that a relationship can be seen to the problems faced in England. It can be seen that both France and England share a tradition of parliamentary sovereignty. Therefore, an investigation of the means by which France has come to terms with the problems caused by such a doctrinal tradition would appear to be a fruitful exercise. French practice can be looked at in order to isolate viable methods of protecting civil liberties in an environment dominated by parliamentary sovereignty.

However, there is a slight difference between the French doctrine of parliamentary sovereignty and that of the England<sup>30</sup> which has become more

---

The resurgence of the *le droit* in the late nineteenth century is described as a "renaissance" (pg.32) because, Stone asserts, the ideology of constitutionalism also dates from the Revolution;

'According to this tradition, which dates from before the Revolution, legislation must either conform to legal norms which are superior to it, or be judicially invalid. The great problem of public law has long been how best to develop and enforce what was argued to be the essential "sovereignty of the *le droit*" in a political system manifestly hostile to constitutional review.' (pgs.23-4).

The advantage of Stone's study is that he moves outwards from a perspective that is external to France. French legal theorists are, therefore, seen to be central actors in the tradition of public law and civil liberties. However, given their internal perspectives, the views of theorists often only implicitly advert to the existence of a subordinate tradition in which they play the central part. For example, the ideology of *le droit* can be seen to be implicit in the increasing popularity of the '*l'état de droit*', as a tradition in which the State is limited by higher laws and which dates from the Revolution, as observed by O. Duhamel 'Le pouvoir politique en France, droit constitutionnel, I' (1991), 51-4.

<sup>30</sup> The point being made here goes further than the claim that France and the England enjoy different 'histories of parliamentary supremacy', as is claimed by Cappelletti, *op. cit.* 191. He, however, rightly draws attention to these differences;

'England, of course, presents us with a much different story. On the one hand, in contrast to *ancien régime* France, there have been no deep popular feelings in England against the judiciary, whose historical role in protecting individual liberties has generally enjoyed widespread respect...The doctrine of the separation of powers was never fully adopted in England in its French version...On the one hand, the English Revolution of 1688 did affirm, and very strongly so, the absolute supremacy of Parliament...' (pg.198).

It is unclear to what extent these factors constitute 'history', as opposed to being elements that constitute a different notion of parliamentary sovereignty, or perhaps both. Nevertheless, the point being made here is that England adheres to a different notion of parliamentary sovereignty that the use of the same term should not be permitted to camouflage.



explicit under the current constitution of the Fifth Republic. At the same time, it is submitted that this difference does not negate the relevance of French arrangements and a sufficient relationship upon which to base comparison. Nevertheless, the difference should be made clear and so it will now be presented.

It has been seen that the Revolution granted a sovereign position to *loi* (statute).<sup>31</sup> At that time parliament (l'Assemblée Nationale) was granted the power to make statutes but, as many commentators have noted, subsequent French history can be seen as a continuing struggle between the executive and parliament over which organ should exercise this power.<sup>32</sup> Therefore,

<sup>31</sup> See, art.6 of the 1789 Declaration;

'Loi is the expression of the general will...' (translation taken from Bell, *op. cit.*, 262).

<sup>32</sup> The struggle between parliament and the executive was used by M. Hauriou ('Précis de droit constitutionnel' (1929), 294) to divide French constitutional history into two cycles. Each cycle consisted of the same series of constitutional arrangements; firstly, a revolutionary period of assembly control of the legislative function. Secondly, there was a consular or imperial period of executive control and thirdly, a parliamentary period, in which there was an equilibrium between parliament and executive. The two countervailing forces were claimed to have been unleashed by the Revolution. Hauriou considered that the most revolutionary arrangement was assembly control, the other, being directorial, consular, imperial or presidential, aimed to enforce the power of the executive that had to a large extent been inherited from the Ancien Régime monarchy. Hauriou's historical cycles have been set out by Duhamel, *op. cit.*, 10 as follows;

1st Cycle 1789-1848	A Gouvernement d'assemblée 1789-1799
	B Gouvernement présidentiel 1800-1814
	C Equilibre parlementaire 1814-1848

IInd Cycle 1848 -	A Gouvernement d'assemblée 1848-1850
	B Gouvernement présidentiel 1851-1870
	C Equilibre 1870.....

Duhamel, *op. cit.*, 11 offers an alternative scheme. This aims to take account of the advent of the 4th Republic, problems of incorporating the rupture that was caused by the Vichy regime and the controversial distinction between the equilibrium of the Third Republic (1870-1944) and the assembly regime inaugurated in 1946 - the contention being that at the end of the Third Republic, parliament dominated, so there can be no distinction between the Third and Fourth Republics;

Ier Cycle	1789-1848
Gouvernement d'Assemblée 1789-1799. Gouvernement Présidentiel 1800-1814. Equilibre 1814-1848.	

Ileme Cycle	1848-1877
Gouvernement d'Assemblée 1848-1851. Gouvernement Présidentiel 1851-1870. Equilibre 1870-1877.	

IIIeme Cycle	1877-1940
--------------	-----------

(Footnote continues on next page)

although Rousseau had inspired the idea that it was for parliament to make *loi*, law-making was actually carried out by executive organs under certain subsequent French constitutions.<sup>33</sup> Nevertheless, parliament could always argue that it had the most legitimate claim to the law-making function because it reflected the will of the people by reason of being elected by them.<sup>34</sup> It was by virtue of the influence of this political philosophy that under the Third Republic the legal doctrine of Parliamentary sovereignty was formulated.<sup>35</sup>

However, under the present constitution of the Fifth Republic, parliament is no longer the only directly elected state organ.<sup>36</sup> Secondly, the will of the people can be manifested by referendum<sup>37</sup> and thirdly, parliament's law-

---

Gouvernement d'Assemblée 1877-1940. Gouvernement Présidentiel 1940-1944. Equilibre 1944-1946.

IVeme Cycle 1946.....

Gouvernement d'Assemblée 1946-1948. Gouvernement Présidentiel 1958.....

For an essentially identical analytical approach (despite some variations in detail, see Gicquel, *op. cit.*, 496-8). These schemes highlight the struggle between the different state organs over the power to make laws.

<sup>33</sup> For example, the executive arrangement constituted by the Napoleonic Consulate established by the Constitution of 22 Frimaire an VIII (13th Dec. 1799) (c.f. J. Godechot, 'Les constitutions de la France depuis 1789' (1979), 151-62 and Gicquel, *op. cit.*, 505-6).

<sup>34</sup> This claim can be inferred from art.3 of the 1789 Declaration;

'The source of all sovereignty lies ultimately in the nation. No body or individual can exercise any authority that is not expressly derived from it.'

(translation taken from Bell, *op. cit.*, 261).

<sup>35</sup> See R. Carré de Malberg, 'Contribution à la théorie générale de l'état' (1920-22), vol.I, 691-816 and 'La loi, expression de la volonté générale' (1931), 110-3.

<sup>36</sup> By virtue of the referendum of 28th October 1962, the 1958 Constitution was amended to provide for the direct election of the President of the Republic. The Referendum Law of the 6th November 1962 effected this change by virtue of a new art.6 (c.f. Duhamel, *op. cit.*, 35-45).

<sup>37</sup> See arts.3 & 11 of the constitution. Art.3 states, *inter alia*;

'Natural sovereignty belongs to the people, which shall exercise it by its representatives and by means of referendum.'

(translation taken from Bell, *op. cit.*, 265).

Art.11 provides that the following may be submitted to a referendum;

'...any bill concerning the organisation of public authorities, or requiring the approval of a Community agreement, or providing for authorisation to ratify a treaty that, without being contrary to the Constitution, would affect the function of institutions.'

(translation taken from Bell, *op. cit.*, 261).

The referendum can be seen as the ultimate expression of the general will, as is instanced by art.89, which, *inter alia*, lays down that a revision of the constitution must be approved by this mechanism and also that the sovereignty of the people cannot be destroyed, since no revision may put in question the republican form of government.

making function is now shared with the executive.<sup>38</sup> A fourth point is fundamental for civil liberties. Traditionally, parliamentary sovereignty had meant that civil liberties were to be regulated and guaranteed by parliament, via statute. Under present arrangements, art.34 only grants parliament legislative competence in a limited number of areas (this is referred to as specific competence). In contrast, by virtue of art.37, the executive is competent to issue legal measures, in the form of regulations, as regards all matters outside of parliament's competencies, as set out in art.34 (this is referred to as general competence). One consequence has been that civil liberties, once the sole prerogative of parliament and statute are, according to art.34, now only to be *guaranteed* by parliament. Their exercise and regulation is now to be secured by the executive, by virtue of art.37. Thus, parliament is prevented from laying down detailed statutory rules concerning the exercise of human rights, whereas the executive has now been granted a wider scope of action in this field.<sup>39</sup> However, parliament may still be able to justify detailed legal regulation by claiming that it is via this means that human rights are guaranteed.

This change has been accomplished in the constitution by making explicit the tradition of the sovereignty of *loi* but not necessarily that of parliament.<sup>40</sup>

---

<sup>38</sup> See art.38, which lays down the conditions under which the executive may issue *ordonnances*. The executive can therefore legislate on matters that are normally reserved to the competence of parliament and what is more, *ordonnances* are subject to less parliamentary scrutiny.

<sup>39</sup> See, Braud, *op. cit.*, 291-304 & 389-397.

<sup>40</sup> It may be argued that in stating that *lois* are to be passed by parliament, art.34 maintains parliament's position as the sole state organ that can issue statutes and *fuses* parliamentary sovereignty and *loi*. However, it should be recalled that art.38 effects a sharing of law-making functions, whereby the executive can 'legislate' via *ordonnances* which have the force of statute. The constitution, therefore effects a shift, as Stone (*op. cit.*, 47) has noted, from form to *content*;

'In sum, *la loi* was no longer to be defined by its form, an act of parliament, but by its content, the matter to be regulated.'

Consequently, *ordonnances* can be said to be *loi* because of their *content*, i.e. they can regulate matters normally reserved to *la loi*. Parliament and *loi* are not fused and the distinction that exists between them can be seen in art.40;

'Private members' bills [propositions de loi] and amendments drafted by Members of Parliament are not admissible if their adoption would have the consequence of reducing public resources or creating or increasing a public charge.'

(translation taken from Bell, *op. cit.*, 253).

This article limits the law-making role of parliament (private members' bills) by excluding it from certain subjects but it does not touch the sovereignty of *loi*.

Therefore, the French tradition, despite its terms, makes *statutes* supreme, not the *organs* (be they executive or parliamentary) that pass them.<sup>41</sup>

Nevertheless, despite the difference in the French notion of parliamentary sovereignty, it is still submitted that French arrangements merit closer analysis because they reflect an attempt to come to terms with the supremacy of *loi* and the often pernicious consequences that this has for human rights. In addition, it will be noted that one of the criticisms in England has been that it is increasingly the executive that is sovereign because it enjoys effective control over parliament's law-making functions.<sup>42</sup> Thus, the differences between French and English notions may not, after all, be so great. In England, it is the executive's effective control over statutes that has made traditional controls, designed to scrutinise parliament (as the organ that has traditionally legislated), increasingly ineffective. Essentially, in France, statute (*loi*) is sovereign, whereas in England this position is accorded to parliament. Therefore, in France, a 'Bonapartist tradition' has been identified,<sup>43</sup> according to which the ideal is to bring parliament under executive control (this, for example, occurred in the periods 1799-1814 and 1852-1875). It is widely stated that the present constitution was drafted with this aim in mind.<sup>44</sup> As a result, executive control of parliament is less problematic than it is in England because such control is not seen as challenging the traditional sovereignty enjoyed by statute.

Having dealt with the differences in the French notion of parliamentary sovereignty, it should be noted that this tradition had also resulted in a hierarchy of powers, that closely resembles the subordinate position

---

<sup>41</sup>The nature of French parliamentary sovereignty can be clearly seen in the executive's practice of issuing *décret-lois* under the Third Republic. These often concerned matters on which only parliament was competent to legislate. Therefore, the executive effectively acted as the legislature; this legislation was supreme, although parliament was not (c.f. for a brief, historical overview of the Third Republic, G. Burdeau, F. Haman & M. Troper, 'Droit constitutionnel' (1991), 345-64 and Gicquel, *op. cit.*, 524-39 and for comments on the weakening of parliament's role, see Bell, *op. cit.*, 81-6). It will be seen that parliament increasingly came to be seen to be an inefficient and unstable legislative organ. It was this view that was one of the causes of the 'rationalisation' of parliament under the present constitution.

<sup>42</sup> See for example, C. Graham & T. Prosser, 'Waiving the Rules: The Constitution Under Thatcherism' (1988) and Ewing & Gearty, *op. cit.*, 255-6.

<sup>43</sup> This phrase is used by Stone, *op. cit.*, 30-1 (c.f. D. Rousseau, 'Droit de contentieux constitutionnel' (1990), 12).

<sup>44</sup> Stone, *op. cit.*, 46-7, Bell, *op. cit.*, 14-19, Duhamel, *op. cit.*, chp.III and Gicquel, *op. cit.*, 559-571).

traditionally accorded to human rights in England. Situated at the top of this hierarchy was statute and at the bottom judicial decisions. In between were rules issued by the executive. It followed from this hierarchy that the judiciary was positively prohibited from reviewing administrative acts. As a consequence, administrative acts could not be struck down by the judiciary on the grounds that they violated civil liberties. In short, the tradition of parliamentary sovereignty granted a pre-eminent position to *loi* and a superior position to the executive vis à vis the judiciary. The result of this tradition today is that civil liberties do not enjoy the requisite higher status in order to prevail against legislative acts.

To conclude, the tradition of civil liberties is one in which they have had to exist in an environment in which they are subordinate to the dictates of statute. This tradition has conditioned the way in which civil liberties are treated.

*A tradition of uncertainty as regards the legal status of civil liberties:*

A corollary of the traditionally strong affirmation of the doctrine of parliamentary sovereignty in France is the uncertainty as to whether civil liberties have the status of positive law and, if so, what exactly this status is. This traditional uncertainty is submitted to flow from the superior position of statute. In such an hierarchy, those who seek to claim that the legislature and the administration are constrained by the need to respect human rights must firstly accord a legal status to these rights and secondly, grant these rights a higher status than that enjoyed by statute and administrative regulation.<sup>45</sup> The first has proved difficult to achieve, not directly because of the sovereignty of parliament, but because of the strong positivistic tradition in French public law. The second, however, results directly from the sovereignty of *loi*, in that even granted a legal status for civil liberties, the French tradition does not envisage any higher legal value than that enjoyed by statute. These two aspects of what is submitted to be the *tradition of uncertainty* will be set out here in order to complete this outline of tradition within which the

---

<sup>45</sup> As stated by Braud, *op. cit.*, 273;

'Obligations étatiques, elles ne peuvent l'être vraiment que si elles émanent de sources supra-étatiques, c'est-à-dire à la fois supra-législatives et supra-réglementaires; sinon l'Etat ne serait pas authentiquement lié puisqu'un organe disposerait de la faculté de modifier le principe de l'obligation, voire de la nier.'

(c.f. Costa, *op. cit.*, 44).

current arrangements for the protection of human rights that will next be looked at are to be found.<sup>46</sup>

Irrespective of the different political structures and constitutions that have been applied in France since the Revolution,<sup>47</sup> it has been traditionally claimed that human rights do not have a legal status.<sup>48</sup> Instead, they are stated to be merely moral aspirations which have no binding legal effect.<sup>49</sup> Support for this view is sometimes drawn from the fact that the Declaration of 1789 was not placed within the Constitution but rather at its head.<sup>50</sup> This claim is lent further support when constitutional history is examined. This reveals that civil liberties were often declared in texts that were set apart from the actual constitution and indeed, sometimes a charter of rights was even

---

<sup>46</sup>These two aspects are noted by Colliard, *op. cit.*, 18;

'La théorie des libertés publiques, c'est-à-dire la reconnaissance à l'individu de certains droits, relève du droit positif et non du droit naturel: il n'y a pas de droit supérieur à la législation positive. Évidemment il y a des législations positives plus ou moins libérales, plus ou moins individualistes, et plus ou moins conformes à un idéal, mais c'est là une toute autre question.' and see also Costa, *op. cit.*, 16.

Therefore, it can be seen that in the French tradition, positivism and parliamentary sovereignty are connected but it is submitted that this is not a logically necessary connection. However, the tradition can be explained here more clearly by separating the two points.

<sup>47</sup>See, Godechot, *op. cit.*

<sup>48</sup>This claim was generally accepted from the Revolution onwards, see, F. Grazier, M. Gentot and B. Genevois, 'La marque des idées et des principes de 1789 dans la jurisprudence du Conseil d'État et du Conseil constitutionnel' 40 E.D.C.E. [1989] 151, 172-3;

'Dès l'origine la portée juridique de la Déclaration des droits de l'homme et du citoyen a été l'objet d'interrogations et de discussions. Mais après l'abolition de la Constitution de 1791 et surtout sous le régime des lois constitutionnelles de 1875, lui reconnaître de valeur droit positif fut, pour la quasi unanimité des juristes, totalement exclu.'

Duhamel, *op. cit.*, 110, neatly sums up the traditional position;

'Mais alors, elle n'avait plus que la portée dogmatique d'une déclaration de vérités philosophiques,...ou plutôt, elle se ramènerait à l'énoncé de concepts de droit naturel, qui ont bien pu inspirer la Constitution de 1791 et dont la grande influence sur la formation du droit public française est, à cet égard, indéniable, mais qui ne sauraient être considérées comme des prescriptions juridiques ayant l'efficacité de règles de droit positif.'

(c.f. Duhamel, *op. cit.*, 111 and J. Robert & Duffar, 'Les Libertés Publiques et Droits de l'Homme', (1988), 85-7).

<sup>49</sup>This point is clear from Bell's (*op. cit.*, 138) quotation of Barthélemy;

'The classical attitude was well expressed by Barthélemy in his thesis of 1899, where he said that: "most often, declarations of rights are no more than solemn proclamations of principles, rules for the conduct of the State, pure maxims of political morality, promises whose force lies solely in public opinion and whose solemn inscription alone is made by the Constitution, without the possibility for individuals to enforce their observations or practical realisation."

<sup>50</sup>Duhamel, *op. cit.*, 120 asserts that if the claim made by Duguit is conceded that the 1789 Declaration still has legal force, despite the abolition of the 1791 Constitution, by reason of the fact that it was not part of the Constitution, it means that it merely expresses future moral and philosophical principles that are at most of guidance for future constitutions. In other words, it has no positive law value.

omitted.<sup>51</sup> On other occasions the traditional view is supported by reference to the vague terms in which rights are couched.<sup>52</sup> They are stated to lack both precision and the mechanisms by which they can be applied.<sup>53</sup> A distinction is therefore often drawn between declarations of rights and guarantees of rights, a distinction which has its origins in the Revolution.<sup>54</sup> In contrast to the 1789 Declaration, the guarantee is claimed to have constitutional status, not only because they are found in the body of the constitution, but also because they have sufficient precision to be applied.<sup>55</sup>

In turn, this distinction reveals the strong element of positivism in the French legal tradition. This manifests itself in the claim that civil liberties have no legal status unless so granted by positive law; traditionally via statutory

---

<sup>51</sup> See, Godechot, *op. cit.*

<sup>52</sup> This was one of the arguments put forward by Esmein and Carré de Malberg, see Robert & Duffar, *op. cit.*, 86-7;

'Les déclarations ne sont que des énoncés très généraux de principes assez vagues. "Ce ne sont pas", estime Esmein, "des articles de lois précis et exécutoires. Ce sont purement et simplement des déclarations de principes." De son côté, Carré de Malberg écrit: "La Déclaration des droits de 1789 n'avait que la portée dogmatique d'une déclaration de vérité philosophique. Elle se ramenait à l'énoncé de concepts du droit naturel qui ont bien pu inspirer la Déclaration de 1791, mais qui ne sauraient être considérés comme des prescriptions juridiques ayant l'efficacité de régler le droit positif."

<sup>53</sup> Morange, *op. cit.*, 30 essentially makes this point;

'Par ailleurs, ce sont les principes qui sont reconnus et non les moyens ou procédures qui permettraient de les mettre en œuvre.'

(c.f., T. Marshall, 'Les droits de l'homme et l'art politique à l'époque révolutionnaire: la France et les États-Unis' in C-A. Colliard, G. Gonac, J. Beer-Gabel & S. Froge, (eds.) 'La Déclaration des Droits de l'Homme et du Citoyen de 1789, ses origines - sa pérennité' (1990), 36).

<sup>54</sup> Thus, for example, the first constitution of 1791, Title I, mentioned fundamental provisions (including some human rights) that were guaranteed by the Constitution.

<sup>55</sup> Guarantees of rights, as found in French constitutional texts have been defined by Gicquel, *op. cit.*, 100, as follows;

'Cette notion provient de ce que, dans les déclarations, on trouve des principes autres que ceux se rapportant aux droits individuels: souveraineté nationale, séparation des pouvoirs, responsabilité des fonctionnaires, etc. Ce mélange de principes d'organisation politique et même administrative avec l'affirmation des droits fondamentaux de l'individu, pouvait faire douter de la valeur juridique pour le législateur des droits individuels proclamés dans cet ensemble.'

According to Braud, *op. cit.*, 379 *et. seq.*, these guarantees can be constitutional, statutory or regulatory. The main point of importance here is that guarantees exist via positive law provisions. As such, they are capable of being applied. It is this characteristic that is traditionally contrasted with declarations of rights; see Colliard, *op. cit.*, 56-7 and at 57;

'La distinction entre déclaration des droits et garantie des droits ainsi marquée est capitale. La déclaration des droits s'oppose à la garantie en ce sens que seule la garantie est un texte constitutionnel à portée positive. La déclaration n'est qu'un énoncé de principes devant guider le législateur, mais elle ne constitue pas le droit positif. Ce divorce entre droit positif et déclaration des droits se marque dès le début de l'histoire constitutionnel (sic) française, il importe de l'avoir présent à l'esprit.'

enactment.<sup>56</sup> Without the intervention of positive law, civil liberties remain creatures of natural law.<sup>57</sup> As such, they may have a moral weight but they have no legal significance - in other words, they are situated outside the legal domain.

As part of their attack on this dominant tradition, French theorists have asserted that the human rights found in the successive declarations enjoy a legal status.<sup>58</sup> In the Third Republic, government practice and judicial decisions encouraged these claims.<sup>59</sup> However, the fact that successive governments during this Republic passed statutes to protect civil liberties

---

<sup>56</sup> See, Colliard, *op. cit.*, *supra*.

<sup>57</sup> See, P. Lemire, 'La protection constitutionnelle des libertés en droit public français' (1975), 23;

'Les libertés sont donc en droit français le résultat de l'organisation et de l'insertion dans le droit positif national des principes qui forment ce que l'on appelle les "Droits de L'Homme".'

<sup>58</sup> For details of these arguments, see Robert & Duffar, *op. cit.*, 85-6, Stone, *op. cit.*, 33-8, Bell, *op. cit.*, 23-7, Colliard, *op. cit.*, 107-8, Gicquel, *op. cit.*, 111 and Duhamel, *op. cit.*, 119-124.

<sup>59</sup> There was a liberal consensus in the Third Republic which resulted in a series of statutes that guaranteed and regulated the exercise of certain human rights. For a list of the civil liberties that were so enacted, see J.E.S. Hayward, 'Governing France: The One and Indivisible Republic' (1983), 135 and Colliard, *op. cit.*, 90. Morange, *op. cit.*, 13 characterises the practice of Third Republic governments as an application of the positivistic tradition. As a result, he claims that the *proclamation* of the Rights of Man was abandoned during this period and that instead a *system* of civil liberties was put in its place. Thus, the Third Republic can be seen as reaffirming the requirement that civil liberties must be positivised in order to enjoy legal status;

'Les libertés publiques traduisent juridiquement, plus ou moins fidèlement, une philosophie des droits de l'homme.'

(Morange, *op. cit.*, 15).

Although the case law of this period generally denied that bills of rights were legally binding in themselves, the Conseil d'État confirmed, in a series of cases, that non-written general principles of law could be derived from them. Generally, these principles had statutory force; see, Robert & Duffar, *op. cit.*, 87;

'Le Conseil d'État considère par là même - que les Déclarations de droits, en général, n'ont pas de valeur juridique par elles-mêmes, mais seulement que les principes qu'elles contiennent peuvent être retenus comme règles coutumières ou principes généraux du droit avec une valeur juridique au maximum égale à celle des lois ordinaires.'

(c.f. Grazier, *et.al.*, *op. cit.*, 157, the general principles of law were also derived from sources other than the Declaration; see Aramu et autres C.E. 26th Oct. 1945, Rec.213, S.1946.33.1., Dame veuve Tromprier-Gravier C.E. sect. 5th May 1944, Rec.133 and R.J. Cummins, 'The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France' I.C.L.Q. 35 [1986] 594, 603).

The Conseil d'État also confirmed the earlier judgment of the ordinary courts (Cass. crim. 11th May 1833 Paulin S.1833.1.357) that statutes could not be constitutionally reviewed (C.E. 6th Nov. 1936 Arrighi Rec.1936.966, c.f. Rousseau, *op. cit.*, 182). Consequently, the courts continued to recognise the supremacy of law but at least as far as the administration was concerned, they developed the competence to review their regulatory measures as against standards *derived from* declarations of rights.



may be interpreted as continuation, rather than a break with positivism.<sup>60</sup> In addition, the Conseil d'État was scrupulous in not directly granting legal status to civil liberties, preferring instead to employ human rights as sources of inspiration for the 'general principles of law',<sup>61</sup> which were granted legal status. Therefore, this uncertainty may be seen to have been conditioned by a tradition which asserted that human rights, and the bills of rights in which they were placed, were not legally binding.<sup>62</sup>

Consequently, the current mechanisms for protecting of human rights, which will be dealt with next, must be seen against the backdrop of this traditional uncertainty as to whether human rights have a legal status. The same picture

---

<sup>60</sup> Braud, *op. cit.*, 282 sees the Third Republic as continuing the Revolutionary tradition by which statutes regulated the exercise of civil liberties. However, he also sees this period as being one in which the 'Republican tradition' was established, by which statute also introduced human rights into positive law;

'Grâce à l'influence combinée de Rousseau et de Montesquieu, un climat très favorable à la loi s'est constitué pendant la période révolutionnaire. La République de Jules Ferry et de Léon Gambetta, se veut son héritière sur ce point comme sur beaucoup d'autres.'

This principle would be later confirmed in the Fourth Republic by the Conseil d'État in its advice of 1953 (see *infra*.).

<sup>61</sup> See Cummins, *op. cit.*, 612-18.

<sup>62</sup> The Fourth Republic essentially continued the tradition of the non-positive law status of civil liberties. However, at the same time, theorists asserted growing pressure to have civil liberties granted legal status; see, for example, Stone, *op. cit.*, 40-5 and Robert & Duffar, *op. cit.*, 90.

Their claims were greatly assisted by the decision of the ordinary courts to the effect that the provisions of the Preamble in the 1946 Constitution (which contained a series of human rights) could be invoked before them and had the force of law (Trib.civ. de la Seine 22nd Jan. 1947; Gaz.Pal. 1947.I.67 and c.f. Gicquel, *op. cit.*, 112 and Robert & Duffar, *op. cit.*, 90).

Although the Conseil d'État continued to expand its case law on the general principles of law (c.f. J. Rivero, 'Le Juge administratif: un juge qui gouverne?' D.1951 chr.21), it was still unwilling to clearly state that human rights had positive law status. Therefore, in Dehaene (C.E. 7th July 1950; Rec.426), the Conseil d'État applied the right to strike, as found in the 1946 Preamble but did not go on to state what legal status, if any, the Preamble had (although the Commissaire du Gouvernement Fournier suggested that general principles of law derived from the Preamble might have constitutional status). Despite this omission, the case is generally seen by theorists as laying down that the right to strike is a general principle of law and that this principle has constitutional value (see, Braud, *op. cit.*, 312 and Colliard, *op. cit.*, 111). In other cases, the Conseil d'État only derived general principles of *statutory force* (for example, C.E. 25th Jan. 1957 Syndicat fédéral des fonctionnaires malgaches et assimilés Rec.65). In an earlier advice to government, the Conseil d'État had stated that the Preamble had no constitutional value (C.E. 23rd April 1947).

In summary, despite some new developments, the Fourth Republic maintained the traditional sovereignty of parliament (neither the administrative or ordinary courts reviewed statutes according to human rights, or even those principles that were derived from them) and generally, no higher legal status than statute was admitted (the general principles of law being generally granted only a statutory value).

can be discerned as regards the *position* of civil liberties in the French legal hierarchy, assuming that their legal status has been established.

Before the Third Republic, the question does not seem to have been raised; the traditional position being that declarations of rights had no status whatsoever.<sup>63</sup> However, as part of their attempts to have the human rights in the declarations accorded positive law value, theorists asserted that they had either constitutional or supra-constitutional status.

In support of the former claim, Hauriou asserted that a state was governed by two constitutions; one political and the other social. The second, laid down the foundations of social order and in liberal societies it contained the civil liberties of citizens, as part of the relations between citizens and the state. If constitutional value was accorded to the political constitution (which regulated the functions and organisation of state powers), the same had to be accorded to the social constitution and, therefore the declarations of rights contained therein.<sup>64</sup>

The claim to constitutional status was necessary because of the practice at that time of protecting civil liberties via the enactment of statutes. This practice reinforced the sovereignty of parliament. Therefore, this claim sought to place constitutional norms at the summit of a legal hierarchy that was traditionally dominated by statute.<sup>65</sup> In such a way, statutes, despite their being used to

---

<sup>63</sup> As was previously noted Grazier, *et. al., op. cit.*, 172-3 *supra*.

<sup>64</sup> Hauriou, *op. cit.*, 297-300. Gicquel, *op. cit.*, 111, summarises Hauriou's theory in the following manner;

'Maurice Hauriou à résumé sa pensée à travers la théorie dite des deux constitutions. Tout État dispose *simultanément*, estime-t-il, d'une *constitution politique* et d'une *constitution sociale*. La première règle l'organisation et le fonctionnement des pouvoirs d'État; la seconde est celle qui pose les bases de l'ordre social, selon lequel vit la communauté étatique et qui prévoit, en particulier, la nature des rapports entre les citoyens de l'État, c'est-à-dire, dans le cas d'un ordre social individualiste, les droits individuels des citoyens.

Dès lors, si on admet que la constitution *politique* est un texte ayant valeur de super-légalité, il doit en être de même pour la constitution *sociale*, dont le noyau dur est la déclaration des droits. Car la seconde est, au moins, aussi importante que la première.'

<sup>65</sup> See, Stone, *op. cit.*, 34-9 and Duhamel, *op. cit.*, 54. Lemire, *op. cit.*, 8 underlines that in order to secure an efficient protection of civil liberties, they must be placed at the top of the legal hierarchy but that such a position would contradict tradition;

'Il est évident qu'une telle affirmation heurte la tradition française qui, en pratique, de 1789 à nos jours, n'a cessé de fonder l'ensemble de notre système sur l'omnipotence et la souveraineté de la loi, considérée comme la norme la plus apte à garantir efficacement la protection, voire la promotion, des libertés.'

effect important human rights reforms during this time, could be subordinated to human rights. It should be noted that in spite of the claimed inadequacies of statutory protection, the statutory enactment of civil liberties was one important factor in the Third Republic's so-called 'golden age' of public law.<sup>66</sup>

Moving to a consideration of the supra-constitutional claim, it should be noted that this was sometimes founded upon natural law. Here, the claim was that a higher law existed above positive law, however, this view was not accepted by a growing number of theorists who refuted the existence of natural law.<sup>67</sup> Moving from a secular foundation, Duguit asserted the supra-constitutionality of the 1789 Declaration by claiming that it constituted an implicit principle that bound the constituent power. The fact that the revolutionaries preceded the 1791 Constitution with the 1789 Declaration, was claimed to be evidence that it was not part of the Constitution and thus, had no constitutional value. Rather, it constituted the prior condition of the Constitution and for this reason had supra-constitutional value.<sup>68</sup>

Under the Third Republic, it has been seen that this assertion was rejected by according the 1789 Declaration purely moral or philosophical status. Therefore human rights, it was objected, could hardly be said to enjoy a supra-constitutional value. This view was affirmed in two cases, which denied that human rights had constitutional value (and by implication, supra-constitutional value), whilst holding that the general principles of law that were derived from them were of legislative (statutory) value.<sup>69</sup>

---

<sup>66</sup> Both Stone, *op. cit.*, 32 and Grazier *et. al.*, *op. cit.*, 156, speak of a 'golden age' or 'time'. Stone, *op. cit.*, 32 also notes the importance of the enactment of civil liberties; '...an extraordinary renaissance of public law occurred during the second decade of the Third Republic, and the discipline subsequently entered a golden age. I can only offer some tentative explanations for the causes of this renaissance...a series of laws which sought to guarantee what in France are *public liberties* were passed - on free association, union membership, freedom of the press, and so on - and these came to be seen as performing the function of a judicially applicable bill of rights.'

<sup>67</sup> See Robert & Duffar, *op. cit.*, 85-6.

<sup>68</sup> See, L. Duguit, 'Traité de droit constitutionnel' (1921-29) Vol.III, 560 and Duhamel, *op. cit.*, 125, Burdeau, *op. cit.*, (1972), 64-5, Bell, *op. cit.*, 24 and Stone, *op. cit.*, 34-40. Indeed the 1789 Declaration can be seen as constituting the conditions for a social contract.

<sup>69</sup> C.E. 9th May 1913 Roubeau Rec.521 and C.E. 4th Feb. 1944 Guieysse R.D.P. 1944.166 (c.f. Robert & Duffar, *op. cit.*, 87).

The Conseil d'État accordingly took great care not to declare that human rights had legislative value in themselves. The 1789 Declaration, therefore, remained a non-positive law text; a natural law source of inspiration from which positive law principles could be drawn.<sup>70</sup> It should be noted that even if the 1789 Declaration had been granted constitutional or supra-constitutional status, the practical effects would have been largely negated by the decision of the Conseil d'État that it lacked the competence to review statutes as against the constitution.<sup>71</sup> This would have meant that the human rights, even those of a constitutional value, would have remained subordinate to statute because the judiciary would continue to uphold statute in cases of conflict between statutes and constitutionally valued human rights. Furthermore, even given a supra-constitutional status, this strong affirmation of parliamentary sovereignty would have meant that statutes could not have been struck down because no higher status was recognised above that of statute.

The uncertainty as to what value human rights enjoyed was also raised in the Fourth Republic. During this period civil liberties were set out in the Preamble to the Constitution.<sup>72</sup> However, uncertainty resulted as a tension manifested itself between the dominant tradition and the continued assertions of public law theorists. Despite the creation of the Comité constitutionnel, charged with limited powers of constitutional review, it was clearly stated that review could only take place *before* a statute was promulgated and statutes were not to be reviewed as against the Preamble.<sup>73</sup> At the same time,

---

<sup>70</sup> See Braud, *op. cit.*, 312.

<sup>71</sup> See, Arrighi, *op. cit.*, and c.f. Rousseau, *op. cit.*, 82-3.

<sup>72</sup> For the differences between declarations and a preambles, see Gicquel, *op. cit.*, 98. It is submitted that these differences are of little relevance for present purposes, given that both types of texts act as the repositories of human rights.

The Preamble to the Fourth Republic Constitution (27th Oct. 1946) reaffirmed the rights and liberties contained in the 1789 Declaration, the fundamental principles recognised by the laws of the Republic and certain political, economic and social principles, considered to be particularly necessary for the time (c.f. Gicquel, *op. cit.*, 106-10 and for an English translation, Bell, *op. cit.*, 263). The Constitution was a product of a compromise between the Right and the Left (c.f. Stone, *op. cit.*, 41-3) after the rejection, by referendum, of an earlier constitutional project (Gicquel, *op. cit.*, 545-6).

<sup>73</sup> Art.92, *inter alia*, stated,

'Dans le délai de promulgation de la loi, le Comité est saisi par une demande émanant conjointement du président...

Le Comité examine la loi, s'efforce de provoquer un accord entre l'Assemblée nationale et le Conseil de la République...

(Footnote continues on next page)

the *travaux préparatoires* clearly showed that the drafters had no intention of granting legal value to the Preamble, let alone according it a legislative, or even constitutional status.<sup>74</sup>

This uncertainty regarding human rights is nowhere more manifest than in the divergent case law of the ordinary and administrative courts. As regards the former, it was decided that the 1946 Preamble had statutory force as long ago as 1947.<sup>75</sup> On the other hand, the Conseil d'État's position was less clear but tended to err on the side of not granting the Preamble legal value in itself but rather, in accordance with its previous jurisprudence, the general principles of law that were derived from it.<sup>76</sup>

Once again, no court struck down a statute on the grounds that it violated human rights. This fact therefore indicates that despite the continued pressure that was asserted by public law theorists, the traditional view remained dominant. However, the uncertainties and divergences in the case law can be seen to reveal a tension. The current arrangements regarding human rights also reflect this tension; the 1958 Constitution represents a new departure from tradition but as has earlier been claimed, this same change will be seen to have been conditioned by that tradition.

---

Il n'est competent que pour statuer sur la possibilité de révision des dispositions des Titres Ier à X de la présente Constitution.'

By reason of the Preamble being *outside* the titles mentioned in art.92, it could not be used as a basis on which to review statutes. Therefore, a limited review was envisaged, to the extent that in the event of a contradiction between the Constitution and an as yet unpromulgated law, it was the Constitution that could be revised, not the statute. This limited review has been seen to be the result of trying to accommodate the dominant tradition; see, Burdeau, *op. cit.*, 426;

'La Constitution organise un semblant de contrôle de constitutionnalité par l'intermédiaire d'un Comité constitutionnel. Pour éviter de présenter ce contrôle comme un obstacle à l'expression de la volonté générale, le Comité ne doit pas examiner si les lois sont contraires à la constitution, mais si elles "supposent une révision de la constitution". Le Constituant se rattachait ainsi à la justification procédurale du contrôle.'

Therefore, even if the Preamble had been included in one of the texts over which the Comité had competence by virtue of art.92, it could have been revised in the event of it being in contradiction with a statute (c.f. Bell, *op. cit.*, 22 and Rousseau, *op. cit.*, 13).

<sup>74</sup> See Stone, *op. cit.*, 41-4.

<sup>75</sup> Trib.civ. de la Seine, *supra*.

<sup>76</sup> See, for example, Dehaene, *supra.*, C.E. 11th July 1956 Amicale des Annamites de Paris Rec.317, C.E. 25th Jan. 1957 Syndicat fédéral des fonctionnaires malgaches Rec.65 and C.E. 7th June 1957 Condamine R.D.P. 1958.98. These principles are not always expressly derived from the Preamble, see, for example, C.E. sect. 9th March 1951 Société des concerts du conservatoire Rec.151 and C.E. Ass. 25th May 1954 Bare! Rec.308 and they do not necessarily concern human rights; see, Rivero, (1951), *op. cit.*, 22.

The construction of human rights is an example of this conditioning. Consequently, human rights are usually claimed to be laid down and regulated by positive law norms.<sup>77</sup> In common with contemporary, liberal human rights theorists, French commentators claim that human rights are founded upon social consensus. In this sense, the decision as to which actions and activities are sufficiently important to be classed as civil liberties (a decision that is traditionally effected by the enactment of a statute), is a product of social agreement and not because it is dictated by natural law postulates.<sup>78</sup> This consensus may, however, change and this possibility, makes civil liberties contingent and not universal across time.<sup>79</sup>

One result of the nature of human rights is that French theorists differ as to whether human rights are purely negative, or also positive,<sup>80</sup> This is but one

---

<sup>77</sup> Therefore, Colliard, *op. cit.*, 2 states;

'Certains systèmes de civilisation admettent l'existence au profit des individus de certains droits reconnus, organisés et protégés par l'État. Ce sont ces droits qu'on appelle les libertés publiques.'

and in defining civil liberties, the requirement of positive law regulation is emphasised, *op. cit.*, 28;

'On désigne sous le non de libertés publiques des situations juridiques légales et réglementaires dans lesquelles l'individu se voit reconnu le droit d'agir sans contrainte dans le cadre des limites fixées par le droit positif en vigueur et éventuellement déterminées, sous le contrôle du juge, par l'autorité de police chargée du maintien de l'ordre public. Ce droit est protégé par action en justice, essentiellement par la mise en œuvre du contrôle de légalité.'

(c.f. Braud, *op. cit.*, 271-2 and Robert & Duffar, *op. cit.*, 12).

<sup>78</sup> See, for example, Morange, *op. cit.*, 74;

'Ce sont des principes sur lesquels, pour des raisons variables, s'est établi un large consensus. Ils feraient partie de la règle du jeu que doivent respecter les acteurs politiques, un peu au même degré que la règle démocratique elle-même.'

(emphasis added).

<sup>79</sup> Costa, *op. cit.*, 16;

'...les libertés publiques n'existent que dans et par le droit positif; elles ont par conséquent un contenu plus précis, mais plus contingent aussi, puisqu'elles dépendent de la liste qu'en fixe le législateur, et qui varie dans le temps comme dans l'espace.'

<sup>80</sup> Colliard, *op. cit.*, 25-8, excepts that not all civil liberties are negative. However, he claims that certain positive rights are not human rights. These are those that seek to secure the necessary material conditions for the exercise of classic civil liberties (negative rights). These positive rights are merely linked to human rights; *op. cit.*, 27;

'Les démocraties libérales connaissent d'ailleurs de semblables liaisons. La liberté de parole, en matière électorale, n'est-elle pas assurée par une prestation positive de l'État accordant la possibilité aux formations politiques d'utiliser le service public de la radiodiffusion ou de la télévision.'

He contrasts these with other positive rights which, because they lack regulation by positive norms, remain mere ideals. Here, the positivistic tradition can be seen to be strongly determinative of Colliard's views (c.f. Costa, *op. cit.*, 16, who on the same basis distinguishes

(Footnote continues on next page)

among many other areas of difference concerning human rights<sup>81</sup> but such uncertainty and disagreement was also found to exist in England and it this pervasive uncertainty that once again justifies the theoretical position that was formulated and adopted in chapter I. More importantly, France and England also have in common a tradition of parliamentary sovereignty that constitutes a relationship upon which useful comparisons can be made as regards the protection of human rights. The usefulness of French practice will be seen next when the current French arrangements are presented. These arrangements will also later serve to illustrate the general context of the specific legal protection of the liberty to assemble.

### THE PROTECTION OF CIVIL LIBERTIES IN FRANCE

It will be seen that current arrangements for protecting human rights are strongly affected by the tradition that was presented above. The present arrangements of the Fifth Republic, to a great extent represent a victory for French public law theorists in their attempt to secure the position of human rights at the top of the legal hierarchy.

The protection of civil liberties will be presented using the method commonly adopted by French theorists. This consists of looking at the mechanisms of protection that exist at each level of the legal hierarchy.<sup>82</sup>

#### *Protection by virtue of international treaties:*

Civil liberties are protected by international treaties, most commonly by the ECHR.<sup>83</sup> By virtue of art.55 of the Constitution, international treaties, once

---

between civil liberties and the Rights of Man; the former concern *facultés* and the latter, *créances*).

On the other hand, some theorists claim that human rights encompass both negative and positive conceptions. It is this sense that Braud, *op. cit.*, 271 & 275 *et. seq.* speaks of the rights of individuals and state obligations (c.f. Robert & Duffar, *op. cit.*, 13).

<sup>81</sup> To take but one other example, theorists disagree as to which civil liberty is the most important; Colliard, *op. cit.*, 234 and Robert & Duffar, *op. cit.*, 18, claim that personal freedoms are the most fundamental human rights, whereas, Gicquel, *op. cit.*, 97, accords this to the liberty of expression / communication and Duhamel, *op. cit.*, 329, to equality.

<sup>82</sup> For examples of the application of this method, see Robert & Duffar, *op. cit.* 84, C. Leclercq, 'Libertés Publiques' (1991), 143-59 and Morange, *op. cit.*, 88.

<sup>83</sup> France did not ratify the ECHR until 3rd May 1974 and granted the right of individual petition to the Court of Human Rights in Strasbourg on 9th October 1981 (c.f. Leclercq, *op. cit.*, 89-91). Currently, France has the second largest number of complaints lodged by individuals to the Commission of the ECHR and actually surpassed the UK for the first nine months of 1990 (c.f. Leclercq, *op. cit.*, 97-101 and Gicquel, *op. cit.*, 114-5).

ratified, enjoy a superior legal status to that of statute.<sup>84</sup> Thus in domestic law, the ECHR is recognised as higher law. This status has been generally recognised in the case-law of the various jurisdictions. Therefore, although the Conseil constitutionnel (Cc) has declared that it does not have the jurisdiction to investigate whether statutes are compatible with the ECHR under art.61, which lays down the conditions under which it may review statutes and other legislative measures,<sup>85</sup> it has nevertheless indicated that it could, by virtue of art.61, review laws in order to ascertain whether they are in accordance with the constitution, which includes art.55.<sup>86</sup> This possibility has been confirmed in two cases concerning immigration and elections.<sup>87</sup>

The administrative and ordinary courts have declared themselves competent to strike down legislation on the grounds that it is not in conformity with international treaties ratified by France. The ordinary courts were first to do so and decided as early as 1975 that parties could raise the ECHR in proceedings before them.<sup>88</sup> On the other hand, the Conseil d'État affirmed the supremacy of the ECHR over statute in a case in 1989<sup>89</sup> and did the same as regards European Union legislation.<sup>90</sup> The limitations of the Cc's jurisdiction are therefore offset by the protection afforded by the ordinary and administrative courts. The result is that civil liberties, found in international treaties will prevail over statute and administrative regulations.

---

<sup>84</sup> Art.55 reads as follows:

'From their publication, duly ratified or approved treaties or agreements have a higher authority than lois, subject, for each treaty or agreement, to its implementation by the other party.'

(translation taken from Bell, *op. cit.*, 257).

<sup>85</sup> Dec. No.74-54DC 15th Jan. 1975, Rec.19 Abortion Law, consideration 7 and Dec. No.89-268 DC 29th Dec. 1989, Rec.110 Loi de finances pour 1990, considerations 79-85.

<sup>86</sup> See, D. Rousseau, 'L'intégration de la Convention européenne des droits de l'homme au bloc de constitutionnalité' in D. Rousseau & F. Sudre (eds.) 'Conseil constitutionnel et Cour européenne des Droits de L'Homme: droits et libertés en Europe' (1990), 119-121.

<sup>87</sup> Respectively, Dec. No.86-216 DC 3rd Sept. 1986, Rec.135 Loi relative aux conditions d'entrée et de séjour des étrangers en France, consideration 6 and Nos.88-1082, 1117 21st Oct. 1988, considerations 4 & 5.

<sup>88</sup> See, Ch. crim. 3rd June 1975 Respino, Bull.crim. no.141, 382 (for examples of other cases, see Leclercq, *op. cit.*, 95). In Cass. ch. mixte 24th May 1975 Société Jacques Vabre D.1775.497, the ECHR was held to prevail over laws passed prior, or subsequent, to the ratification of the Treaty (c.f. Leclercq, *op. cit.*, 122-3).

<sup>89</sup> C.E. Ass. 20th Oct. 1989 Nicolo, Rec.190.

<sup>90</sup> C.E. 24th Sept. 1990 M. Boisdet, A.J.D.A. 1990.906.



This position reflects the application of a new hierarchy of laws.<sup>91</sup> Respect for this hierarchy is required by reason of it now being constituted as a constitutional norm, *viz.* art.55. As a result, statutes are subordinate to international treaties. This in turn provides an example of how the tradition of parliamentary sovereignty has been challenged under the Fifth Republic.

*The Conseil constitutionnel:*

The strongest challenge to the doctrine of parliamentary sovereignty appears to be the constitutional review of laws that is carried out by the Cc. As a result of this review power, the Cc has been able to protect civil liberties from statutory infringement. However, upon closer inspection, it will be seen that the Cc constitutes a compromise and, in many respects, even a continuation with the French public law tradition.

The Cc may review the constitutionality of statutes via four methods. These are divided into external and internal controls and it is one of the latter forms, called the 'violation de la Constitution', by which human rights are generally protected.<sup>92</sup> Under this head, the Cc reviews statutory legislation in order to check that it does not violate the human rights set out in texts to which constitutional value has been attributed. These texts have come to be known as the 'bloc de constitutionnalité'<sup>93</sup> and they consist of the texts referred to in the Preamble to the 1958 Constitution;

The French people solemnly proclaims its attachment to the rights of man and to the principles of national sovereignty such as are defined by the Declaration of 1789, confirmed and completed by the Preamble to the 1946 Constitution.<sup>94</sup>

Therefore, the Cc generally reviews statutes against the 1958 Constitution, the 1789 Declaration, the fundamental principles recognised by the laws of the Republic (usually abbreviated to PFRLR and henceforth adopted here), the

---

<sup>91</sup> This hierarchy is generally welcomed by theorists, for example, Costa, *op. cit.*, 44; 'A défaut de garantie constitutionnelle, celle du traité est importante, car, en vertu de l'article 55 de la Constitution de 1958, les traités régulièrement ratifiés ont, dès leur publication, une autorité supérieure à celle des lois. D'où l'importance de textes tels que la Convention Européenne de sauvegarde des Droits de l'Homme et des libertés fondamentales...'

<sup>92</sup> These different forms are set out by Rousseau, *op. cit.*, 118-24 and as regards review for violation of the constitution, see pgs.121-2.

<sup>93</sup> This phrase is used by, amongst others, Rousseau, *op. cit.*, 91, Robert & Duffar, *op. cit.*, 92 and Grazier *et. al.*, *op. cit.*, 175.

<sup>94</sup> Translation taken from Bell, *op. cit.*, 245.

principles particularly necessary to our time and principles of constitutional value. Although the Constitution was silent as to the legal value of the Preamble and despite the clear evidence that its drafters did not intend it to have binding force, the Cc has granted it constitutional value, thus resolving the traditional uncertainty that was noted above. This activism has been defended and supported by theorists.<sup>95</sup>

The Cc is granted the jurisdiction to review statutes by reason of art.61(2) of the Constitution. It may only be seized under certain conditions. Essentially, only the President of the Republic, the Prime Minister, the Presidents of the National Assembly and the Senate, or sixty deputies or senators can ask the Cc to review a *loi*. Such review can also only be requested before promulgation.<sup>96</sup> Constitutional review is therefore *a priori* and is initiated by highly political actors. It is generally seen as *part of the legislative process*.<sup>97</sup> The

---

<sup>95</sup> Gicquel, *op. cit.*, 112, stresses that given the silence of the Preamble, the Cc's decision was activist;

'Il n'est pas indifférent, à ce propos d'indiquer que si, à la différence de la constitution de 1946 (art.92), celle de 1958 n'excluait pas le préambule du champ d'intervention du contrôle de constitutionnalité, elle ne le proclamait pas, pour autant. Ce n'est qu'au terme d'une autre démarche *volontariste* que le Conseil parviendra à ce résultat...'

The extent of this activism becomes clear when reference is made to the *travaux préparatoires* of the constitution, in which the Cc was intended to protect the executive's regulatory power from being encroached upon by parliament and where it is made clear that the Preamble did not have constitutional value (c.f. Stone, *op. cit.*, 49 and Bell, *op. cit.*, 64).

The Fifth Republic had seen the continuation of the debate as to the legal value, if any, of human rights (see, Robert & Duffar, *op. cit.*, 90-2 & 113-4) but with the Cc's 1971 decision (see, *infra.*), theorists were quick to support the Cc's activism (see Stone, *op. cit.*, 95 & 103-4). Rousseau, *op. cit.*, 29 provides a typical example of the way theorists have justified the Cc's activism;

'...la Constitution de 1958 n'interdit à aucun moment la possibilité pour le Conseil de se référer au préambule et la déclaration de 1789, à la différence de la Constitution de 1946 qui, elle, excluait expressément, au dernier alinéa de l'article 92, tout contrôle de la loi au regard du préambule. De cette non-interdiction et de cette différence, il est donc permis de déduire, sans forcer le trait, que le texte ne condamnait pas la possibilité d'un contrôle de la loi au-delà des seules règles de compétence et de procédure...'

(c.f. Grazier *et. al.*, *op. cit.*, 175).

<sup>96</sup> Art.61(2), states;

'..lois may be referred to the Conseil constitutionnel, before they are promulgated, by the President of the Republic....' etc.

(translation taken from Bell, *op. cit.*, 258).

<sup>97</sup> Stone, *op. cit.*, 8, states;

'...the Council rules only on the constitutionality of bills which have been definitively adopted by parliament but not yet promulgated by the executive. Legislation may not be challenged by private citizens, nor can legal controversies percolate up to the Council through the judicial system. The control is thus *a priori* and abstract...'

and

(Footnote continues on next page)

Cc cannot review statutes of its own volition, neither can it generally review existing laws.<sup>98</sup> At the same time, because an entire statute is referred, the Cc may review other aspects of the proposed statute that have not been referred.<sup>99</sup> If a *loi* is declared to be in violation of the human rights protected in the bloc de constitutionnalité, it may neither be promulgated nor applied by any administrative or judicial authorities.<sup>100</sup> Thus, human rights must be respected by all state organs and the Conseil d'État and the Cour de Cassation must follow the Cc's decisions.<sup>101</sup>

The first occasion upon which the Cc struck down a statute because it violated a civil liberty was in its 1971 decision concerning the liberty of association. In this case, it struck down a *loi* on the ground that it violated the PFRLR.<sup>102</sup> It has subsequently upheld a wide variety of human rights by

---

'As a matter of fact, each Council decision necessarily constitutes the final, substantive stage of the policy-making process, and is itself an integral part of a referred bill's legislative history.'

(c.f. pgs.108-9 and Rousseau, *op. cit.*, 65 *et. seq.*, & 69-71).

<sup>98</sup> Art.61 clearly states that review can only occur before promulgation. This position was upheld by the Cc in its 1978 decision concerning radio and television monopolies (No.78-96 DC 27th July, Rec.29). However, as a result of an obiter dictum in a case concerning the state of emergency in New Caledonia (No.85-187 DC, Rec.43 at 45), the Cc claimed that it had jurisdiction to review the constitutional conformity of an existing (i.e. already promulgated) statute in three different situations. Firstly, when the statute, for which it had been seized, modifies a previous statute. Secondly, when it affects or thirdly, completes the scope of application (the domain) of a prior statute.

Nevertheless, such review is excluded if the statute to be reviewed merely applies an existing *loi* (c.f. Rousseau, *op. cit.*, 176 *et. seq.* & Bell, *op. cit.*, 33).

<sup>99</sup> See, Duhamel, *op. cit.*, 320 and Bell, *op. cit.*, 53.

<sup>100</sup> Art.62 states;

'A provision that has been declared unconstitutional may neither be promulgated nor applied. Decisions of the Conseil constitutionnel bind public powers and all administrative and judicial authorities.'

(Translation taken from Bell, *op. cit.*, 258).

<sup>101</sup> For the case law of the Conseil d'État and Cour de Cassation on this subject, see Leclercq, *op. cit.*, 154, Robert & Duffar, *op. cit.*, 119 and see C.E. 12th Dec. 1969 Conseil national de l'ordre des pharmaciens, Rec.436. However, Stone, *op. cit.*, 99, notes;

'By most accounts, the traditional rule according to which the *Conseil d'État* is bound by the effects of a Council decision but not by its argumentation, has not broken down. The cases cited in support of the contrary conclusion, however, show (to my reading at least) only that the *Conseil d'État* agrees with the Council's interpretation, not that it feels obliged to agree...'

<sup>102</sup> No.71-44 DC 16th July 1971, Rec.29 (the background to the case can be found in J. Rivero, 'Le Conseil constitutionnel et les libertés' (1984), 9-24, Rousseau, *op. cit.*, 58-61, Bell, *op. cit.*, 149-151 and Hayward, *op. cit.*, 139-41). The Cc stated, *inter alia*;

'Considering that, among the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed by the Constitution, is to be found the freedom of association; that this principle underlies the general provisions of the *loi* of 1 July 1901; that, by virtue of this principle, associations may be formed freely and can be registered simply on the condition of

(Footnote continues on next page)

reference to other texts in the bloc de constitutionnalité<sup>103</sup> and it has been noted that the Cc has even expanded the bloc, principally by reference to constitutional principles.<sup>104</sup> Despite severe criticisms from politicians in response to certain decisions concerning highly politically charged legislation, the Cc has generally become accepted by the academic community and the general public.<sup>105</sup>

At first glance, the Cc's method of protection appears as a direct challenge to the tradition of the sovereignty of law. However, there are important continuities as regards tradition. The original role that was accorded to the Cc can be seen as continuing the 'Bonapartist'<sup>106</sup> tradition within the dominant tradition of public law, which emphasises the role of the executive branch. According to this tradition, parliament is seen as a source of instability which must be rationalised' by being brought under the control of the executive.

---

the deposition of a prior declaration; that, thus with the exception of measures that may be taken against certain types of association, the validity of the creation of an association cannot be subordinated to the prior intervention of an administrative or judicial authority, even where the association appears to be invalid or to have an illegal purpose.'

The Conseil d'État had previously declared the liberty to associate a general principle of law under the Fourth Republic (*Amicale des Annamites de Paris, supra.*, and c.f. Stone, *op. cit.*, 69) and the Cc is widely seen to have been inspired by the Conseil d'État's jurisprudence (c.f. Rousseau, *op. cit.*, 59-60). However, the importance of the Cc's decision was that it subordinated prospective legislation to a requirement that civil liberties must be protected; '...pour la première fois en France, le principe de la suprématie de la Constitution par rapport à la loi trouve la sanction juridictionnelle qui le fait passer de la théorie à la réalité. Pour la première fois en France, un acte voté par le Parlement se voit privé de sa force par une juridiction. Pour la première fois en France, la nécessité de protéger les libertés contre la loi est reconnue, et se traduit en acte.'

(Rivero, (1984), *op. cit.*, 13-4).

<sup>103</sup> For an analysis of this case law, see Rivero, (1984), *op. cit.*, Bell, *op. cit.*, 138-98 and L. Favoreu, 'Les libertés protégées par le Conseil constitutionnel' in Rousseau & Sudre, *op. cit.*, 33 and for lists of the protected liberties, see Gicquel, *op. cit.*, 113-4, Leclercq, *op. cit.*, 145-7 and Robert & Duffar, *op. cit.*, 117-8.

<sup>104</sup> The Cc has had recourse, variously, to 'principes, dispositions ou règles à valeur constitutionnelle', 'objectifs de valeur constitutionnelle' and 'd'exigence constitutionnelle', Rousseau, *op. cit.*, 97 claims;

'Ces différentes expressions soulèvent un problème autrement plus difficile que celui posé par les P.F.R.L.R. Elles permettent en effet au Conseil d'opposer au législateur des principes qui n'ont pas été, en tant que tels, affirmés par le Constituant, s'octroyant ainsi un pouvoir de création de textes constitutionnels.'

<sup>105</sup> See, Stone, *op. cit.*, 53 & 80-91. He also notes in chapter 4, how theorists, whilst initially hostile towards the Cc, have, since the 1971 decision, rallied to its support. Duhamel, *op. cit.*, 310, quotes a SOFRES opinion poll from 1983, in which 80% of the French population supported the Cc's role of ensuring the constitutional regularity of statutes.

<sup>106</sup> It will be recalled that this term is adopted by Stone, *op. cit.*, *supra.*

Constitutional review under this tradition is carried out by a *political organ* that is under the executive's control.<sup>107</sup>

The Cc, and indeed the 1958 Constitution, were a response to the problem of parliamentary instability that had dominated and eventually led to the fall of the Third and Fourth Republics. By the end of the Fourth Republic, parliamentarianism had fallen into disrepute.<sup>108</sup> Thus, the Fifth Republic's constitution sought to 'rationalise' parliament by shifting the balance of power towards the executive. It was noted above, how, by virtue of arts.34 and 37,<sup>109</sup> the constituents introduced the novel feature of attributing specific legislative

---

<sup>107</sup> In two periods of French post-Revolutionary history, such control was attempted but these bodies had little or no independence from the dictates of the executive; constitutional review thus fell into disrepute (Rousseau, *op. cit.*, 12 and Bell, *op. cit.*, 21; as already noted, these two occasions were 1799-1814 and 1852-75). The political institutions that were set up during these periods form part of what Stone (*op. cit.*, 30-1) terms the 'Bonapartist' tradition. That the Cc was seen as continuing this tradition has been noted by Rousseau, *op. cit.*, 12; 'Chaque fois qu'un mécanisme quelconque de contrôle était proposé, le souvenir de la faillite des Sénats impériaux était invoqué pour faire condamner l'initiative.' Before 1971, theorists were overwhelmingly critical of the Cc. They dismissed it as a largely partisan, executive-dominated institution. It was compared unfavorably with the ideal of independent judicial review on the United States model (Stone, *op. cit.*, chp.4). These criticisms were supported by an analysis of the case law between 1958-71, in which the Cc was more concerned with policing the boundaries between the legislature and the executive and invariably decided in favour of the latter (Stone, *op. cit.*, 60-6 and Rousseau, *op. cit.*, 57-8 & 60).

<sup>108</sup> Bell, *op. cit.*, 11, observes;

'Like the Third Republic, the Fourth was a parliamentary regime, with real power lying in the Assemblies, which chose the President, and to whom the Government was responsible, and upon whose support it relied. Again like the Third Republic, the institutions chosen produced a significant degree of governmental instability, which brought the politicians into disrepute and failed to create the consensus necessary to maintain the system in crisis.'

<sup>109</sup> The reduced competence of parliament to that of *guaranteeing* civil liberties, leaves intact a choice which theorists traditionally claim is open to parliament. Accordingly, parliament is free to decide to place a civil liberty in either a repressive or preventative statutory framework (Robert & Duffar, *op. cit.*, 95 *et. seq.* and Colliard, *op. cit.*, 120 *et. seq.*). Robert & Duffar, *op. cit.*, 96 have described the repressive regime as being;

'...quand le législateur laisse le citoyen libre d'agir selon ses propres désirs, quitte à l'obliger à subir les conséquences de ses actes s'ils s'avèrent contraires au droit. L'individu n'a point à demander à quiconque l'autorisation d'exercer sa propre liberté mais le mauvais usage qu'il peut en faire l'expose à des sanctions ou à l'obligation de réparer les dommages causés. Le régime répressif est un "régime de droit" par la primauté qu'il accorde aux droits individuels.'

This is contrasted with the 'régime préventif' as being

'...quand l'autorité publique impose préventivement des obligations aux individus, de manière à empêcher le fait ou l'acte contraire au droit. L'individu ne peut exercer ses libertés qu'après avoir accompli une formalité préalable. Le régime préventif est un "régime de police" par la place qu'il fait à la réglementation.'

For a discussion of the case law concerning the parliamentary and executive regulation of civil liberties under arts.34 and 37, see Robert & Duffar, *op. cit.*, 101 *et. seq.*

competence to parliament, whilst the executive enjoyed general competence. In this context of a desired weakening of parliament's role, the Cc was created in order to police the boundaries between statutes and regulations (i.e. between parliament and the executive) but with the balance of power in favour of the executive.<sup>110</sup> This intention is clear from its composition.<sup>111</sup> In addition, the Cc operates in political space and consequently was, to a certain extent, intended to constitute a continuation with the tradition of executive dominance. It was never intended that *lois* should be subordinated to the human rights in the Preamble, but rather that the Cc should merely uphold the constitutional provisions that limited and controlled parliamentary procedure<sup>112</sup> and its competence. In short, it was an institution that was intended to rationalise parliament.

However, in spite of its departure from its intended purpose by virtue of its case law on the protection of human rights, the Cc remains a highly political body<sup>113</sup> and permits the continued existence of parliamentary sovereignty,

---

<sup>110</sup> See, Rousseau, *op. cit.*, 23, Duhamel, *op. cit.*, 308, Braud, *op. cit.*, 291 *et. seq.*, Stone, *op. cit.*, 46-59 and Bell, *op. cit.*, 27 who notes;

'As originally conceived, the Conseil constitutionnel was not to be a radical departure from what had gone before in terms of institutional competence. The essential difference was the new view of parliamentary sovereignty as limited by the role accorded to the executive. The Conseil was merely one institutional mechanism to ensure that this new function of Parliament was adhered to.'

<sup>111</sup> The Cc has nine members, renewable by one third every three years. The members are nominated in rotation by the Presidents of the Republic, the National Assembly and the Senate (c.f. art.56, Rousseau, *op. cit.*, 37 *et. seq.*, Bell, *op. cit.*, 34-41 and Stone, *op. cit.*, 50-3).

<sup>112</sup> See art.61(1) and Bell, *op. cit.*, 31-2;

'The scrutiny of *parliamentary standing orders* is justified by the desire that Parliament does not overstep the boundaries set out for it in the Constitution. If Parliament were to adopt procedures that blocked the dominance of the executive, this could clearly upset the new arrangements of 1958.'

(c.f. Stone, *op. cit.*, 47 and Rousseau, *op. cit.*, 24-5).

<sup>113</sup> Rousseau, *op. cit.*, 47 *et. seq.*, notes the existence of a debate as to whether the Cc is a 'jurisdiction' or a political organ. He feels this debated can be reduced to the question, does the Cc create or apply law? If it performs the former function, it is a political organ. The disagreement is claimed to reflect a struggle between lawyers and political theorists for control over the constitutional domain (pgs.52-3).

Stone, *op. cit.*, 96-7, also mentions this debate but claims that since the late 1970's there has been a consensus amongst theorists that the Cc is a 'jurisdiction';

'According to this paradigm, all jurisdictions must conform to certain minimal criteria (as easily recognised by common lawyers). Juridictions are (1) composed of judges who are (2) primarily engaged in settling disputes brought by (3) real-life litigants who (4) argue a concrete case or controversy before them according to (5) fixed, contradictory judicial procedures.' (pg.96).

French theorists abandoned their traditional hostility to the Cc and began to argue that it was a 'jurisdiction' by relaxing the criteria of the paradigm;

(Footnote continues on next page)

thus it constitutes a certain continuation with tradition. Parliamentary sovereignty can still be said to exist by reason of the fact that the Cc may only review statutes before they become *real lois*.<sup>114</sup> Before promulgation, they remain incomplete and thus divested of the sovereignty enjoyed by statutes.<sup>115</sup> In addition, the Cc does not have the competence to review statutes that have been previously passed and consequently, these still enjoy a superior position in the legal hierarchy.<sup>116</sup>

Present arrangements in France show how human rights may be protected against the legislature in a political forum in which political struggle and debate take place. The importance and inevitability of philosophical and political disagreement concerning human rights was pointed to in chapter I. It was claimed that human rights involved controversial decisions and that given this controversy, a Bill of Rights would not only fix certain choices but, if were enforced by the judiciary, it would exclude citizens from making and participating in such choices. A central aspect of the conception of civil liberties that was proposed was that they should be seen as contingent categories that could be used in a pragmatic manner to achieve reform and challenge existing configurations of power. The Cc would appear to be a political body that by its composition at least clearly reflects the political will of the political representatives of citizens. Furthermore, the procedure for bringing cases before it allows political actors to decide which pieces of legislation should be subject to review. The review that takes place also accords respect for political choice by only concerning legislation that has not

---

'A constitutional jurisdiction came to specify any institution charged with the power to determine, in a definitive manner, the content and applicability of constitutional law.' (pg.96). This claim is not without its problems (Stone, *op. cit.*, 97) but what is of concern here is to emphasise that the Cc is an institution that permits considerations of a highly political nature. As a result, civil liberties are protected by reason of political struggle and debate, as manifested in a contested legislative process in which the Cc constitutes the final stage.

<sup>114</sup> This procedure makes the Cc a unique institution as far as constitutional and supreme courts that review legislation as against constitutionally protected human rights are concerned, see L. Favoreu (ed.), 'Cours constitutionnelles européennes et droits fondamentaux' (1982).

<sup>115</sup> The same point is made by Stone, *op. cit.*, 8 as regards what he refers to as the 'constitutional orthodoxy' of the supremacy of law;

'The constitution of the Fifth Republic does not undermine this constitutional orthodoxy, at least not technically. Once promulgated, a law may not be challenged or made subject to any jurisdictional control other than that of parliament itself.'

<sup>116</sup> However, this is now subject to the case law that was noted above, *supra.*, n.92.

yet been promulgated. Human rights are not always upheld<sup>117</sup> but the question of the protection of human rights becomes a part of political debate and controversy. This in turn means that human rights are contingent on political pressure and forces but as the same time they are recognised as values. Essentially, the benefits of the French approach to protecting human rights against parliamentary sovereignty are that it provides for the continued role of political mechanisms, which it has been argued not only fit the constitutional arrangements in England but are also justified by the jurisprudential theory formulated in this study.

It is not suggested that the French system of constitutional protection be simply 'transplanted'<sup>118</sup> wholesale into the UK. Firstly, constitutional review in France is dynamic and as a result, far-reaching reforms are currently under discussion.<sup>119</sup> Secondly, certain aspects may need to be altered before they can be adopted in England. Thirdly, the Cc draws inspiration for its decisions from a series of texts and sources, a similar institution in England would require similar texts upon which it could rely and the question that is then raised is whether this should be a home-grown and specially drafted document or one that already exists, like the ECHR for example. These issues are subjects of further discussion, but what is submitted to be of importance here, is the possibility of protecting human rights via political control, a control that it is claimed is peculiarly suited to the 'political' conception of

---

<sup>117</sup> Human rights must compete against other considerations and with each other, for example, a liberty may be restricted when an 'objective of constitutional value' needs to be pursued, e.g. public order (and respect for the freedom of others) (c.f. No.82-141 DC 27th July 1982 Audio Visual Law, Rec.48).

<sup>118</sup> Watson, *op. cit.*

<sup>119</sup> For example, at the moment a proposal to increase the scope of constitutional review is under discussion, so that when a point concerning the constitutionality of a statute is raised in litigation, it may be referred to the Cc; see L. Favoreu, 'L'élargissement de la saisine du Conseil constitutionnel aux juridictions administratives et judiciaires', R.D.P. 4 [1990] 581 (and other essays in this issue), 'Le retour des mythes', Le Monde, 11th Aug. 1989, 6, J. Robert, 'La protection des droits fondamentaux et le juge constitutionnel français: bilan et réformes', R.D.P. (1990), 1255, F. Luchaire, 'Le contrôle de la loi promulguée sur renvoi des juridictions: une réforme constitutionnelle différée', R.D.P. 106 (1990), 1625, B. du Granut, 'Faut-il accorder aux citoyens le droit de saisir le Conseil constitutionnel?', R.D.P. 106 (1990), 309 and the Comité consultatif pour la révision de la Constitution, présidé par le doyen Georges Vedel, 'Rapport au Président de la République: propositions pour une révision de la Constitution, 15 Février 1993' (1993), 76-7. More generally the dynamism of French civil liberties is also illustrated by the calls for reform- even to the extent of the enactment of a new Bill of Rights; see for example, the propositions for a Bill of Rights made by the Gaullists, Socialist and Communist parties in 1975 (Nat. Assem. #2080 17th Dec., #2131 20th Dec. and #2128 20th Dec., respectively)



human rights earlier proposed in this study. A comparison with France, given the similarity of its constitutional traditions with those of England, points to interesting ways of achieving reform beyond simply enacting a Bill of Rights.

### *The administrative courts*<sup>120</sup>

When the acts of the administration violate civil liberties, the administrative courts have sole jurisdiction to strike down these acts. The effect of such a decision is that the act is void *ab initio*. In what follows, the main aspects of the protection of human rights by the administrative courts will be set out.

As will be shortly seen, the administrative courts protect human rights in conjunction with the ordinary courts<sup>121</sup> but here attention will be focused on the administrative courts. The administrative judge has competence to review a wide range of administrative acts,<sup>122</sup> except when there is a flagrant irregularity (this is known as a 'voie de fait', from herein the French term will be retained).<sup>123</sup> It must be underlined that the administrative courts remain

---

<sup>120</sup> For introductions to French administrative law and the courts, see L. Neville Brown & J.S. Bell, 'French Administrative Law' (1993), R. Chapus, 'Droit du contentieux administratif' (1990), C. Dadomo & S. Farran, 'The French Legal System' (1993), 87-104 and O. Khan-Freund, C. Lévy & B. Rudden, 'A Source-Book on French Law: Public law: Constitutional and Administrative law: Private Law: Structure. Contract' (1991), 119-204.

<sup>121</sup> Ordinary judges were excluded from reviewing administrative decisions by the Revolutionary Law of 16th & 24th Aug. 1790, Title II, art.13, concerning the organisation of the judiciary (c.f. Décret of 16 Fructidor, an III (23rd Aug. 1795) and so the 'duality' of the French legal order dates from this time (Rivero, (1978), *op. cit.*, 243 *et. seq.*). This separation has been *partially* upheld by the Cc as a PFRLR in No.86-224 DC of 23rd Jan 1987 Competition Law, Rec.8 and more recently in No.89-261 DC 28th July 1989 Entry and Residence of Foreigners, Rec.81.

<sup>122</sup> See, Neville Brown, *op. cit.*, 153 *et seq.*, Chapus, *op. cit.*, 308-47, J. Rivero, 'Droit administratif', (1990), *op. cit.*, 113-23 and Robert & Duffar, *op. cit.*, 150. The administrative courts can also review the autonomous regulations made under art.37 and the *ordonnances* made under art.38. Under the former, regulations are made *independently* of legislation, in the sense that the administration does not derive its regulatory power from an authorising statute. By virtue of art.38, the executive may legislate for a temporary period in what is normally the statutory domain (set out in art.34) via *ordonnances*. Both arts.37 and 38 are examples of the 'rationalisation' of parliament that was earlier noted but despite the importance and position accorded to regulatory power, regulations still find themselves submitted to control by the administrative courts.

<sup>123</sup> The term 'flagrant irregularity' is taken from Neville Brown & Bell, *op. cit.*, 135; 'In the administrative context it indicates some irregularity on the part of administration which is so flagrant and gross that it cannot be regarded as an administrative act at all but is treated as if it were the act of a private body, thereby losing the privilege of being adjudicated upon by the administrative court and falling within the cognizance of the ordinary courts.' (c.f. Robert & Duffar, *op. cit.*, 8-10 & 146).

Aside from the requirement of a serious irregularity, a *voie de fait* is only made out if there has been a violation of a civil liberty, as is stated by Neville Brown & Bell, *op. cit.*, 136;

(Footnote continues on next page)

incompetent to review statutes, although recent developments may have made significant inroads into this traditional position.<sup>124</sup>

Civil liberties are normally protected by the action for excès de pouvoir, which is an action for judicial review of administrative action.<sup>125</sup> Interested parties can bring this action in order to have an administrative act struck down.<sup>126</sup> The effect of such a decision is that the measure will be declared to

---

'...the irregularity in question must have infringed some fundamental right of the individual, such as liberty of the person, sanctity or property, or inviolability of the home.' (c.f. Rivero, (1978), *op. cit.*, 27).

Similarly, if an act is carried out by an administrative agent but this act is classified as a 'faute personnelle' (where the civil servant is liable personally and so administrative liability for his actions is not found to exist), the administrative courts are incompetent to review the act.

<sup>124</sup> The principle of the non-constitutional review of statutes was laid down in *Arrighi op. cit.*. This decision laid down (1) that where there was no statute between the administrative act and the constitutional text, the administrative courts could review the constitutionality of the act but where (2) the statute was the origin of an administrative act, the administrative courts could not engage in constitutional review, otherwise this could lead to the review of an administrative act that was contrary to the constitution but in conformity with statute. This result would in effect institute an indirect constitutional review by the administrative courts, which would constitute a breach of tradition (Rousseau, *op. cit.*, 182). Therefore, this decision laid down the principle of the 'loi-écran'; the presence of a statute constituted a 'screen' making constitutional review impossible.

However, this principle and that of the non-constitutional review of law was considerably weakened by *Nicolo, supra.*, in which the Conseil d'État reviewed a statute against an international treaty. This statute had been passed after the Treaty of Rome (art.227(1)), which was the international treaty in question in the case. Despite the existence of a statute, the Conseil d'État held that its constitutionality could be reviewed. This decision has been widely seen as the Conseil d'État upholding the hierarchy of legal norms that is partially set out by art.55 of the Constitution (granting treaty law a higher status than statute), see, M. Long, *et al. op. cit.*, 742. It has also been interpreted as an application of indirect constitutional review. It is argued, that in reviewing the statute in question against a treaty, the court is *applying* art.55 of the constitution and ensuring that it is respected by the legislature (Rousseau, *op. cit.*, 184 and Neville Brown & Bell, *op. cit.*, 269).

<sup>125</sup> This action forms part of what is called 'Le contentieux de l'annulation' (litigation for annulment) but is but one of many forms of action that can be brought before the administrative courts (c.f. Neville Brown & Bell, *op. cit.*, 168-71 and Chapus, *op. cit.*, 117-40). All the actions that constitute the *contentieux de l'annulation* are initiated by individuals seeking to have administrative acts quashed by reason of their illegality.

<sup>126</sup> For details of locus standi and the conditions precedent before the action can be brought, see Neville Brown & Bell, *op. cit.*, chp.7. As a consequence of local authority reforms, it is not only individual citizens but representatives of central government at a local level who can also bring actions for excès de pouvoir, should civil liberties be in danger of being violated by the local administrative authorities. Thus, the existence of the *déféré préfectoral* which was introduced by the decentralisation reforms of 1982 (Law n.82-213, 2nd March, art.3) abolished prefectural 'tutelle' and replaced it with administrative tutelle. As a result, the prefect lost his/her *a priori* supervisory powers over local authority decisions but under the new system, he/she could apply an *a posteriori* control. A local authority is now obliged to transmit its decisions to the prefect who can decide to refer them to the administrative courts, should he/she consider that, *inter alia*, they violate human rights (c.f. Rivero, (1990), *op. cit.*, 523-29).

have never existed. The particular type of illegality of an act (*cas d'annulation* or *cas d'ouverture*) can be broken down according to whether it concerns external or internal legality. External legality refers to the legal basis of the decision, i.e. that its author did not have the legal power to so decide, or that he/she has not followed the correct procedure. On the other hand, internal illegality concerns the purposive elements of a decision, i.e. has the author of a decision used his/her administrative authority for purposes outside of those for which it was granted, or have they acted on the basis of illegal motives.<sup>127</sup>

The administrative courts will review administrative decisions with varying degrees of scrutiny, according to such factors as the interests of the individuals affected and the public interest. Two factors that are of importance are whether a civil liberty is involved and further, whether it is protected by statute.<sup>128</sup> Therefore, if parliament has not passed a statute to

---

<sup>127</sup> The division between external and internal illegality conforms to the classic distinction employed by theorists (although it is not referred to in the judgements of the courts). Accordingly, *external* illegality consists of '*l'incompétence*' (acting without authority) and '*vice forme*' (a form of procedural *ultra vires*). *Internal* illegality consists of '*détournement de pouvoir*' (it looks to the motives of the decision-maker and claims that he/she exercised powers for objects other than for which they were conferred) and '*violation de la loi*' (this concerns the content of the act: does it conform to the legal conditions imposed on administrative actions), (c.f. Rivero, (1990), *op. cit.*, 313-30 and Neville Brown & Bell, *op. cit.*, 223-35).

Worthy of note is the doctrine of '*inexistence*' (N.B. Chapus, *op. cit.*, 121, refers to it as a separate form of action within '*le contentieux d'annulation*'). This doctrine can be applied by both the administrative and ordinary courts, where the latter finds itself faced with a point that concerns administrative liability. Neville Brown & Bell, *op. cit.*, 225, describe the doctrine in the following terms;

'*Inexistence* assumes that the judge has gone so far as to doubt whether the administration has really taken any decision for him to review: the illegality is so gross and flagrant as to amount to the administration's acting completely outside its jurisdiction. The administration has virtually behaved as an outlaw and deserves no consideration from the judge.'

Acts of this nature are considered as *voie de faits* and so can be dealt with in the ordinary courts. The doctrine is seldom used, given the existence of other grounds of illegality which are normally sufficient to ground an action.

<sup>128</sup> J. Bell, 'The Expansion of Judicial Review Over Discretionary Powers in France' P.L. [1986] 99, 106, talks of the existence of a 'sliding scale' of judicial review;

'What one seeks is, thus, a kind of sliding scale of intensity of review depending on a number of variables looking both to the public interest and to the interests of individuals affected by the decision, as well as to the respective competencies of the administrator and judge.'

He contrasts this with a tripartite division between minimum, normal and maximum control. However, where a civil liberty is present, it is claimed that the courts exercise maximum control (c.f. Neville Brown & Bell, *op. cit.*, 250, n.50).

Robert & Duffar, *op. cit.*, 151 *et. seq.*, claims that

'...lorsqu'il s'agit d'une liberté publique, il n'y a plus de pouvoir discrétionnaire reconnu à l'Administration.'

(Footnote continues on next page)

protect a liberty, the executive is accorded a wider scope of action as far as its regulation. This means that other interests, such as public order, may enjoy greater weight.<sup>129</sup> On the other hand, when parliament has intervened, the administration is prohibited from regulating the liberty in such a manner that it would have the effect of reversing the statute.<sup>130</sup> Although the case law and theories of administrative law are not of direct interest here, it is important to note the plurality of considerations involved in the decisions of the courts and the varying degrees of protection that may be accorded as a result.

The action for judicial review has recently been supplemented by what is termed the 'd'éré préfectoral'. This system was introduced in 1982 by virtue of Law no. 82-213 of 2nd March 1982, art.2(II)<sup>131</sup> as part of the Socialist

---

By this they mean that the administrative courts have assumed the power to review the correctness of the facts upon whose basis a decision was taken, the reasons, the proportionality of restrictions and the appropriateness of the act, given the legitimacy of the object to be pursued (c.f. Neville Brown & Bell, *op. cit.*, 237-50).

<sup>129</sup> Therefore, in these exceptional circumstances, less judicial scrutiny will be exercised (see, Robert & Duffar, *op. cit.*, 150-1).

<sup>130</sup> Colliard's observation (*op. cit.*, 120) can be taken as an illustration of this point;

'Dans le mesure où la liberté atteinte est une liberté garantie par la loi, il n'appartient point au règlement de la supprimer, mais si la loi est muette, les pouvoirs de l'autorité de police deviennent plus importants.'

An important administrative authority in this context is the police. Burdeau, *op. cit.*, 43 *et. seq.* observes that the existence of a statute limits the police scope of action, in that, as part of the administration, they can only *regulate* the exercise of the human right in question. Any decision going beyond this would constitute grounds for an action for excès de pouvoir. The police enjoy an autonomous regulatory power (i.e. one not derived from an authorising statute) and so can regulate civil liberties without being specifically authorised. Once again, however, this power is limited by the intervention of parliament. It should be noted that even in the absence of statute, this regulatory power will still be subject to limits imposed by the administrative courts, albeit of a more liberal nature than would have been the case had parliament intervened.

Burdeau, *op. cit.*, 45-8, claims that this control is guided by two principles. Firstly, police powers are to be limited to the fundamental purpose of the police which is to keep *good order*, 'Toute mesure qui ne peut se réclamer de la tranquillité, de la sécurité ou de la salubrité publique est donc, en principe, irrégulière, car si les libertés peuvent être limitées dans leur exercice, ce ne doit être qu'en considération d'un intérêt au moins égal à celui que présente le respect de leur intégrité. Il s'ensuit que, si plusieurs mesures sont possibles, l'Administration doit choisir celle qui affecte le moins la liberté de l'individu.' (pg.44-5).

(It will be noted that this view seems to indicate that public order is constituted by human rights, i.e. an expansive view of civil liberty, see chapter IV, *infra*.)

Secondly, although there is wide scope for regulation, police powers are not permitted to completely repress the exercise of civil liberties. The extent of police powers is inverse to the legal status of the civil liberty in question, so that when there is statutory protection, regulatory power is more limited.

<sup>131</sup> As amended by Law no. 83-8 of 7th June 1983, art.65 and Law no. 84-53 of 26th Jan. 1984, art.113-I.

reforms aimed at devolving greater powers to the local elected authorities.<sup>132</sup> It lays down a procedure whereby the departmental prefect has the right to request an interim injunction to suspend what he/she considers to be an illegal act and also lays down an emergency expedited procedure as far as civil liberties are concerned.

More precisely, this article sets out a series of local authority acts which the local authority is obliged to transmit to the representative of the state at local level (the prefect). These include decisions by the police authorities;

Les décisions réglementaires et individuelles prises par le maire dans l'exercice de son pouvoir de police.

By virtue of art.3, the prefect can refer these acts to an administrative tribunal, within two months of their being transmitted to him/her and a request for an interim injunction can be attached to such a reference.

If the administrative tribunal considers that an administrative act that is referred to it is likely to 'compromise' the exercise of a civil or individual liberty, it must grant an interim injunction, suspending the decision within forty-eight hours.<sup>133</sup> An appeal can be made from the tribunal's decision to the Conseil d'État within fifteen days of the decision's notification and, in turn, this appeal must be disposed of within forty-eight hours. It should be noted that according to the terms of art.3, the decision to grant injunctive relief does not depend on the fulfilment of the same conditions set out as regards other decisions that the prefect can refer to a tribunal, so that in the case of the compromise of a civil liberty, the injunction is *mandatory* once the likelihood of its infringement is shown. Another advantage for civil liberties under this new framework is that of speed. The obligation to decide the matter in forty-eight hours is an improvement on the two to three months required as far as ordinary injunctions. The individual can request the prefect

---

<sup>132</sup> See generally V. Wright, 'The Government and Politics of France' (1990), 294 *et. seq.*, S. Mazey, 'Paris Outside Paris', in P. Hall, J. Hayward & H. Machin, (eds.) 'Developments in French Politics' (1990), 157 and the decision of the Conseil constitutionnel, No.82-137 DC of 25th Feb. 1982, Rec.1982.38.

<sup>133</sup> Art.3 reads, *inter alia*;

'Lorsque l'acte attaqué est de nature à compromettre l'exercice d'une liberté publique ou individuelle, le président du tribunal administratif ou un membre du tribunal délégué à cet effet prononce le sursis dans les quarante-huit heures.'

to refer a local authority decision or request the prefect to seek an interim injunction, without prejudice to his/her own rights to bring an action for judicial review.<sup>134</sup>

This reform is an improvement on the normal procedure for an interim injunction in the administrative courts.<sup>135</sup> The normal order is discretionary and exceptional<sup>136</sup> and two general conditions have to be met before the administrative court is able to exercise its discretion. Firstly, the administrative decision in question must be likely to lead to a loss to the applicant that is of such a nature that it will be difficult to compensate. Secondly, the facts alleged must be serious and capable of being struck down by the court. Aside from these two conditions, the Conseil has developed a number of principles; one of which is that an interim injunction may only be granted to preserve the legal position of the applicant before the administrative decision is taken.

Aside from these obstacles, the grant of an interim injunction can take between two and three months at the fastest.<sup>137</sup> Therefore the *déféré*

---

<sup>134</sup> See M. Courtin, Tribunaux administratifs: procédure d'urgence, demande de sursis à exécution J.-Cl. (Admin), (1990), Fasc. 635-2, 5, 14, Rivero, (1990), 526-9 and D. Chabanol, 'Un renouveau du sursis à exécution?', Gaz.Pal. 1985.1.doctr.87. It should also be noted that by virtue of art.3, reports are laid before the national assembly detailing the number and kind of references that are made each year, entitled 'Rapport du Gouvernement au Parlement sur le contrôle a posteriori des actes des collectivités locales et des établissements publics locaux établi en application des dispositions de la loi no.82-213 du 2 mars 1982 modifiée relative aux droits et libertés des communes, des départements et des régions' and for a recent assessment of these reforms, see 'Décentralisation, bilan et perspectives' A.J.D.A., numero spécial, 20th April (1992).

<sup>135</sup> An interim injunction in French law is known as a 'sursis à exécution'. Recently (by virtue of the Decree no.88-907 of 2nd Sept. 1988) the administrative courts have been granted the competence to grant the emergency remedy known as the 'référé'. This allows the President of one of the various levels of administrative courts to grant an interim order containing such measures necessary as to

'...to put an end to a plainly unlawful situation other than by a stay of execution of the administrative decision...or by issuing orders to the administration (but he may issue orders, "vue l'urgence", to private individuals).'

Neville-Brown & Bell, *op. cit.*, 117. However, because these remedies have been noted to have been used only with some reticence by the administrative courts (Rivero, (1990), *op. cit.*, 281), attention will focus on the interim injunctions and the *déféré* préfectoral, which are likely to have a greater impact on human rights.

<sup>136</sup> See Decree no.53-934 of 30th Sept. 1953, art.9 and see generally, Rivero, (1990), *op. cit.*, 278-81 and J.J. Gleizal, 'Le sursis à exécution des décisions administratives - théorie et politique jurisprudentielle' A.J.D.A., 1975.381.

<sup>137</sup> J.-R. Etchegaray, 'Limites du sursis à exécution', Gaz.Pal. 1985.1.doctr.87, 89.

prefectoral can provide a more speedy remedy that is all the more valuable as far as human rights are concerned.

Having laid out in structural form some of the procedures generally used to protect human rights against the administration, attention will now be turned to issues of *substance* as regards the most widely used procedure - judicial review of administrative action. The administrative courts have generally struck down administrative decisions on the basis of the principle of *légalité* via the elaboration of the general principles of law. Under the Fifth Republic, the Conseil d'État has expanded the sources from which they have derived the general principles and secondly, they have granted some of them constitutional status.<sup>138</sup> The general principles provide the substantive criterion by which a decision to annul an administrative decisions for excès de pouvoir is taken.<sup>139</sup>

It has been noted that there is a symbiotic relationship between the principles and the human rights contained in the 1789 Declaration. Therefore, it is said that the principles have permitted the *legal application* of the human rights, while the legitimacy and importance of human rights has granted a high

---

<sup>138</sup> It was noted that it was first stated that a general principle of law might have constitutional value by the Commissaire du Gouvernement Fournier, in Syndicat général des ingénieurs-conseils, *supra*. n.62, (c.f. Grazier *et. al.*, *op. cit.*, 161 and C.E. 12th Feb. 1960 Société Eky, Rec.101). Robert & Duffar, *op. cit.*, 91 suggests that this development was in response to the creation of autonomous regulations by virtue of art.37 of the Constitution. These were not subordinate to the law and so it was not possible to use the general principles of law, which only had legislative status, to override them. Thus, the importance of granting of *constitutional* value to certain general principles of law. However, he feels, *op. cit.*, 91 that this move was unnecessary;

'Même autonome, le règlement se situe toujours, dans l'échelle des actes juridiques, à un niveau inférieur à celui de la loi. Dans certains cas même, il lui est soumis. C'est notamment le cas des règlements pris dans le champ réservé à l'Exécutif en matière de libertés publiques, c'est-à-dire tout ce qui excède "les garanties fondamentales" (du seul ressort du Parlement). Dans cette hypothèse, ces règlements, bien que prévus à l'article 37, doivent respecter les lois qui ont institué ces garanties fondamentales. Ainsi n'était-il point nécessaire...de conférer valeur constitutionnelle aux principes généraux pour que les règlements autonomes fussent tous tenus de s'y conformer.'

(c.f. R. Chapus, 'De la soumission au droit des règlements autonomes' D.1960 chr.117 and 'De la valeur juridique des principes généraux du droit et des autres règles jurisprudentielles du droit administratif' D.1966. chr.99)

<sup>139</sup> For examples of the application of these principles to the protection of human rights and the diversity of principles, see Neville Brown & Bell, *op. cit.*, 210-23 (it should be underlined that the principles do not solely concern human rights), c.f. Grazier, *et. al.*, *op. cit.*, 162-4 and Cummins, *op. cit.*

degree of *authority* to the principles.<sup>140</sup> It is submitted that the same relationship also holds as regards those rights found *outside* the 1789 Declaration but referred to in the 1958 Preamble.<sup>141</sup>

There are, however, weaknesses in the administrative courts' protection. Firstly, there is the long length of time before the court takes a decision, which can have serious consequences as far as civil liberties are concerned.<sup>142</sup> Secondly, an administrative decision is not suspended when proceedings are commenced and injunctions may only be granted under what are claimed, relative to England, to be very strict and limited conditions.<sup>143</sup> Thirdly, given the administrative courts' position within the administration, they cannot direct the administration as to how it should behave in the judgements that they hand down, thus there are difficulties in securing the administration's compliance with its decisions.<sup>144</sup> Finally, given the dual competence of the administrative and ordinary judges, it is often complained that litigants may find it difficult to choose the appropriate forum. For example, if a litigant

---

<sup>140</sup> See, Grazier, *et. al.*, *op. cit.*, 173.

<sup>141</sup> This view is confirmed by Grazier *et. al.*, *op. cit.*, 171-2;

'Enfin quant aux principes qui n'ont été l'objet d'une formulation ni dans la *Déclaration des droits de l'homme*, ni dans les lois de l'époque révolutionnaire, ni dans le Préambule...il reste encore que, pour la plupart, il sont imprégnés de l'esprit de la Révolution française et du souci d'assurer le respect et la garantie des droits de l'homme dans le cadre d'institutions démocratiques et républicaines.'

<sup>142</sup> See, Neville Brown & Bell, *op. cit.*, 281 and Robert & Duffar, *op. cit.*, 152-3.

<sup>143</sup> The fact that in general the initiation of proceedings before the administrative courts does not suspend the effects of an administrative decision (Robert & Duffar, *op. cit.*, 152), is part of the doctrine of *la décision exécutoire* (see, Rivero, (1990), *op. cit.*, 116 *et. seq.*). Injunctions (known as '*sursis à exécution*') may only be granted, as already noted, if the grounds upon which the proceedings are based are *serious* and capable of giving rise to an annulment and secondly, that the administration's decision is likely to cause loss which it would be difficult to compensate or reverse.

Interim orders are also available but also only under strict conditions (see, Neville Brown & Bell, *op. cit.*, 116-7 and Chapus, *op. cit.*, 799-832).

<sup>144</sup> The purpose of the *contentieux de l'annulation* is to have an administrative decision annulled, therefore the administrative courts are generally prevented from issuing orders to the administration or substituting their decisions. This power is only available if another action is taken, i.e. the *contentieux de pleine juridiction* (see, Khan-Freund *et. al.*, *op. cit.*, pgs.163-4). Therefore, an individual may sometimes be forced to commence two actions in order to secure his/her rights (this possibility is illustrated by the case of *Rodiere*, cited in Neville Brown & Bell, *op. cit.*, 111-2). The weaknesses of mechanisms for the enforcement of decisions has for long been an area of criticism (see, Neville Brown & Bell, *op. cit.*, 110-11 and Khan-Freund, *et. al.*, *op. cit.*, 167 *et. seq.*). As a result, reforms have been introduced in order to secure a greater degree of compliance with the judgements of the administrative courts (see, Khan-Freund *et. al.*, *op. cit.*, 165 *et. seq.*, Neville Brown & Bell, *op. cit.*, 113-5, Rivero, (1990), *op. cit.*, 287-91 and Chapus, *op. cit.*, 632-46).



commences an action for excès de pouvoir before the administrative courts, he/she may then discover that because a *voie de fait* has been found, the action has to be suspended and recommenced before the ordinary courts. By virtue of the fact that the doctrine of the *voie de fait* has been developed by case law, it is a fluid and uncertain notion.<sup>145</sup> As a consequence, a litigant must face some uncertainty as to whether he/she has commenced his action in the right jurisdiction. Moreover, the litigant may fall victim to conflicts of competence that tend to arise on occasion between the two orders of courts.<sup>146</sup>

---

<sup>145</sup> Rivero, (1978), *op. cit.*, 27, notes;

'La théorie de la *voie de fait* est purement jurisprudentielle. Elle ne s'appuie sur aucun texte. Il en résulte qu'elle est fragile: le juge, qui l'a créée, peut y renoncer;..'

He also notes (pgs.246 *et. seq.*) how many victims of *voies de faits* make a mistake and initiate actions in the wrong jurisdiction. This slows down proceedings where speed is essential for the protection of civil liberties.

<sup>146</sup> Conflicts of competence are an inherent feature of the dual system of courts and when they arise they are usually referred to the Tribunal des conflits (see, Neville Brown & Bell, *op. cit.*, 144-50). The existence of the possibility of referring questions of jurisdiction to the Tribunal has itself become a locus of struggle between the ordinary and administrative courts. It will be seen below that the ordinary judge has jurisdiction to hear cases where personal liberty has been violated; by virtue of art.66 of the Constitution. This competence, combined with that of the *voie de fait*, leaves the ordinary courts a wide scope of action as far as civil liberties are concerned. However, the administration has sought to delay proceedings before the ordinary courts where administrative agents are alleged to have violated the civil liberties of an individual. This has been attempted via the practice of raising a conflict of jurisdiction. This leads to the suspension of proceedings until the Tribunal has decided upon the question. Although conflicts cannot be raised in criminal proceedings, this is only the case where administrative liability is concerned and not where the personal fault of an administrative agent is raised. Thus, conflicts were raised by the administration in both the civil and criminal courts.

Despite the prohibition, by virtue of the former art.112 of the Criminal Procedure Code, on the raising of conflicts when a public agent had violated a civil liberty and its confirmation by the ordinary courts, the case law of the Conseil d'État and the Tribunal encouraged the continuation of the practice. Firstly, in Alexis et Wolf (C.E. 7th Nov. 1947 D.1948.472) the Conseil d'État found a civil liberty had been violated by a public agent but instead of declaring itself incompetent, went on to decide the case. Secondly, the Tribunal narrowly interpreted art.112 in Dame de la Murette (27th March 1952, D.1954.291), to the effect that only where an administrative agent was alleged to be personally at fault did the ordinary courts have competence. On the other hand, where an action was brought against an administrative agent, but it was claimed that the administration was liable, the administrative courts were granted jurisdiction. The new art.112 effectively abolishes this case law, by declaring the raising of conflicts inadmissible, irrespective of whether the action is against a public body or one of its agents (see, Rivero, (1978), *op. cit.*, 249-50, Robert & Duffar, *op. cit.*, 147-9 and Neville Brown & Bell, *op. cit.*, 151 for the case of M. et Mme Cuvillier (C.E. 22 Dec. 1954, Rec.688), as an example of the unfortunate consequences of such conflicts for litigants).

*The ordinary courts*<sup>147</sup>

The role of the ordinary courts in protecting human rights is most clearly expressed in art.66 of the Constitution;

No one may be detained arbitrarily.

The judiciary, the guardian of individual liberty, ensures respect for this principle in circumstances provided for by *loi*.<sup>148</sup>

Although, on its face, art.66 only accords the ordinary judge jurisdiction to protect *one* liberty, namely personal liberty, it has been noted that this liberty has been widely interpreted. For example, it has been held to cover freedom of movement and some theorists have claimed that personal liberty even extends to the protection of private life and political and religious freedom.<sup>149</sup>

The ordinary courts, more precisely, the criminal jurisdictions, have exclusive competence whenever a penal sanction is envisaged, irrespective of the status of the accused (i.e. whether or not they are civil servants).<sup>150</sup> Another area of exclusive competence is the already mentioned *voie de fait*. Although the administrative courts have the competence to qualify an action as a *voie de fait*,<sup>151</sup> only the ordinary courts can apply a sanction once this has been found.<sup>152</sup> Therefore, should an administrative court decide that an administrative decision constitutes a *voie de fait*, they must stop the proceedings and the plaintiff must bring an action before the ordinary courts. This, as already noted, has led to problems for litigants as far as the correct choice of court order and the subsequent delay that error causes.<sup>153</sup>

---

<sup>147</sup> The term 'ordinary courts' will here be used to cover both civil and criminal jurisdictions. For a general introduction to the structure of these courts, see Khan-Freund *et. al., op. cit.*, 258-88.

<sup>148</sup> Translation taken from Bell, *op. cit.*, 259.

<sup>149</sup> See, D. Turpin, 'L'Autorité judiciaire, gardienne de la liberté individuelle' A.J.D.A. 1983.653, 655 *et. seq.*

<sup>150</sup> See, Rivero, (1978), *op. cit.*, 245.

<sup>151</sup> Therefore, both court orders can qualify an administrative act as a *voie de fait*; 'Seule la caractérisation de la voie de fait peut être partagée entre le juge judiciaire et le juge administratif.'

(Leclercq, *op. cit.*, 157).

<sup>152</sup> Rivero, (1978), *op. cit.*, 246 states, as regards the doctrine of the *voie de fait*, that the ordinary judge

'...est la seule qui, dans le droit administratif français, attache une conséquence juridique, sur le terrain de la sanction, à la qualification de "liberté publique" donnée à un droit.'

<sup>153</sup> Rivero, (1978), *op. cit.*, 247, has noted two attempts by the Conseil d'État to reduce the disadvantages suffered by litigants when the administrative courts declare themselves

(Footnote continues on next page)

Civil liberties are also protected by the ordinary judge in an area in which he/she enjoys 'parallel competence'<sup>154</sup> with the administrative judge. This is the defence of illegality before the criminal courts (known as '*l'exception d'illegalité*'). Essentially, this is the defence raised by the defendant by which he/she claims that the administrative decision upon which the plaintiff or prosecution rests their case, is illegal. This collateral attack allows the ordinary judge to investigate the *legality* of an administrative measure, as does the administrative judge in *excès de pouvoir* proceedings. The consequences of a finding that the act was illegal is not an annulment, rather, the act remains in force but is simply not applied by the judge in the instant case, so that no criminal sanctions are applied on its basis. Therefore, the defendant can claim that his/her civil liberties have been violated by the very measure upon which the case against him/her rests. It should be noted that as with the doctrine of *inexistence*, there is no limitation period in which this claim must be made. Finally, it is only the criminal courts that can decide the issue of illegality, the civil judge must refer the issue as a preliminary question ('question préjudicielle') to the administrative courts.<sup>155</sup>

---

incompetent after a finding of a *voie de fait*. Firstly, the Conseil d'État appears to have established a link between the *voie de fait* and the doctrine of *inexistence*. According to the latter, both orders of courts can declare

'...that an administrative decision may be simply non-existent for want of some essential element. There is no need to annul it, as the court only has to declare its non-existence.'

(Neville Brown & Bell, *op. cit.*, 224).

The doctrine results in a decision being declared void *ab initio* and can be alleged by any interested party, even after the expiry of the normal limitation period of two months. Another benefit is that the doctrine permits the administrative courts to, in effect, strike down the administrative measure, instead of declaring itself incompetent, thus avoiding extra cost and time for the litigant. The connection that has been made results in

'La gravité du vice qui entache l'acte constitutif de *voie de fait* en ferait, nécessairement, un acte inexistant.' (Rivero, (1978), *op. cit.*, 247).

Once struck down the measure becomes a *voie de fait* and the ordinary courts have jurisdiction to consider the sanctions that should be consequently applied (see, Neville Brown & Bell, *op. cit.*, 225-6).

The second development that Rivero notes is the decision Ministre de l'Intérieur, c. Soc. Le Témoignage chrétien (C.E. 4th Nov. 1966, A.J.D.A., 1967.40, Rec.584), in which the Conseil d'État declared that administrative courts could grant compensation for a decision that in the course of proceedings was found to be a *voie de fait* (c.f. Robert & Duffar, *op. cit.*, 9). Once again, the Conseil refused to simply declare itself incompetent, which would have left the litigant with the sole option of having to initiate proceedings in the ordinary courts. At the same time, this case can be seen as yet another example of the battle between the two court orders over jurisdiction.

<sup>154</sup> This term is taken from Rivero, (1978), *op. cit.*, 247.

<sup>155</sup> See generally, Neville Brown & Bell, *op. cit.*, 142-4, Rivero, (1978), *op. cit.*, 247 and Leclercq, *op. cit.*, 157.

## SUMMING UP

The above are considered to be the main legal methods by which civil liberties are protected in France. While they have not been dealt with here, it should be borne in mind that non-legal mechanisms also exist, such as the 'Médiateur' (the French version of the Ombudsman).<sup>156</sup> French theorists also talk of politico-legal guarantees of rights which are derived from the French Revolution. However, these are claimed to be of little practical significance, given the existence and scope of the legal guarantees.<sup>157</sup>

More concretely, it can however, be seen that civil liberties are protected by a diversity of methods, they are conceived as positive law categories and both negative and positive rights are protected. The most strongly protected are those that are located within a statutory framework. French law has had to come to terms with a doctrine of parliamentary sovereignty in order to protect human rights. Despite belonging to different legal families, a relationship has been shown to exist between France and England and what is more, this exists in the area of public law. Thus, more comparative studies should be undertaken in this field. In addition, certain French arrangements institutions have been seen to be of interest in so far as they seem to point to the practical application of suggestions made by jurisprudential theory as far as the manner in which human rights ought to be protected.

At the same time, the French context shows that the legislature has not been seen as the sole threat to liberties. Therefore, the development of specific forms of protection against the administration and against other individuals (by the administrative and ordinary courts, respectively), is once again supported by the conception of human rights that was earlier adopted. Finally, these general considerations provide the context in which the specific liberty under study is situated. It remains to be seen to what extent this liberty differs from the general picture that has been described.

---

<sup>156</sup> See, Robert & Duffar, *op. cit.*, 135-42, Neville Brown & Bell, *op. cit.*, 29-31, Leclercq, *op. cit.*, 161-8 and L. Neville Brown & P. Lavirotte, 'The Mediator: A French Ombudsman?' L.Q.R. 90 [1974] 211.

<sup>157</sup> Politico-legal guarantees are normally said to consist of the so-called rights to disobedience, resistance to oppression and revolution (see, for example, Robert & Duffar, *op. cit.*, 122 *et. seq.* and Colliard, *op. cit.*, 188-95).

### SECTION III

#### ANOTHER PRACTICAL CONCERN: THE PROTECTION OF HUMAN RIGHTS IN THE EUROPEAN UNION<sup>158</sup>

Having argued for the application of comparative theory to the Bill of Rights debate, this next section points to another practical issue where the application of theory is claimed to be required. This concerns the protection of civil liberties in the European Union.

In the late 1960s, the lack of adequate protection for human rights vis à vis the powers and activities of the Community institutions led to a threat to the supremacy of EC law. As a response, the European Court of Justice (ECJ) developed a body of case-law which sought to compensate for the perceived deficit in civil liberties protection. By virtue of this case-law, fundamental rights were found to be part of the Union legal order and were thus to be respected and protected. These unwritten rights were derived from the common legal traditions of the Member States. As a result of this claim, it is suggested that there is now a practical need within the European Union to identify what the traditions of human rights common to the Member States actually are and that more importantly, this requires resort to comparative theory.

The liberty of assembly, that is the subject of this study is *prima facie* a human right that is part of this stated common tradition.<sup>159</sup> Therefore, by concentrating on two Member States in which assembly has historically played a prominent role,<sup>160</sup> it will be attempted to elaborate the content of the common tradition of the liberty to assemble more precisely. It is suggested that the ECJ's approach requires an interpretative comparison of the

---

<sup>158</sup> The problems concerning human rights in the European Union were brought to light when the Union was the European Economic Community and then the European Community. Therefore, on occasion, this latter term is also used but with the realisation that the protection of human rights in this context is still a live one today in the Union.

<sup>159</sup> This is instanced by the inclusion of the liberty to assemble in the ECHR, (art.11) and in the words of Palley, *op. cit.*, 224, the Convention;

'...is part of the common heritage of Europe and something which every Government as a member of the Council of Europe has for 40 years been committed to observing.'

<sup>160</sup> The historical role of the liberty to assemble in France and England will be looked at in chapter III. below, as part of the justification for concentrating on this specific liberty.

traditions of the Member States. Although at the present time it seems unlikely that the liberty to assemble will be raised in the context of European Union law, this study can be taken as an example of the methodological approach that the ECJ would need to adopt as far as more relevant liberties. However, it should be recalled that it was not foreseen that civil liberties would be relevant to the EC at the inception of the Treaty of Rome but subsequent history, which will now be presented, has proved this belief to have been erroneous. To accept that the liberty in question is irrelevant to the EU may therefore be a repetition of this error.

### *The lack of civil liberties in the EEC Treaty*

It is clear that the primary motivating factor behind the establishment of the European Economic Community (EEC) was the desire to achieve lasting European peace through closer *economic* co-operation. The economic emphasis in the Treaty has been much noted and criticised because it is seen as resulting in a lack of human rights protection.<sup>161</sup> Consequently, such rights as do exist in the Treaty are instrumental rights; intended to facilitate closer economic union between Member States.<sup>162</sup>

The absence of a Bill of Rights in the Treaty eventually led to serious concern on the part of the German Constitutional Court. The ECJ initially denied that human rights existed in the Treaty but finally, after the German Constitutional Court's claim that they could review EEC decisions and legislation against its Basic Law (Grundgesetz) and, more importantly, its assertion of a power to strike down measures that it felt were in violation of

---

<sup>161</sup> An interesting exception to these criticisms is provided by J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities' (1986) Wash.L.R. 1103, who notes at 1111 that the 'tenor' of the provisions that provide for judicial review in the Treaty indicate a desire on the part of the ECJ to maintain a separation of powers and the power to hold the acts of the Community institutions *ultra vires* the terms of the Treaty. There is no concern to subject these organs to higher law. For him, therefore, the absence of fundamental rights is not linked to the economic content of the Treaty. Instead, he sees the reason for the absence as being the result of a concern that entrenched rights would threaten the competencies, supremacy and jurisdiction of the EC institutions.

For an example of a more traditional observation as to the economic priority of the Treaty, see M.A. Dausies, 'The Protection of Fundamental Rights in the Community Legal Order' [1985] E.L.R. 398 at 399;

'The historical reasons for such silence in the Treaties are well-known. In view of the largely technical nature of the European Coal and Steel Community, established in 1951, it was not realistic to envisage situations where the Community authorities might encroach upon what might be termed fundamental rights. Subsequently, the establishment of the European Economic Community and the European Atomic Energy Community by the Treaties of Rome in 1957 was influenced by the political failures which preceded it. The comprehensive drafts for a European Defence Community and a European (Political) Community had foundered in 1954; the original euphoria gave way to sober utilitarian considerations and sight of a general concept of fundamental and human rights was lost.'

<sup>162</sup> Such rights include the prohibition against discrimination on the grounds of nationality (art.7), the right to equal pay for equal work, irrespective of gender (art.119), the right to move goods freely (arts.9-37), the right for workers to move freely and establish themselves in other member states (arts.48-58), the right to provide services freely (arts.59-66) and the right to move capital freely (arts.67-73).

German human rights, it began to develop a body of case-law in which human rights were found to exist within the Community legal order.<sup>163</sup>

*The work of the ECJ and the Nold dictum*

The ECJ's motivation for claiming the existence of human rights within the EU legal order is generally seen to have not been based on human rights concerns; it was a strategy designed to ensure the general supremacy of EU law over national laws, including, perhaps most importantly, those at a constitutional level.<sup>164</sup> Notwithstanding the purposes behind the ECJ's case-law, the Court, in a series of cases was able to find and apply human rights from within the Community legal order. It drew these civil liberties from different sources, which were eventually set out in consolidated form in the case of Nold v Commission:

As the Court has already stated fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from Constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those states.

Similarly, international Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.<sup>165</sup>

---

<sup>163</sup> The ECJ's early decisions denying the existence of civil liberties in the Community's legal system were Friedrich Stork & Co. v High Authority of the E.C.S.C. (1/58) [1959] E.C.R. 17 at 26, Geitling v High Authority of the E.C.S.C. (36-8, 40/59) [1960] E.C.R. 423 at 438 and Sgarlata v Commission of EC (40/64) [1965] E.C.R. 215. The German Federal Constitutional Court indicated its disquiet and issued its challenge to the supremacy of EC law in the area of human rights in its judgement BVerfG [1974] 2 C.M.L.R. 540. The court gradually softened the rigour of this ruling by eventually deciding to only review the primary legislation of the EC against German human rights (c.f. Steinke BVerfG [1980] 2 C.M.L.R. 531).

<sup>164</sup> Weiler, *op. cit.*, at 1119, critically analyses the motivation of the court in developing a body of civil liberties case-law. He claims that the ECJ's judgements show a 'surface language' of human rights but the 'deep structure' is concerned with supremacy and the preservation of the integrity and uniformity of the legal order. A. O'Neill & J. Coppel, The European Court of Justice Taking Rights Seriously [1992] C.M.L.Rev. 669-692 concur in the view that the development of this case-law was a defensive response by the court, on the other hand, T.C. Hartley (The Foundations of European Economic Community Law: An Introduction to the Constitutional and Administrative Law of the European Community (1981)) states, *op. cit.*, 122;

'...it is probably fair to say that the conversion of the European Court to a specific doctrine of human rights has been as much a matter of expediency as conviction.'

<sup>165</sup> (4/73) [1974] E.C.R. 491 at 507. It is worth noting here the structural similarities between this dictum and the source of law mentioned in the statute to the Permanent Court of International Justice (art.38(3));

'...general principles of law recognised by civilised nations.'



Using these sources the Court has claimed that the rights to pursue a trade or profession,<sup>166</sup> to enter a state (subject to the limitations that may be imposed by the legitimate needs of a democratic society),<sup>167</sup> to property,<sup>168</sup> to privacy and due process of the law<sup>169</sup> and to freedom of religious practice,<sup>170</sup> are, *inter alia*, within EU law. This interpretation has been accepted by the Member states<sup>171</sup> and the other organs of the Union.<sup>172</sup> As a result of these

---

<sup>166</sup> Staatsanwalt Freiburg v Keller (234/85) [1987] 1 C.M.L.R. 875.

<sup>167</sup> Rutili v Min. Interior (36/75) [1975] E.C.R. 1219.

<sup>168</sup> Hauer v Land Rheinland-Pfalz (44/79) [1979] E.C.R. 3729.

<sup>169</sup> National Panasonic v Commission (136/79) [1980] 3 C.M.L.R. 169.

<sup>170</sup> Prais v Council (44/79) [1976] 2 C.M.L.R. 708

<sup>171</sup> The German Federal Constitutional Court recognised the improvement in the mechanisms for the protection of civil liberties that had occurred in the Community legal order since 1974, as manifested by the ECJ's case-law. This development was seen as affording the same level of protection as that which existed in German constitutional law. Therefore, the German Constitutional Court stated in (Re the Application of Wunsch Handelsgesellschaft [1987] 3 C.M.L.R. 225 at 265);

'...in view of those developments it must be held that, so long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential character of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation... and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution..'

The Italian government also signalled a conditional acceptance of the protection of civil liberties in Frontini v Ministero delle Finanze [1974] 2 C.M.L.R. 372. The member states in general have most clearly manifested their approval of the ECJ's case law by virtue of their determination, as stated in the Preamble to the Single European Act 1986, to promote '...democracy and fundamental rights as recognised by the constitutions of the Member States, the European Convention of Human Rights and Fundamental Freedoms and the European Social Charter.'

The same attachment to the protection of human rights was made in art.F(2) of the Common Provisions of the Treaty on European and Political Union 1991.

<sup>172</sup> The approval of the Union institutions has been manifested in a series of documents; see Dausies, *op. cit.*, 413-15, who notes two trends in these politico-legal developments; firstly, growing support for the EU to accede to the European Convention of Human Rights and secondly, the drafting of an autochthonous Bill of Rights for the Union (the advantages and disadvantages of these two proposals are set out in 'Commission Memorandum on Ascension to the European Human Rights Convention' 4th April 1979, E.C.Bull.Suppl. 2/79). An example of the degree of consensus as to the importance of civil liberties in the Union's legal order can be gauged by the 'Fundamental Rights: Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977';

'1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(Footnote continues on next page)

developments, earlier problems concerning civil liberties would appear to have been resolved.<sup>173</sup> For the present purposes, it is the *source* of civil liberties in the constitutional traditions common to the Member States that is of interest. More particularly, it is the type of legal research that this source requires, which, it is suggested, requires a comparative civil liberties methodology.

### *Comparative civil liberties*

The Nold formulation, by asserting the common constitutional traditions of the Member States as one source of the civil liberties that are said to exist within the EU, results in the need for a particular method of judicial investigation on the part of the ECJ. This is the comparative method: it is only by comparing the traditions of the Member States that judges can elucidate what is and what is not common to the Member States. If, on the contrary, such an investigation is not carried out, judges who continue to invoke the Nold formulation will be acting in bad faith, or in Dworkinian terms, without 'integrity'. They will be merely substituting their own views of what the common constitutional traditions *should be*, without first, at least attempting, to state how they have actually been constructed in the Member States.<sup>174</sup> At the same time, standards will be needed in order to assess judicial decisions. In other words, it is not only judges but also commentators and lawyers who will require comparative theory.

Although it has been claimed that judges are always to some extent imposing their own personal opinions and even prejudices behind what appears to be the neutrality of legal rationality in their judgements,<sup>175</sup> these are

---

2. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.'

<sup>173</sup> Although there are still criticisms of the motives and use of civil liberties by the Court, see Weiler, *op. cit.* and O'Neill & Coppel, *op. cit.*

<sup>174</sup> Judges may still have to exercise a wide degree of personal choice; for example, the constitutional traditions that are discovered may be so diverse as to permit of no plausible synthesis. In such a case, a judge will have to decide whether to abandon the enterprise, or to draw from only one tradition, perhaps (but not necessarily) the one that s/he thinks affords the greatest protection. The fact that this degree of choice remains open to the judge is noted by R. Bernhardt, 'Problèmes liés à l'établissement d'un catalogue des droits fondamentaux pour les Communautés européennes' E.C.Bull.Suppl. (1976) 5/76, 27.

<sup>175</sup> See for example J. Frank, 'Cardozo and The Upper Court Myth' in (1948) 13 Law Cont.Probl. 369 and M. Kelman, 'Interpretative Construction in the Substantive Criminal Law' 33 (1981) Stan.L.R. 591.

controversial claims and it is suggested that at the outset and in the absence of evidence to the contrary, judicial practice and pronouncements should be taken at face-value; in other words, taken seriously. If this point is accepted, the judges of the ECJ must be seen to have a genuine allegiance to the employment of constitutional traditions as a source of human rights protection.<sup>176</sup> In such circumstances, the only chance of successfully deriving civil liberties from this source is by engaging in comparative research and the application of comparative theory.

## A SUMMARY

This chapter has sought to provide concrete examples of the kind of human rights reforms that could allow for the characteristics of human rights that were revealed in chapter I. It has sought to achieve this via the use of comparative theory. In applying this theory to the reform of human rights protection in England, it has been suggested that French law is of interest because of its attempts to combine a similar notion of parliamentary sovereignty with a concern to protect human rights. It is suggested that the review of parliamentary bills by the Cc and the review of administrative action are of particular interest. French protection has, however, been shown to have its problems and these have been examined in some detail in order to underline that a wholesale transplantation of the legal methods to England is not possible, or even desirable. Comparative theory, merely points to approaches that should be further pursued. This detailed examination will also serve as the context in which to see the protection as regards the liberty to assemble that is set out in chapters IV and V.

---

<sup>176</sup> J.M. Balkin, 'Taking Ideology Seriously: Ronald Dworkin and the CLS Critique' (1987) 55 U.Missouri at K.C.L.Rev. 392 argues, in the context of judges acting with integrity, that while judges may honestly attempt to apply the law independently of their own ideological and political beliefs, they might actually be acting under a false consciousness which means that they will still actually apply their own views, but sub-consciously. It is suggested that if the inevitability of personal prejudice and bias in judicial reasoning is accepted, this provides another reason in favour of the suggested use of comparative theory - so that judicial decisions as to what constitutes common traditions can be verified and criticised. At the same time, it would be considered commendable if judges deviated from a common tradition that violated human rights and other values. Therefore, it is not contended that judges should be slaves to common tradition and indeed it will be argued in Part III below that in certain circumstances judges should ignore common traditions.

Furthermore, it has been argued that comparative theory might not only be of use as regards problems in England but also as regards the protection of human rights in the European Union. In attempting to forge standards of human rights protection from the standards of the Member States it would appear that regard must be had to comparative theory - hence, adding further support to the claim made in this study that theory can usefully be applied to practice.

## CHAPTER III

### A SPECIFIC CIVIL LIBERTY: THE LIBERTY TO ASSEMBLE

#### INTRODUCTION

Whereas chapters I and II respectively presented reasons for looking at one specific civil liberty and for making comparisons with French law, this chapter seeks to explain the concentration on the liberty to assemble and to define it so that the field of comparison can be clearly seen. Accordingly, this chapter also constitutes the *third* and final step towards justifying the comparison undertaken in this study.

Although, the reasons for focusing on the liberty to assemble are set out in section I, they can be briefly outlined here. The liberty to assemble is a widely recognised human right but one which in England tends to be subsumed within the right to free speech. Thus, a focus on its specific needs and context, with the aim of isolating the specific characteristics and values for which it stands, beyond what generally applies to freedom of speech is called for. Secondly, it is a liberty whose exercise takes place in an explicit context of countervailing values and activities. It follows that its regulation is acutely concerned with making contested choices and so it provides a good example by which to illustrate the difficulties concerning methods of protecting human rights which seek to fix these choices. Thirdly, assemblies have been of historic importance in both France and England. Therefore, in attempting to formulate a common tradition of this liberty, the experience of these two Member States will be of significance.

Having looked at these reasons in section I, section II defines the liberty to assemble. It will be claimed that while there is a general concept of the liberty to assemble that is shared by France and England, within this concept there are differing conceptions which may not be accepted in both jurisdictions. A range of different activities will be covered by the liberty, according to which conception is adopted and it may make more sense to talk of the *liberties* to assemble, instead of assuming a single liberty. However, by focusing on what is argued to be the central conception of this general concept, the liberty to assemble is defined as securing peaceful meetings and processions (or marches). Consequently, the laws regulating these activities will be the object of comparative analysis.

Finally, it should also be noted that in accordance with the abstract level at which the jurisprudential theory is situated, the terms 'liberty' and 'right' to assemble are here used interchangeably.

## SECTION I THE IMPORTANCE OF THE LIBERTY TO ASSEMBLE

The liberty to assemble has certain features that make it an interesting right to study. These features which were set out briefly above and will be examined in greater detail here.

### AN INDEPENDENT LIBERTY?

The liberty to assemble is recognised in the Universal Declaration of Human Rights (art.20(1)) and in the ECHR (art.11). It is also commonly found within the lists of rights protected in many national constitutions.<sup>1</sup> For this reason, it can be said to be a widely recognised human right. Notwithstanding this status, there is some uncertainty as regards its meaning or, more precisely, what are the activities or values that it protects. Given this uncertainty, the right tends to be seen in England as part of the right to free speech and ultimately, the freedom of expression. However, subsuming the right as merely an aspect of the liberty of expression may mask the particular value of the right and renders the fact that it is normally declared separately in constitutional texts somewhat difficult to justify. In addition, specific legal mechanisms that are designed with specific characteristics of the liberty in mind may not be provided for. It is for these reasons that the liberty to assemble appears to be an ideal liberty by which the particularity of a specific civil liberty can be examined.<sup>2</sup> If specific functions or values of the liberty to assemble can be discovered, there will then be grounds for according it an independent status, buttressed by its own particular means of protection.

---

<sup>1</sup> For example, Denmark (art.79), Germany (art.8), Greece (art.11(1)), Italy (art.17), the Netherlands (art.9(1)), Portugal (art.45(1)) and Spain (art.21(1)).

<sup>2</sup> It will be recalled that this is one aspect of the jurisprudential theory of human rights that was formulated in chapter I.

The claim that the liberty under study is not an independent liberty will first be examined before then looking at some of the problems this view has been seen to raise.

### *An aspect of free speech*

The English tendency to see the liberty to assemble as an aspect of the right to free speech is instanced by Bonner and Stone, who state;

No special protection is given to political demonstrators *exercising freedom of speech through procession and assembly*.<sup>3</sup> (emphasis added).

Indeed, for some commentators, assemblies secure protest speech and as a consequence they actually use the term 'freedom to protest' rather than the liberty to assemble in order to emphasise the latter's protest function;

It might be thought that freedom of protest is simply one aspect of the more general right of freedom of speech...but protest involves the *communication* of ideas, not their formulation or validity. This aspect of human rights is about the *means* of persuasion or airing of grievances, and public protest is seen as a distinct human right worthy of individual treatment in positive constitutional codes.<sup>4</sup>

On occasion, this protest speech function is also seen as serving more fundamental aims. For example, Alderson, in discussing the right to protest, sees this liberty as acting as a 'safety-valve';

The key relationship between rights and power is worthy of note. Politics being concerned with the power to govern there is a constant tendency, a need perhaps for governments to seek an accretion of power. This may in turn induce protest from subjects whose activation of any right or freedom to protest may make the task of governing more difficult. On the other hand rights or freedoms to assemble, to process, and to exercise freedom of speech offer a safety valve. This acts as an insurance against driving protest below the surface where it may take on more sinister forms.<sup>5</sup>

---

<sup>3</sup> 'The Public Order Act 1986: Steps in the Wrong Direction?' P.L. [1987] 202, 203. (c.f. 229-30) For further examples of the same approach, see V.T. Bevan, 'Protest and Public Order' [1979] P.L. 163, 163-4, D.G.T. Williams, 'Keeping The Peace: The Police and Public Order' (1967), 10 and C. Gearty, 'Freedom of Assembly and Public Order', in C. McCrudden & G. Chambers (eds.) 'Individual Rights and the Law in Britain' (1994), 39.

<sup>4</sup> J. Murdoch, 'The Rights of Public Assembly and Procession' in Campbell *et. al.*, (eds.), *op. cit.*, 174. D. G. Barnum, 'The Constitutional Status of Public Protest Activity in Britain and the United States' P.L. [1977] 310, sees the right as performing a protest function, which in turn is part of the freedom of speech and A. Sherr 'Freedom of Protest, Public Order and The Law' (1989) takes the same protest view, although more implicitly (c.f. Dworkin, *op. cit.*, (1990), 6-7 and Feldman, *op. cit.*, 782-5).

<sup>5</sup> J. Alderson, 'The Right to Protest' in R. Hoggart (ed.), 'Liberty and Legislation' (1989), 29-30.

Alternatively, Sherr links the safety-valve function to the requirements of democracy. He claims that liberal political theory asserts a principle of government of the people by the people, which is then effected by democratic electoral procedures. If political change is required, these procedures should ideally be used to effect such changes. However, protest and demonstration, via the liberty to assemble function when these kinds of political channels are inefficient or insufficient.<sup>6</sup>

Another function attributed to free speech which is sometimes seen to be served by the liberty to assemble is that of self-government. According to this view, speech again serves the purposes of democracy but this time the emphasis is on protecting *political* speech and encouraging political participation. Political speech serves to inform citizens so that they may make informed political choices and participate in government.<sup>7</sup> Those who assemble can then convey or signal to their governors decisions as regards choices that affect them, in this way they can participate in government: self-government.<sup>8</sup>

---

<sup>6</sup> Sherr, *op. cit.*, 9-10.

<sup>7</sup> The democratic function of free speech is traditionally associated with the American theorist, A. Meiklejohn, 'Political Freedom: The Political Powers of the People' (1965). The right to assemble is seen by Murdoch, *op. cit.*, 74-5 as but another mode of encouraging participation in governmental decision-making and thus provides another example of the speech-democracy function view;

'Nor has the advent of more democratic processes rendered protest less valuable. Participation in influencing, persuading and directing decision-making is deep rooted in Western political systems: the great gatherings of Scandinavian tribes in the *Althing* arenas may today only be mirrored in the annual town parliaments in Swiss cantons and in New England townships, but more sophisticated political devices, such as referenda and initiatives, have emerged in recent years even in states in which a high degree of representative government has been achieved. Democracy requires the governors to keep in contact with the governed. Guaranteeing rights of public protest can therefore be seen as another, albeit informal, way of encouraging participation in decision-making, for it allows the governed to signal to their rulers. The existence of the ballot box does not render assembly and procession obsolete.'

(c.f. Barendt, *op. cit.*, 20-3 and L.H. Tribe, 'American Constitutional Law' (1988), 786-7).

<sup>8</sup> G. Rutherglen, 'Theories of Free Speech' [1987] 7 Ox.J.L.S. 115, 121;

'...all...of the arguments from truth and self-fulfilment are deeply connected by a common principle of respect for the opinions and decisions of individual citizens. The justification for democratic political processes, including free speech on political issues, proceeds from this principle to a general right of all citizens to participate in the government of the community. The arguments from truth and self-fulfilment justify free speech as an aspect of respect for the individual's ability to form his own opinions and to make decisions about the basic course of his own life.'



These diverse opinions have in common an instrumental view of the liberty to assemble; it has no value in itself but rather as a means to secure other values. In consequence, it is not seen as an independent liberty but as either an aspect of the freedom of speech and ultimately the freedom of expression. Once this view is adopted, the liberty is seen to carry out speech functions or values, such as protest or democracy, truth or individual self development and fulfilment; these being values that free speech is traditionally claimed to protect.<sup>9</sup>

These views of the liberty are problematic because firstly, they do not, as seen above, seem to accord with the legal practice of citing the liberty separately from speech rights and a jurisprudential theory that emphasises a look at specific civil liberties. Secondly, if the liberty in question is not a liberty that is independent from speech rights, a distinction must be maintained between *speech* and *conduct*. This will however be shown to be a somewhat problematic distinction.

#### *Some problems*

Where the liberty to assemble is claimed to perform free speech functions, it follows that the activities that are subject to protection are those that fall within the scope of this freedom. Therefore, the act of assembling is not protected *per se* but rather it is any *valued communication/speech* that occurs during an assembly that is protected.<sup>10</sup> The assumption here is that there is a

---

<sup>9</sup> Summaries of the strengths and weaknesses of the main free speech theories can be found in Barendt, *op. cit.*, 7 & 8-23, F. Schauer, 'Free Speech: A Philosophical Enquiry' (1982), 15-60 and for a lengthy critique of the truth function, see C.E. Baker, 'Human Liberty and Freedom of Speech' (1989), 6-70. It has also been noted that freedom of speech may serve more than one value; see Schauer, *op. cit.*, 14;

'Freedom of speech may have but one core, and there is nothing unseemly about looking for one. But it may instead have several cores. If this is what the analysis reveals, there is no reason to think that something is missing.'

and similarly, G. Marshall, 'Press Freedom and Free Speech Theory' P.L. [1992] 40, 44;

'There may be more than one human interest that is promoted by the free expression principle. Indeed, it must be rash to suppose that there is a single purpose served by all forms of civil liberty that involve communication. Communication rights include a number of loosely related freedoms, including those of free assembly, free association and the right to petition. They have also been held to embrace in recent times a further range of expressive actions, including freedom to picket, to advertise and to spend money in financial political campaigns.'

<sup>10</sup> The overriding importance of speech activities as objects of protection within assemblies is illustrated by Schauer's defence of assemblies as 'speech in the streets' (*op. cit.*, 201 *et. seq.*). He notes a traditional concern with the *content* of speech which has recently been joined by a concern as to the *location* of speech;

(Footnote continues on next page)

distinction between speech and conduct so that people can be assembled (conduct) whilst at the same time be engaged in the distinctive activity of communication (speech). In these circumstances the liberty to assemble functions to protect such conduct but only because of the presence of valued speech. The distinction means that it must be possible to separate those speech activities which are the proper object of protection from conduct, which lies outside the scope of protection.

However, there are problems with this distinction. As Barendt notes, communication may be effected not only by verbal or literary means but also using symbols (he gives examples of badges, uniforms, styles of appearance and gestures). This form of communication is referred to as 'symbolic speech'<sup>11</sup> and it reveals that on certain occasions speech and conduct can become blurred. Furthermore, Barendt notes;

The courts are frequently confronted by circumstances which clearly contain some 'pure speech', but also involve an element of physical conduct: leafleting and canvassing, demonstrations and many forms of picketing constitute examples of these situations. They should perhaps be treated more benevolently than 'symbolic speech' which is not accompanied by verbal or literary communication. The justification for this discrimination is that in the former group of cases there is a clearly understood intention to transmit information or opinions, and the difficulties only arise because the object is achieved by, or in conjunction with, some linked activity, which may create a social nuisance or harm unrelated to the content of the speech.<sup>12</sup>

---

'Traditionally, these concerns with content have constituted the only important free speech questions. But as speech has moved into new settings, new contributions not related to content have appeared. When people communicate by picketing, through the use of demonstrations or in parades, interests not related to the content of the communication are implicated. Parades interfere with the flow of traffic, demonstrations may prevent people from going where they wish to go, and picketing may interfere with the operation of a business or office. All of these are legitimate concerns. Yet these settings for communication are becoming increasingly prevalent in contemporary society. Reconciling the free speech interests with the acknowledged importance of traffic - and crowd - control has as a result become an increasingly important problem for free speech theory.' (pg.201).

For Schauer, assemblies are a form of speech, which, by virtue of their less conventional form, can secure more attention;

'There is a din of speech, and our limited capacity to read or hear has resulted in effective censorship by the proliferation of opinion rather than by the restriction of opinion. We learn no more from a thousand people all speaking at the same time than we learn from total silence.

Under such circumstances it is frequently necessary, literally or figuratively, to shout to be heard.' (pg.202).

<sup>11</sup> *op. cit.*, 41.

<sup>12</sup> *op. cit.*, 42 and c.f. L. Tribe, 'Constitutional Choices' (1985), 199-200.

The possibility that firstly, there may be no firm distinction between speech and conduct and secondly, that in certain fact situations, such as assemblies, speech and conduct may be linked, leads to uncertainty as to whether and how the liberty to assemble performs free speech functions.

The above-mentioned problem is addressed by Baker, who rejects the dichotomy between speech and conduct;<sup>13</sup>

Common sense operates less to divide the world of behaviour objectively between expression and action than to indicate the perspective of the person doing the dividing. If the distinction is between 'expressing' and 'doing,' most conduct falls into both categories. Most consciously undertaken actions are at least self-expressive; and many - a political assassination, a hair style, a knife placed behind another's back - can be primarily intended to communicate something to others. Contrarily, verbal conduct usually does something. A speaker may be described as composing a poem, commanding the troops, testing the student, creating a mood, threatening an enemy, or making a promise or contract.<sup>14</sup>

He further claims that freedom of speech and the liberty to assemble function to protect '*substantively valued conduct*' and that such conduct is '*inherently expressive*'. For Baker, the two liberties both protect expressive conduct which is a wider category of activities than mere speech. These expressive activities provide for individual self-development and self-realisation.<sup>15</sup> The liberty to assemble protects assemblies because they are activities in which individuals engage in self-expression and creation.<sup>16</sup> These activities promote individual fulfilment and self-determination, which are in turn, key values upon which democratic decision-making and legal obligation are based.<sup>17</sup> It should be

---

<sup>13</sup> *op. cit.*, 70 *et. seq.*

<sup>14</sup> *op. cit.*, 71. Baker relies on the linguistic theory of speech acts (c.f. J.L. Austin, 'How To Do Things with Words' (1962) and 'Philosophical Papers' (1970)), which essentially asserts that speech is a form of action. Thus a distinction between words and actions is denied.

<sup>15</sup> Therefore, Baker adopts an 'individual fulfilment' function for the liberty to assemble, *op. cit.*, 59;

'The key ethical postulate is that respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values...Granted this ethical postulate, and since the concept of coercion only has a place within some such ethical order, the use of speech (normally) ought not to be viewed as coercive - even if the person's expression, for example, her racist or sexist speech, reflects and perpetuates an unjust order and affirms or promotes a much more stunted view of the person. Likewise, this same premise, which views people as agents who can either reject or accept views that they hear, implies that a person's speech cannot normally be viewed as improperly interfering with a listener's or third-party's proper realm of decision-making authority.'

(c.f. Tribe, *op. cit.*, (1988), 787).

<sup>16</sup> *op. cit.*, 53-4.

<sup>17</sup> *op. cit.*, 49-50.

stressed that, according to Baker, the liberty to assemble *shares* this function with the freedom of speech and it is not to be seen as a mere aspect of the latter liberty.<sup>18</sup> For these reasons he presents an independent, if shared, function for the liberty to assemble, that can be seen as part of the broader liberty of expression. In short, both speech and assembly are aspects of expression.

It is not possible to assess Baker's claims here. This will only be possible after comparison has been undertaken in order to see how French law views the liberty but his views point to the uncertainty that surrounds the English view which tends to place the liberty within free speech. Adopting the English view of the liberty would therefore prejudice this issue and prejudice the orientation of the study, especially if French law is revealed to have an alternative conception of the liberty. It may also be the case that the two jurisdictions differ as to the functions that they accord to the liberty. The jurisprudential theory that underpins this study can, however, accommodate these differences whilst providing a sufficiently precise basis on which to commence investigation. Although it insists that all civil liberties *ultimately* function to provide a means of challenge and change, this is compatible with a range of different means (or functions) by which this is sought to be achieved. For example, the liberty to assemble might be used in order to protest or to discover or assert truth (as long as it is remembered that the latter is contingent and thus should be open to change) in order that social and political change can be brought about. It will be by concentrating on its specific context that it will be seen what, if any, are the particular and different ways that the liberty is claimed to achieve these ultimate ends in the two jurisdictions.

## COUNTERVAILING VALUES

A second reason for studying the liberty in question is that its exercise reveals the often sharp conflicts that arise between it and other values. As such it

---

<sup>18</sup> *op. cit.*, 128;

'Courts often treat conduct as at best, "speech-plus," which receives less protection than pure speech. Moreover, courts and commentators tend to value the conduct, the assemblies and associations, the picketing and parades, only because and, thus, only to the extent that they facilitate speech, which remains the primary focus. The first amendment explicitly protects assemblies, an activity that obviously involves more than verbal conduct. In fact, the dichotomy even disembodies speech itself - which is necessarily a physical activity that takes place at specific times and places and can interfere with other activities.'

provides a particularly good example of the difficult choices and uncertainties that are claimed to constitute the context or environment inhabited by all human rights.<sup>19</sup>

When an assembly takes place, its exercise might restrict the rights of others, for example the freedom of movement of pedestrians and drivers of motor vehicles. If it disturbs another assembly it may be said to restrict free speech (and even the right to assemble). The fact that rights conflict is not what makes the liberty to assemble such an interesting right, this, after all, has been widely noted as a feature of other human rights.<sup>20</sup> What the liberty in question brings into such sharp focus is the choices that may need to be made between other values which are not commonly viewed as human rights - most commonly public order<sup>21</sup> - and the exercise of the liberty itself.<sup>22</sup> It is

---

<sup>19</sup> See chapter I, section I, *supra*. The importance of the liberty to assemble as a barometer of how human rights are respected generally was noted by French comparativists when in the 1930's comparisons were made with England in order to search for responses to continued outbreaks of disorder during this period;

'...l'étude du droit de réunion nous permet-elle d'apprécier dans quelle proportion un régime de droit positif s'accorde non seulement avec le droit naturel mais encore avec le degré de libéralisme politique d'un pays donné. Une telle liberté est intimement liée au libéralisme et ne vit que sous son climat.' (M. Baffrey, 'Le droit de réunion en Angleterre et en France' (1937), 6) and c.f. P. Mousset 'Les meetings: essai sur les caractères politiques et juridiques de la liberté de réunion en Angleterre' (1931), 11.

<sup>20</sup> See, for example, Gewirth, *op. cit.*, 57, Dworkin, (1977), *op. cit.*, 193 and J.W. Nickel, 'Are Human Rights Utopian' *Philosophy and Public Affairs* (1982), vol.II, 247, 250.

<sup>21</sup> Some commentators assert that public order is really a human right. For example, A.J.M. Milne, 'Should We Have A Bill of Rights' [1977] 40 M.L.R. 389, 392 claims that, *inter alia*, the following rights exist;

'The right to life. The right to freedom, in particular from unprovoked violence, in general from arbitrary coercion.'

It will be recalled that Gewirth, *op. cit.*, founded civil liberties on the conditions that were necessary for human action (*op. cit.*, 69). These conditions were freedom and well being. It might, therefore, be claimed that protection from physical violence and protection of one's personal property are rights without which freedom and well being could not be secured.

See also, Hart, (1961), *op. cit.*, 189-95, where under what is called the 'minimum content of natural law', with survival as a human aim, Hart claims that an authority would have to protect people from physical harm and the destruction of property. These functions may be seen as condition precedents for the exercise of other human rights and this would justify a claim to their being the most fundamental civil liberties. In the context of Rawl's theory of justice Hart, however, claimed that liberty is not merely restricted for the sake of other liberties but also for other valued interests; 'Rawls on Liberty and Its Priority' in N. Daniels (ed.), 'Reading Rawls: Critical Legal Studies on Rawl's A Theory of Justice' (1975), 230 at 244-7. The tendency to expand the use of human rights, including to these other interests, has been criticised by critical scholars, as was seen above and also some liberal theorists; K. Minogue, 'What is Wrong With Rights' in C. Harlow (ed.), 'Public Law and Politics' (1986), 209 and a warning against the overuse of rights may be found in P.P. Craig, 'Public Law and Democracy in the United Kingdom and the United States of America' (1990), 7;

(Footnote continues on next page)

contended, although this will be explained at greater length below, that the liberty is concerned to protect *peaceful* assemblies<sup>23</sup> and this means that if it is decided that an assembly has or is likely to become violent, it falls outside of the protective scope of the liberty and can be restricted in order to secure public peace and order.

However, such decisions become all the more controversial where a view is not taken on the basis of actual violence but on apprehended violence, either from those intending to assemble or those opposed to their views. In these circumstances, it can be asked to what extent the law should uphold the right to assemble when this threatens public order and when is this right legitimately restricted. Furthermore, decision-makers and their perceptions become crucial,<sup>24</sup> as well as what is considered to be violent.<sup>25</sup> These difficult

---

'There is often an unspoken assumption that, if an issue is not capable of being framed as a legally enforceable constitutional right, it is therefore of no constitutional concern to lawyers. This is erroneous. One may reach the conclusion that a particular interest is incapable of being framed as a justiciable legal right, but still believe that it generates a constitutional obligation which the legislature is bound to advance.'

<sup>22</sup> According to S. Uglow, 'Policing Liberal Society' (1985), 80;

'...with any gathering the interests of other people, both as individuals and as the "public", are adversely affected. Competing rights and public interest both provide subtly different justifications for the dispersal of a crowd or the arrest of participants...'

<sup>23</sup> *infra.*, section II.

<sup>24</sup> These decisions are often taken by the police, see, in the British context, D. Galligan, 'Preserving Public Protest: The Legal Approach' in L. Gostin (ed.), 'Civil Liberties in Conflict' (1988), 39;

'...there are difficulties in handling public protest. At the theoretical level, there is little common ground as to how the liberties involved - assembly, speech, and movement - are to be reconciled with each other, with conflicting rights and liberties, or with notions of public order. At the practical level, these conflicts become real and immediate; decisions have to be made and actions taken which directly or indirectly define the scope of public protest. Sometimes the problems of clashing values and interests are solved by legislative enactment...More typically, however, matters are left to be determined in a piecemeal way by the police, the courts, the Home Secretary, and a variety of other officials. And even where there are statutes, they are unlikely to provide more than a broad framework of guidance within which specific decisions are to be made.'

D. Waddington, K. Jones & C. Critcher (eds.), 'Flashpoints: Studies in Public Disorder' (1989), 163, note that one of the key factors behind outbreaks of violence in assemblies is the relationship between the assemblers and the police. For an example of an analysis of police occupational culture and its effects on police behaviour and attitudes towards assemblies, see Waddington *et. al., op. cit.*, 181 *et. seq.* and for an introduction to crowd theory, see J.S. McClelland, 'The Crowd and the Mob: From Plato to Canetti' (1988), C. McPhail, 'The Myth of the Madding Crowd' (1991) and N. Smelser, 'Theory of Collective Behaviour' (1962).

<sup>25</sup> E. Dunning, P. Murphy, T. Newburn & I. Waddington, 'Violent Disorder in Twentieth-Century Britain' in Gaskell & Benewick (eds.), 'The Crowd in Contemporary Britain' (1987), 19 at 29 *et seq.* note that there has been a change over time as to what is considered to be violent in the context of collective disturbances in Britain since 1900. More precisely, it was discovered that before the 1930's street fights involving the police and members of the local

(Footnote continues on next page)

issues will be seen to suffuse the case-law in both France and England but here it should be noted that they illustrate the peculiarly vivid context of the liberty.<sup>26</sup>

Moreover, one more the point it can be seen that the laws that will be needed to regulate the exercise of the liberty will need to deal with this specific and particular context. It is argued that from a jurisprudential and political viewpoint, the right to assemble is not be a value that constantly overrides other values but at the same time the fact that a community grants it special status should be respected and secured by the law. This is once again the challenge of providing for change and uncertainty whilst at the same time protecting human rights. The particular and specific ways in which these two requirements are met in the law is investigated because of the emphasis on the specific and the particular, which is a central part of this study. By employing this method it is hoped to elucidate a more detailed picture of the context of the liberty to assemble.

## HISTORICAL AND CONTEMPORARY IMPORTANCE

This last reason may be dealt with briefly because it will be illustrated in greater detail by the French and English legal regulation of the liberty.

Historical studies have shown the important role played by assemblies, often of a violent nature,<sup>27</sup> in the demand for political and social change. This has

---

community were regarded by spectators and participants as entertainment. This is claimed to be linked to the existence of the 'street' as a principal centre of working class leisure. It is further asserted that due to the clearance of the working class from the inner cities after the war, the street declined as a location for this type of entertainment and there was a concomitant decline in the view that these disorders were legitimate. It is submitted that this evidence suggests that the criteria for distinguishing between violence and non-violence is dynamic and fluctuates in response to changing circumstances, including, as in the above examples, the economic and the social. Essentially, violence is not a fixed, objective category but is a social construct that very much reflects the opinions and values of the time.

<sup>26</sup> Feldman, *op. cit.*, 782;

'In every society there is a tension between the desire of citizens to be free from annoyance and disorder and their wish to be free to bring to the attention of their fellow citizens matters which they consider to be important. The way in which any legal system resolves the tension, and the balance which it strikes between competing interests, is indicative of the attitude of that society towards the relative value of different sorts of freedom.'

Robertson, *op. cit.*, 66 also asserts the importance of the liberty;

'More than any other freedom it comes at a price...'

<sup>27</sup> Sherr's safety-valve conception also leads to a view that violence may be necessary where democratic channels to effect change and to voice one's interests are blocked. Violent assemblies might also be felt to be a legitimate means to challenge a violent and grossly

(Footnote continues on next page)

especially been the case in France and England.<sup>28</sup> For example, Rudé notes, in studying popular protest in Paris and London in the eighteenth century, that assemblies were an important means of seeking reform;

In neither city were the wage-earners or craftsmen of the eighteenth century considered a part of the political community...In consequence, at moments of crisis and social and political tension, the *menu peuple* or 'lower orders' sought redress for their grievances through street demonstrations, in strikes and in riots.<sup>29</sup>

Tilly also underlines the historical importance of assemblies in France and England when he asserts that a 'répertoire' of collective action was developed in these two countries around the mid-nineteenth century.<sup>30</sup> He claims that this signals the birth of modern social movements, as the interests of people shifted away from the parochial and local to national affairs and major concentrations of power and capital.<sup>31</sup> This change occurred in England in the 1830's and in France around the 1848 Revolution.<sup>32</sup> The reasons for the development of these new forms of collective action were linked to electoral reforms and the expanded scope of participation in national politics. A new

---

unjust political regime. This leads on to the issue of civil disobedience, which is again dealt with by Sherr, *op. cit.*, 5-14 and c.f. J. Rawls, 'A Theory of Justice' (1972), 363-91 and H.A. Bedau (ed.), 'Civil Disobedience: Theory and Practice' (1969).

<sup>28</sup> See generally, G. Rudé, 'Paris and London in the Eighteenth Century: Studies in Popular Protest' (1970) 35-60, 223-67, 319-40, C. Tilly, 'Les origines du répertoire de l'action collective contemporaine en France et en Grande Bretagne' *Vingtième Siècle: Revue d'Histoire* 4 [1984] 89, E. Hobsbawm, 'Primitive Rebels' (1959), E.P. Thompson, 'The Making of the English Working Class' (1963), M. Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820' *Ox.J.L.S.* 10 [1990] 307 and R. Cobb, 'The Police and The People: French Popular Protest 1789-1820' (1972). Barnum, *op. cit.*, 312, sums up the use of assemblies as one important vehicle for achieving change;

'Throughout history, large numbers of religious zealots, labour leaders, left- and right-wing propagandists, suffragettes, racists, pacifists, students, poor people, and many others, have at least temporarily forsaken conventional political processes and means of communication and chosen a public forum for expression of their grievances. Their activity has been as varied as publishing, meeting, speaking, parading, leafleting, picketing, and in many ways demonstrating their dissatisfaction.'

It was concern over police practices as regards the liberty to assemble in England that led to the birth of the National Council for Civil Liberties (now Liberty) in the 1930's; see M. Lilly, 'The National Council for Civil Liberties: The First Fifty Years' (1984) and R. Kidd, 'British Liberty in Danger: An Introduction to the Study of Civil Rights' (1940), 123-50 for a description of some of their activities at this time.

<sup>29</sup> *op. cit.*, 54.

<sup>30</sup> *op. cit.*, (1984) and 'Speaking Your Mind Without Elections, Surveys, or Social Movements' *Public Opinion Quarterly* 47 (1983), 461, 464 *et. seq.*

<sup>31</sup> *op. cit.*, (1983), 468 and *op. cit.*, (1984), 95 & 102.

<sup>32</sup> *op. cit.*, (1984), 100;

'Ce n'est qu'au printemps de 1848 que la passion de s'assembler, de défilier et de délibérer fit pencher l'action collective vers le répertoire qui domine depuis lors.'



discipline was called for, as opposed to the sporadic and localised violence of previous forms of collective action.<sup>33</sup> The new repertoire that was developed is concerned with trying to achieve change and here assemblies play a central role;

The social movement consists of a series of challenges to established authorities, especially national authorities, in the name of an unrepresented constituency. Its concrete actions combine various elements of the newer repertoire: *public meetings, demonstrations, marches, strikes*, and so on, coupled with an attempt by leaders to link the actions organizationally and symbolically, as well as to bargain with the established authorities on behalf of their claimed constituency.<sup>34</sup> (emphasis added).

On the other hand, some commentators view contemporary assemblies as also being characterised by the manifestation of grievances and protest.<sup>35</sup> It may therefore be claimed that in contemporary times, assemblies have a political and democratic significance, and this view would coincide with the function of human rights as proposed by the jurisprudential theory adopted here.

Having stated the reasons for concentrating on the liberty to assemble, the next section will define it in more precise terms in order to have a clear view of what is being compared.

## SECTION II DEFINING THE LIBERTY TO ASSEMBLE

In defining the liberty to assemble an effort will be made not to prejudice how the right is constructed in France by imposing conceptions derived from English law. At the same time, the liberty must be sufficiently well defined so that the relevant areas of law may be investigated. These two concerns seem

---

<sup>33</sup> *op. cit.*, (1984), 102. Rudé, *op. cit.*, 17-34, also notes a transition in collective action and contrasts this with the more violent, disorganised characteristics of what he calls the 'pre-industrial crowd'. Furthermore, he also claims that these forms of collective behaviour date from the early eighteenth century in England and France until around the 1840's. Therefore both these historians point to the birth of modern assemblies in eighteenth century France and England.

<sup>34</sup> *op. cit.*, (1983), 466.

<sup>35</sup> See, for example, J. Benyon & J. Solomos (eds.), 'The Roots of Urban Unrest' (1987), particularly, J. Benyon, 'Interpretations of Civil Disorder', 23 and S. Hall, 'Urban Unrest in Britain', 45 and G. Gaskell & R. Benewick, *op. cit.*, especially G. Gaskell & R. Benewick, 'The Crowd in Context', 1.

to pull in different directions: openness/flexibility on the one hand and closure and certainty on the other. The dilemma that results will be resolved by having regard to jurisprudential theories which have sought to come to terms with similar problems in other areas of law.

The result of the application of these theories is that the liberty to assemble will be seen to be a complex general liberty that protects a range of activities. However, for the purposes of this study, two central activities will be focused on. These are found to be peaceful meetings and processions, which are claimed to be commonly understood and accepted aspects of the liberty to assemble. It follows that a reasonably certain definition of the liberty is formulated by which to commence comparison and which at the same time does not prioritise one national conception over that of the other.

A comparison will therefore be made of the laws that regulate these two fundamental aspects of the liberty to assemble. Finally, attention is drawn to a point that was touched on in the previous section; namely the possibility that the liberty to assemble would be best seen as a series of sub-liberties and therefore referred to as the 'liberties to assemble'. Although the English view of a single liberty within free speech has been noted, it will be seen to what extent French law points to a single liberty or instead a bundle of plural liberties and what would seem best from the point of view of jurisprudential theory, after comparison has been carried out in Part III. Here, this uncertainty and the need to avoid prejudicing this issue are recognised by once again using interchangeable terms: thus the 'liberty/right to assemble', 'liberties/rights to assemble', 'liberty/right to meet' and the 'liberty/right to process' will be provisionally employed until Part III.

#### **DEFINITION AND COMPARATIVE LAW**

As previously stated, comparative analysis should avoid defining the subject to be compared in terms that reflect a particular set of values and understandings. For present purposes, this means that it is possible that the liberty to assemble may be defined differently in England and France; a definition from one jurisdiction cannot at the outset be posited without the risk of excluding features from the other jurisdiction. The liberty to assemble that would be compared using such an approach may legitimately be open to the criticism that it produces a distorted and partial understanding of that human right. Therefore, identifying and defining the subject of comparison is

essentially an enterprise that searches for the highest degree of generality possible, in an attempt to avoid presenting the subject of study in terms that are pre-determined by a particular legal system. This seems to be conceded in the comparative methodology adopted by Zweigert and Kötz;

The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without reference to the concepts of one's own legal system.<sup>36</sup>

and further;

If one's comparative researches seem to be leading to the conclusion that the foreign system has 'nothing to report' one must rethink the original question and *purge it of all the dogmatic accretions of one's own system.*<sup>37</sup> (emphasis added).

It follows that the act of defining is crucial; as stated above, it should be sufficiently precise to permit comparison to be carried out, whilst at the same time avoid the danger of imposing the features of one system on that of another. It might be thought that resort could be had to existing texts in which the liberty is mentioned. Art.11 of the ECHR immediately springs to mind because of the fact that it binds both France and England and because, as already mentioned, it constitutes part of the common European heritage.<sup>38</sup> However, this provision does not provide much assistance; it merely refers to the 'right to peaceful assembly'. The only advance that can be said to be made towards resolving the problem of definition is that the liberty is concerned with peaceful assemblies but it is still unclear what is meant by 'assembly' in this context.

Another means of defining the liberty can be found in jurisprudential theory. Put briefly this theory claims that water-tight definitions are often impossible in the law but notwithstanding this there will often be substantial, if not unanimous agreement, as to certain legal terms. Hart firstly argued for the existence of a 'core' and 'penumbra' as far as the application of legal rules to factual circumstances.<sup>39</sup> This was been taken up by other theorists, including

---

<sup>36</sup> *op. cit.*, 31.

<sup>37</sup> *op. cit.*, 31.

<sup>38</sup> *supra.*, chap.II, section III.

<sup>39</sup> *op. cit.*, (1961), 119

Ronald Dworkin and John Finnis.<sup>40</sup> For example, Dworkin's consensus theory that was analysed above,<sup>41</sup> works with a similar sort of point. Dworkin therefore claims that there is broad agreement as to the *concept* of law but broad disagreement as regards particular *conceptions* of law. Although Dworkin wishes to move beyond the core/penumbra distinction to wider considerations about interpretation and meaning in the law, for present purposes it is sufficient to note that he accepts that at a certain point there will be broad consensus as to the concept of law.

Secondly, Hart argued that the meaning of law and legal concepts could be gleaned from their use.<sup>42</sup> This was because legal concepts did not refer to real objects or entities. For example, the meaning of the word 'dog' can be elucidated by pointing to a object to which it refers or stands for but this not the case for concepts such as 'rule', 'duty' or 'obligation'. To discover what they mean an examination of their different uses must be carried out.<sup>43</sup>

These insights will be adopted here so that the core meaning of the liberty to assemble will be elucidated and this will be undertaken by primarily examining its uses or values. More precisely, the liberty is defined by asking what are the functions or values which it is generally seen to carry out and then seeing which activities are generally seen to carry out these values. It these activities that constitute the core of the liberty.

## FROM THE PENUMBRA TO THE CORE

The liberty to assemble does not cover all assemblies. For example, it would be unlikely that it would cover those gathering to watch a football match or a play in a theatre. These activities can be located well within the penumbra of

---

<sup>40</sup> See Dworkin (1986), *op. cit.*, 90-6, Finnis, *op. cit.*, 9-11. However, this approach is not without its critics, for example, M.H. Kramer, 'The Rule of Misrecognition in the Hart of Jurisprudence', *Ox.J.L.S* [1988] 401, *op. cit.*, (1991) and R.M Unger, 'The Critical Legal Studies Movement' (1986), 5-42.

<sup>41</sup> Chap.I, section III, *supra*.

<sup>42</sup> See 'Definition and Theory in Jurisprudence' (1954), 70 L.Q.R. 37, also found in 'Essays in Jurisprudence and Philosophy' (1983), especially 2-6 & 26 and (1961), *op. cit.*, 120-7.

<sup>43</sup> Here, Hart drew heavily on linguistic theory, especially that of L. Wittgenstein, 'Philosophical Investigations' (trans. G.E.M. Anscombe: 1953), 43;

'For a large class of statements - though not all - in which we employ the word "meaning" it can be defined thus: the meaning of a word is its use in the language'  
and at 421;

'Look at the sentence as an instrument, and its sense its employment'.

the meaning of the right. On the other hand, other activities can be placed within the core, for example picketing, sit-ins and vigils. These will generally be felt to be activities which the liberty to assemble should protect. What is the reason why one set of activities can be placed within the core, while the others are consigned to the penumbra? The response would seem to lie in the *value* of the activities concerned. As a consequence, the meaning of the liberty of assembly is not just simply a list of diverse activities that can, according to ordinary language, be called assemblies. Instead it refers to certain valued activities and their value in turn will be seen to be linked to their perceived functions, and ultimately their context of countervailing interests, that was presented in the previous section. It is therefore because of the valued functions of certain assemblies that justifies them being activities that are protected by a civil liberty.

If attention is returned to those examples of activities that were stated to be likely to be placed within the core of the liberty under study (picketing, sit-ins and vigils), it can be seen that they are placed in this position because they can be seen to be capable of performing the valued functions that, were generally thought to be those of the liberty. Thus, for example, picketing can be carried out in order to protest. If this protest acts as a safety-valve, in providing an outlet for grievances instead of violence, it could also be said that another aforementioned function is being carried out. The same observations could be made of a sit-in and a vigil. All three types of assembly could be employed as regards matters concerning democratic decisions and governance, thus they could fulfil the democracy and self-governance functions and values. Furthermore, these core aspects of the liberty to assemble can be used in the search for truth, which is yet another claimed value/function. Therefore, whether via protest or as part of the democratic process, they might be used as means to challenge established truths and in so doing it might be further argued that the self-fulfilment (yet another valued function) of those that participate is increased.

These examples show why these activities are valued and consequently why they are covered by the liberty to assemble. They can be contrasted with other assemblies which belong in the penumbra because of the relative difficulty of arguing that they fulfil the valued functions of the liberty. For example, it is not so easy to argue that gathering in order to watch a football match or a

play in a theatre performs a democratic, truth, self-fulfilment, safety-valve or protest function/ value.<sup>44</sup>

It is not contended that these functions are totally beyond these kinds of assembly but that they are not so *obviously* vehicles for effecting these values. Instead, in order for them to be seen as fulfilling the functions of the liberty to assemble, new and unusual factors must be added. Therefore, gathering to see a play could be said to be a means of protest but there would have to be a relationship between the assemblers and the play which resulted in the fact of their gathering to see it being viewed as protest. A similar relationship would need to exist between a football match and the gathering spectators in order for the assembly to be seen as performing democratic or truth functions. Nevertheless, the assembling is important: having to watch a football match or a play alone may often reduce the significance and pleasure of the spectacle. Thus, it would appear that the assemblies in these examples have value but not the values commonly attached to the liberty to assemble. For this reason they are not what is meant when the liberty to assemble is mentioned.

What is then shown is that the liberty to assemble means a series of assembly activities that are valued because of their functions and because these functions have value. In addition, it is claimed that the liberty covers peaceful assemblies. This quality is related to the aforementioned *context* of the liberty, which is the possibility that it might conflict with other liberties and values. Thus, a vigil might interfere with rights of passage, if it takes place on the public highway and a sit-in in a factory might adversely effect rights to work. The core activities of the liberty may also raise problems of public order, which have to be weighed up against the values that would be secured by assembling. Even though a penumbral activity such as assembling to watch a football match often causes problems of disorder, there is very rarely any assembly value that is seen as being at stake. As a consequence, it would be

---

<sup>44</sup> Function and value are used synonymously here in that what is being referred to is the commonly put forward justifications for the liberty to assemble; in other words why is the liberty worth protecting and respecting. Marshall, *op. cit.*, (1992), 44 acknowledges this approach as regards free speech rights

'Foundational theories and arguments deal in justification and answer the question, " Why is free expression or communication in general worth protecting as a political and constitutional interest? What social aims or purposes does the practice serve?'"

unlikely to be claimed (and even less likely to be accepted) that the liberty to assemble was being violated if a decision was taken to ban spectators from watching a match. Therefore, the context, like the function/value of penumbral and core assembly activities would appear to differ. In the latter case of a football match, the values that conflict with values such as public order have a different weight and priority and for this reason they *a priori* fall within the scope of the civil liberty.

The fact that the liberty covers so many different activities points to the possibility that it is not a single liberty but is rather a bundle or series of related liberties. Moreover, it may be that the grouping of all these activities within one general liberty might obscure the particular legal mechanisms of protection that they require, as well as the difficulties from which they suffer. Recalling the priority given to specific analysis in this study, it would then seem best to separate out these different aspects and speak of the liberty to picket, the liberty to sit-in etc. and investigate their particular contexts and needs. Such a strategy would not only be theoretically based but would also avoid making any prejudgement that the liberty to assemble is a unified liberty in both French and English law. Consequently, this strategy is adopted here, so that along with the terms 'rights' and 'liberties', the terms the '*liberty* to assemble' and the '*liberties* to assemble' will both be employed.

A final aspect concerns the peaceful nature of assemblies. It is claimed that the liberty to assemble means *peaceful* assemblies. This claim is founded upon a consensus view. This consensus is seen in the fact that in national constitutions the liberty is invariably declared to secure peaceful assemblies. Thus, for example, in the First Amendment to the United States Constitution the 'right of the people to *peacefully* assemble' is guaranteed, whereas in art.8 of the German constitution it is stated that 'Germans shall have the right to assemble *peaceably*'. Similar provisions are invariably found in national Bills of Rights.<sup>45</sup> The same can be said as regards international texts, for example, art.20(1) of the Universal Declaration of Human Rights 1948 states;

Everyone has the right of peaceful assembly

---

<sup>45</sup> See the various provisions quoted in n.1 of this chapter, *supra*.

This formula has also been widely taken up in regional texts, such as art.15 of the American Declaration on Human Rights 1969;

The right of peaceful assembly, without arms is recognised.<sup>46</sup>

Given the broad degree of consensus, this view is also adopted here as being part of the general definition of the liberty. This is not to suggest that violence does not play a role in the regulation of the liberty. As was noted above, a decision that an assembly has or is likely to become violent will be of crucial importance, as it is on the basis of this decision that an assembly can be restricted. Nevertheless, it is one thing to note that assemblies within the liberty to assemble may become violent and another to equate them with violent assemblies, such as riots.<sup>47</sup> These assemblies have no place within the protective scope of the liberty and consequently the focus of the study will be on the legal regulation of the former, but with careful regard as to the way in which violence conditions its legal framework.

## MEETINGS AND PROCESSIONS

At this point the liberty to assemble could be defined as peaceful assemblies that perform certain valued functions but whose exercise may conflict with other human rights and values. However, this would not suffice as a definition of the liberty in this study because space precludes a detailed comparative analysis of all the assemblies that could commonly be said to be covered by so widely a defined liberty in France and England. Three examples of assemblies that are commonly agreed to belong within the liberty have been mentioned but, without claiming to be exhaustive, others such as meetings, processions and sit-downs could also be included. Given the limits of space, a choice has to be made as to which core activities should be examined.

The choice that is made in this study is that the liberty to assemble should be taken to mean meetings and processions. In Dworkinian terms they will be taken to be 'paradigms' of the liberty to assemble.<sup>48</sup> This choice is justified on

---

<sup>46</sup> For other examples, see art.21 of the American Declaration of the Rights and Duties of Man 1948, the already noted art.11 of the ECHR and art.21 of the International Covenant on Civil and Political Rights 1966.

<sup>47</sup> D. Taratowsky, 'La politique et la rue' *Ethnologie française* 21 (1991) 317.

<sup>48</sup> *op. cit.*, (1986), 72-3 & 75-6.



a number of grounds. Firstly, they have a longer history and were the first kinds of core assemblies to be legally regulated.<sup>49</sup> This means that the legal regulation that concerns them is likely to be closer to the origins of the liberty to assemble. Secondly, they have in the past broken out into violence and their exercise can cause inconvenience and the restriction of other liberties.<sup>50</sup> As a consequence, they squarely raise the context of countervailing values that was mentioned above. Thirdly, it is contended that these two assemblies can act as the means to achieve the kinds of challenge and social change that is advocated by the theory of human rights that has been formulated in this study. Fourthly, the law regulating the liberty to assemble has often been seen in England as a reliable indicator of the way in which human rights are generally regulated. Thus Dicey stated;

No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies.<sup>51</sup>

and more recently but in a less optimistic vein, Feldman has made the same point;

This field, perhaps more than any other, makes manifest the consequences of a constitutional and political ethos which values pragmatism above principle, and has little or no room for rights.<sup>52</sup>

---

<sup>49</sup> Tilly, *op. cit.*, (1983), 476 and (1984), 104, observes that in the twentieth century there have been some new initiatives or themes as regards the repertoire of collective action (i.e. assemblies). These have generally involved the occupation of space (*op. cit.*, 468) but he insists that people have retained and adopted 'centuries-old' established means of, *inter alia*, meetings and demonstrations, This repertoire developed in the 1830's and was manifested by the use of meetings and marches; *op. cit.*, (1983), 473;

'It bore a number of stigmata of our own time's social movements: holding public meetings, organizing associations, mounting petition drives, marching through the streets... Throughout Great Britain, people mobilized for and against different programs of parliamentary reform. They called *meetings* and *marches*, claiming victory when many people showed up for them.' (emphasis added).

Therefore these two activities can be claimed to lie at the heart of collective behaviour via assemblies, as noted by Robertson, *op. cit.*, 67;

'Demonstrations helped to win the democracy we enjoy today. The right to stand for Parliament, the right to vote and the right to join trade unions were all hastened by *meetings and marches* and protest movements.' (emphasis added).

<sup>50</sup> Tartatowsky, *op. cit.*, 317 and Waddington *et. al.*, *op. cit.* and Rudé, *op. cit.*

<sup>51</sup> 'Introduction to the Study of the Law of the Constitution' (1885), 271 and Baffrey, *op. cit.*, 31 states;

'Etudier le droit de réunion en Angleterre, c'est retracer non seulement son histoire, c'est vivre une des plus parfaites réalisations de la Common Law...'

<sup>52</sup> Feldman, *op. cit.*, 842.

It is therefore of considerable interest to English law to examine how this important liberty is regulated in France. These remarks were made about the regulation of the liberty under ordinary circumstances and not under states of emergency. The regulation of the liberty under these circumstances will not be studied here because its regulation in normal times provides a better example of how the law decides if the right is to prevail against other interests. On the other hand emergency measures or states of emergency invariably mean that human rights are curtailed and so do not exert their normal influence and importance.<sup>53</sup>

The liberty to assembly will therefore be defined in this study as the activity of peacefully meeting or processing/marching in order to carry out certain valued functions which can be ultimately employed to challenge the status quo and achieve political and social change. Furthermore, the possibility that these aspects are liberties in their own right will be recognised by employing the terms 'liberty/liberties to assemble' and 'liberties to meet and process or march'.

Having defined and highlighted the specific importance and meaning of the liberty to assemble, the liberties to meet and to process can be seen as justified objects of comparison. Therefore, it is to the legal regulation of these central or paradigmatic aspects of the liberty to assemble that attention is now turned.

## **A SUMMARY**

In this chapter the concern has been to justify the concentration on the liberty to assemble in this essay. In this connection, it has been argued that this is an important human right both historically and in contemporary times and that it classically presents the kind of issues that legal regulation must deal with as concerns human rights in general but also particular problems that stem from its specific nature. The second concern has been to define the liberty in order that France and England may be compared. The definition of the liberty to assemble focuses attention on central aspects of this liberty, while at the same time indicating the possibility that there, on the contrary, *liberties* to assemble.

---

<sup>53</sup> On states of emergency generally, see K. Jeffrey & P. Hennessy, 'States of Emergency' (1983) and D. Bonner, 'Emergency Powers in Peacetime' (1985).

## **PART TWO**

# **THE LIBERTY TO MEET AND THE LIBERTY TO PROCESS IN FRANCE**

The two chapters in this part of this study present the legal regulation of the two central aspects of the liberty to assembly - the liberties to meet and to process - in France. Consequently, **Chapter IV** looks at the liberty to meet, whereas **Chapter V** focuses on the liberty to process.

## CHAPTER IV

### THE LIBERTY TO MEET IN FRANCE

The legal regulation of the liberty to meet in France will be presented in this chapter. Like the next, this chapter constitutes the 'raw material' of the study, in the sense that it is this legal framework that will be compared and evaluated with that in England. The emphasis is therefore on description but an accurate report of the law would not be complete without pointing to problems and inconsistencies that may exist and so the more important of these will also be included.

The liberty to meet will be presented in three sections. First it will be seen how it is commonly defined in French law. Secondly, its legal history will be explained because this provides the context for the current arrangements that will then be described in the third section.

#### SECTION I

##### A DEFINITION

##### DEFINITIONS VIA FUNCTIONS/VALUES

There is no legislative text in the French legal system which defines the liberty to meet. However, the importance of definition has been recognised<sup>1</sup> and as a consequence, French commentators have formulated different definitions of the liberty to meet by claiming that it performs certain functions and guarantees certain values. These will be set out here.

Therefore, on some occasions the liberty is placed within a category referred to as the liberties of thought and expression. Examples of this are provided by Colliard who places the liberty within what he entitles the 'liberties of thought and intellectual liberties',<sup>2</sup> whereas Robert and Duffar claim that the liberty to

---

<sup>1</sup> For example, M. Waline, 'Qu'est-ce qu'une réunion publique?' D.1937.73;

'...il reste utile et même nécessaire de distinguer la réunion de plusieurs activités; la manifestation - le spectacle - enfin, le cours d'enseignement postsecondaire ou d'enseignement supérieur. Cette nécessité réside en ceci, que ces activités sont soumises à des régimes juridiques différents, moins libéraux.'

<sup>2</sup> *op. cit.*, 409, these include;

(Footnote continues on next page)

meet is an aspect of the 'liberties of collective expression'.<sup>3</sup> It follows that meetings are claimed to be of secondary importance compared to the communicative functions that are carried out within them;

La réunion n'y est jamais qu'un élément accessoire et secondaire qui vient se greffer sur une autre liberté dans la législation de laquelle elle est englobée.<sup>4</sup>

If this definition is accepted, the liberty under study can be seen as occupying a position set out by article 11 of the Declaration of the Rights of Man and the Citizen 1789, which states that

La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme

This is the claim that is made, for example, by Berthon;<sup>5</sup>

Dans la Déclaration [d]es Droits de l'Homme et du Citoyen, de juillet-août 1789, est affirmée la liberté en général, la liberté d'aller et de venir; par conséquent la liberté de se réunir, la liberté de la pensée et de l'expression de la pensée - cela suffit pour établir le droit de réunion.

On other occasions the liberty to meet is placed within a category of group liberties.<sup>6</sup> Interestingly, Duffar and Robert's formulation of collective liberties of expression can be seen as a fusion of the group and expressive aspects of the liberty.

Alternatively, the liberty to meet, along with the liberty to process, is placed within the liberty to protest/demonstrate ('manifester'), thus Tercinet distinguishes between those liberties that protect the individual against public power and those liberties that

tendent à l'expression active de convictions telles la liberté de la presse, la liberté de réunion ou la liberté de manifestation.<sup>7</sup>

---

'La liberté d'opinion - La liberté religieuse - La liberté d'enseignement - La liberté de la presse - Le régime des spectacles, du cinéma - Le régime de la radio-diffusion, télévision - La liberté de réunion - La liberté d'association.'

<sup>3</sup> *op. cit.*, 17 *et. seq.*, & 567.

<sup>4</sup> A. Joubrel, 'Du droit de réunion' (1904), 14.

<sup>5</sup> R. Berthon, 'Le régime des cortèges et des manifestations en France' (1938), 15.

<sup>6</sup> Costa, *op. cit.*, 84 claims that group liberties contain five principle rights: the liberty of association, the liberty to meet, the liberty to process, the liberty to belong to a trade union and the right to strike.

<sup>7</sup> M-R. Tercinet, 'La liberté de manifestation en France' R.D.P. (1979), 1008 at 1009.

Nevertheless, the liberty to meet is mentioned as an independent liberty in the penal code.<sup>8</sup> This construction of the right has a long pedigree, for example, both the studies by Lefebvre and Joubrel, at the beginning of this century, mention the liberty to meet and provide historical accounts going back to the eighteenth century.<sup>9</sup> It should be added that there is a tendency not to make reference to the liberty to 'assemble' and but rather a preference for concentrating on specific assembly rights, such as the liberty to meet. An exception is provided by Le Clère,<sup>10</sup> who speaks of the 'liberté d'assemblée' but even so his study emphasises specific types of assemblies. Therefore, he is critical of the use of the word 'meeting' to cover all the various and distinct forms of assembly. He claims that meetings are commonly and erroneously simply held to mean the gathering together of persons with the simple goal of being together and asserts that this obscures the diverse forms of assembly and the value that they secure;

attachons-nous de suite au cœur du problème: être ensemble! Oui, c'est bien là que gît le principe directeur, la vérité lumière, sous l'écorce du mot roturier qui cache aussi bien la conférence, le meeting, l'émeute, le spectacle ou le culte. Parce qu'on imagine tout cela avec un seul mot, on oublie son acception plus étroite et le but d'être ensemble est éclipsé par celui de penser ensemble. Le mot réunion a caché le concept assemblée.<sup>11</sup>

The aim of Le Clère's study is therefore to examine the specific legal frameworks of the different assemblies and as such, his method can be seen to emphasise the particular, as appears to be the tendency in France.<sup>12</sup> Thus, even with Le Clère's use of the broad term 'liberty to assemble', there is an acknowledgement of the specific and diverse activities that this covers.<sup>13</sup> In

---

<sup>8</sup> Art.431-1, section III, *infra*.

<sup>9</sup> E. Lefebvre, 'Le droit de réunion' (1903) and Joubrel, *op. cit.*

<sup>10</sup> 'Les réunions, manifestations et attroupements en droit français et comparé' (1945), 3 *et. seq.*

<sup>11</sup> *op. cit.*, 4.

<sup>12</sup> *op. cit.*, 7;

'A chacune de ces incarnations d'un même phénomène social, le législateur français a appliqué des règles différentes,...'.

<sup>13</sup> *op. cit.*, 7;

'L'assemblée, fait social, se manifeste sous trois activités principales: la réunion, assemblée qui pense et que l'échange des idées oppose à la manifestation, deuxième groupe de la grande famille, qui se caractérise dans la matérialisation d'un but par le nombre. Enfin, voici l'attroupement, forme dégénérée de la réunion et de la manifestation et bien plutôt maladie de l'espèce qu'entité distincte et caractérisée de la trilogie ainsi groupée sous le terme assemblée.'

(For an explanation of attroupement, see *infra.*, chapter VI).

French law it is therefore possible to point to a distinct liberty to meet, even if it is seen as part of a wider and more general category of expression. However, the differences in definition point to the uncertain and flexible nature of the liberty, which were characteristics that were noted of human rights in chapter I.

### DEFINITION VIA CHARACTERISTICS

Notwithstanding this kind of uncertainty, there have been attempts to define the technical characteristics of meetings, in order to distinguish them from other forms of assemblies but these can also be characterised by uncertainty. Therefore, French commentators commonly assert that a meeting must have three characteristics.<sup>14</sup> These are drawn from the opinion expressed by the Commissaire du gouvernement in the case of Benjamin,<sup>15</sup> in which he stated (1) that a meeting must be limited in time. In other words that a meeting must be a *momentary* assembly of persons, (2) that it must be *organised* in advance, meaning that the meeting must have been intentional and (3) that it must have a *specific goal*, namely the exchange of ideas and opinions, or the protection of interests.<sup>16</sup>

This opinion can be seen as a synthesis of prior decisions which sought to isolate those activities which are covered by the liberty to meet.<sup>17</sup> Thus, in du Halgouet,<sup>18</sup> the court found that there was not the requisite element of prior organisation in the gathering of a group of people who, having just left Sunday mass, stood to listen to the 'haranguing' of a deputy from the balcony of the local town hall.<sup>19</sup> However, the vagueness of this notion of organisation

---

<sup>14</sup> For example, R. Dautan, 'Police des réunions, manifestations et attroupements', J.-Cl. (Admin), Fasc. 210, 2, (1992), 3, Colliard, *op. cit.*, 720-3, Burdeau, *op. cit.*, 216-7, Robert & Duffar, *op. cit.*, 570, J. Montreuil, 'Réunions publiques' J.-Cl. (Pénal), Fasc. 10, 11, (1990) 3 and Joubrel, *op. cit.*, 3.

<sup>15</sup> C.E. 19th May 1933, Rec.541 and see M. Long *et. al.*, *op. cit.*, 277-283, Colliard, *op. cit.*, 737, Burdeau *op. cit.*, 219-220, Robert & Duffar, *op. cit.*, 574-5, Rivero *op. cit.*, 340 and Dautan *op. cit.*, 3.

<sup>16</sup> The Commissaire de gouvernement stated;

'La réunion publique constitue un groupement momentané de personnes formé en vue d'entendre l'exposé des idées ou d'opinions en vue de se concerter pour la défense d'intérêts.' (c.f. M. Menanteau, 'Les nouveaux aspects de la liberté de réunion' (1937), chps.I & II).

<sup>17</sup> Cass. civ. 27th Feb. 1886, S.1888.1.9. and Delmotte C.E. 6th Aug. 1915, D.P.1916.3.1.

<sup>18</sup> Cass. civ. 14th March 1903, S.1906.1.103.

<sup>19</sup> This opinion was followed in Castex, Cass. crim. 13th Dec. 1923, D.P.1924.1.121.

has been noted<sup>20</sup> and can be further seen in the later decision, in Castex,<sup>21</sup> that an assembly of persons who stayed after the close of a formal meeting in order to hear a speaker who had not been permitted to speak at that meeting, manifested a sufficient degree of organisation in order to constitute a meeting. There is a novel departure from du Halgouet in the introduction of the notion of a *degree* of organisation. The case therefore adds a gloss to the former requirement of mere organisation by stating that a minimum level of organisation must be present in order to constitute a meeting for the purposes of the liberty to meet. However, what this level actually is, is not specified, thus making the requirement somewhat vague.

A second type of uncertainty is revealed when an attempt is made to distinguish the two cases. From their respective facts it is difficult to isolate the salient differences between the two which would justify their different outcomes. In the du Halgouet no organisation was held to exist, whereas in the Castex there was found to be a sufficient degree of organisation. Between these two points there is an almost infinite variety of possible levels of organisation and thus further uncertainty.

It is submitted that light may be thrown on the *ratio* of du Halgouet if it is read as a decision concerning both the so-called characteristics of organisation and momentariness. It seems possible to interpret the gathering in this case as not merely being by chance but also momentary. Though, as stated above, a meeting must have momentariness as one of its characteristics, it is submitted that a meeting which is both momentary and lacking in prior organisation, as the facts suggested in the instant case, would lead the court to hold that a meeting had not been legally constituted for the purposes of the liberty to meet. In this sense Castex can be read as solely concerning the question of organisation. The two cases can therefore be said to respond to two different circumstances and it is for this reason that they lead to different conclusions.

However, this reading of du Halgouet presents yet another problem. If, as stated above, a meeting must be of momentary character, but at the same time it must not pass below a minimum degree of momentariness, the uncertainty that formerly tainted the requirement of prior organisation now effects that of

---

<sup>20</sup> Colliard, *op. cit.*, 720.

<sup>21</sup> *op. cit.*



momentariness. Moreover, this characteristic is important in setting out the scope of a meeting. It is by reason of its momentary and discontinuous character that a meeting is commonly differentiated from an association.<sup>22</sup>

It is submitted that both requirements of organisation and momentariness have areas of greater or lesser certainty, which corresponds to a core and penumbral distinction referred to in chapter II above. The elucidation of these characteristics defines, with a relative degree of certainty, those elements that combine to constitute a meeting as opposed to other assembly activities. However, such a delimitation is open to constant uncertainty. The same can be said for the third characteristic; that of a specific goal or object.<sup>23</sup> Nevertheless, the three serve to hive off (with the accompanying interplay of certainty and uncertainty mentioned above) meetings from associations, and other kinds of assembly.

The inter-relationship between the different defining characteristics of meetings is illustrated in the recent case of Préfet du Finistère.<sup>24</sup> The facts of the case concerned the decision by the Mayor of Brest to ban the use, by elected communist council representatives, of the town hall for political meetings every Friday. The prefect sought judicial review of this decision and

---

<sup>22</sup> The momentary character of a meeting is contrasted with the more durable nature of an association and more specifically, the common link or lien between the members of the latter, as is stated by the Commissaire du gouvernement in Benjamin (*supra.*);

'La réunion se distingue de l'association en ce que cette dernière implique un lien permanent entre ses membres; elle ne doit pas être confondue non plus avec un spectacle théâtral ou un spectacle de curiosités soumis, l'un et l'autre, à des régimes juridiques différents de celui de la réunion.'

and Colliard, *op. cit.*, 721;

'Le critère qui permet d'opposer la réunion à l'association est que la réunion à un caractère momentané, discontinu, à la différence de l'association. Le lien d'association est beaucoup plus fort, beaucoup plus durable que le lien de la réunion. Les membres d'une réunion ne se retrouveront peut-être plus jamais alors que les associés se retrouvent périodiquement.'

As will be seen in the next section, the authorities have not always been scrupulous in recognising the distinction between meetings and associations.

<sup>23</sup> For the first time, in the case of Delmotte et Senmartin, C.E. 6th Aug. 1915, D.P.1916.3.1., the Conseil d'État formulated a definition of meetings as the following:

'Réunion concertée ou organisée en vue de la défense d'idées ou d'intérêts.'

Although, this definition emphasises the third of the requirements mentioned above it is incomplete because it fails to address such questions as the difference between meetings and associations. In this case the Conseil refused to confer upon a group of consumers who met unintentionally, even if regularly, in a cafe, the status of a meeting (c.f. Colliard, *op. cit.*, 720-1).

<sup>24</sup> Trib. Admin. Rennes 10th Jan. 1985, A.J.D.A., 490.

requested that it be struck down as being discriminatory and therefore an excès du pouvoir.

The court had to decide whether the representatives were prevented from exercising their liberty to meet. According to the relevant legislation, electoral meetings fell within the protective scope of the liberty,<sup>25</sup> therefore the court had to decide in law if the representatives had sought to hold an electoral meeting. It was held that the meetings were of a permanent kind. This permanent nature was based upon the councillors' request to use the town hall every week. Thus, the proposed meetings were not found to be momentary and so did not constitute meetings for the purposes of the liberty to meet. However, the judgement went further and held that the degree of permanence that had been found had the effect of altering the *purpose* of the meeting; in that a permanent gathering of councillors had different objectives than those of an electoral meeting.<sup>26</sup>

The court's reasoning is of interest because it shows how one of the three delimiting characteristics can be altered by a change in one of the other characteristics. In the instant case it was the lack of momentariness that altered the purpose of the meetings. In addition, the same observation can be made here as was made earlier, as to the lack of certainty as regards the requirement of momentariness. Therefore, it remains an open question as to what degree of momentariness would have been sufficient for the court to find that an electoral meeting had been constituted: would, for example, an intention to hold a meeting once every month have had the requisite degree of momentariness?

Furthermore, there is a tension between a minimum degree of advanced organisation (the third of the traditional defining characteristics) and momentariness. It is contended that the instant case can also be seen as an example of where the degree of organisation was too high, so that it eclipsed any momentary nature that the meetings had. However, it is not suggested that every meeting that is organised with great detail will lose its momentary

---

<sup>25</sup> See section III, *infra*.

<sup>26</sup> The court stated;

'...une permanence d'élus tend à la réalisation d'objectifs différents tels que le maintien du contact avec les électeurs et la prestation de certains services: intervention, secours...'

character, but rather that if the prior organisation involves planning for a series of future meetings, it will be more likely that the court will find that the meetings no longer have the requisite momentariness.

### *Public and private meetings*

It should be noted that the three characteristics noted above can also be applied to private meetings. As will be seen later in this chapter, private meetings are subject to greater legal protection than public meetings and as a result it may be important to distinguish between the two.<sup>27</sup> Consequently, in a number of cases it has been sought to determine the scope of public and private meetings and a number of principles have been drawn from this case-law, whilst the subject is treated at length by legal commentators.<sup>28</sup>

Essentially this case-law has shown that attempts to distinguish between public and private meetings on the basis of their location do not succeed. Such a distinction was long ago rejected in the case of Larcy,<sup>29</sup> in which it was held that a meeting could be of a public nature even if held in a private domicile. The court did not rely on the location of the meeting but instead on the nature of the people invited to attend the meeting. Therefore, although invitations had been circulated, they were in effect available to anyone.<sup>30</sup> This same principle was again applied in order to state that a private meeting was one to which members had been personally invited<sup>31</sup> but as a criteria there is much uncertainty as to what exactly a personal invitation means.<sup>32</sup>

---

<sup>27</sup> Dautan, *op. cit.*, 3;

'La différence de régime entre ces deux types de réunions exige qu'elles soient nettement définies l'une par rapport à l'autre.'

(c.f. Burdeau, *op. cit.*, 223).

<sup>28</sup> Colliard, *op. cit.*, 723-6, Robert, *op. cit.*, 570, Montreuil, *op. cit.*, 5-6 and Dautan, *op. cit.*, 3-4.

<sup>29</sup> Cass. crim. 9th Jan. 1869, S.69.1.281.

<sup>30</sup> The court ruled as follows;

'...Est publique, bien que tenue dans le domicile privé d'un citoyen, la réunion pour laquelle des invitations ont été distribuées soit à domicile mais sans adresses, soit sur la voie publique, soit à la porte de l'habitation du prévenu, ou chacun pouvait s'en procurer...'

and it has been confirmed that a meeting can be found to be private even where it is held in a venue that is normally considered to be public; Trib. civ. Rennes 10th March 1905, D.P. 1905.5.8.

<sup>31</sup> Cass. crim. 6th Dec. 1909, D.P. 1910.1.496.

<sup>32</sup> In Benjamin the Conseil refused to uphold the applicant's claim that a literary conference was a private meeting because the invitations were again open to all. In the case of Bucard (C.E. 23rd Dec. 1936, Rec.Leb.115), the Conseil upheld a mayor's ban on a series of meetings planned by the right-wing Franciste movement. The mayor had feared that these purported private meetings were in reality public, or would degenerate into public meetings that were

(Footnote continues on next page)

Another principle that seeks to distinguish public from private meetings is the existence or non-existence of a link between the persons invited to attend. According to this view, a private meeting is one in which attendance is reserved to members of a club or association. There is a connection between this reservation to members only requirement and the personal invitation requirement, which can be seen in the following hypothetical fact situation, in which a meeting is to take place and the persons invited are a class of persons defined by some common characteristic. It follows that it is this characteristic which constitutes the link between the invitees. Membership of an association is invariably conditional on persons meeting the required characteristics. The broader the class of persons, the more difficult it becomes to maintain that they are linked by any particular characteristic that justifies differentiating them from the broadest class of all: the general public. Finally, if the general public are in effect the class of persons invited to the meetings, it can then be claimed that there is no special or associational link between the members. Indeed, it could further be argued that the class has become so wide as to no longer constitute a class.

There must, therefore, be limits to the generality of an associational link and the courts have recognised this. In Cass. crim. 7th Dec. 1927,<sup>33</sup> the court held that an association that purported to be holding private meetings in which all the members of the public were permitted to enter upon the payment of a membership fee, was in fact holding a series of public meetings. The membership fee was found in effect to be an entrance fee. The court went on to require a narrower associational link that actually united all the members.<sup>34</sup> It is clear that the associational link requirement, as a means of delimiting

---

likely to cause public disorder (see section III below for powers to ban or restrict public meetings that threaten public order). The Commissaire du gouvernement made four points as to the invitations lack of personal qualities: (1) the invitations were non-nominative, in that they bore no names on them; (2) they were distributed widely and without charge; (3) they were distributed in all public buildings in the locality and (4) they were in the possession of virtually every person in the locality. The points made in this case appear to be the sole occasion in which any attempt has been made to give content to the personality requirement. For an extensive discussion of the nature of personal invitations, see Joubrel *op. cit.*, 121-133.

<sup>33</sup> S.1928.1.85.

<sup>34</sup> Colliard *op. cit.*, 725 asserts the following:

'La réunion, dès lors, n'est plus privée lorsqu'elle comporte à côté des sociétaires permanents, des membres temporaires ou des invités qui constituent un public, public désigné par les tribunaux sous le nom de "public spécial", "public restreint".'

public and private meetings, is itself uncertain in its scope and is a question of degree.

Two further characteristics have been raised as means of distinction.<sup>35</sup> The first is a requirement that the venue of a private meeting be closed. This can be seen as a sophistication of the personal invitation requirement because the essence of this characteristic is that a private meeting must have access reserved to those personally invited. The venue therefore becomes 'closed' to those who are not invited, i.e. the general public. The second requirement is linked to the first, in that it states that for a meeting to be considered private, there must be an effective, constant and real control of those who are admitted. This control could therefore be constituted by the difficulty of access for the uninvited, demanded by the first requirement. It must, however, be noted that no legal authority is stated to support the existence of these two characteristics.

The question of the distinction between public and private meetings as with the definition of meetings in general, is therefore answered in French law by the utilisation a number of different characteristics, of varying degrees of uncertainty and authority. What is however clear is that even if there is not a water-tight definition of the liberty, it is recognised as a distinct civil liberty that protects a distinct form of assembly that functions to secure certain values.

## SECTION II THE HISTORY OF LEGAL REGULATION

The history of the legal regulation of the liberty to meet<sup>36</sup> will be seen to have greatly affected the present regulation of this liberty. It also provides the context of this liberty and therefore leads to a better understanding of the law. For these reasons its history is presented here. A recurrent theme will be seen to be the close link between political events and the exercise and regulation of the liberty, so that it may be asserted that perhaps to a greater degree than

---

<sup>35</sup> Montreuil, *op. cit.*, 6.

<sup>36</sup> See generally, Lefebvre, *op. cit.*, 27-81, Joubrel, *op. cit.*, M-L. Degrenne, 'Les réunions et les pouvoirs de police' (1938), chp.I and Le Clère, *op. cit.*, 8-41.

other civil liberties, the history of the liberty to meet closely follows the changes in the political climate, as stated by Robert and Duffar;

'L'histoire de la liberté de réunion suit en effet directement l'évolution politique de notre pays'.<sup>37</sup>

Finally, this investigation of history will further illustrate the importance of this liberty in the political and social history of France, as was initially claimed in chapter III above.

## THE REVOLUTIONARY REGIMES

It was the 1789 Revolution<sup>38</sup> that led to the legal articulation of the liberty to meet. Although the 1789 Declaration did not expressly include the liberty under study, there is support for the view, as mentioned above, that this liberty can be derived from the Declaration of 1789.<sup>39</sup> An express mention of this liberty can be found in article 62 of the Decree of 14th December 1789, which for the first time recognises the 'right' of citizens to meet peacefully and unarmed. This proclaimed right could only be exercised if a prior declaration was made to the municipal authorities. The insistence on a prior declaration was not the only restriction placed upon this right: it was only granted to politically active citizens.<sup>40</sup> The right to meet was thus more of a benefit to the middle classes and was viewed instrumentally as enabling participation in political life rather than a value in itself. This can be seen as an early example of the liberty performing a democratic function.

---

<sup>37</sup> *op. cit.*, 571.

<sup>38</sup> See generally, G. Lefebvre, 'The French Revolution: from 1793 to 1799' (1967), G. Rudé, 'The French Revolution' (1988) and A. Soboul, 'Dictionnaire historique de la Révolution Française' (1989).

<sup>39</sup> See section I, *supra.*. It should also be recalled that the liberties set out in the Declaration were unenforceable and that this reflected the supremacy of parliament, as influenced by Rousseau's theory of the 'general will' (see chp.II, section II, *supra.*, C. Fohlen, 'La filiation américaine de la Déclaration des Droits' and T. Marshall, *op. cit.*, both in C-A. Colliard *et. al.*, *op. cit.*, (eds.), 21 & 36 respectively).

<sup>40</sup> The distinction between 'active' and 'passive' citizens was introduced by Sieyès. The qualifying conditions that had to be met in order to be classed as an 'active' citizen are to be found in Title III, First Chapter, section II, art. 2 of the 1791 Constitution. The requirements basically concerned wealth (c.f. Soboul, *op. cit.*, 1001). In consequence, this distinction was itself met with violent resistance, co-ordinated by the 'Club des Cordeliers'. The Jacobean revolutionaries were therefore attacked despite their Republican ideology. Moreover, the Cordeliers drew greater support from the proletariat because they were predominantly 'passive' citizens and the Jacobeans were predominantly from the middle classes (c.f. Joubrel *op. cit.*, 56)

A series of legislative measures were passed in the immediate aftermath of the Revolution, which recognised the right of peaceful assembly and reflected the dominant revolutionary ideology of this time: Instruction of 12-24th Aug 1790, art.3(8), Decree of 19-20th Sept 1790 and the Decree of 13-19th Nov 1790<sup>41</sup>. In addition, the liberty to assemble was finally recognised at a constitutional level in the Constitution of 3rd Sept. 1791, Title 1(3).<sup>42</sup> It should therefore be noted that during this period, it was the liberty to assemble that was generally spoken of, as opposed to the liberty to meet and other kinds of assembly. However, sporadic disorder and the responses by the authorities were to lead to a central role being played by meetings and initially it was the meetings of clubs that were of pivotal importance.

The politically volatile nature of the Revolutionary period and the need to keep under control dissenting elements which threatened to cause public disorder can be seen by the Constituent Assembly's concern over the excesses of the clubs.<sup>43</sup> On the other hand, the power of the clubs is demonstrated by

---

<sup>41</sup> See further, E. Lefebvre, *op. cit.*, 28-9.

<sup>42</sup> 'La liberté aux citoyens de s'assembler paisiblement et sans armes, en satisfaisant aux lois de police...'

<sup>43</sup> As is instanced by the Decree of 16-17th June 1791 which required a prior declaration before a club could be formed. The revolutionaries were extremely uneasy about the existence and proliferation of clubs, as indeed was the case for any form of intermediate body or group that sought to place itself between the citizen and the state;

'Les hommes d'État de 1789 étaient avant tout des individualistes, repoussant complètement tout corps intermédiaire entre les citoyens et l'État, repoussant également au maximum l'intervention de cet État, le concept pour eux étant l'État gendarme...'

(G. Lepointe, Histoire des institutions du droit public français (1952), 9). Indeed, it has been noted that one of the characteristics of the Revolution and the 1789 Declaration was that of individualism, for example, Morange, *op. cit.*, 29-30, points to the fact that only individuals are holders of rights in the Declaration and no group, except the nation as holder of sovereignty (art.12), is mentioned. What therefore resulted was a deep suspicion of groups and group rights, as highlighted by the content of the Declaration;

'Il n'est fait aucune allusion à la famille et les droits de réunion ou d'association ne sont pas reconnus. Ces omissions sont volontaires. On craint que les groupes n'étouffent l'individu et, suivant le raisonnement de Rousseau, ne gênent la formation de la volonté générale. L'individu, être générique et non "situé", se voit conférer des droits abstraits.' (*op. cit.*, 30).

Clubs, and indeed all forms of opposition to the government were not institutionalised at this time. Therefore the constitutions of the revolutionary period can be seen as partisan, procedural devices which sought to set out the policies and general conditions by which the particular group in power at the time were to rule; see Hayward, *op. cit.*, 2;

'Therefore with the fall of the constitutional Monarchy in August 1792 and the King's execution on 21st Jan. 1793, the various factions that were subsequently to take control of parliament each sought to secure their positions against perceived and often actual violent opposition.'

their securing of the Decree of 13th June 1793,<sup>44</sup> which, *inter alia*, prohibited the police from interfering with club members and those that took part in popular assemblies. This decree was followed by an even stronger prohibition against interference with club members by virtue of the Decree of 15-25th July 1793.<sup>45</sup> In addition the Convention's constitution of 24th June 1793 (arts.7 & 122) guaranteed the liberty to assembly peacefully and the right to meet in clubs. Despite the formal liberality of these texts, everyday practice during this period was generally illiberal. For example, such was the hegemony of the Jacobeans, that the Monarchists were forced to meet secretly (their club was known as the 'Club des Feuillants') in fear of their lives.<sup>46</sup>

Eventually the Assembly was unable to endure the political and physical agitation caused by the clubs and they were gradually banned. The process began with the banning of women's clubs<sup>47</sup> and then finally all clubs that met periodically were banned by virtue of the Decree of 16th Oct 1794.<sup>48</sup>

---

<sup>44</sup> Article 2. This measure must be seen in the context of two earlier pieces of restrictive legislation that were passed to curb the violent excesses of the clubs; Law of 19-22nd July 1791, Title 1, art.14 and Law of 29th July 1791 (as regards seditious meetings).

Joubrel *op. cit.*, 54-67 states that the first French club appeared in Paris in 1782. The French clubs were basically inspired by those in England. Their popularity grew, especially given the liberalising of the legal environment by virtue of the Decree of 14th Dec 1789, (*supra*). It is within this period that the Jacobean Club achieved its position of political dominance; urging for a more Republican orientation in policy, in opposition to the demands of the Monarchists. The often violent excess of the Jacobeans was one of the factors which had led to the Revolution, and violent opposition to the Ancien Régime was encouraged when all clubs were ordered to be closed down in 1787 by the Royal Police.

Despite this relatively long pre-Revolutionary pedigree, the nature of clubs presented a problem for the liberty to meet. This stems from the fact that the clubs were associations that also held meetings. In spite of judicial recognition that these clubs were associations, formed with the aim of arranging periodical public meetings, it will be seen below that measures aimed at clubs were also applied to public meetings; thus taking advantage of the dual qualities of clubs (c.f. Joubrel *op. cit.*, 20-1).

<sup>45</sup> The provision provided for a penalty of ten years in irons for officials and five years for ordinary citizens who attempted or actually disrupted the meetings of clubs.

<sup>46</sup> See further E. Lefebvre, *op. cit.*, 30 *et. seq.*

This period of Jacobean rule saw the institution of The Great Terror, c.f. G. Lefebvre, *op. cit.*, 116-125, Rude (1988) *op. cit.*, 85-107 and Soboul, *op. cit.*, 1020-5.

<sup>47</sup> Decree 30th October 1793. Joubrel *op. cit.*, 70 quotes a member of the Convention as stating the following in support of the measure;

'...les femmes sont, par tempérament, plus portées que les hommes à l'exaltation et la vivacité de leurs passions, leur présence dans les débats publics, serait funeste aux intérêts de l'Etat.'

<sup>48</sup> This outright ban occurred shortly after the execution of the Jacobean leader, Robespierre (28th July 1794). The measure might be seen as the implementation of the Girondins' more conservative philosophy as regards public order, as well as an example of their use of their newly secured legislative power to ensure the emasculation of the primarily Jacobean-organised.

(Footnote continues on next page)



The activities of the political clubs had finally led the authorities to depart from their earlier liberalism but more importantly, the clubs had used meetings as the predominant mode of assembly by which to communicate and discuss their views. The liberty meet consequently achieved recognition as an important value, separately from the liberty to assemble, and was eventually enshrined in art.122 of the 1793 Constitution;

La Constitution garantit à tous les Français...le droit de se réunir en sociétés populaires

Thus, despite the general use of the term 'liberty to assemble' in the legislative measures of this time, it was the more specific activity of meetings that were felt to be fundamental. However, it was because of the link between meetings and clubs, that efforts to control the excesses of the latter restricted the liberty to meet. In other words, legislation aimed at controlling political associations was also applied to meetings.

It was the Constitution of the 22nd Aug. 1795 which first introduced the distinction between meetings and associations in order to ban the latter<sup>49</sup> but because the law was clumsily applied meetings were often repressed.<sup>50</sup> Furthermore, the constitution restricted the liberty to meet by virtue of art.362, which prevented any discussion of political questions in the meetings of those clubs that were not banned by the constitution;

Aucune société particulière, s'occupant de questions politiques, ne peut correspondre avec une autre, ni s'affilier à elle, ni tenir des séances publiques, composées de sociétaires et d'assistants distingués les uns des autres<sup>51</sup>

---

(c.f. N. Hampson, 'Will and Circumstance: Montesquieu, Rousseau and The French Revolution' (1983), 5-62 for a detailed analysis of the influential political theories during the revolution).

<sup>49</sup> Art.361;

'Aucune assemblée de citoyens ne peut se qualifier de société populaire.'

This provision was reinforced by the more specific Decree of 23rd Aug 1795 dissolving clubs.

<sup>50</sup> See E. Lefebvre, *op. cit.*, 32-5.

<sup>51</sup> Other provisions of the constitution illustrate the primacy of public order concerns at this time, for example, art.360;

'Il ne peut être formé de corporations ni d'associations contraires à l'ordre public.', and art.364 concerning the right of petition;

'tous les citoyens sont libres d'adresser aux autorités publiques des pétitions, mais elles doivent être individuelles; nulle association ne peut en présenter de collectives..'

In effect, the liberty to meet was prevented from being used in order to support and provide for participation in political decisions, which, as has been seen, was a major function in the early period of the Revolution and is today claimed to be one of its values. The Revolutionary period can therefore be summarised as a time of continual political upheavals and resulting public disorder that led to restrictions on the liberty to meet after its earlier liberal treatment.

### 1810-1848

The legal framework dating from the Revolutionary period was essentially maintained until 1848. The statutory developments between the constitution of 1795 and this date were principally aimed at controlling (and thereby invariably restricting) the liberty to associate. For example, the penal code of 1810, in an attempt to once again restrict the liberty to associate and the activities of clubs, was used to restrict the liberty to meet by virtue of art.291;

Nulle association de plus de vingt personnes dont le but sera de se réunir tous les jours ou à certains jours marqués pour s'occuper d'objets religieux, littéraires, politiques ou autres, ne pourra se former qu'avec l'agrément du Gouvernement, et sous les conditions qu'il plaira à l'autorité publique d'imposer à la société.'

In response, clubs ceased to meet periodically and split into small groups of less than twenty, thus avoiding prosecution under the penal code. In this way they continued to incite anti-government feeling and public disorder.<sup>52</sup> In consequence, the government passed the Law of 10th April 1834, which amended art.291 so that it applied to associations of more than twenty persons even if they were

partagées en sections d'un moindre nombre et qu'elles ne se réunissaient pas tous les jours ou à des jours marqués

These restrictions became even more severe in the penal code of 1848: arts.291-294 banned all associations of greater than twenty persons and submitted smaller associations to a regime of prior government authorisation. These provisions were essentially the same as the provisions in the 1810 penal code, except that in the latter case associations of less than twenty persons were formerly unrestricted.

---

<sup>52</sup> Colliard, *op. cit.*, 754 and M. Deslandres, 'Histoire constitutionnelle de la France: de 1789 à 1870' Vol. II (1932), 163-173.

The legislative intention behind the provisions of the 1810 code can clearly be seen from the debates in the Assembly.<sup>53</sup> These show that arts.291-294 were only to be used to restrict associations.<sup>54</sup> Decisions by the Cour de Cassation also confirm the non-application of these provisions to meetings (16th Aug 1834 and 14th Feb 1835). Nevertheless, despite these avowed intentions and the judicial pronouncements, the exercise of the liberty to meet was virtually impossible during this period. This was because the local authorities could also use their general powers to maintain public order, granted by virtue of art.50 of the Decree of 14th Dec. 1789, art.3(5), Title XI of the Laws of 16-24th Aug 1791 and the Decision of the Consuls du 12 Messidor An VIII (1st July 1800), against those who sought to exercise the liberty.<sup>55</sup>

In order to by-pass these legal restrictions, special kinds of meetings were thought of in which what was often violent opposition to the government was co-ordinated and sustained.<sup>56</sup> This was principally achieved via a series of banquets that were later to become known as 'La campagne des banquets reformistes'. An attempt was made to resort to the Revolutionary statutes that had been already passed in order to fill the legal lacuna which enabled these anti-government meetings to continue but there was considerable doubt as to the legality of such a move<sup>57</sup> and in any case it remained largely ineffective. It

---

<sup>53</sup> Recorded by E. Lefebvre, *op. cit.*, 33-4.

<sup>54</sup> However, Le Clère, *op. cit.*, 11-12, claims that despite the legislature's claims to only restrict associations, there was also an intention to strike at the liberty to meet; 'On a prétendu que cet article ne visait que les associations. Mais nous avons déjà dit quelle était la rubrique du chapitre: Des associations ou réunions illicites. Et, pour dissiper tout malentendu, lors de la discussion des articles 291 à 295, Berlier, rapporteur au Conseil d'Etat, déclara le 16 Février 1810: "Le droit absolu et indéfini qu'aurait la multitude de se réunir pour traiter d'affaires politiques, religieuses ou autres serait incompatible avec notre politique actuelle."'

<sup>55</sup> For an explanation of these powers, see section III, *infra.*, ?

<sup>56</sup> Menanteau, *op. cit.*, 11 & 70 claims that it was because deputies were unable to assemble people together in order to have small political meetings that the idea of having political dinners was developed.

<sup>57</sup> The government claimed that it could apply the provisions of the 1848 penal code and the similarly restrictive Law of 10th April 1834 (as regards associations) to meetings and therefore to the series of banquets that had begun at the end of 1847. For details of the acrimonious debates concerning the legal propriety of the government's claim, see Joubrel *op. cit.*, 90 *et. seq.* and for the application and effect of this law, see Menanteau, *op. cit.*, 66-70. At this time an impressive array of public order powers existed: the Minister of Interior had an outright power to ban meetings (confirmed by art.13 of the 1868 statute). Mayors had duties to maintain order (by virtue of their general public order powers noted above and see section III, *infra.*) and the public peace (Law of 22nd Dec.-10th Jan. 1790, art.2). In addition, the Law of 18th July 1837, art.11 gave them the power to take regulatory decisions regarding those

(Footnote continues on next page)

was thus a banquet which the government had insisted it could ban (planned for 22nd Feb. 1848) which caused the riot that in turn led to the revolution which brought down the government and the July Monarchy of Louis-Philippe.<sup>58</sup> This is a clear instance of where the liberty to meet was of crucial historical importance.<sup>59</sup>

#### 1848-1881:

Owing its very existence to the demands to exercise the liberty to meet, the new government had little political choice but to liberate meetings and clubs from the legal and extra-legal restrictions under which they had been placed between 1810 and 1848.<sup>60</sup> However, once again serious public disorder was to follow as the clubs took advantage of this liberalisation.<sup>61</sup> This is an interesting period for the liberty to meet, in that the statutory developments were in general of a liberal trend but there were continual oscillations towards restrictive measures. This highlighted the government's fear and suspicion that certain groups (i.e. the clubs) were abusing the liberty.

Therefore, while the liberty to meet was preserved with little restrictive regulation and the Constitution of 1848, by virtue of art.8 recognised the liberty of citizens to peacefully assemble and associate,<sup>62</sup> clubs proliferated

---

areas they were to keep under surveillance by law. This power permitted mayors to take action to prevent the continuance of public disorder once it had broken out. In the exercise of this power, mayors had the same powers as the prefects of police; the latter also drawing their authority from the 1790 act. In Paris the prefect was given, by virtue of Consular decision of 12 Messidor, An VIII (*supra.*), the power to '...prendre les mesures propres à empêcher ou prévenir les réunions tumultueuses ou menaçant la tranquillité publique...'

<sup>58</sup> A more detailed account of 'La campagne de banquets' can be found in Deslandres, *op. cit.*, 209-217, E. Lefebvre *op. cit.*, 36-7 and A. Jardin & A-J. Tudesq (trans. E. Forster), Restoration and Reaction, 1815-1848 (1983), 200-204.

<sup>59</sup> Colliard, *op. cit.*, 732;

'La liberté de réunion n'est pas aussi nettement la cause de la Révolution de 1848 que la liberté de la presse de celle de la Révolution de 1830.'

<sup>60</sup> E. Lefebvre *op. cit.*, 37 states;

'Le gouvernement du 24 Février, né d'un mouvement en faveur de la liberté de réunion, dût reconnaître d'une manière absolue cette liberté.'

This liberalism was further underlined by the proclamation of 19th April 1848;

'Citoyens, la République vit de liberté et de discussion. Les clubs sont pour la République un besoin, pour les citoyens un droit.'

<sup>61</sup> Menanteau, *op. cit.*, 11, notes that after the liberalisation of 1848 and between 24th February and 30th March of that year, 145 clubs were formed in Paris and its suburbs.

<sup>62</sup> 'Les citoyens ont le droit de s'associer, de s'assembler paisiblement et sans armes, de pétitionner, de manifester leurs pensées par la voie de la presse ou autrement. L'exercice de ces droits n'a pour limites que les droits ou la liberté d'autrui et la sécurité publique.'

and were suspected of inciting the riots of the summer of that same year. Eventually, after an attack on the Assembly, the government was eventually forced to act. On 28th July it passed a Decree whose title clearly stated that its object was to restrict the activities of the clubs.<sup>63</sup> Notwithstanding this intention, the measure severely restricted most meetings.

It was the July Decree that first made a distinction between public and private meetings. It was only the former that were regulated; being required to submit a declaration to the authorities not less than forty-eight hours before the holding of a meeting.<sup>64</sup> This system of prior declarations did not prevent further rioting and general public disorder, again solicited by the clubs, but this time aided by a burgeoning and vociferous press. Indeed a state of siege was declared in response to an attempted coup on 13th June 1849. However, it was the Law of 19th June 1849 which most severely restricted the liberty under study. This emergency legislation enabled the government to ban clubs and other meetings (be they public or private) which were felt to compromise public security. The bans had a duration of one year. However, each year the Assembly renewed the provisions<sup>65</sup> and it essentially remained the statutory regime until the coup d'état of the 2nd December 1851 and the return of an authoritarian monarchy.

When the Second Empire was subsequently proclaimed (1851), the initial intention appeared to be that of liberalising the legal framework that regulated the liberty to meet. By virtue of the Decree of 25th March 1852, the July 1848 Decree, which was ostensibly aimed at clubs, was repealed and the provisions of the 1810 penal code (as amended by the 1848 code)<sup>66</sup> were reapplied, as well as the law of 1834 to public meetings. Nevertheless, as time passed there was a return to the oscillation between liberality and restriction

---

<sup>63</sup> 'Décret sur les Clubs'. It should be further noted that the general exclusion of women from political assemblies (dating back to the Decree of 30th Oct 1793, see n.47, *supra.*) remained in force by virtue of art.3, which prohibited women from being club members.

<sup>64</sup> For a general account of the provisions of the July Decree, see Joubrel, *op. cit.*, 97-8. After the Decree no subsequent legislation has ever sought to regulate private meetings, Menanteau, *op. cit.*, 122.

<sup>65</sup> The provisions of this statute were renewed on 6th June 1850 and then again on the 21st June 1851 and it was stated in art.1;

'Le gouvernement est autorisé pendant l'année qui suivra la promulgation de la présente loi, à interdire les clubs et autres réunions publiques qui seraient de nature à compromettre la sécurité publique.'

<sup>66</sup> See *supra.*

and this is made nowhere more explicit than in the Decree of 15th January 1853 which, *inter alia*, banned all clubs and public meetings of a political nature and subjected all associations and meetings consisting of more than twenty persons to an obligation to seek prior authorisation. Even electoral meetings were caught by this statute.<sup>67</sup> On the other hand, a liberal trend in the legislation then followed, as instanced by various ministerial circulars and the forbearance of the police authorities.<sup>68</sup> This was to culminate in the Law of 6th June 1868.<sup>69</sup>

The 1868 Act was the central provision that once again established a more liberal legal framework.<sup>70</sup> All public meetings, except those of a religious and political nature, were no longer subjected to an obligation to seek prior authorisation. Instead, a declaration had to be made three days in advance of the proposed date of the holding of the meeting (art.2).<sup>71</sup> However, religious and political meetings remained subject to the prior authorisation requirement under the 1853 decree.<sup>72</sup>

The Act also contained some interesting features (some of which were inspired by the 1848 Decree) which were to have a considerable bearing on the drafting of subsequent legislation. Thus, the prior declaration had to be signed by seven persons who were domiciled in the commune where the

---

<sup>67</sup> The application of the law to electoral meetings was supported in the decision by the Cour de Cassation; 4th Feb. 1860; D.1.65.91.

<sup>68</sup> See Colliard, *op. cit.*, 733.

<sup>69</sup> Entitled 'Loi relative aux réunions publiques'.

<sup>70</sup> For example, a circular from the Ministry of Interior (12th Feb. 1866) permitted authorities to authorise public meetings, as long as they did not appear likely to compromise public order. In cases of doubt authorities were to seek guidance from the Minister.

<sup>71</sup> Electoral meetings enjoyed more favourable regulation. Therefore, by virtue of art.8 it was provided that electoral meetings could take place *one* day after the authorities had issued a receipt acknowledging a prior declaration had been made. The statute also introduced a clear distinction between associations and meetings by stating that only the former were subject to arts.291-294 of penal code and the 1834 law;

'Le projet de loi, ainsi que l'indique son titre, n'a pas pour but de modifier les prescriptions des art. 291 et suivants du Code pénal, ni celles de la loi du 10 avril 1834, qui atteignent les associations; il ne s'applique qu'aux réunions publiques se produisant à l'état de fait accidentel et temporaire, sans les caractères de permanence et d'organisation qui constituent et caractérisent les associations.'

(Presentation of the legislative bill to the Senate; 13th March 1867, by M. Peyrusse: Rec. de lois 1868.253).

<sup>72</sup> Art.1(2);

'Toutefois, les réunions publiques ayant pour objet de traiter de matières politiques ou religieuses continuent à être soumises à cette autorisation.'

meeting was to take place (art.2(2)) and had to indicate the time, place, date and subject of the meeting. The proposed meeting was also required to have an organising committee of three persons,<sup>73</sup> whose duties were to maintain order and to keep the topic of the meeting within that stated in the prior declaration (art.4). An official<sup>74</sup> could also attend the meeting and he/she had the power to dissolve it if he/she believed that it was ultra vires its stated purposes, or was becoming riotous (arts.5 & 6).

An anti-liberal feature of the Act was that meetings could only be held in closed and covered locations and then only up until the closing time of public buildings and shops in the locality (art.3). Once again this provision was originally to be found in the July 1848 Decree (art.3). Furthermore, by virtue of the continued application of the penal code and the 1834 law, clubs were still, as in 1853, banned.

The wide powers accorded to the authorities within article 13 provide yet further evidence of the continued vacillation between liberality and restriction in the statutory developments of this period. The article in question provides that

Le préfet de police à Paris, les préfets dans les départements peuvent ajourner toute réunion, qui leur paraît de nature à troubler l'ordre ou à compromettre la sécurité publique.

L'interdiction de la réunion ne peut être prononcée que par le ministre de l'Intérieur.

There was severe criticism of this power of 'adjournment' (which will henceforth be referred to as postponement) in the Assembly. Most of the article's critics claimed that there could be little difference between the stated power to adjourn and an outright power to ban. Given the temporal nature of public meetings, a decision by the prefect to postpone a meeting until a later date would have the same practical effect as a ban because the impact

---

<sup>73</sup> The 1848 Decree (arts.4-6) was the first legislative measure to provide for the concept of an organising committee. However, the 1868 Act substantially modified the nature and functions of this committee.

<sup>74</sup> The exact wording is 'un fonctionnaire de l'ordre judiciaire ou administratif'. In the parliamentary discussion of the bill, the Commissaire du Gouvernement stated; 'Ce n'est pas un simple agent comme on a paru le croire, c'est un fonctionnaire qui doit assister aux réunions. Ce fonctionnaire peut être un préfet, un sous-préfet, un maire, un commissaire de police, un juge de paix. Cette nomenclature n'est évidemment qu'énumérative.'  
(Rec. des lois, *op. cit.*, 259).

achieved by holding a meeting at its originally intended time would be weakened, if not completely destroyed.<sup>75</sup>

It must be noted that both the official's power to dissolve (art.6) and the prefect's power to postpone (art.13) public meetings complemented the existing local authority police powers regarding public order (art.7). It will be seen in section III below that these local authority powers are crucial to the regulation of the liberty to meet.

Deslandres<sup>76</sup> makes the point that the 1868 Act was received coolly because there was party-political distrust of a liberty which had in the past been the cause of so much public disorder. Nevertheless, legal practice at this time seemed to be liberal because the distinction between political and other meetings was not in practice applied and officials did not see themselves as obliged to attend public meetings as one of the members of the organising committee.

It was after the fall of The Second Empire in 1870 that the Third Republic was installed.<sup>77</sup> It had to deal with serious public disorder.<sup>78</sup> Meetings were restricted using the Law of 7th June 1848, which however was a measure aimed at disorderly assemblies (*atroupements*).<sup>79</sup> Strict application of the criminal sanctions attached to the 1868 law (art.9) and those of a general nature (arts.291-294 of the penal code) were the order of the day. Therefore, the Third Republic commenced by only permitting the exercise of the liberty to meet within the terms of the 1868 framework but this was sufficiently liberal to allow clubs to meet.<sup>80</sup> The government was however forced to try to

---

<sup>75</sup> For accounts of the debates in the Assembly regarding art.13, see Joubrel *op. cit.*, 106-8.

<sup>76</sup> *op. cit.*, 641

<sup>77</sup> For a detailed commentary of the precarious but long-lived Third Republic, see J.F. McMillan, Dreyfus to de Gaulle: Politics and Society in France 1898-1969 (1985).

<sup>78</sup> For example, the events surrounding the Paris Commune of 1871; see R. Williams, The French Revolution of 1870-1871 (1969) and S. Edwards, The Paris Commune, 1871 (1971) and for the disorder of the 1930s, see chap.V, section II, *infra*.

<sup>79</sup> For an explanation of these assemblies, see chap.V, section II, *infra*.

<sup>80</sup> see, M. Deslandres, Histoire constitutionnelle de la France: l'avènement de la Troisième République: la constitution de 1875 (1937), 44;

'...le Gouvernement aurait pu les interdire. Il l'aurait dû, car en pareilles circonstances ils sont extrêmement dangereux, étant des foyers tout préparés pour la révolution. Il les toléra, étant un gouvernement d'autorité morale, et dans les *Débats* le 27 septembre de Molinari les déclara nécessaires comme les baromètres permettant de mesurer la pression de l'opinion publique.



curb the excesses of the clubs and so for the third time in history they were banned (by virtue of the Decree of 22nd-23rd January 1871).

Despite this restriction, other types of meetings were liberalised. A statute was passed on 2nd August 1875, which, *inter alia*, created a special, more liberal regime for electoral meetings (art.16). They were permitted to be held up to, and including, the day of voting, whereas under the 1868 Act they could not be held less than five days before an election (art.8).<sup>81</sup>

This liberal trend was confirmed when eventually, after two years of debate and study, the government passed the Law of 30th June 1881. Although the measure is generally agreed to be a liberal reform of the law,<sup>82</sup> it should be noted that it is located within the penal code and was passed in the context of a perception that public meetings no longer posed the same threat to public order as before;

*l'expérience démontre que grâce au progrès des mœurs publiques, les périls que l'on pouvait redouter autrefois ne sont plus à craindre aujourd'hui.*<sup>83</sup>

Nevertheless, the Act states in bold terms in art.1 that 'Les réunions publiques sont libres' and so the intention to secure the position of the liberty is clear. For the first time, the liberty was explicitly guaranteed.<sup>84</sup> Although the previous practice under the Third Republic had generally been liberal, as seen by the continued application of the 1868 Act, the 1881 Act can be said to be even more so, in that though it also states that the liberty will not be subject to prior authorisation, it adds an explicit statement of principle which sets the tone for the remaining provisions. It follows that the provisions are qualified by the need to uphold liberty, as is noted in the report to the Senate during the legislative passage of the bill;

*vous avons cru devoir proclamer plus nettement le principe même de la loi, la liberté des réunions publiques; nous avons cru qu'il était utile que cette déclaration dominât toutes les dispositions qui vont suivre, non seulement afin qu'elle constituât une affirmation théorique indiscutable, mais aussi afin qu'elle servit de règle d'interprétation à l'administration et à la*

---

<sup>81</sup> However, it should be noted that this liberalisation of electoral meetings was limited in scope by the fact that the provisions only applied to elections to the Senate.

<sup>82</sup> For example, Robert & Duffar, *op. cit.*, 571 and Colliard, *op. cit.*, 735.

<sup>83</sup> Rec. des Lois, 1881, 210.

<sup>84</sup> Robert & Duffar, *op. cit.*, 571.

magistrature, pour toutes les questions qui ne seraient pas expressément résolues par les dispositions réglementaires suivantes.<sup>85</sup>

### THE 1881 ACT

However, in its original form the 1881 Act relied heavily on the novel features first introduced by the 1868 Act. Therefore, in requiring a prior declaration before a meeting could be held (art.2), it drew on the 1868 system.<sup>86</sup> It also adopted the requirement, although with some modification, of the organising committee (art.8)<sup>87</sup> and the possible attendance of an official (art.9). The same article also left intact the public order powers of the local police, as was the case under the 1868 Act. Finally, clubs remained banned (art.7) as under the 1868 Act.

There are however, important differences between the two acts.<sup>88</sup> Firstly, the 1881 Act subjected all meetings, irrespective of their content, to the more liberal requirement of having to make a prior declaration. This repealed the regime that existed under the 1868 Act, by which political and religious meetings had to seek prior authorisation, while all other kinds of meeting had only to provide a prior declaration. Furthermore, in contrast to the 1868 Act, the declaration only had to be submitted twenty-four hours before a meeting, instead of the former requirement of forty-eight hours.

---

<sup>85</sup> *op. cit.*, 211.

<sup>86</sup> The major difference between the two statutes was that in the 1881 Act the prior declaration had to be made for *all* public meetings, including those of a religious or political nature (see *supra.*).

<sup>87</sup> The presence of the organising committee was a prerequisite of a properly constituted public meeting under art.8 of the 1881 Act. The committee were to police public order in the meeting. This appears clear in consequence of its four functions; (1) to maintain order (2) to stop all breaches of the law (3) to keep the meeting to the subject that had been stated in the declaration and (4) to prohibit all discussion that was contrary to public order and good morals or which consisted of a provocation to commit criminal offences.

Nevertheless, in being bound by these duties the committee had no police powers; at most it could either request that the official intervene to dissolve the meeting or it could close the meeting. Once the committee had closed a meeting it was no longer criminally liable for any crimes that may later have been committed within the meeting.

<sup>88</sup> For a general comparison between the 1868 and 1881 acts, see E. Lefebvre *op. cit.*, 67-81.

Secondly, this declaration only had to be signed by two persons of good character from the locality<sup>89</sup> and it no longer had to state the object of the meeting (art.2).<sup>90</sup>

Thirdly, whereas the 1868 Act merely stated that a certificate had to be immediately given by the authorities upon receipt of a prior declaration, the 1881 Act went further. In art.2, it laid down that a legal record of a refusal to provide a receipt could be made; it is submitted that the purpose of this provision was to enable an aggrieved party to use this official record as evidence in any judicial or administrative proceedings that might subsequently ensue.<sup>91</sup>

Fourthly, and perhaps most interesting for the future development of this area of law, the 1881 Act fails to adopt article 13 of the 1868 statute. This article provided that only the Minister of the Interior could ban a meeting. The 1881 Act is therefore silent as to banning powers, in that it does not contain its own banning powers. Instead, the power to prohibit meetings is thus to be found in other statutes that, as already noted, are mentioned and preserved in art.9.<sup>92</sup>

Further differences can be noted; although the 1868 Act did not mention a prohibition of meetings on the public highway, as in art.6 of the 1881 enactment, it must be noted that it did include the far wider and more draconian measure of limiting public meetings to closed and covered locations (art.3). Thus the location of meetings was liberalised, in that they no longer had to be held in these closed and covered places.

---

<sup>89</sup> See Joubrel, *op. cit.*, 135-45. The prior declaration was justified in terms of both public order and the protection of the right;

'Il est facile d'en justifier l'utilité: la déclaration est une mise en demeure à l'autorité, non seulement de sauvegarder l'ordre, mais de faire respecter la liberté qui pourrait être menacée par des manifestations hostiles aux promoteurs de la réunion.'

(extract from the report to the Senate, Rec. des Lois, 1881, 211).

<sup>90</sup> However, art.4 required that the declaration state what *kind* of meeting was to held;

'La déclaration fera connaître si la réunion a pour but une conférence, une discussion publique ou si elle doit constituer une réunion électorale..'

<sup>91</sup> Art.2(5) reads;

'Dans le cas où le déclarant n'aurait pu obtenir de récipissé, l'empêchement ou le refus pourra être constaté par acte extrajudiciaire ou par attestation signée de deux citoyens domiciliés dans la commune.'

<sup>92</sup> These are the general public order powers of the police.

In addition, as in the 1868 Act (art.9), the criminal sanctions for breaches of the 1881 Act set out in art.10 also provide for police penalties,<sup>93</sup> notwithstanding prosecution for crimes that may be committed within the meeting itself but it also provides uniformity in comparison with the previously complex criminal sanctions within the 1868 Act by treating *all* breaches of its provisions as contraventions. In contrast, the 1868 statute provided that failure to obey the orders of the official (art.10) could be sanctioned by tougher fines and the possibility of longer prison terms than were applicable for other breaches of its provisions (art.9). Interestingly, the 1868 Act also sanctions those that enter a meeting armed (art.11). This is not sanctioned in the 1881 Act but as will be seen below, it is dealt with by the general public order powers of the police.

Finally, the statute reduced the scope of the official's power of dissolution so that this power could only be exercised either when he/she was requested to exercise these powers by the organising committee or if the meeting became violent. Under the 1868 Act, by virtue of art.6(1), the official could also dissolve on the grounds that the discussion had strayed onto matters outside those stated in the prior declaration. Thus, in general, the 1881 Act can be said to be a measure that emphasises the regulation of the liberty to meet rather than one that is primarily concerned with maintaining public order.

The original Act has been amended on two occasions at the beginning of this century. Both amendments have been seen as liberal reforms and are

---

<sup>93</sup> Art.10 reads as follows;

'Toute infraction aux dispositions de la présente loi sera punie des peines de simple police, sans préjudice des poursuites pour crimes et délits qui pourraient être commis dans les réunions.'

Police penalties were the lowest criminal sanctions in French law. They punished police contraventions, which were divided into five classes, according to the maximum fine that was applicable (art.R.25). According to art.464 of the former penal code the sanctions consisted of imprisonment, fines and the confiscation of certain goods, which were either obtained illegally, were the products of a contravention or were to be used to commit a contravention (art.470).

These provisions have now been repealed (art.372 of the Law of 16th Dec 1992, *infra.*) and have been replaced by a new scale of contraventions and police penalties, set out in arts.131-12-18 of the new penal code. The sanctions are generally the same as under the former code, except no provision is made for imprisonment. Therefore, a breach of any of the provisions of the 1881 Act can still now only lead to a fine or the confiscation of goods.

contrasted by what are commonly seen to be later restrictions on the part of administration and the judiciary.<sup>94</sup>

The first amendment was effected by the Law of 1st July 1901. For the first time, this statute provided a legal framework for the liberty to associate,<sup>95</sup> it also legalised the formerly illegal clubs by repealing art.7 of the 1881 Act, which banned them. It follows that the meetings of clubs are now permitted and are therefore regulated by the amended 1881 Act on the same terms as any other public meeting.

The second statutory amendment was effected by the Law of 28th March 1907. By virtue of art.2, the requirement that public meetings had to provide a prior declaration was repealed.<sup>96</sup> Art.1 sets out the current position;

les réunions publiques quel qu'en soit l'objet, pourront être tenues sans déclaration préalable

Although clearly a liberal step, the statute actually represented a considerable concession by the government vis à vis the Catholic church, which had refused to obey the Law of 9th December 1905, concerning the separation of Church and State. As part of this objective, the Act laid down that all religious meetings, like all public meetings, would merely be required to make a symbolic prior declaration. This declaration would cover all meetings, whether permanent, periodic or occasional for an entire year. However, the Church felt that such a regime breached the principle of hierarchy as far as the position of the Catholic religion was concerned and so consequently it rejected and subsequently refused to obey this measure. Their argument was based on the view that requiring the same prior declaration as other meetings was to assert that the Church was on the same footing as an ordinary lay organisation and other religions.

The government seemed to be faced, *prima facie*, with three possible, but awkward, choices of action. Firstly, it could take legal action against the

---

<sup>94</sup> For example, Colliard *op. cit.*, 736;

'L'évolution contemporaine a été successivement marquée par deux tendances contradictoires, une tendance plus libérale, avant 1914, une tendance moins libérale, très limitatrice de la liberté de réunion depuis 1933.'

<sup>95</sup> See J. Morange, 'La liberté d'association en droit public français' (1977), Colliard, *op. cit.*, 751-77 and Robert & Duffar, *op. cit.*, 584-604 for the history and regulation of this liberty.

<sup>96</sup> Therefore, arts.2-4 of the 1881 Act were repealed.

Church for breaking the law; a prospect with high political and moral costs. Secondly, it could decide not to prosecute the Church; but then it would be countenancing, by its forbearance, the systematic breach of the law. Thirdly, it could amend the 1905 Act by extending its provisions to all religious meetings, except those of the Catholic church; exposing them to the criticism that they were according the Catholic religion a privileged position.

There was, however, a less obvious alternative, which the government accepted and is manifested by the Act of 1907. This was to remove the requirement of a prior declaration for *all* meetings (whether religious or non-religious). The result was to put all the religions on an equal footing which left the Church with no ground upon which to complain about the loss of their position of superiority: because they could not point to the imposition of any positive legal requirements that smacked of treating them on the same level as a lay organisation other religions.<sup>97</sup>

Finally, the 1907 Act also repealed art.3 of the 1881 Act which regulated electoral meetings. Art.3 had laid down the periods when such meetings could be held and the procedure for the submission of a prior declaration. Anomalously, the statute did not repeal art.5 which defines electoral meetings in terms of the function of choosing candidates and the categories of persons who can attend such meetings.<sup>98</sup> The result is that the 1881 Act defines electoral meetings but does not refer to them anywhere else. It can be asked why electoral meetings are still separately defined when they are now treated in exactly the same manner as other public meetings.

The liberty to meet has been seen to have a long history but one linked to public disorder. On the other hand, it has often been repressed because it has been confused with other activities such as associations. Its history has also been seen to have been linked to important political events in France. The 1881 Act is an important measure for three reasons. First, it was the first statute to deal exclusively with a specific human right. To turn the idea round

---

<sup>97</sup> See Berthon, *op. cit.*, 24-5 and Colliard, *op. cit.*, 736.

<sup>98</sup> Art.5 reads as follows;

'La réunion électorale est celle qui a pour but le choix ou l'audition de candidats à des fonctions publiques électives, et à laquelle ne peuvent assister que les électeurs de la circonscription, les candidats, les membres des deux Chambres et le mandataire de chacun des candidats.'

the other way, as Rivero does, the liberty to meet was the first to receive 'its [own] statute'.<sup>99</sup> It is also interesting to emphasise the legislative desire to provide a detailed and specific set of legal rules, which could regulate the liberty, as well as containing a declaration of principle;

une simple déclaration de principes, qui ne serait accompagnée d'aucune disposition d'organisation, n'offrirait de garantie ni pour l'ordre public, ni pour la liberté des citoyens.<sup>100</sup>

Secondly, the statute not only distinguishes the right from other liberties, such as the liberty to associate, but it is also prioritises a concern to regulate a civil liberty, as opposed to securing public order. Therefore, although the application of police powers is provided for should disorder break out, the focus of the measure is on securing the right to assemble *peacefully*.

Thirdly, by virtue of 1881 Act the right is recognised by *statute*, which it will be recalled enjoys a pre-eminent position in French law by reason of the doctrine of parliamentary sovereignty. It will be seen in the next section that in the face of countervailing values and interests that often call for the restriction of the liberty, its statutory status gives it an important weight and value that must be taken into consideration.

### SECTION III THE CURRENT LEGAL FRAMEWORK

In this section, the current legal arrangements that regulate the liberty to meet will be described. The provisions of the 1881 Act, which form the centrepiece of the current legal framework, have already been presented as part of the historical examination above and so attention can now be turned to other aspects of this framework. The liberty will be seen to be regulated by a combination of statute, administrative regulation and case-law. In addition, a major concern or justification for its limitation is that of maintaining public order. Consequently, this value will also be examined.

---

<sup>99</sup> 'Les libertés publiques' vol. II, (1977), 334 .

<sup>100</sup> Extract from report to the Senate, Rec. des Lois, 1881, 210.

## STATUTES

### *Protection from other citizens*

As part of the new penal code,<sup>101</sup> the protection of the liberty to meet has been extended, so that by virtue of art.431-1 the liberty is protected not only from interference by the state but also from other citizens. While it may be recalled that in the early Revolutionary period a similar protection was provided for,<sup>102</sup> the present measure can be said to reflect a modern understanding that this right can be just as much threatened by official power as by other members of society. The provisions of art.431 read as follows;

Le fait d'entraver, d'une manière concertée et à l'aide de menaces, l'exercice de la liberté d'expression, du travail, d'association, de réunion ou de manifestation est puni d'un an d'emprisonnement et 100 000F d'amende.

Le fait d'entraver, d'une manière concertée et à l'aide de coups, violences, voies de fait, destructions ou dégradations au sens du présent code, l'exercice d'une des libertés visées à l'alinéa précédent est puni de trois ans d'emprisonnement et de 300 000F d'amende. (emphasis added).<sup>103</sup>

Therefore, this article, *inter alia*, protects meetings from being disrupted by threats or actual violence. Whereas the 1881 Act was a measure that was primarily addressed to the police authorities, art.431-1 would appear to send a message to ordinary persons as to the importance and value of the liberty. This is also reflected by the heavy penalties that can be imposed on those found guilty of disrupting meetings. However, it should be noted that a key elements in these crimes are actual or threatened violence and acting in a group. It follows that firstly, mere heckling would not be criminalised, unless what is expressed constitutes a threat and secondly, the violence would have to be carried out by a group acting together, therefore a single person, acting on his/her own, could not be sanctioned. From its terms, it seems that the mischief that the legislature had in mind is that of the serious disruption of public meetings via actual or threatened public disorder.<sup>104</sup> This

---

<sup>101</sup> The new code came into force on 1st March 1994, by virtue of Law no.92-683, Law no.92-684, Law no.92-685 and Law no.92-686 of the 22nd July 1992 and art.373 of Law no.92-1336 of 16th Dec. 1992 (as amended by Law no.93-913 of July 1993).

<sup>102</sup> See, for example the Decree of 15-25th July 1793, section II, *supra*.

<sup>103</sup> Introduced by Law no.92-686 of 22nd July 1992 (J.O. 23rd July, pg.??).

<sup>104</sup> However, the origins of the article are surrounded in mystery. The article was introduced as a last minute amendment in the Senate (J.O. Sénat, 7th July 1992, 2477) as being the result of a Government amendment in the legislative commission. However during the debate before the vote on adopting Title III of the new penal code, the article was attacked by the Communists, who alleged that it would be used against strikers and the right to strike (see J.O. Sénat, 7th July 1992, 2479).



view is confirmed by the location of the article within the penal code: it is found in the chapter entitled 'Des atteintes à la paix publique'.<sup>105</sup>

### *The police*

Statute also affects the regulation of the liberty in more indirect way; by providing for the police, who in turn play a fundamental role in the regulation of the liberty. In France, the police authority at the local level consists of the mayor and the prefect.<sup>106</sup> Both are at the same time agents of central and local government and both can exercise public order powers.<sup>107</sup> However, this sharing of competences is complex and needs to be explained as it demonstrates who can decide whether to restrict the right to meet. The best way to explain these features is by an analysis that follows the administrative divisions of local according to communes and departments.

#### *(a) the police authority in the commune*

It is the mayor that is responsible for the maintenance of public order in communes with populations of less than 10,000. In these areas, the municipal police are at his/her disposal.<sup>108</sup> However, in those communes of over 10,000 inhabitants the prefect acts as the police authority and has recourse to the national police.<sup>109</sup> The mayor nevertheless retains some police powers, notably as regards habitual assemblies<sup>110</sup> but the vast majority of communes today are served by a national police force ('police étatisée').<sup>111</sup> Whereas the mayor is elected, the prefect is a centrally appointed civil servant, as are the members of the national police. It follows that the prefect, although also a

---

<sup>105</sup> Furthermore, this chapter is located within the part of the code entitled 'Des Crimes et Délits contre la Nation, L'État et la Paix'.

<sup>106</sup> For the history of the French police, see G. Carrot, 'Le maintien de l'ordre en France: depuis la fin de L'Ancien Régime jusqu'à 1968' (1984) and for a general introduction to the system of policing, see J. Moreau, 'La police municipale' in F. Bénait, J.-Cl. 'Collectivités locales' (1982), vol III, 2201-1, P.J. Stead, 'The Police of France' (1983), R.I. Mawby, 'Comparative Policing Issues: The British and American System in International Perspective' (1990), 34-49 and J. Rivero, (1990), *op. cit.*, 544-7 and J.J. Gleizal, 'La Police en France' in J.M. Erbès, 'Polices D'Europe' (1992), 159.

<sup>107</sup> These powers are explained below, as part of the examination of the French notion of public order.

<sup>108</sup> Art.L.131-2 of the Code des Communes, see *infra*.

<sup>109</sup> Art.L.131-13 and art.L.132-8.

<sup>110</sup> Art.L.132-8.

<sup>111</sup> Chapus, *op. cit.*, 524.

local government representative is much closer to central government than is the mayor.<sup>112</sup>

If public order is threatened in two or more neighbouring communes in which the mayor is the police authority, the prefect may exercise public order powers. The prefect may also substitute for the mayor after a request to the mayor to use his/her powers has been met with no result.<sup>113</sup>

Here a distinction should be made between substitution and annulment. Both are supervision ('tutelle') powers that are enjoyed by the prefect. The latter gave the prefect the power to override the decisions of the mayor which he/she felt were, *inter alia*, illegal. This power was abolished in 1982.<sup>114</sup> Substitution, on the other hand, does not involve an alteration of the mayor's decision, but rather concerns an act or decision taken in place of the mayor. These powers over the mayor indicate the continuing emphasis on central control that characterises the system of French policing.<sup>115</sup> However, recent reforms under President Mitterrand have attempted to devolve more power to the local level, hence the abolition of the prefectural tutelle (supervision) and its replacement with a system known as the 'd'été préfectoral'.<sup>116</sup> This procedure has been more extensively used to protect the liberty to march and so it will be explained in detail in the next chapter concerning this liberty.

---

<sup>112</sup> The mayor is the representative of the local council (arts.L.122-11 & L.122-19 of the Codes des communes), as well as the representative of the state at local government level (arts.L.122-23 & L.122-26 of the Codes des Communes), whereas the prefect has one position: that of the representative of the state at the local level (the department). It can readily be seen that both the mayor and the prefect are state representatives but this is within a hierarchical system in which the mayor, when acting in this capacity, does so under the authority of the prefect (art.L.122-23). The foregoing does not alter the formal recognition of the mayor as the local police authority (arts.L.122-22 & L.131-1) but it must be noted that the mayor's dual role of central and local representative means that he/she can also be seen as a branch of the central police authority.

<sup>113</sup> Art.L.131-13. However, in these circumstances the prefect may only exercise the public powers set out in art.L.131-2(2) & (3) of the Codes des communes (see *infra.*), c.f. Moreau, *op. cit.*, 2210-13, Préfet, Commissaire de la République d'Eure-et-Loir c. Maire de Dreux, T.A. d'Orléans, 7th April 1987, req.no.84-4675, R.F.D.A. 1987.9., and Préfet du Finistère, *op. cit.*

<sup>114</sup> By virtue of art.34-III of Law no.82-213 of 2nd March 1982, relative aux droits et libertés des communes, des départements et des régions' (J.O. 3 et. rectific. 6th March 1982).

<sup>115</sup> See Mawby, *op. cit.*, and Gleizal, *op. cit.*, 160-1.

<sup>116</sup> Law no.82-213 of 2nd March 1982, *supra.*, arts.3-4 (as amended by Law no.82-623 of 22nd July 1982, (J.O. 23rd July 1982, pg.2347) and Law no.83-8 of 7th Jan. 1983 (J.O. 9th Jan. pg.215), art.65. J-M. Auby, in his note on the case C.E. 15th Dec 1982, D.1983.279, refers to this new procedure as 'judicial tutelle'.

*(b) the police authority in the department*

In the department, the prefect is the police authority and exercises police powers<sup>117</sup> and once again makes use of the national police. However, other state police forces, such as the Compagnie Républicaine de Sécurité (CRS) exist, which he/she may deploy.<sup>118</sup> Since 1982, the prefect exercises these powers after consulting with the Conseil général of the department, which is an elected body. This change once again reflects the recent desire to decentralise police governance.

*(c) Paris*

The prefect of police is the sole police authority for Paris. This position is justified by the special circumstances of the capital.<sup>119</sup>

## ADMINISTRATIVE REGULATIONS

### *The 1935 decree-law*

During the Third Republic the executive increasingly issued what came to be termed 'décret-lois' (from henceforth, the term 'decree-laws' will be employed). These were executive regulations which had the force of law; in other words, they could alter existing statutes.<sup>120</sup> This derogation from the principle that legislating was the exclusive prerogative of Parliament was not, as today, provided for in the constitution but was justified firstly by the

---

<sup>117</sup> See for example, art.9 of Decree no.86-475 of 14h March 1986. Since the decentralisation reforms of 1982, the prefect now shares some police powers and duties with the President of the General Council but not as regards public order (art.25 of the Law of 2nd March, op. cit.).

<sup>118</sup> See generally, E. Picard, 'Forces civiles et militaires de police: organisation' in J.-Cl. (Admin), (1987), Fasc.201-2, 5.

<sup>119</sup> Art.L.184-12 of the Codes des communes and see, J. Moreau, *op. cit.*, 2210. For the particular arrangements pertaining to the departments of the Bas-Rhin and the Haut-Rhin, see art.L.181-47 of the Codes des communes. The competences of the Mayor have been increased as part of the decentralisation reforms (art.9 of the Law no.86-1308 of 29th Dec. 1986, J.O. 30th Dec. pg.15773) but public order remains in the prefect's hands.

<sup>120</sup> See generally, V.D. Rusu, 'Les décrets-lois dans le régime constitutionnel de 1875' (1942), Gicquel, *op. cit.*, 539-40 & 794-5 and Bell, *op. cit.*, (1992), 80. The following definition clearly explains the executive origin and statutory force of decree-laws;

'Les décrets-lois sont des décrets pris par le Gouvernement à la suite d'une loi d'habitation par laquelle le Parlement autorise le gouvernement à régler certains questions pendant un certain délai. Le décret-loi a la même valeur juridique que les lois qu'il peut modifier ou abroger. Généralement il est ensuite soumis au Parlement pour ratification.'

(J.-M. Auby and R. Ducos-Ader, 'Droit public, droit constitutionnel, libertés publique, droit administratif' (1984), 55).

special circumstances of World War I and the subsequent financial difficulties in which France found itself during the 1920s.<sup>121</sup>

In the legal framework that governs the liberty to meet the most important regulation is that of the Decree-law of 23rd Oct. 1935. As will be explained below, this regulation is only of relevance to the liberty under study by virtue of an accompanying government circular that makes a controversial interpretation of the law. Although administrative circulars have no legislative effect, they do have considerable persuasive authority and so will be considered as part of the administrative framework, and thus part of the wider legal regime that regulates the liberty under study.<sup>122</sup>

---

<sup>121</sup> There was no provision made for decree-laws in the 1875 Constitution because art. 3 placed all legislative power in the hands of parliament. However, decree-laws developed during the 1914 war and became an accepted practice and thus a constitutional custom (c.f. A. Martin-Pannetier, 'Institutions et vie politique françaises de 1789 à nos jours', (1981), 57 and also Rivero, *op. cit.*, (1990), 72-91). Their emergence resulted from (1) the brevity of the 1875 Constitution; it was silent as to the regulation of many issues and (2) the procedural encumbrances then faced by parliament; its inability to quickly pass all the legislative measures which it deemed necessary.

The present constitution lays down that parliament can delegate its legislative power to the government in order that it can make ordinances (art.38). These most closely approximate to the former decree-laws, except that today they have a constitutional basis.

In the field of civil liberties, the emergence of decree-laws during this period posed problems for their legal protection. During this period it was statutes that generally protected civil liberties (the 1881 Act being a prime example). This protection could be undermined by the use of executive measures like decree-laws, especially where they contained detailed regulations concerning civil liberties which had the effect of altering the statutory regime of protection. However, in recognition of this danger, the Conseil d'État has held that decree-laws issued under the Third Republic can be the subject of an action for excès de pouvoir; C.E. Ass. 25th June 1937 Union des véhicules industriels; Rec.Leb. 619.

<sup>122</sup> Administrative circulars are also sometimes referred to as 'instructions de service' and defined as;

'...des communications par laquelle un supérieur hiérarchique, normalement le ministre, fait connaître à ses subordonnés ses intentions sur un point relatif à l'exécution du service ou à l'interprétation d'une loi ou d'un règlement.'

(Rivero, (1990), *op. cit.*, 118).

Circulars can, and often do, affect the legal position of citizens, in this sense they can be seen to have regulatory effects. Following on from this, they have been recognised as being susceptible to judicial review when they are more than simply internal administrative instructions. In C.E. Ass. 29th Jan. 1954 Institution Notre-Dame du Kreisker; R.F.D.A. 1954.50, the Conseil d'État held that a circular concerning subsidies to private schools was of a regulatory nature. The court's reasoning was based on a finding that the issuing minister had added new legal provisions to the statutory framework by virtue of the circular. The court then annulled the statute on the grounds that it was ultra vires the enabling statute. The Conseil went on to formulate a distinction between 'interpretative' and 'regulatory' circulars. Only the latter type of circulars could be reviewed by the courts (c.f. M. Long *et. al.*, *op. cit.*, 504-14 for a detailed analysis of the judgement of this case and the case-law on the administrative review of circulars).

(Footnote continues on next page)

The government passed three decree-laws on the 23rd Oct 1935 in an attempt to control the increasingly violent outbreaks of public disorder at this time.<sup>123</sup> For the purposes of the liberty to meet only one of these decrees is of relevance.<sup>124</sup>

The title of the 1935 decree-law ('Portant réglementation des mesures relatives au renforcement du maintien de l'ordre publique') clearly states that it concerns measures to be used to maintain public order. In effect, the decree-law lays down the statutory framework for the liberty to process/march. It does however, make one reference to the liberty to meet in its first article;

Les réunions sur la voie publique sont et demeurent interdites dans les conditions prévues par loi du 30 juin 1881, article 6.

However, this article merely reiterates the position concerning the liberty to meet that was laid down in the 1881 Act.

The 1935 Decree-law goes on to require that the organisers of a procession/march that is planned on the public highway must submit a prior declaration to the public authorities (arts. 1 & 2). It also explicitly grants the police authorities banning powers as regard marches. The regime is therefore less liberal than that which governs the liberty to meet, where it will be

---

In more recent times the transparency of circulars for citizens has been increased by two legislative measures. The first is the mandatory publication of circulars provided by art.9 of the Law no. 78-753 of 17th July 1978 (J.O. 18th July, pg.2581) and the second is by virtue of arts.1 & 8 of the Decree 28th Nov 1983 (no. 83-1025; J.O. 3rd Dec, pg.3492) concerning the relations between the administration and its users. This decree provided, *inter alia*, that circulars that were not contrary to laws and regulations could be relied upon by a citizen in any legal action against the administration. It is submitted that both of these measures confirm the view, first enunciated by the Conseil d'État, that regulatory circulars can be more than merely documents that are internal to the administration.

Finally, based on a report by the Conseil d'État (18th April 1985), the government drew attention in its circular of 15th June 1987 ('Relative aux circulaires ministérielles; J.O. 17th June, pg.6460) to certain problems concerning circulars. These included their excessive use. It sought to improve the situation by restating their legal nature and the legal requirements regarding their use. In this connection, it is interesting to note the following statement in the circular;

'La circulaire ne peut créer, pour les usagers, d'obligations qui ne résulteraient ni de la loi, ni du règlement'.

<sup>123</sup> For a more detailed explanation of this public disorder, see Chap.V, section II. *infra*.

<sup>124</sup> The other two decrees concerned the confiscation of arms and the dissolution of leagues.

recalled that no prior declaration is required and there are no special powers to ban meetings contained in the 1881 Act.

The decree-law keeps the two regimes governing the liberty to meet and the liberty to process/march separate. The bulk of the provisions in the decree-law are clearly directed towards the latter, whilst merely re-affirming the illegality of meetings on the public highway as regards the former liberty. However, this was not how the decree-law was interpreted by the Minister of the Interior, Joseph Paganon, who published and distributed a circular concerning its application to the prefects two days after it had been issued.<sup>125</sup> In this circular Paganon gave his interpretation of the case-law regarding the liberty to process/march. He noted that the case-law in this area had established that processions and marches could be banned if there was a likelihood that they would compromise public order. The most crucial aspect comes in his next step, in which he interprets the case-law as also establishing that mayors have the power to ban public meetings which

par la période choisie, le lieu ou elles doivent se tenir, la façon dont elles ont été organisées, le mode selon lequel elles doivent se dérouler sont de nature à laisser prévoir des incidents et à faire redouter des troubles tels que les services de police seraient dans l'obligation d'intervenir sur la voie publique.

Further, Paganon declares that prefects can, by exercising their powers of substitution, decide to ban a meeting where a mayor fails to do so.<sup>126</sup> Paganon implicitly claims that these banning powers are to be found in the public order powers of the police.<sup>127</sup> However, this emphasis on public order in the circular and the role of central government is criticised by Colliard because of the restrictive effects on the liberty to meet;

Les préfets sont ainsi invités à intervenir, donc les garanties que pourrait procurer la diversité politique même des maires disparaissent devant les directives gouvernementales. Confier à un fonctionnaire dépendant aussi étroitement du pouvoir que le préfet la possibilité d'interdire des réunions publiques équivaut à une étrange inapplication de la loi de 1881.<sup>128</sup>

---

<sup>125</sup> Its full title was, 'Circulaire du Ministre de l'Intérieur aux préfets, du 27 novembre 1935, sur les réunions publiques et privées'.

<sup>126</sup> 'Toutefois, la responsabilité du maintien de l'ordre public incombant en définitive au gouvernement, celui-ci estime que son représentant est qualifié, soit pour donner son accord à l'exercice incontestablement délicat de cette interdiction, soit pour substituer son autorité à celle du magistrat municipal défaillant.'

<sup>127</sup> See, section II, *infra*.

<sup>128</sup> *op. cit.*, 738-9.

At this point a number of further criticisms can be made concerning the circular. Firstly, its interpretation of the case-law. It can be forcibly argued that there were no judicial decisions up until this time which applied principles established in cases dealing with the liberty to process/march to the regulation of the liberty to meet<sup>129</sup>. A second criticism, which must be left in outline until the case-law is analysed below, once again concerns Paganon's interpretation. It is submitted that the case-law of this period (certainly that of the Conseil d'État) established the primacy of the liberty to meet over considerations of public order, so that liberty was the rule and its restriction the exception. The circular therefore *reverses*, rather than applies the case-law, as it purports to do. The use of the banning power becomes the first resort when public disorder is apprehended, instead of the last resort, as will be seen to have been the requirement laid down by the case-law. Thirdly, the terms used in the circular as to the grounds upon which a public meeting may be banned are both extremely vague and leave too much discretion to the police.<sup>130</sup>

The effect of the circular was to place the liberty to meet, which was guaranteed by the 1881 Act, under the less liberal auspices of the 1935 decree-law governing the liberty to process/march. The circular actually reads words into the decree-law, instead of merely providing guidance to police authorities as to its application. This blurring of the legal framework governing the two liberties is open to even more criticism because of the palpably different civil libertarian consequences that result from the respective legal frameworks.<sup>131</sup>

---

<sup>129</sup> See *infra*.

<sup>130</sup> Colliard, *op. cit.*, 738 makes this point;

'Les expressions utilisées, telles que "susceptibles" ou "de nature à", sont extrêmement vagues et imprécises et autorisent une fâcheuse extension des pouvoirs de police.'

<sup>131</sup> This has been the subject of much criticism from the commentators, for example, Burdeau, *op. cit.*, 221;

'Aucun de ces textes ne concerne les réunions. Cependant les instructions administratives données pour leur application excédèrent les termes des décrets et mirent en cause la liberté de réunion.'

and Colliard, *op. cit.*, 739;

'...cette confusion sans doute volontaire a permis de soumettre à un même régime une tolérance toujours révisable et une liberté garantie par la loi.'

The question to be addressed now is how far this guidance was followed by the prefects and mayors? Although the decree was legally binding on the police authorities, the circular, in offering interpretative advice merely offered *guidance*. Nevertheless, Colliard is clear as to its illiberal effects;

Certains maires prirent le parti d'interdire toutes les réunions publiques de manière à assurer l'ordre et de garantir à tous une même égalité, celle du silence!<sup>132</sup>

Moreover, according to Burdeau, a certain arbitrariness became commonplace, which was justified on the grounds of the need to maintain public order. In addition to the unpredictable use of the broader banning powers, he notes the development of general bans which were pronounced by prefects in certain departments and which covered all meetings in the area.<sup>133</sup> Although provision for such sweeping powers is not mentioned in the 1935 measure and the previous case law will be seen to have only envisaged their use in exceptional circumstances, the clear emphasis in the circular on the maintenance of public order seems to have provided ample justification for their use.

Another practical effect was that certain mayors required that the organisers of public meetings seek *prior authorisation*.. Such a requirement ran directly counter to the provisions of the 1881 Act, which, as was noted, by virtue of the 1907 amendment dispensed with any prior form of notification, not to mention requirements to seek prior authorisation. It was also contrary to the controversially applicable provisions of the 1935 decree-law themselves, which merely required a prior declaration. Notwithstanding, this extra-legal practice was sanctioned by the government when it declared on the 4th Oct. 1936 that it would only 'authorise' ten meetings, among fifty-two planned by the Communist party in the departments of Alsace-Lorraine.<sup>134</sup>

The context which firstly justified the illiberal Paganon circular and secondly, its application by mayors and prefects, was one of growing public disorder throughout France. Although this will be explored in greater detail as regards the liberty to process, this context explains the attitude taken towards the liberty to meet and so will be briefly noted here.

---

<sup>132</sup> Colliard, *op. cit.*, 739.

<sup>133</sup> *op. cit.*, 221.

<sup>134</sup> Colliard *op. cit.*, 739 and Burdeau, *op. cit.*, 221.



This period was characterised by continual public protest in the form of strikes, marches, and meetings, which often degenerated into riots in which people were injured and killed and serious damage to property sustained. These protests were against the austere economic measures imposed by the government and the rise of right-wing and fascist leagues (the most prominent being 'L'Action Française').<sup>135</sup> The leagues also engaged in often violent protests against the government. The protests against the governments economic policies, however, were co-ordinated by a coalition of left-wing and Communist parties under the banner of the 'Front Populaire'. Opposition to the austerity measures was even more pronounced because of the chosen method for their implementation: by decree-laws.

On the 7th June 1935 the government had succeeded in gaining the power to legislate solely by decree-laws up until the 31st October of that same year. It immediately set to work issuing a large number of economic decree-laws which were hugely unpopular but because of their regulatory nature were not subject to any parliamentary scrutiny.<sup>136</sup> In summary, this context led the government to set out a regulatory framework, via the 1935 decree-law, for marches that was inspired by public order anxieties, as opposed to concerns to guarantee human rights. Meetings were also a concern but the Paganon circular conveniently avoided the need for controversial legislation which would have been required in order to restrict the 1881 Act. Finally, police authorities seized the opportunity granted by the 1935 decree and the accompanying circular to clamp down on public meetings.

---

<sup>135</sup> See generally E. Weber, 'Action Française: Royalism and Reaction in Twentieth Century France' (1962), particularly, 341-3 & 361 for an account of the protest activities organised by Action Française in the years 1934-6. This period saw the rise of fascism in France via the emergence of a number of leagues; see R. Soucy, 'French Fascism: The First Wave, 1924-1933' (1986). Fascism also spread in Britain, see for example , C. Cross, 'The Fascists in Britain' (1961) and provided the context in which legislation affecting the liberties to assemble was passed.

<sup>136</sup> Leon Blum, a central figure in the Front Populaire movement, wrote these words in 'Le Populaire' on the day that the Laval government issued its first nineteen decree-laws (16th July, 1935) by virtue of their new powers;

'Des aujourd'hui nous ouvrons la lutte contre les décrets-lois de M. Laval.'

Taken from E. Bonnefous, 'Histoire politique de la Troisième République' (1973) vol.V; 1930-1936, 345.

For a detailed analysis of the Front Populaire, see K.G. Harr Jnr., 'The Genesis and Effect of The Popular Front in France' (1987).

*The 1985 circular*<sup>137</sup>

In this year the Minister of the Interior issued a circular to the police (only the prefects) concerning both the liberty to meet and the liberty to process. As far as the former is concerned, the circular constitutes a resume of the law: it reminds the police of their public law powers and duties, whilst at the same time recalling the fact that 'La loi reconnaît le libre exercice des réunions'. The circular is important because it firstly contains model examples of bans and secondly it provides important indications of the administration's view of the law.

It should be briefly noted that the circular makes reference to the Decree of 28th Nov. 1983,<sup>138</sup> art.8, by virtue of which the organisers of a public meeting have a right to be heard and to make representations before a ban is made and to circular no.80-292 of 18th Aug. 1980 ('sur la motivation des actes administratifs'), which in the present context requires that when a ban is made it must be accompanied by the reasons or grounds upon which it was taken.<sup>139</sup>

Having set out the main legal texts<sup>140</sup> that regulate the liberty to meet, attention will now be turned to the cases in which the law has been applied and interpreted.

## CASE-LAW

It will be recalled that judiciary have attempted to define the kinds of meetings that fall within the protective scope of the liberty to meet.<sup>141</sup> These cases will not be repeated here but instead attention will be focused on decisions concerning the actual exercise of the liberty, which form the central aspect of any description of its legal regulation.

---

<sup>137</sup> Circular no.85-180 of 25th July 1985.

<sup>138</sup> *supra*.

<sup>139</sup> These measures complement that of Law no.79-587 of 11th July 1979 ('relative à la motivation des actes administratifs'). See also S. Sur, 'Motivation ou non-motivation des actes administratifs' A.J.D.A. 35.1979.3.

<sup>140</sup> Montreuil, *op. cit.*, 13-14, lists a series of other offences that may be committed during a procession. These include insulting a police officer in the exercise of his or her duty (now found in art.433-5 of the penal code) and press crimes, such as the provocation to commit a crime (Law of 29th July 1881). However, it will be seen from the case-law that these have not played a role in the regulation of the liberty to meet.

<sup>141</sup> See section I, *supra*.

## *Benjamin*

The leading authority in this area is the decision in Benjamin.<sup>142</sup> It is generally regarded as laying down a principled ruling as to how the liberty in question should be exercised in relation to other countervailing concerns, notably public order. There is, however, disagreement as to whether the case lays down a libertarian or restrictive principle.<sup>143</sup> This disagreement reflects the attempts by the Conseil d'État to 'reconcile' two interests: that of the need to maintain public order and the need to protect and guarantee the liberty to meet.

The facts of the case, briefly stated, were as follows: a literary conference was to be held in the town of Nevers in which Benjamin was to parody to comic effect the state educational system. Upon hearing of Benjamin's proposed contribution, left-wing groups and unions notified the Mayor of their intention to counter-demonstrate. The Mayor, apprehending that there would be an outbreak of public disorder if the conference was permitted to go ahead, banned the conference, justifying his actions on the grounds that he was fulfilling his duty to maintain public order under article 97 of the Law of 5th April 1884.<sup>144</sup> The organisers then sought to hold a private meeting instead but this was banned once again on the same grounds. Benjamin brought an action for judicial review,<sup>145</sup> alleging that the Mayor had acted *ultra vires* his powers, on the grounds that he had violated the 1884 Act and the liberty to meet, protected by the 1881 Act. The Conseil d'État upheld his

---

<sup>142</sup> C.E. 19th May 1933, Rec.541; see generally, M. Long *et. al.*, *op. cit.*, 286-288, Colliard, *op. cit.*, 737, Burdeau, *op. cit.*, 219-220, Robert & Duffar, *op. cit.*, 574-5, Rivero, (1977) *op. cit.*, 340 and Dautan, *op. cit.*, 3.

<sup>143</sup> Colliard, *op. cit.*, 737, describes the case under the following heading 'L'atteinte jurisprudentielle' and goes on to state;

'...malgré le succès du requérant, dans l'espèce, le principe posé par l'arrêt n'est pas un principe libéral.'

Similarly, Costa, *op. cit.*, 91 and Mestre, S.1934.3.1., see the decision as restricting of liberty to meet.

On the other hand, M. Long *et. al.*, *op. cit.*, 287-8 present the case as an example of the Conseil d'État's liberalism. Rivero, (1977), *op. cit.*, 341, analyses the case as formulating both liberal and anti-liberal principles; he feels that the case contains (1) 'le principe de l'interdiction' and (2) 'la limitation' of this banning power.

<sup>144</sup> At the time of the case, this measure laid down the police general public order powers. These are now found in art.L.131-2 of the Code des Communes. The previous statutes that contained these local police powers have been mentioned above (section II, *supra.*). It was also noted that these powers were preserved in art.9 of the 1881 Act (section II, *supra.*).

<sup>145</sup> See chap.II, section II, *infra.*, for a general introduction to French judicial review.

action but also accepted that public order powers could be used to limit the exercise of the liberty.<sup>146</sup>

The dispute in the Benjamin case can be characterised in the following ways: (1) as a conflict between two legal notions: civil liberty (the liberty to meet) versus public order and (2) as deciding upon the nature and existence of banning powers and the conditions governing their use. In its judgement the Conseil d'État seems to have dealt with each of these characterisations.

The Conseil accepted that the Mayor was under a duty to maintain public order under the 1884 Act; they accepted that he could exercise banning powers in order to fulfil this duty and that such powers were applicable within the regime set out by the 1881 Act.

The applicability of the public order powers is clear from art.9 but the court can be seen to have gone further by deciding how those powers could be exercised as regards the liberty to meet. Therefore, it was stated that banning powers were to be exercised within certain limits: they had to be 'reconciled' with and 'respect' the liberty to meet, guaranteed by the 1881 Act;

Considérant que s'il incombe au maire, en vertu de l'art.97 de la loi du 5 avr. 1884, [now art.L.131-2] de prendre les mesures qu'exige le maintien de l'ordre, il doit *concilier* l'exercice des ses pouvoirs avec le respect de la liberté de réunion garantie par les lois du 30 juin 1881 et du 20 mars 1907 (emphasis added).

The apprehended public order had to be firstly serious and the degree of its seriousness had to be such that no other police measures were available to prevent it. In the instant case, the Conseil agreed that serious public disorder was apprehended but they felt its degree of seriousness was not sufficient to justify the use of the banning powers because other adequate police measures could still have been taken to maintain public order. It was therefore held that in circumstances in which a conflict arises between the liberty to meet and the duty to maintain public order, banning powers can only be used as a *final resort*; when all other measures for the maintenance of public order would prove to be inadequate.<sup>147</sup>

---

<sup>146</sup> Colliard, *op. cit.*, 737 observes;

'L'arrêt admet la possibilité pour l'administration de supprimer véritablement une liberté reconnue et organisée par la loi.'

<sup>147</sup> See, for example, Rivero, (1977), *op. cit.*, 340;

(Footnote continues on next page)

However, at the same time as setting out the limits of the power to ban public meetings, the Conseil d'État for the first time recognised that meetings, legally constituted under the 1881 Act, could be banned using the public order powers of the police. The limitations placed upon the exercise of these powers also leave a margin of discretion to the authorities; firstly, as to the likelihood of the occurrence of public disorder and secondly, whether, if disorder occurred, it would be of such a degree of seriousness that other available police measures could not prevent disorder. At the same time, these two factual circumstances are open to review by the courts, as this judgement has shown.<sup>148</sup>

### *Subsequent cases*

The principles laid down in Benjamin have been applied and refined in subsequent cases. These will be set out here, as well as other cases touching on other aspects not touched by this decision.

Thus, in the case of Bujadoux,<sup>149</sup> one of the principles in Benjamin was underlined. This concerns the last resort requirement, which lays down that a meeting can only be justifiably banned if the facts at the time go to show that serious public disorder could not be avoided in any other way. The instant

---

'...il fait de l'interdiction l'ultime remède, lorsque la conciliation entre le respect de la liberté et le maintien de l'ordre s'avère impossible, compte tenu notamment de l'importance des forces de police par rapport à la gravité des troubles prévisibles..',  
and Dautan, *op. cit.*, 6;

'L'autorité de police doit tout mettre en oeuvre pour que puisse s'exercer la liberté de réunion et ce n'est qu'exceptionnellement que celle-ci peut être paralysée quand l'ordre public ne peut être autrement sauvegardé...'

This position is expressed in the much quoted phrase, first mentioned by the Commissioner of Government in Berthenet et Baldy (C.E. 10th August 1917, Rec.Leb.637 at 638;.

'...la liberté est la règle et la restriction de police l'exception'.

<sup>148</sup> In the instant case the Conseil held that firstly, there was a sufficient likelihood that public disorder would occur but that secondly, adequate police measures could have been taken to prevent it without having to have banned the meeting. The Conseil reached this conclusion by pronouncing on what in England would have been considered an 'operational' matter that is as a result left to the appreciation of the police authorities (c.f. L. Lustgarten, 'The Governance of The Police' (1986), 78 & 172-3).

At the same time, Robert & Duffar, *op. cit.*, 574, point to the uncertainties surrounding the Conseil's conditions limiting the banning powers;

'On peut présenter, malgré tout, une interprétation moins optimiste de l'arrêt. On mentionnera par exemple, qu'un trouble simplement éventuel peut amener l'interdiction. On avancera également l'incertitude qui règne sur le point de savoir, en face de simples menaces, si le risque couru est suffisamment grave pour légitimer une interdiction...'

<sup>149</sup> C.E. 2nd Feb. 1937; D.1938.3.19.

case concerned the Mayor of Lyon's decision to ban a banquet organised by a league of Monarchists.<sup>150</sup> The Conseil struck down the ban because the Mayor had failed to show that he did not have other means available to maintain public order. The case not only stresses that the exercise of banning powers must be a last resort but also highlights the extent of the review that can be carried out by the administrative courts. This is manifested, more precisely, in its exacting examination of the factual circumstances pertaining at the time the decision was taken, in order to judge whether sufficient police officers were at the Mayor's disposal.

Where a Mayor banned a meeting on the grounds that it could not have taken place without the deployment of police officers in order to preserve public order, the Conseil in Xavier Vallat<sup>151</sup> did not hesitate to strike it down. The case represents a subtle extension of the Benjamin principles applied in Bujadoux. In the instant case the Conseil agreed with the Mayor's view of the factual circumstances prevailing at the time he took his decision; *viz.*, that the proposed banquet would have required him to exercise his public order powers in order to maintain public order. However, the court went on to add that the mere fact that public order could not be maintained without the police being deployed still did not justify a ban. In other words, other alternative public order measures could have been employed.

Another way of viewing the case is to see it in terms of the court's refusal to widen the grounds of justification upon which a ban could legitimately be made, and a re-affirmation of the justificatory grounds set out in Benjamin. To have upheld the Mayor's ban in the instant case would have been tantamount to holding that situations which force the mere exercise of police powers mean the same thing as serious outbreaks of public disorder and therefore justify a ban.

In Bucard,<sup>152</sup> the Conseil seemed to grant a greater emphasis to public order by upholding a prefectural ban on all meetings in the department, even though these bans purported to extend to private meetings. The fact that the department was situated on the border with Germany and the tense relations

---

<sup>150</sup> The 'Monarchists' was another name for 'L'Action Française' (see section II, *supra*).

<sup>151</sup> C.E. 2nd Feb. 1938; D.H.1938.2.95.

<sup>152</sup> C.E. Ass. 23rd Dec. 1936; Rec.1151.

with that country at the time, may be seen as constituting exceptional circumstances that justified the decision. However, the greater accent on public order is clear from the terms of the judgement;

Considérant que le principe de la liberté ne saurait faire échec aux nécessités du maintien de l'ordre public, avec lesquelles il doit se concilier; qu'il incombe aux autorités compétentes de prendre les mesures que commandent la sécurité et la tranquillité publiques et même si la sauvegarde de l'ordre public l'exige impérieusement, d'interdire les réunions.

The case is also interesting because it implicitly concedes that public order powers may be used to ban private meetings but it would seem that this is only justified where there are exceptional circumstances, as in the instant case. This interpretation has been adopted by the administration, as is noted by the following advice in the 1985 circular;

*Les réunions publiques...ne peuvent être interdites que dans certaines circonstances exceptionnelles* telles que la gravité particulière des troubles attendus la transformation prévisible en réunion publique, la simultanéité de plusieurs réunions tenues en des points très disséminés d'un département (CE 23 décembre 1936 - BUCARD), la contre-manifestation.<sup>153</sup>

Therefore, although the legislature had not sought to regulate private meetings in the 1881 statute, it has become understood that by virtue of the wider public order powers, the police may exceptionally ban such meetings.

While the emphasis on public order can be seen in a number of cases during this period,<sup>154</sup> these seem to have been in the context of the special circumstances caused by the Second World War and the Occupation. Therefore, after the Liberation, the Benjamin principles were re-applied in a series of later cases<sup>155</sup> but that of Naud stands out because of its peculiar facts.<sup>156</sup> This case concerned a conference to be held in Paris which had been held four years earlier in other French towns and cities. The Mayor banned the conference on the ground that he apprehended serious public disorder. However, the court struck down the ban on the grounds that other police measures could have been taken to prevent serious disorder. Therefore the

---

<sup>153</sup> *op. cit.*, 2.

<sup>154</sup> See for example, Beha et Masson, C.E. 9th April 1938; Rec.245, Wodel, C.E. 17th April 1942; Rec.122 and Ferraton, C.E. 26th Feb. 1943; Rec.50.

<sup>155</sup> For example, Demazieres et autres, C.E. 29th July 1953; Rec.407, Houphouët-Boigny, C.E. 19th June 1953; Rec.298 and Bakary Djibo, C.E. 30th Nov. 1956; Rec.719.

<sup>156</sup> C.E. 23rd Jan. 1953; Rec.32.

court, while accepting that there was a threat of public disorder, did not accept that this, without more, justified restricting the right to meet; as a consequence, it insisted that the restriction should only be as a last resort.<sup>157</sup>

The report of the case suggests that the Mayor sought to rely on the fact that in other towns his counterparts had banned the conference because the police officers that were available were not sufficient to prevent public disorder. It would appear that the Conseil responded to this argument in the following manner: they stressed that the relevant time period for deciding whether or not public disorder could be prevented by available police measures was the time on or around the date of the proposed meeting. In view of this, the only factual circumstances that could be relied upon were those occurring at this time and these circumstances would of course be subject to judicial review.

Another example of the relevant time period upon which to base a decision to restrict the liberty can be seen in Commune de Genissac.<sup>158</sup> This was an appeal against a decision by the Administrative Tribunal of Bordeaux to strike down a ban, by the part of the mayor, of any balls in the area for the whole month of January. Although the case does not concern meetings, the principle of the relevant time period is the same as that which Naud applied to meetings. As a consequence, the appeal was allowed and so the ban was upheld because of the serious damage and injury caused by a previous ball organised on 31st December. A close proximity was held to exist between this date and any balls organised in January, to the extent that a likelihood of the repetition of such disorder was justified.

#### *Access to local authority premises*

The degree to which the courts will engage in factual review of police decisions in this area may once again be seen in the recent decision of the Conseil d'État in Communes de Chartrettes.<sup>159</sup> This case concerned a mayor's

---

<sup>157</sup> For an example of a similar judgement, see Ministre de l'Intérieur c. sieur Salem, C.E. sect. 27th Nov. 1959; Rec.632 at 633;

'Cons. qu'il ne ressort pas de l'instruction que la conférence projetée par le sieur Salem pour le 20 décembre 1956 à la salle des fêtes de la mairie de Valence, fût de nature à menacer l'ordre public dans les conditions telles qu'il ne pût être paré au danger par des mesures de police appropriées, lesquelles pouvaient être prises en l'espèce...'

<sup>158</sup> C.E. 23rd July 1974; Rec.445.

<sup>159</sup> C.E. 10th Feb. 1984; req. no.39010. Unfortunately, only a brief summary of this case is available.



decision to ban a meeting in a communal hall. The court found that the ban had been based upon erroneous facts and therefore struck it down. The Conseil once again engaged in a typical 'operational' judicial review and emphasised that decisions to ban meetings could only be upheld if they were based upon a correct factual basis. It should be underlined that in order to discover an error as to the facts, the court has to review the facts at the relevant time and this might require the investigation of detailed and specialist information. In the cases thus far this has been instanced by examining the numbers of police available and the likelihood of disorder at the relevant time. In some ways, the court can be seen to be putting itself in the shoes of the police authority and it is for this reason that it must examine often detailed operational evidence.

In more recent times, a series of cases have concerned disputes that arise when local authorities refuse local groups and associations the use of local authority halls and rooms in order to hold public meetings.

In Communes de Turrettes-sur-loup<sup>160</sup> the local mayor refused to authorise the use of a room in a town hall by a local pressure group. The group requested the room in order to hold a public meeting and it was noted that the room in question had frequently been made available to other local groups for the same purpose. The Conseil's judgment in this case drew upon its previous case-law<sup>161</sup> and can be viewed as containing three elements. Firstly, it was held that the Mayor's decision could not be upheld because it was not based upon the needs arising from the *practical management and administration* of the buildings in his charge. Secondly, the decision could not be upheld because it was not based upon the necessities of maintaining public order and thirdly, it was in consequence, a violation of the principle of non-discrimination.

The second of these elements can be seen to be derived from Benjamin. Thus, the Conseil decided that one of the reasons that could justify the withholding of premises, normally made available for public meetings, from a particular person or group, was the need to maintain public order. Although local

---

<sup>160</sup> C.E. 21st March 1979; Rec.739.

<sup>161</sup> See Assoc. 'Caen-Demain', C.E. 15th October 1969; Rec.435, Commune de L'Hermitage, C.E. 8th July 1970; Rec.469 and Ville de Caen, C.E. 21st April 1972; Rec.302.

authorities are under a duty to maintain order, the practical implications of this duty are that liberty must as far as possible be respected. Therefore the case can be said to apply principles from Benjamin as to the need to maintain public order but also the limitations that were placed on this need.

The third element, the principle of non-discrimination<sup>162</sup> has been taken up in Préfet du Finistère.<sup>163</sup> It will be recalled that this case concerned a refusal on the part of a mayor to permit communist local councillors to use local authority premises in order to carry out electoral meetings. Although, it was held that the intended meetings were not within the scope of the liberty to meet, it was however stated that there was still a prohibition against discriminating between different individuals and groups when it came to granting them access to local authority premises. This application of the principle to the use of public property has a long history and has been declared to be a general principle of law<sup>164</sup> but the instant case is important in showing that it is also applicable in the domain of the liberty to meet and local authority property.

The first element in Communes de Tourrettes-sur-loup that concerns the needs arising from practical management and administration, is not an exception to the prohibition on discrimination but rather the expression of another value like that of public order. It concerns the aim of providing an efficient service for all. Therefore, given the scarcity of local authority premises relative to the demand for them, choices will have to be made and criteria and procedures adopted which provide for the best possible use of the premises. These procedures/criteria should not however be discriminatory. It is in this sense that the court speaks in terms of managing and administering; if access to premises were completely unregulated there would be chaos and ultimately only the groups and individuals that were the most powerful would be able to exercise their liberty to meet.

---

<sup>162</sup> This is a fundamental principle that underpins French law, (see generally, Colliard, *op. cit.*, 202-29, Bell, (1992), *op. cit.*, 199-226 and G. Vedel, 'L'égalité' in Colliard *et. al.*, *op. cit.*, 171-80). The principle is now enshrined in art.2 of the 1958 Constitution.

<sup>163</sup> *op. cit.*, section I, *supra*.

<sup>164</sup> See for example, C.E. 9th May 1913, Roubeau; Rec.521 and C.E. 18th May 1928, Laurens; D.1928.3.65.

The approach of the court in Communes de Tourrettes-sur-loup is therefore to examine the facts in order to see whether the denial of access is based upon either public order or management and administrative grounds. If this is not the case, the court will find that the principle of non-discrimination has been violated and will then strike down the decision.<sup>165</sup> The cases in this area therefore introduce another countervailing value - practical management and administration - that limit the exercise of the right to meet.

#### *Meetings on the public highway*

The cases have dealt with another issue within the framework of the 1881 Act. In Mutuelle nationale des Etudiants de France,<sup>166</sup> a student's association requested the Conseil d'État to strike down the local mayor's refusal to grant them authorisation to hold an electoral meeting on the public highway. Although art.6 of the Act (prohibiting meetings on the public highway) was not mentioned in the judgment, the court's refusal to overrule the mayor's decision can be seen to draw implicit support from this provision;

Considérant qu'aucune disposition ne fait obligation aux maires de mettre la voie publique à la disposition des étudiants pour l'organisation d'élections qui les concernent.

It has nevertheless been recognised that municipal law grants mayors the power to authorise public meetings on the public highway, without reference to the specific origins of this discretion. Joubrel claims that the omission of such a reference within the 1881 Act was the result of a view on the part of the legislature that such a provision would be superfluous because it was generally conceded to already exist.<sup>167</sup> If this is accepted, meetings on the public highway, as is clearly shown by art.6 of the statute and the above case, cannot take place except at the discretion of the local police authority.

---

<sup>165</sup> The formulation in the judgment can also be seen, for example, in Ville de Caen, *op. cit.*; '...qu'il n'est pas allégué que le refus de l'utilisation d'une salle opposé par le maire de Caen à l'association 'Caen-Demain' ait été motivé par l'administration des propriétés communales; qu'il ne ressort pas des pièces du dossier que l'ordre public ait été menacé; que dès lors, la décision du maire de Caen ne respectait pas l'égalité de traitement entre les usagers, qui s'imposait...'

<sup>166</sup> C.E. 3rd May 1974.; A.J.D.A.1975.188.

<sup>167</sup> *op. cit.*, 147;

'On admet même que les maires pourraient autoriser les réunions sur la voie publique, s'ils jugeaient qu'elles sont dépourvues d'inconvénient. Le projet de la commission exprimait formellement le droit d'autorisation de l'autorité municipale...si cette disposition a disparu du texte définitif, c'est qu'il a paru inutile de rappeler un droit que la loi municipale accorde aux maires et que nul ne leur conteste.'

However, it would also seem to be likely, from the case-law on access to local authority premises, that in exercising this discretion, there should be no discrimination between individuals and groups. Therefore, discretion should be exercised on the grounds of public order and the needs of practical management and administration.

## **PUBLIC ORDER**

Despite the existence of management and administrative considerations, the recurrent value that appears to conflict with the exercise of the liberty to meet has been seen to be that of public order. However, the initial impression that public order and the liberty are seen as conflicting values in French law is dispelled if a closer look is taken at the nature of the French conception of public order. Such an examination is undertaken here.

### *Public order powers and duties*

It has been seen above in the investigation of the history of the liberty that the police general public order powers and duties<sup>168</sup> date back to the Revolution. Today, these powers are found in the first three paragraphs of art.L.131-2 of the Code des Communes;

La police municipale a pour objet d'assurer le bon ordre, la sûreté, la sécurité et la salubrité publiques. Elle comprend notamment:

1° Tout ce qui intéresse la sûreté et la commodité du passage dans les rues...et voies publiques;

2° Le soin de réprimer les atteintes à la tranquillité publique telles que les rixes et disputes accompagnées d'ameutement dans les rues, le tumulte excité dans les lieux d'assemblée publique, les attroupements, les bruits, y compris les bruits de voisinage, les rassemblements nocturnes qui troublent le repos des habitants et tous les actes de nature à compromettre la tranquillité publique;

3° Le maintien du bon ordre dans les endroits où il se fait de grands rassemblements d'hommes, tels que les foires, marchés, réjouissances et cérémonies publiques, spectacles, jeux, cafés, églises et autres lieux publics;

The carrying out of these tasks and others concerning public health and morality are stated to be the specific purpose of the police and it will be seen below that this reflects the fact that policing in France has a wide signification than in England.<sup>169</sup> Here, what should be first noted is that public order is

---

<sup>168</sup> The two terms of 'powers' and 'duties' will be used here because the police clearly enjoy public order powers but since the decision in C.E. 23rd Oct. 1959 Doublet; Rec.540, it has been held that there is a duty to exercise these powers when, *inter alia*, public order is threatened.

<sup>169</sup> Mawby, *op. cit.*, 46.

itself a broad term that *includes* a trilogy of duties mentioned in the above article - good order, safety, security and public health - but this is not an exhaustive list.<sup>170</sup>

Within this broad conception of public order, sometimes referred to as 'general public order',<sup>171</sup> the liberty to meet often seems to be competing with a narrower conception of public order which concerns physical violence. More specifically, this latter notion of public order is captured by 'le bon ordre matériel' or 'tranquillité du public, au sens passif du terme' within the wide 'le bon ordre' category in art.L.131-2;<sup>172</sup>

Il résulte de l'absence de bagarres, de discussions, de violences, de tumultes et d'agitations dans les rues, les foires, les marchés, les salles de spectacles, les cafés et tous autres lieux d'assemblées publiques.<sup>173</sup>

Four characteristics of these narrower public order powers/duties should be noted that are of particular relevance to the legal regulation of the liberty to meet. The first is that the public order power is seen as a pervasive. Thus, Teitgen notes that even where a liberty is given a specific legal framework, it does not escape the duties to maintain public order. Legislation concerning a liberty, does not therefore exclude public order powers/duties, rather it simply limits the means which the police may use to regulate the liberty. If, on the other hand, there has been no legislation, the police have a wider discretion as to how they may regulate the liberty.

The liberty to meet has its own legal framework by virtue of the 1881 Act and the express mention in art.9 of the continued application of the public order powers/duties can be seen to simply reflect the pervasive nature of public order powers. However, it has been seen that it was left to the judiciary (in Benjamin and subsequent cases) to lay down the specific ways in which these powers could be used, since the legislature merely chose to enumerate these powers, instead of detailing how they might be used. However, the courts

---

<sup>170</sup> See S. Ktistaki, 'L'Evolution du contrôle juridictionnel des motifs de l'acte administratif' (1991), 102 and the second sentence of the article; 'Elle comprend *notamment*'.

<sup>171</sup> J. Buisson, 'L'Acte de police' (1988), 480-2.

<sup>172</sup> P-H. Teitgen, 'La police municipale: étude de l'interprétation jurisprudentielle des articles 91, 94 et 97 de la loi du 5 avril 1884' (1934), 28 & 30 uses both these terms and c.f. Buisson, *op. cit.*, 478-9.

<sup>173</sup> Teitgen, *op. cit.*, 30.

had recourse to the tenor of the enactment, which emphasised civil liberty before public order.

A second characteristic of the public order powers/duties is that they are original powers that exist prior to law;

le pouvoir de police,....n'est pas un pouvoir délégué par le législateur aux autorités administratives. Il est antérieur à la loi; il appartient, par nature, au pouvoir exécutif et puise originairement dans sa fonction tous les droits qui lui sont nécessaires pour maintenir l'ordre dont il est responsable.<sup>174</sup>

From this point of view art.L.131-2 can be seen as the legal expression of what are ultimately pre-legal powers that are fundamental to the role and function of the executive itself.<sup>175</sup> Once again it must be underlined that legislation cannot exclude these powers/duties from the regulation of a liberty, it can only limit the means by which they are exercised. Furthermore, because of the unforeseeable nature of factual circumstances it is impossible to set out in advance all the ways in which these powers may be used.<sup>176</sup> Essentially, the police function of maintaining public order is wider than the non-exhaustive list of these functions in art.L.131-2. Therefore, this provision only highlights *some*, but no doubt the most prominent, of these police powers because it is actually impossible to list them all.

The third characteristic of the French notion of public order is that it is seen as securing the necessary conditions within which human rights may then be exercised. It is therefore claimed that public order and human rights do not conflict and that public order is often seen as the harmonious conciliation of

---

<sup>174</sup> Teitgen, *op. cit.*, 379.

<sup>175</sup> J. Bédier, 'Les principes de la législation sur le maintien de l'ordre public' (1938), 7-8; 'Qu'est-ce que l'ordre public? C'est essentiellement l'ordre dans la rue. Le devoir élémentaire de tout gouvernement est de le maintenir. Un gouvernement qui serait décidé à ne pas maintenir l'ordre dans la rue ne pourrait être qualifié de gouvernement; l'Etat serait proprement anarchique.', and *op. cit.*, 75;

'En vérité la police fait essentiellement partie de la compétence naturelle du pouvoir exécutif; ses pouvoirs en général, elle les tient de l'exigence de l'ordre public...ordre qu'elle est chargée de maintenir.'

<sup>176</sup> Teitgen, *op. cit.*, 379;

'...quand la loi intervient par la suite pour le consacrer, l'organiser et le définir, elle ne peut pas le limiter à la mise en œuvre de dispositions législatives préétablies, parce que les exigences de l'ordre public dépendent de circonstances imprévisibles et concrètes que les lois, générales et abstraites, ne peuvent pas prévoir.'(c.f., *op. cit.*, 122-3).

order and liberty. For example, Ktistaki refers to public order as a 'social order' in which liberty and order are in a 'dialectic relation', whereby each provides the *raison d'être* of the other;

les libertés ne peuvent être conçues que dans le respect de l'ordre; même, l'ordre public ne constitue point une fin en soi et doit donc être réalisé en tenant compte des libertés. L'ordre public et la liberté sont nécessaires l'un à l'autre, sans que leurs objectifs soient antagonistes.<sup>177</sup>

This view is also echoed by Buisson and Teitgen. Buisson refers to public order as 'global public order' in order to indicate its breadth but he stresses that it is a social order that serves a chosen general interest; which in liberal society is to secure the most expansive exercise of liberty in order that people can formulate and achieve their own their goals;

Cet ordre social consiste dans l'harmonisation de la vie sociale, et partant, dans l'aménagement des libertés, et plus généralement dans la faculté donnée à chacun d'atteindre ses aspirations légitimes dans le respect des autres.<sup>178</sup>

Teitgen asserts that public order is not antagonistic to human rights but instead works to secure the human rights of all;

Il ne se réalise pas contre elles par leur amputation, il se réalise pour elles par leur conciliation, dans l'intérêt commun des libertés de tous<sup>179</sup>

Public order is therefore seen as the equitable determination of the liberties of each person or group, which then permits their harmonious exercise in a society. Finally, Rivero sums up the fact that public order is not a value in itself but rather that in liberal society;

Il s'agit de créer les conditions matérielles d'une vie paisible, dans laquelle l'homme ne soit pas entravé par des volontés étrangères à la sienne, et puisse choisir et suivre sa voie.<sup>180</sup>

The fourth characteristic that will be mentioned is that the French notion stresses that public order is socially constructed. In consequence, Rivero sees

---

<sup>177</sup> *op. cit.*, 100.

<sup>178</sup> *op. cit.*, 499 and see generally, 476-508.

<sup>179</sup> *op. cit.*, 385-6.

<sup>180</sup> 'Ordre public et état démocratique', *Revue de la Police Nationale* 1980-81, no.13, 16 and at 17 he asserts;

'L'ordre public n'est pas une fin en soi: il faut qu'il serve à quelque chose.'

public order as securing the interests that are considered valuable in a particular society;

L'ordre public est donc fonction de ce que les responsables de la collectivité considèrent comme nécessaire à l'épanouissement de celle-ci et à la poursuite des buts qu'ils se sont assignés.<sup>181</sup>

Given that it is the product of social forces, public order does not have a constant and unchanging content. On the contrary, it is a value that is subject to change and this change in turn reflects the changes within the society that created it, as is observed by Bédier;

L'ordre public est une notion essentiellement relative, évolutive, dépendant de l'état politique et moral à un moment donné.<sup>182</sup>

As another consequence of this contingent and flexible nature, the requirements of public order change in response to different fact situations and human rights.<sup>183</sup> This social and flexible view of public order seems very similar to that adopted in this study as concerns human rights.<sup>184</sup> This should not be surprising if it is recalled that public order was seen as a countervailing social *value* and that human rights were also seen as socially constructed values.

It is this conception, which Bédier has referred to as 'essentiellement l'ordre dans la rue',<sup>185</sup> that is commonly the countervailing value in the cases. Thus in Benjamin, the Conseil d'État had to weigh the Mayor's duty to preserve public order against respect for the exercise of the liberty to assemble. However, a closer reading of the cases and an examination of public order, reveal that public order is not seen to require a balancing of conflicting values but rather the *conciliation* of different, but ultimately, compatible concepts. It also shows that the liberty to meet is accorded a higher degree of protection than would be the case if it did not have the benefit of a specific statutory framework.

---

<sup>181</sup> (1980-1), *op. cit.*, 16 and c.f., Buisson, *op. cit.*, 498.

<sup>182</sup> *op. cit.*, 9.

<sup>183</sup> Ktistaki, *op. cit.*, 101.

<sup>184</sup> See *supra.*, chap.I, sections I & II.

<sup>185</sup> Bédier, *op. cit.*, 7.



### *Judicial review*

In the decisions concerning the liberty to meet, the conciliatory nature of public order can be seen. Therefore, in Benjamin the Conseil d'État was clear in its ruling that even though the Mayor had a duty to maintain public order, this had to be reconciled with respect for the right. The Conseil expressed itself in virtually the same terms in Naud<sup>186</sup> but this time regarding a prefect's decision to ban a meeting. However, judicial review of such decisions (and thus the conciliation of public order and the liberty to meet) is affected by a number of factors and these will now be set out. It will be seen that these factors that go to the substance of judicial review and build upon the outline presented of judicial review in chapter II.<sup>187</sup>

Theorists commonly group these factors into a number of interpretative rules or doctrines which the Conseil d'État, in particular, has formulated. Two<sup>188</sup> of these which seem of relevance here are the doctrines of necessity and proportionality.

#### *(a) necessity*

According to Ktistaki,<sup>189</sup> this rule is of particular significance to human rights that are guaranteed by statute, such as the liberty to meet. When such rights are involved, the doctrine is claimed to require that any restriction of such a liberty that is not provided for in the specific protective statute will only be permitted if it is *necessary* in order to maintain public order in the face of a real threat of serious disorder. The judge must make a decision as to whether the measure was taken in view of the maintenance of public order and whether it was necessary to achieve this objective.<sup>190</sup>

The principle of necessity can be clearly seen in Benjamin. In this case, the liberty to meet was protected by statute and bans were not specifically provided for in this enactment. However, they would have been upheld had it been shown that they were necessary to maintain public order in the circumstances of the case. Instead, the Conseil found that other police measures could achieve this objective. Where the circumstances are so grave

---

<sup>186</sup> For other rules, see M. Long *et. al.*, *op. cit.*, 280.

<sup>187</sup> Section II.

<sup>188</sup> See Teitgen, *op. cit.*, 402-69.

<sup>189</sup> *op. cit.*, 92.

<sup>190</sup> See generally, Buisson, *op. cit.*, 628-62.

that they leave no scope for other measures, bans will be upheld, as in, for example, Houphouët-Boigny<sup>191</sup> where the court found that serious and widespread public disorder necessitated the banning of a congress. The measure was necessary because there was no other means to maintain order given the gravity of the disorder that was threatened.

It follows that the judge examines whether the restriction was necessary in the *specific* factual circumstances of each case; thus in Bakary Djibo<sup>192</sup> the Conseil upheld the decision by the Governor of Niger to ban all the meetings of a particular political party on the grounds that they threatened such widespread disorder that a general ban was 'indispensable' in order to assure public order. The necessity of the ban was therefore made out by the specific seriousness of the disorder.<sup>193</sup> The review of what the specific context necessitates also covers the length of time of a restriction, in the sense that the duration of a restriction must also be shown to be necessary in the face of serious public disorder. This was the judgement in Commune de Louroux-Beconnais,<sup>194</sup> in which the mayor was permitted to ban all balls in the area until public order was re-established but the duration of the ban had to be related to the persistent risk of disorder; in other words, it had to be shown to be necessary.

*(b) proportionality*

Sometimes the restriction of a human right, cannot be merely what is necessary to maintain public order, in the sense of the most *efficient* measure. Consequently, the courts have further required that there be a balance or proportional relation between the measure and the specific circumstances to which it responds.<sup>195</sup> Essentially, the measure must be *proportional* to the

---

<sup>191</sup> *op. cit.*

<sup>192</sup> *op. cit.*

<sup>193</sup> Ktistaki, *op. cit.*, 93, asserts that there is a kind of presumption of illegality as far as such general bans are concerned because of the emphasis on specific factual circumstances; 'Par suite, les règlements de police, prescrivant une interdiction absolue et générale sont, à l'évidence, illégaux pour insuffisance de leurs motifs, car la généralité de leur portée prouve à elle seule que l'autorité compétente n'a pas tenu compte des circonstances et qu'il (sic) a certainement dépassé, de ce fait, les nécessités de l'ordre public.'

<sup>194</sup> C.E. 28th Oct. 1983; Rec.645. This case concerns balls but illustrates the application of the principle under discussion.

<sup>195</sup> See generally, Buisson, *op. cit.*, 683-96 and Teitgen, *op. cit.*, 423-69.

seriousness of the disorder that it is sought to be prevented and the value of the liberty that is restricted.<sup>196</sup>

As regards the first factor, the judge reviews to the nature of the circumstances confronting the liberty in issue. The judge therefore gauges the degree of the seriousness of disorder by looking at such factors as the time and place in which the meeting is to be held.<sup>197</sup> Attention is then turned to the measure and it is assessed in relation to this context. Thus, while in Benjamin the less serious degree of potential public disorder and the possibility of calling for police reinforcements<sup>198</sup> resulted in a finding that the ban was disproportionate, Bucard can be seen as a case in which the special circumstances pertaining to time (World War II) and place (the department being located on the border with Germany) justified a series of bans that were also extended to private meetings. Similarly, in Djibo Bakary, it was seen that general bans were justified because of the extremely grave disorder at the time in Niger. In short, serious disorder in turn justifies serious restrictions, such that the restriction is in proportion to the disorder.

The other aspect of the doctrine of proportionality involves the judge weighing up the severity of the restriction against the *value* of the liberty.<sup>199</sup> This value is judged by whether or not the liberty in question has been given statutory protection. In this sense, the judiciary can be seen to measure value in democratic terms.<sup>200</sup> The result, as has been noted above, is that human rights that are protected by statute are accorded greater value. This greater value translates into greater weight in the conciliation with public order.

---

<sup>196</sup> Ktistaki, *op. cit.*, 94-5 states;

'Cette règle se traduit par le fait qu'une décision de police prise dans une matière dépend, d'une part, de l'importance du trouble à éviter, en liaison avec la gravité du préjudice matériel que cause effectivement cette décision aux individus qu'elle atteint; d'une autre part, elle varie selon la valeur juridique de la liberté atteinte. En d'autres termes, une mesure de police restrictive d'une liberté publique doit être proportionnée à l'intensité de la menace sur l'ordre public ainsi qu'à la valeur de la liberté en cause.'

<sup>197</sup> Ktistaki, *op. cit.*, 96.

<sup>198</sup> See M. Long, *et. al., et. seq.*, 278.

<sup>199</sup> Teitgen, *op. cit.*, 438;

'L'étendue des droits que possède le maire pour éviter un désordre d'une gravité donnée dépend de la valeur juridique abstraite du droit ou de la liberté qui lui est opposé.'

<sup>200</sup> Ktistaki, *op. cit.*, 99;

'...lorsque certaines activités humaines sont particulièrement reconnues et organisées par le législateur, elles doivent être respectées par l'autorité de police. Il s'agit des comportements qui ont bénéficié de cette individualisation protectrice, normalement liée à leur importance pour l'homme et la société.'

The liberty to meet is clearly an example of human right that has a high value. The result is that restrictions of its exercise must not only be necessary to maintain public order but they must also be related to the value of the right to meet. To illustrate this point, regard can be had to Bujadoux, where it will be recalled that the Conseil struck down the Mayor's ban because of the availability of other, less restrictive police measures. This can be interpreted as a decision that the ban was disproportionate to the value of the liberty to meet; in the sense that given its high value, all other measures should have been shown to be insufficient to maintain public order before it was restricted.

It has been noted by Teitgen that the location in which a liberty is exercised can have a bearing on the severity of the restrictive measure, even if this liberty is highly valued. More precisely, he asserts that a liberty that is guaranteed by the law but which is exercised in a location which has been created for different purposes can be restricted by police measures in order to maintain the original function of the location;

Les libertés garanties par la loi, mais exercées sur une dépendance du domaine contrairement à son affectation, ne sont pas opposables à la police municipale, lorsqu'elle agit pour sauvegarder l'affectation de la dépendance du domaine dont il s'agit.<sup>201</sup>

This view appears to throw more light on Mutuelle Nationale des Etudiants de France,<sup>202</sup> where it will be recalled that a ban of a meeting to be held on the public highway was upheld. This decision would have been supported by art.6 of the 1881 Act but this provision was not cited by the court. It was then asserted by Joubrel that police authorities enjoyed a discretion as to whether to permit meetings on the public highway. However, Teitgen's claim indicates that the liberty to meet has a lesser value than the rights of passage of pedestrians and vehicle drivers when it is sought to be exercised on the public highway. This secondary position means that the police may exercise a discretion as to whether to accord priority to rights of passage. In addition, the existence of the express prohibition in the 1881 Act may make it difficult to defend the exercise of meetings in such locations but it must be underlined that this does not mean that meetings on the public highway are always

---

<sup>201</sup> *op. cit.*, 449.

<sup>202</sup> *op. cit.*

illegal but simply that they will be held at the discretion of the police and are under a presumption of illegality.

Although necessity and proportionality are distinct, they may often be difficult to distinguish in the cases and indeed both may be applied at the same time. Therefore, the Conseil would not accept that a ban based on the mere necessity of having to deploy police officers in Xavier Vallat<sup>203</sup> was proportionate to the disorder threatened. Put more simply, the liberty to meet was too important a liberty to be legitimately restricted by such an extreme measure and the degree of potential disorder was not sufficiently grave so as to legitimate a ban. However, the measure was also unnecessary given that public order could be maintained by merely deploying the police, which was an alternative measure that would have permitted the exercise of the right.

This brief analysis of the two central doctrines of judicial review provides a more detailed explanation of the 'sliding scale' or different degrees of review noted earlier.<sup>204</sup> Essentially, the degree to which the judge will accept the factual findings of the police have been seen to depend on a multiplicity of factors that are raised by the doctrines of proportionality and necessity. The regulation of the liberty is thus a constantly changing and flexible adjustment according to the different configurations of factors in each specific case and the equally flexible demands of public order.

## A SUMMARY

It has been seen that after a somewhat chequered early history, the liberty to meet is currently regulated and more importantly, guaranteed by a combination of legal measures and case-law. The legislature can thus be said to have recognised the specific needs and context of the liberty by according it a specific legal framework. In the case-law the importance of this right has also been stressed, as well as the exceptional nature of its restriction, although the administration, as highlighted by the Paganon circular, has not always interpreted the cases in this way. It has fallen to the judges to hone down and refine the broad police powers and an important factor in this process has been seen to be the fact that the right is statutorily guaranteed. This in turn provides another example of the continuing vigour of parliamentary

---

<sup>203</sup> *op. cit.*

<sup>204</sup> See chap.II, section II, *supra*.

sovereignty in France. At the same time, space has been created in which this human right is respected and prioritised. In short, the regulation of the liberty to meet provides an example of how parliamentary sovereignty can co-exist with the protection of human rights.

## CHAPTER V

### THE LIBERTY TO PROCESS IN FRANCE

In this chapter the legal regulation of the liberty to process<sup>1</sup> will be set out and the same structure as was used for the liberty to meet in the previous chapter will be employed. Therefore, an examination of how the right is defined will be carried out in section I, before then presenting the history of the legal regulation in section II. Finally, the current legal regulation of the right will be set out in section III.

It will be seen that in contrast to the liberty to meet, the liberty to process is not constructed as a pedigree human right in French law. In other words, its lack of statutory protection means that it is generally tolerated, so that its exercise is permitted because processions are not illegal and not because there is a recognised right to process. In this sense, the liberty to process is very similar to the notion of negative civil liberty that exists in English law.<sup>2</sup> Interestingly, it will be seen that in French law a distinction is made between the liberty to meet and the liberty to process.

#### SECTION I

##### A DEFINITION

Despite the above remarks as to the lesser status of the liberty vis à vis the liberty to meet, it will be noted that definition of the liberty to process is of considerable importance. Essentially, this right has its own particular legal regime, which in addition seeks to protect a different type of assembly right or activity than does the liberty to meet. However, there has been less attention paid to the definition of the right to process than to the right to meet.

#### DEFINITION VIA CHARACTERISTICS

No statutory definition of the liberty to process exists in French law. Consequently, it has been left to the legal commentators to formulate definitions and it to these that attention will now turn. The first set of

---

<sup>1</sup> The terms 'processions' and 'marches' will be used interchangeably here.

<sup>2</sup> See chap.I, section I, *supra*.

definitions that will be looked at are those that seek to set out the characteristics of processions.

One of the characteristics that is traditionally isolated is that of mobility. A standard definition can be said to be the following by Montreuil;

La manifestation est le fait pour une groupe de personnes d'user de la voie publique pour exprimer une volonté collective; si elle est mobile c'est un cortège, si elle est immobile c'est un rassemblement.<sup>3</sup>

From this definition, it can be seen that processions are presented as a particular aspect of a wider notion of *demonstrations*. Therefore the liberty to process is generally defined in a secondary manner; as a demonstration that is distinguished by its *mobile* nature. This mobile form of demonstration is called a 'défilé' or 'cortège' and can be seen as the equivalent of a procession.

Le *cortège* est une suite nombreuse de personnes qui entendent manifester leur opinion par un défile sur la voie publique.<sup>4</sup>

For this reason a presentation of the law regulating the liberty to process will focus on the law of demonstrations and when this term is referred to, it should be understood that reference is being made to processions. A second characteristic builds upon the demonstration function and is present in all types of demonstrations. It asserts that participants in demonstrations express a single and collective will or opinion;

Les cortèges et manifestations sont des rassemblements d'hommes qui se produisent dans certaines circonstances. Ces rassemblements expriment une volonté collective, des sentiments communs.<sup>5</sup>

There is therefore no exchange of views or discussion in a procession and moreover, this characteristic is generally used to distinguish meetings from processions;

Manifester consiste pour les citoyens à se rassembler sur la voie publique en vue d'exprimer une opinion commune par la présence et par la voix. Par la-même, la manifestation, mobile

---

<sup>3</sup> J.-Cl. (Pénal), 'Manifestations', Art.104 à 108, (1990), Fasc.20, 11, 4.

<sup>4</sup> Bédier, *op. cit.*, 18 and Berthon, *op. cit.*, 67-8 also stresses the idea of movement as a characteristic of mobile demonstrations, thus processions are defined as; '...une troupe de gens qui vont ou qui viennent ensemble vers un même endroit, ou d'un même endroit.'

<sup>5</sup> Colliard, *op. cit.*, 743-4.



ou immobile, se différencie de la réunion publique dont le lieu d'exercice ne peut pas - du moins légalement - être la voie publique et dont l'élément principal est le discours, l'échange de discours, voire le débat contradictoire.<sup>6</sup>

In consequence, whereas the liberty to meet protects stationary assemblies, the liberty to process guarantees not only mobile assemblies but also those in which debate and the exchange of ideas is not a feature but where there is a single or unified expression of opinion. No official guidance is however given as to the degree of consensus that is required in order to constitute a demonstration, or what degree of divergence in the opinions expressed by the participants in a march will lead to the activity being characterised as a meeting.

Some commentators use order as an alternative defining characteristic. For example, Colliard asserts;

Le cortège, en dehors de cette notion de mobilité, comporte un élément d'ordre qui est plus marqué qu'en ce qui concerne la manifestation.<sup>7</sup>

This view is echoed by Robert and Duffar;

Le cortège implique un élément d'ordre plus marqué que la simple manifestation; il suppose, en effet, une organisation, des dirigeants, un service d'ordre, du matériel (banderoles, pancartes ou drapeaux...), bref tout un dispositif mis en place par une équipe responsable.<sup>8</sup>

According to this view, processions are a more orderly form of demonstration, than a static demonstration (assembly). This characteristic was also used to distinguish processions from attroupements (assemblies that threaten to breach the peace, which will be examined below);<sup>9</sup>

tandis que dans la notion d'attroupements, semble contenue une idée de spontanéité, d'organisation et de rassemblement accidentel, celle des cortèges et des manifestations éveille à l'esprit au contraire une idée d'organisation et de rassemblement concerté.<sup>10</sup>

---

<sup>6</sup> Tercinet, *op. cit.*, 1010. Another example is provided by Le Clère, *op. cit.*, 7;

'...la réunion, assemblée qui pense et que l'échange des idées oppose à la manifestation, deuxième groupe de la grande famille, qui se caractérise dans la matérialisation d'un but par le nombre.'

<sup>7</sup> *op. cit.*, 743-4 .

<sup>8</sup> *op. cit.*, 560.

<sup>9</sup> See section II, *infra*.

<sup>10</sup> Berthon, *op. cit.*, 32.

A further defining characteristic is that of the location of processions, so that it is generally agreed that they take place on the *public highway*.<sup>11</sup> This can be most clearly seen in the definitions by Montreuil and Tercinet that were set out above.<sup>12</sup>

From the examples presented here it can be seen that there is a tendency in French law to talk of the right to demonstrate ('manifester') and to see processions or marches ('les cortèges' or 'les défilés') as a mobile example of this wider category.<sup>13</sup>

Thus far the liberty to process in France could be defined as protecting processions that are characterised by order, mobility, the public highway as a location and the expression of a consensus opinion. These characteristics have not been tested in the case-law but nevertheless they can be seen to have the same degree of uncertainty or flexibility as was noted as regards the characteristics that defined the right to meet. For example, there is no indication of the degree or kind of movement that is required in order to constitute a procession. Does, for example, moving around in a circle, as in

---

<sup>11</sup> In French law there is no definition of what constitutes the public highway for the purposes of the liberty to process but via a combination of legislative texts and case-law, its legal nature can be elucidated. If it is assumed that public highways are the property of state authorities, then according to art. L.2 of the Code du Domaine de l'État, all property '...qui ne sont pas susceptibles d'une propriété privée en raison de leur nature ou de la destination qui leur est donnée sont considérés comme dépendances du domaine public national. Les autres biens constituent le domaine privé.'

(c.f. Ville de Bordeaux, C.E. 7 Oct. 1967; J.C.P.67.II.15053). As a result, it can be stated that the public highway is part of the 'domaine public' (c.f. Code Civil, art.538 and J. Duffau, Domaine Public, J.-Cl. (Admin.), vol.V, Fasc.405-1, 5, (1992), 6-8).

Returning to the question of what constitutes the public highway, as opposed to questions as to its legal ownership, the responses that have been provided have been at best circular, or they rely on the fact of belonging to the 'domaine public', for example Ordonnance no.59-115 of 7th Jan. 1959, art.1;

'La voirie des communes comprend: (1) Les voies communales qui font partie du domaine public; (2) Les chemins ruraux, qui appartiennent au domaine privé de la commune.'

According to Duffau, *op. cit.*, 15, the 'domaine public routier' consists of '...des voies de communication terrestre affectées à la circulation du public.'

It is submitted that public highways are part of this category of the public domain and that what characterises them ownership and their dedication to the purpose of the movement of pedestrians and motorised vehicles.

<sup>12</sup> See notes 3 & 6, *supra*.

<sup>13</sup> For example, Le Clère claims;

'La manifestation devient l'expression d'une opinion extériorisée par un groupe d'hommes utilisant à cette fin la voie ou un lieu public. Si la foule se déplace, nous parlerons de cortège; si elle reste immobile, ce sera un rassemblement. Mais dans l'un et l'autre cas, il ne saurait être question de discours; sinon, nous verserions dans la réunion ou dans l'attroupement.'

the English case of Tynan v Balmer,<sup>14</sup> constitute a procession? Clearly, whether a procession has occurred or not will often be obvious but what is underlined here is that the defining characteristics have a flexible degree to them. In other words, they have a core and a penumbra.

#### DEFINITION VIA VALUES/FUNCTION

If the above definitions seek to mark out the kinds of activities that the right protects (i.e. marches), the approach that will now be looked at attempts to isolate the *values* that this right seeks to secure. It will be recalled that the same approach was used in chapter III as regards a general definition of the liberties to assemble.<sup>15</sup> Consequently, it is an inquiry into attempts to define the liberty by isolating the valued functions of processions such that their protection is justified. Although this approach has not generally been followed by the commentators, a response can be formulated from the definitions given above.

Therefore, by reason of its being seen as a demonstration, the liberty to meet can be claimed to perform *expression* functions. It will be recalled that the definitions of the liberty to meet by Waline and Tercinet<sup>16</sup> also placed the liberty to meet within a wider category of rights of expression. Robert and Duffar provide yet another example, this time concerning the liberty to process;

On entend généralement par 'manifestation' le fait d'un groupe utilisant la voie publique pour exprimer une opinion par sa présence, ses gestes ou ses cris.<sup>17</sup>

This view can also be seen to be supported by the claim, noted above, that one of the defining characteristics of processions is that they express a single opinion. In addition, it opens up the possibility that the right protects marches that permit the wide range of values that expression was claimed to secure when the general definition of the liberty to assembly was formulated

---

<sup>14</sup> [1967] 1Q.B. 91.

<sup>15</sup> Section, II, *supra*.

<sup>16</sup> See, chap.IV, section I, *supra*?

<sup>17</sup> *op. cit.*, 580 and Costa, *op. cit.*, 93;

'Les manifestations sont des rassemblements d'hommes sur la voie publique en vue de l'expression d'idées ou de revendications.'

in chapter II: democracy, protest, safety-valve, truth and self-fulfilment. This seems apparent from the definition by Berlioz,<sup>18</sup>

La manifestation consiste dans l'expression publique et collective d'une opinion; quelle qu'en soit l'origine, elle correspond à un besoin humain d'expression, elle fait partie intégrante de la liberté d'opinion à laquelle toute démocratie est attachée.

To take protest as one example that illustrates this point, Costa asserts that processions perform a protest function and that this function also indicates public opinions to political leaders. He can therefore be said to be linking protest and democracy as valued functions of the liberty to process;

Le droit de manifester est...devenu peu à peu une revendication assez universelle, un moyen de faire pression sur les pouvoirs publics ou d'attirer leur attention sur un problème ou sur le mécontentement de telle ou telle partie de l'opinion. La bataille pour les droits civiques aux États-Unis s'est appuyée sur de vastes rassemblements devant le Capitole; les manifestations en Afrique du Sud soutiennent la lutte contre l'apartheid; moins dramatiquement, les catégories sociales qui sont en conflit momentanément avec des employeurs ou avec l'État cherchent à peser sur eux, ou à frapper l'opinion, par la grève et par la manifestation.<sup>19</sup>

If the liberty to process is accepted as a liberty that protects marches because they are a means to communicate and express views, then it could be argued, as it was for the liberty to meet, that it falls within the liberty of opinion guaranteed by art.11 of the 1789 Declaration.<sup>20</sup>

An alternative function or value that is isolated by Costa is that the liberty to process is part of a wider category of group liberties. It has already been seen that he makes the same claim for the liberty to meet<sup>21</sup> but it should be noted that he hints that the valued function of group liberties is a democratic one;

l'individualisme, en France, a longtemps prévalu, du point de vue des libertés, sur les droits des groupes.

Ce fut le mérite de la III<sup>e</sup> et de la IV<sup>e</sup> Républiques de reconnaître progressivement ces derniers, de faire passer notre pays de la démocratie politique à la démocratie sociale, ou plutôt peut-être de la démocratie *atomisée* à la démocratie *organisée*..

---

<sup>18</sup> 'Les manifestations', Revue de Police Nationale, no.126 Dec. (1987), 4 at 6.

<sup>19</sup> *op. cit.*, 93-4.

<sup>20</sup> Montreuil, 'Manifestations', *op. cit.*, 2

<sup>21</sup> See, chap.IV, section I, *supra*.

This section concludes with the observation that as far as definitions that seek to delimit the *characteristics* of processions, the liberty to process is seen as an *assembly* right, whereas definitions that concentrate on the values and functions of the liberty emphasise its position as performing *expressive* functions. Therefore, the liberty to process in France can be said to protect marches on the public highway because they are seen to be an important means of communicating opinions and feelings. In turn these opinions and feelings are valued for the traditional variety of reasons that are claimed to be the functions and values of the right of expression.

## SECTION II THE HISTORY OF LEGAL REGULATION

The 1935 decree-law, which was also seen to partially regulate the liberty to meet, forms the central legal measure as far as the liberty to process is concerned. This section therefore concentrates on the history of this enactment. However, in analysing its history, it would appear that two separate but related historical contexts reveal themselves, which require a historical analysis that goes beyond solely discussing the decree-law.

The first relates to previous legal provisions which regulated other forms of assembly but which may have influenced the provisions of the 1935 decree-law. It has already been noted that in relation to the liberty to meet, the 1881 Act, although innovative in many aspects, draws much from preceding legislative texts. In the same way, the 1935 decree-law has a legislative history that strongly influences, and to a large extent explains, its current provisions. Consequently, an attempt will be made to elucidate this history by an analysis of the relevant provisions prior to the decree-law. It will be observed that there was a tendency on the part of the authorities not to differentiate between different categories of the liberty of assembly and non-peaceful gatherings when enforcing the law. The result was that although differentiation was sometimes evident at a formal level - in that some texts were clearly stated to have other forms of assembly and/or violent activities in mind - as far as actual practice these laws were indiscriminately applied across the wide range of activities that constitute the liberties to assemble, including the liberty to process.

The second historical context relates to the political and social context in which the 1935 decree-law was passed. Just as the 1881 Act was seen to be the product of a period of calm and the belief that meetings were less of a threat to the public peace, so the 1935 decree-law can be seen to be the product of a particular historical moment. The socio-political events of this time explain a great deal of its provisions. This type of more specific historical investigation is linked to the first since in responding to the particular needs raised in the 1930s, the authorities were able to draw on previous legal provisions.

### PRIOR LEGAL TEXTS

Before the 1935 decree-law, the liberty to meet was characterised by a lack of formal legal recognition, such that it was either simply tolerated by the authorities or restricted using the police general public order powers or those provided by specific enactments aimed at other types of assemblies.

#### *Public order and other enactments*

Despite the fact that processions of a political and religious nature have been noted as having taken place under the Ancien Régime,<sup>22</sup> it is the Revolutionary period that provides the starting point for texts which have influenced present legal regulation because it was via the general public order powers, first formulated at this time, that marches were, and to a great extent still today, regulated.<sup>23</sup> Therefore, it is in this period that the fundamental principles and practices of public order were formulated.<sup>24</sup> Montreuil notes that the organisation of a public force to maintain public order took place at this time.<sup>25</sup> In addition, the principle of a public force to maintain public order, consisting of ordinary citizens, whose intervention was only to be at the request of civil authorities, became established in this period.<sup>26</sup>

---

<sup>22</sup> For example, Colliard, *op. cit.*, 744 and Montreuil, 'Manifestations', *op. cit.*, 2-3.

<sup>23</sup> For public order powers before the Revolution, see Bédier, *op. cit.*, 21-37 and Le Clère, *op. cit.*, 8-10.

<sup>24</sup> Bédier, *op. cit.*, 14;

'C'est pendant la Révolution que sont nés les grands principes du maintien de l'ordre public et de la défense nationale...la primauté du pouvoir civil...'

<sup>25</sup> *op. cit.*, 3.

<sup>26</sup> See, for example, Carrot, *op. cit.*, v and 15-24. His central thesis is that it was the Revolution that established the principle of a public force to maintain order, aside from the army or other forces under executive control which had been one of the hallmarks of the Ancien Régime (pg.v). This public force was exemplified by the creation of the 'les Gardes Nationaux' (pg.20-2). The practical application of this principle was to last until the Thermidor Convention of 1795, when the army re-assumed a predominant role (pgs.195-220). Nevertheless, despite the

(Footnote continues on next page)

The constituent assembly, therefore set up local police forces ('corps municipaux': prefects and mayors) and granted them powers and duties to maintain public order by virtue of the Law of the 16-24th Aug. 1790<sup>27</sup> and the Law of 19-22nd July 1791 concerning the organisation of local police forces. Although, the liberty to process was not subjected to any specific legal requirements, such as prior declarations as in the case of meetings, the police authorities were able to regulate processions by reason of these general duties and powers to maintain public order.<sup>28</sup>

An important text in this period was the Decree of 20th July-3rd Aug. 1791, which prohibited seditious assemblies. This is because these assemblies were widely defined and could be used to prevent many types of assembly, as well as justifying the use of force to disperse them.<sup>29</sup> This is an example of a text whose terms were sufficiently wide, despite the ostensible aim of only regulating a specific form of assembly, to permit of its application to other forms of peaceful assembly, such as processions and meetings. The law on *atouppements* is a classic case in point.

### *Atouppements*

Despite the passage of texts which secured the right of peaceful assembly<sup>30</sup> and prohibited interference with those who wanted to organise and participate in the activities of clubs,<sup>31</sup> it was noted in chapter IV that there

---

use of the army by subsequent political regimes, a public force was always maintained at least in law, if not in practice, as enshrined in art.12 of the 1789 Declaration; 'La garantie des droits de l'homme et du citoyen nécessite une force publique; cette force est donc instituée pour l'avantage de tous, et non pour l'utilité particulière de ceux à qui elle est confiée.'

<sup>27</sup> *op. cit.* It will be recalled that these powers and duties are today found in art.L.131-2 of the Codes des Communes.

<sup>28</sup> Le Clère, *op. cit.*, 43 and Burdeau, *op. cit.*, 225.

<sup>29</sup> The decree prohibited;

'...tout rassemblement séditieux de plus de quinze personnes s'opposant à l'exécution d'une loi, d'une contrainte ou d'un jugement.'

This text was in turn repeated in the laws granting police powers to the prefects of police; Law of 28 Pluvoise an VIII (17th Feb. 1800) and Consular Decision of 12 Messidor an VIII, *supra.*, chap.IV, section II.

<sup>30</sup> See for example, art.62 of the Law of 14th Dec 1789, *supra.*, chap.IV, section II, which it will be recalled secured the right to peaceful assembly.

<sup>31</sup> The Law of 13-19th Nov. 1790, legally recognised clubs, whilst it was earlier noted that the Decree of 13th June 1793 prohibited interference with those who attended club meetings (see chap.IV, section II, *supra.*).

were continued outbreaks of public disorder after the Revolution. Much of this disorder was dealt with by laws concerning 'attroupements', which were assemblies that threatened to breach the peace.<sup>32</sup> Even though these measures formally sought to restrict attroupements, the width of their definition and the anxieties of the authorities often meant they were applied to a wide range of assembly activities, including processions.<sup>33</sup> For example, according to Vitu and Montreuil,<sup>34</sup> attroupements were defined by art.9 of the Decree of 26th July-3rd Aug. 1791 in exactly the same terms as seditious meetings;

Sera réputé attroupement séditionnel et puni comme tel, tout rassemblement de plus de 15 personnes s'opposant à l'exécution d'une loi, d'une contrainte ou d'un jugement.

---

<sup>32</sup> There appears to be no direct translation of this term in English law, therefore the term 'attroupement' will be retained in this paper. It has been defined as; '...une atteinte à l'ordre public, à la tranquillité publique, constituée par le rassemblement sur la voie publique ou dans un lieu public d'un nombre indéterminé de personnes, soit lorsque ledit rassemblement est armé, soit lorsque non armé il "pourrait troubler la tranquillité publique" alors que les premières sommations légales ayant été effectuées, les participants ne se sont pas dispersés.'

(A. Vitu & J. Montreuil J.-Cl. (Pénal), 'Attroupements', Fasc.30, 11, (1990), 7.

However, this definition was formulated before the coming into force of the new penal code, which by virtue of art.431-3 defines attroupements as;

'..tout rassemblement de personnes sur la voie publique ou dans un lieu public susceptible de troubler l'ordre public.'

This new definition would seem to have resolved a controversy as to meaning of attroupement. Thus, Robert & Duffar, *op. cit.*, 581-2 previously asserted that there were two competing definitions. The first stated that an attroupement was an unorganised gathering of people on the public highway and that it only became illegal when it did not disperse when requested to do so by the police authorities. The defiance of police authority was therefore required, according to this definition. The second definition asserted that an attroupement was constituted by an organised gathering of persons on the public highway, who intended to breach the peace or had another illegal object in mind. In this definition the emphasis was on public disorder and not the failure to obey authority. The current formulation adopts the second definition in that an attroupement is formed before any requests to disband have been made (see *infra.*). However, it will be seen that sanctions are only applicable to those who do not disband once requested to do so and for this reason the second definition has also influenced the law.

<sup>33</sup> Montreuil, 'Manifestations', *op. cit.*, 3 notes of this period;

'L'époque connaît, outre les journées révolutionnaires, d'innombrables manifestations tumultueuses que la force publique est incapable de réduire (quand elle s'y efforce) autrement que par l'usage des armes...Dans une telle conjoncture, il est impossible de distinguer l'attroupement séditionnel de la simple manifestation, cette confusion étant aggravée par l'amalgame entre l'association, la réunion publique et la manifestation, amalgame entretenu par le pouvoir en réaction contre l'immixtion permanente des clubs dans l'exercice du législatif et de l'exécutif.'

<sup>34</sup> *op. cit.*, 6.



Given the already noted width of the definition of seditious meetings, the control of attroupements could similarly restrict peaceful assemblies.<sup>35</sup> The intermittent disorder of the Revolutionary period eventually led to a ban on attroupements by virtue of art.365 of the 1795 Constitution;

Tout attroupement non armé doit être également dissipé, d'abord par voie de commandement verbal, et s'il est nécessaire, par le développement de la force armée.

From this time the French legal structure continued to contain measures against attroupements which were then applied to other forms of assembly, including the liberty to process. For example, the Law of 10th April 1831 provided that;

Toutes personnes qui formeront des attroupements sur la place ou la voie publique seront tenues de se disperser à la première sommation des Préfets, Sous-Préfets, Maires, Adjointes au Maire, Magistrats, et officiers civils, chargés de la police judiciaire.

The provisions of the 1831 Act were taken up in the Law no.459 of 7th June 1848,<sup>36</sup> by virtue of which the authorities could disperse such attroupements using force, after it had been summoned to disperse by an official. The incitement of an attroupement was also declared a crime.<sup>37</sup> This procedure was in the main retained in arts.104-108 of the former penal code.

However, it is important to underline that an attroupement was, and still is, characterised as a *threat to public order*. Therefore a view must be taken by the authorities that such disorder is likely and this is a subjective decision that is invariably taken by the police on the spot. This public order requirement has now been recognised in art.431-3 of the new penal code, which regulates attroupements.

---

<sup>35</sup> In this connection, Le Clère, *op. cit.*, 53, notes that the 1791 decree could be used to sanction any threat to legal authority, no matter where it took place;

'En vertu de l'article 9, il est donc possible à tout magistrat civil de pénétrer dans le domicile privé d'un citoyen où se trouveraient rassemblés plus de 15 personnes dont l'attitude manifesterait clairement leur opposition à l'exécution d'une loi...'

<sup>36</sup> This was in turn inspired by the English Riot Act 1714.

<sup>37</sup> See generally, Berthon, *op. cit.*, 34-40, Le Clère, *op. cit.*, 51-67, Bédier, *op. cit.*, 218-225 and Vitu & Montreuil, *op. cit.*, 6-7.

### *A legal combination*

It was the combination of the general public order powers and more specific enactments restricting *atroupements* that provided the police with the power to ban or attach conditions to processions from the mid-nineteenth century up until the 1935 decree-law.

Processions could thus be banned in order to maintain public order and therefore the imposition of conditions relating to time, location, route and numbers could be justified on a similar basis. However, almost exclusively the public order power was used to ban. It would seem that as far as sanctions for breaches of these bans were concerned and the use of force by the police, the 1848 statute concerning *atroupements* was relied upon, so that if a procession took place after it had been banned on the basis of the public order powers, the organisers could be prosecuted for having provoked an *atroupement* and also the participants for failing to disperse after having been ordered to do so. Essentially, breach of a ban had the legal effect of transforming the subsequent procession into an *atroupement*.<sup>38</sup>

It is doubtful whether such decisions to ban, or otherwise regulate, the liberty were subject to judicial control.<sup>39</sup> The discretion granted to the police whether to characterise processions as actually or potentially violent has already been noted as regards the laws concerning seditious assemblies and *atroupements* and must be added to by that provided by the general public order powers of the police.

---

<sup>38</sup> Colliard, *op. cit.*, 744-5;

'...l'autorité de police ayant connaissance d'une manifestation ou d'un cortège projeté pouvait le réglementer et même l'interdire dans certains cas. Lorsque la manifestation ou le cortège étaient ainsi interdits, s'ils se produisaient tout de même, il y avait lieu de les considérer comme les *atroupements* illégaux, pouvant être dissous par la force.'

(c.f. Tercinet, *op. cit.*, 1014).

<sup>39</sup> In fact the Conseil d'État only began to review the facts in a case in order to ascertain their material accuracy ('l'exactitude matérielle') and whether they justified the administrative act/decision in 1916 (Camino, C.E. 14th Jan. 1916; S.1922.3.10) and 1914 (Gomel, C.E. 4 April. 1914; S.1917.3.25) respectively. Berthon, *op. cit.* 43-45 notes the slow development of judicial review by the Conseil d'État, especially as regards the exercise of local police powers; 'Introduire dans les motifs que l'interdiction s'inspirait d'un souci d'ordre public constituait une présomption de rectitude n'admettant pas la preuve contraire; c'est une présomption *juris et de jure*. Le Conseil s'interdit de rechercher au fond la sincérité de l'arrêté attaqué.' (pg.45).

### *Authorisations and general bans*

The police took advantage of this position of strength in order to *authorise* processions. It has been noted in the context of the liberty to meet that Mayors could justify general bans on the basis of their general public order powers/duties and the same situation existed as regards the liberty to process. This, in turn, resulted in a framework where, in effect, authorisation was required from the police authorities. Therefore, organisers of processions had to seek an exemption from the general ban. In other words, their procession had to be authorised. Where, on the other hand, the organisers desired to have the ban lifted, they would have to provoke a refusal by the police authorities to authorise the procession which could then be challenged before the Conseil d'État.<sup>40</sup>

It has been claimed that the Conseil d'État annulled every refusal to 'authorise' processions in such circumstances and was generally hostile to general bans.<sup>41</sup> However, this only occurred from the beginning of the twentieth century, when the Conseil began to engage in a detailed factual review of police decisions and furthermore, was only as regards religious marches (see, *infra.*). Before then, it has been noted that the Conseil rarely interfered with these police decisions,<sup>42</sup> so that when they struck down refusals to authorise, this was based upon their unwillingness to countenance *discriminatory* authorisation. Therefore, the court would typically state that where the authorities exempted certain processions from the terms of a general ban, whilst still applying it to others, and where there were no factual circumstances to lawfully justify such discrimination, this constituted unlawful discrimination on the part of the administration.<sup>43</sup>

---

<sup>40</sup> Berthon, *op. cit.*, 122;

'Lorsqu'en effet, de tels arrêtés avaient été pris, l'état normal était...l'interdiction et pour lever cette interdiction il fallait obtenir une autorisation.'

<sup>41</sup> Berthon, *op. cit.*, 49.

<sup>42</sup> A. Fossier, 'Les manifestations culturelles sur les voies publiques en France', (1927), 95-99 and Berthon, *op. cit.*, 43-7.

<sup>43</sup> Berthon, *op. cit.*, 121 quotes the following dictum as a typical example of the Conseil's decisions at this time;

'...Annulé l'arrêt d'interdiction, le maire ayant par deux fois repoussé la demande d'autorisation de la Société Philharmonique de Fumay, alors que la Société musicale subventionnée sort librement.'

The Conseil d'État had thus not yet begun to develop a form of judicial review by which they could scrutinise the administration's reasoning, other than for the breach of the general principle of equality before the law (c.f. Colliard, *op. cit.*, 202-29). In this way, the Conseil

(Footnote continues on next page)

It would seem that as a result of this development of exacting judicial review and the consequent hostility that the judiciary came to show towards general bans, they gradually became virtually non-existent. Instead, by the 1920s and 1930s police interference with the liberty to process could only be justified on public order grounds relating to a particular procession. This development has been seen as the beginnings of the application of the doctrine of proportionality, so that the Conseil eventually came to investigate the nature of the apprehension of public disorder in order to check that it was legitimately related to the resulting restriction;<sup>44</sup>

Le Conseil d'État ne se borne pas à faire une constatation des faits, dans leur existence pure et simple, dans leur matérialité. Il examine si dans les circonstances de temps, de lieux, de milieux, révélées par l'instruction, les mesures de police devaient ou non être édictées.<sup>45</sup>

However, the degree of protection accorded to the liberty to process was less than that accorded to human rights that were guaranteed by a statute, such as the liberty to meet;

nos libertés de cortège de manifestation, ne sont garanties par aucun texte précis; ce ne sont que des conséquences certes inéluctables, mais des conséquences de la liberté du citoyen. Leur interdiction est elle aussi, de ce fait, une mesure moins grave que celle d'une réunion.<sup>46</sup>

The result is that the police enjoyed a greater discretion as to how they employ their public order powers because the legislator had not laid down any specific restrictions as to how this power was to be exercised.<sup>47</sup> Nevertheless, this greater discretion was and still is subject to the traditional and general requirement, noted in the previous chapter, of having to reconcile public order and liberty.

---

d'État did not see itself as second-guessing substantive decisions but rather as ensuring a form of procedural propriety.

<sup>44</sup> Berthon, *op. cit.*, 108 and Fossier, *op. cit.*, 104-115 trace the origins of this development in the case-law between 1903 and 1905.

<sup>45</sup> Fossier, *op. cit.*, 110.

<sup>46</sup> Berthon, *op. cit.*, 115.

<sup>47</sup> Teitgen, *op. cit.*, 133;

'Dans le silence de la loi, il lui appartient de les définir complètement et de déterminer toutes leurs limites d'ordre public.'

Another important development occurred in the same period concerning religious processions and these changes were to have important implications for the 1935 decree-law.

### *Traditional and religious marches*

At the same time as the Conseil d'État developed a more rigorous review of administrative decisions in the early years of this century, it formulated a distinction between processions of a local-traditional character and other types of processions. These types of processions benefited from a more libertarian legal framework, according to which bans had to be more strongly justified than would have been the case as regards ordinary processions. The case-law regarding processions within this category is vast but from the welter of cases, commentators have identified the gradual expansion of this category of more highly protected processions.<sup>48</sup>

Initially, when general bans were being struck down in the 1920s and 1930s, no distinction was made between local-traditional and other types of processions. However, for a long time prior to this period the Conseil had required that when the police decided to interfere with *funeral convoys*, the decision had to be justified by public order concerns. In other words, the police authorities had to reasonably apprehend public disorder as a result of the funeral procession and the only way in which order could be maintained was by restricting the march.<sup>49</sup> On this basis, the Conseil struck down these kinds of bans on several occasions and this was extended to other kinds of religious processions. The Conseil then began a process of widening this privileged category in such a way that it also came to include secular processions.<sup>50</sup>

---

<sup>48</sup> See generally, Fossier, *op. cit.*, 99-103.

<sup>49</sup> See Berthon, *op. cit.*, 48 and Marchand, C.E. décr. 10th Jun. 1900; S.1904.3.44, Jourdain, C.E. décr. d'abus 14 th Aug. 1905, Rec.Leb.855 and Olivier, C.E. 15th Feb. 1909; Rec.Leb.180.

<sup>50</sup> Fossier, *op. cit.*, 101 observes;

'Tout l'effort de la jurisprudence administrative va tendre à élargir la notion de procession traditionnelle, à la rendre de plus en plus compréhensive.'

Berthon, *op. cit.*, 49 notes the use of two formulae by the Conseil d'État when striking down decisions to ban such processions;

'...parce que ces interdictions s'appliquent au port viatique, aux convois funèbres et aux cérémonies fondées sur les traditions locales.'

and also,

'...parce que ces interdictions s'appliquent aux cérémonies qui ont pour objet le culte des morts et celles qui sont consacrées par les habitudes et les traditions locales.'

First it assimilated traditional Catholic<sup>51</sup> processions which celebrated the feast days of saints to the libertarian greater protection it accorded to funeral convoys.<sup>52</sup> From 1920, as it gradually expanded the types of processions within this category, the Conseil finally developed a presumption that local-traditional marches and not solely those of a religious nature, did not pose a threat to public order.<sup>53</sup>

The Conseil has never justified this differential treatment. That these types of processions were seen as posing less of a threat to public order is clear but little or no attempt has been made to analyse the reasons behind this perception.<sup>54</sup> It is submitted that the beneficial treatment of religious demonstrations is to a large extent connected to the politics surrounding religion at this time. This, in turn, concerns the wider relations between the Church and the State, which were already touched upon in the context of the liberty to meet but will be investigated in more detail here.

Firstly, the Catholic church had become definitively separated from the State in 1905, by virtue of a statute that at the same time guaranteed the liberty of conscience and religion.<sup>55</sup> Despite the fact that this Act specifically applied the general public order duties/powers (art.27) to religious assemblies that

---

<sup>51</sup> Given the dominant position of the Catholic church as the State religion before the separation between Church and State (*supra.*, chap.IV), it is this religion that was affected by the legal regulation and case-law of this time.

<sup>52</sup> According to Colliard, *op. cit.*, 454, this first occurred in Abbé Didier, C.E. 1st May 1914; Rec.Leb.515 (c.f. Fossier, *op. cit.*, 101 who confirms this view).

<sup>53</sup> See for example, Behague, C.E. 10th Dec. 1920; Rec.Leb.1057, Loeuillet, C.E. 24th Dec. 1920; Rec.Leb.1116 and Fossier, *op. cit.*, 102-3.

<sup>54</sup> Robert & Duffar & Duffar, *op. cit.*, 581, simply remark;

'Ce régime de faveur se justifie ici pour deux raisons: d'une part, ces processions sont couvertes par la liberté des cultes; d'autre part, la tradition garantit qu'il n'y aura pas des troubles.'

<sup>55</sup> Commonly called the 'Law of Separation' of 9th Dec. 1905, (chap.IV, *supra.*); see generally Colliard, *op. cit.*, 438-40 & 453-6, Le Clère, *op. cit.*, 92 and Robert & Duffar, *op. cit.*, 421-9. The statute removes the status of state ceremonies from Catholic and other religious ceremonies but preserves the surveillance powers of the police. The crucial articles for present purposes are art.1;

'La République garantit le libre exercice du culte sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public.'

and art.27;

'Les cérémonies, processions et autres manifestations extérieures d'un culte continueront à être réglées en conformité des articles 95 et 97 de la loi municipale du 5 avril 1884 [the general public order powers were contained in these provisions at this time].'

took place in public, the Conseil d'État went on to interpret the Act as creating a presumption in favour of the liberty of religion. The result was that public order powers could only be exercised whilst respecting religious freedom. In effect, this meant that religious marches could only be interfered with by the authorities in exceptional circumstances and a decision to so interfere would be reviewed more closely in order to ascertain whether those circumstances had actually existed. It could therefore be claimed that because of the statutory level of protection given to religious freedom a higher burden of justification was required before official interference with religious processions would be accepted as lawful; in other words, there was a rebuttable presumption that religious processions were orderly.

Secondly, it is suggested that despite the formal separation of Church and State, religion remained central to local life. At a local level, important personages were connected with the Church and religion continued to be a nexus of community solidarity and consensus. Dissenting and violent elements were therefore perceived as unlikely, and, what is more, it was not perceived that people of influence and important local standing (who were those normally involved in church affairs) would be likely to be involved in encouraging public disorder. Essentially, it is submitted that at the level of perception, religious processions were not perceived as being likely to result in or indirectly cause public disorder in the form of violent counter-processions and demonstrations.

Legal theory is accustomed to the notion that the law as an institution can, by virtue of its ultimate recourse to coercive force, alter the perceptions of those that are subject to it.<sup>56</sup> In social theory it has been asserted that religion, as an institution, acts in much the same way because it is part of the state's coercive apparatuses. According to this theory, most clearly elaborated by L. Althusser,<sup>57</sup> an institution which can ultimately resort to coercion invariably produces an ideology that legitimates that institution. This is because the sole use of force to ensure social compliance and acceptance of the institution is at

---

<sup>56</sup> See for example, K. Olivecrona, 'Law as Fact' (1939).

<sup>57</sup> 'Ideology and Ideological State Apparatuses' in 'Lenin and Philosophy' (1972). The claim that religion is a way of legitimating, reproducing and ensuring social order is made by E. Durkheim, 'The Elementary Forms of Religious Life' (1912), particularly, 207 *et. seq.* If this theory is accepted, the perception that religion and order were compatible can be better understood.

best inefficient and, at worst ineffective. It can be claimed that this process occurred as regards the perception of religious processions in the early nineteenth century, so that religious processions came to be perceived as overwhelmingly orderly.

Thirdly, religious processions, because of the reasons stated above and their long history, were seen as one of the normal and legitimate uses of the public highway. Far from being contrary to the public interest, they were seen to *serve* this interest. This can be contrasted with secular processions which were seen as exceptional, in the sense of not being connected so closely with local life and thus were not so easy to assimilate into what were considered to be normal quotidian activities, such as the use of the public highway.

#### *Prior negotiation*

Within this pre-1935 context of no explicit regulation of the liberty to process, the formal legal position of the liberty was that it could take place without legal restrictions or formalities. However, it has been shown that the public order authorities could intervene in order to prevent a threatened or actual breach of the peace and to disperse an *atroupement*. This formal legal position seems to have led to a practice of prior negotiation and consultation between those desiring to exercise the liberty and the police authorities.

Thus, Tercinet claims that the ability of the police to intervene upon discovering that a procession was to take place was the reason why this practice developed;

C'est pourquoi un *modus vivendi* s'est établi, les organisateurs d'une manifestation venant, dans la plupart des cas, demander officieusement, aux autorités administratives, si leur projet ne risquait pas de se heurter à une interdiction.<sup>58</sup>

Le Clère appears to make the same point;

les organisateurs d'une manifestation venaient s'enquérir officieusement auprès des autorités si celle-ci ne risquait pas d'être interdite et les préfets et les maires protégeaient l'exercice du droit de manifestation ainsi autorisé d'une façon détournée.<sup>59</sup>

---

<sup>58</sup> *op. cit.*, 1013.

<sup>59</sup> *op. cit.*, 44.



Essentially, the powers enjoyed by the police accorded them a position of strength that allowed them to impose a practice of prior negotiation. This practice of prior negotiation was based upon the police having the potential to resort to the power to restrict processions, not merely by reason of the law of attroupements but also because of their general public order duties and powers.

### *Summing up*

The history of the regulation of the liberty to process has shown that this liberty was regulated by a combination of texts and powers, none of which were formally aimed at the liberty. The emphasis in this regulatory framework was on the prevention of public disorder, hence the application of laws that were clearly aimed at violent assemblies and the maintenance of public order. This legal framework also led to informal or extra-legal negotiation and authorisation procedures. An important historical factor was the development of a perception that religious and traditional marches were unlikely to be the cause of public disorder. Nevertheless, it must be stressed that other types of processions were not yet distinguished from disorderly and riotous assemblies and it will be seen that although a distinction can be said to have been achieved in the 1935 decree-law, this context of disorder retains a powerful hold over how processions and the liberty to process are perceived. The specific context of the 1935 decree-law will now be analysed and it will also be seen in the next section, which describes the current regulation of the liberty, that the provisions of the decree-law are very much a product of the public disorder of the 1930s.

## **THE HISTORICAL CONTEXT OF THE 1935 DECREE-LAW**

Although it is claimed that the 1935 decree-law was a response to serious public disorder, this was part of a wider context of violence in the mid-1930's which took place against a backdrop of economic depression, political and ideological confrontation and the gradual establishment of the politics of the street as an alternative to parliamentary politics. It is these three elements that intertwine to form the context of the 1935 decree-law.

### *Economic depression*

The economic depression, precipitated by the Wall Street crash of 23rd October 1929, can be taken as a starting point. The depression took much longer to hit France but its effects were longer lasting. In fact, the timing of

the crash coincided with a feeling of prosperity across the nation.<sup>60</sup> The measures taken by successive governments in response to the economic crisis have generally been seen to have been as at best inadequate and at worst to have caused even further economic damage.<sup>61</sup> The failure to respond to the problems posed by the depression were as much due to economic ineptitude, as to political in-fighting and corruption.

### *Political crisis and street politics*

The Left came to power in the May elections of 1932. However, this was a highly unstable coalition between the Socialists and Radicals.<sup>62</sup> It was

---

<sup>60</sup> It is widely agreed that the period around the resignation of Poincaré in 1929 was the period during which France was at its most prosperous; see P. Bernard & H. Dubrief, 'The Decline of The Third Republic: 1914-1938' (1985), 173-5, A. Werth, 'The Twilight of France: 1933-1940' (1942), 4. The depression did not affect France until the Autumn of 1931, according to W.L. Shirer, 'The Collapse of The Third Republic: An inquiry into the Fall of France in 1940' (1970), 170 and J.P. Azéma & M. Winock, 'Naissance et mort: la Troisième République' (1976), 208. The feeling of prosperity was to a large degree based upon illusory wealth, in the form of speculative capital (Bernard & Dubrief, *op. cit.*, 174). Although France did not suffer as much as other countries during the depression, the economic effects should not be underestimated; according to Shirer, *op. cit.*, 170, it was the worst economic crisis to hit France for one hundred years.

<sup>61</sup> The depression had the effect of reducing retail prices more than wages, so that in 1932 the cost of living fell by 10% but the problem was that there was not a corresponding rise in purchasing power (which actually fell), this being due to an increase in unemployment of two million (Bernard & Dubrief, *op. cit.*, 179-89). Throughout this period each successive French government was to pursue, with varying degrees of rigour, deflationary policies. This policy is claimed to have been disastrous for the French economy; 'The depression was kept going by the decline in purchasing power, which was required to sustain deflation. Meanwhile other countries were pulling out of crisis.' (Bernard & Dubrief, *op. cit.*, 188 and c.f. 187-202), and Shirer, *op. cit.*, 171;

'At home the governments followed a disastrous policy of severe deflation. Production was curbed, wages and salaries cut. Misery increased. And resentment.'

For further analysis and criticism of French economic policy during this period, see E. Bonnefous, *op. cit.*, 224, 228 & 341-2 and J. Chastenet, 'Histoire de la Troisième République: déclin de la Troisième 1931-1938' (1962), 125-7 & 171.

<sup>62</sup> It was the Radicals that remained in power during the most acute period of the depression, despite the often faltering coalition with the Socialists. For an account of the conflict between these two political parties, see Werth, *op. cit.*, 10-13. One of the Socialist's most vehement criticisms of the Radicals during this period was that deflationary policy was aggravating the economic crisis. The conflict between them has been seen as a contributing factor to the re-emergence of the extreme right and the consequent public disorder;

'The discord between the two great Left parties - the victors of 1932- was the dominant note in French parliamentary life during the next two years, and was largely responsible for the great crisis of French democracy, which culminates in the riots of February 6th, 1934',

(Werth, *op. cit.*, 11),

and Azéma & Winock, note *op. cit.*, 206;

(Footnote continues on next page)

therefore not long before the Socialists left the coalition and so for the next two years they were only able to either simply vote against measures proposed by the Radicals (thereby in effect siding with the Centre or Centre Right) or abstain from voting. This division within the political Left weakened their power to deal with the depression and also enhanced the electoral credibility of the Centre-Right.<sup>63</sup>

As resentment against the Left grew, a series of financial scandals were exposed and exploited by the right-wing press, the worst of which was the Stavinsky affair.<sup>64</sup> The object of resentment then became the Republican system itself. It came to be seen as corrupt, as well as being bankrupt as far as policies to alleviate the hardships caused by the depression. The extreme-Right again became popular, manifesting this popularity in the re-emergence of the Leagues,<sup>65</sup> who marched in the streets and held protest rallies.<sup>66</sup> The

---

'...l'inaptitude de la gauche à retrouver un principe d'unité et à établir un programme de gouvernement, en des temps qui ne sont plus ceux de la défense républicaine, mais ceux de la défense monétaire (en apparence) et de l'expansion économique (en réalité).'

<sup>63</sup> The list of left-wing governments during this period is testament to the weakness of the Left; (1) E. Herriot, 3rd June-14th Dec. 1932; (2) Paul-Boncour, 18th Dec. 1932-28th Jan. 1933; (3) E. Daladier, 31st Jan.-24th Oct. 1933; (4) A. Sarraut, 26th Oct.-23rd Nov. 1933; (5) C. Chautemps, 26th Nov. 1933-27th Jan. 1934; (6) E. Daladier, 30th Jan.-7th Feb. 1934.

In addition to the growing resentment felt at the instability of the governments of the Left and their consequent inability to govern in the face of the worsening economic crisis, the Left also lost support to the Right, in large part because, according to Bernard & Dubrief, *op. cit.*, 195, the depression worst affected those on fixed incomes and the non-salaried: the traditional supporters of the Left. In contrast, the supporters of the Right, because they were predominantly people of 'rank and substance', remained relatively unaffected by the depression.

<sup>64</sup> The Stavinsky affair first came to national attention on 5th Jan. 1934 (see Werth, *op. cit.*, 14-15, Chastenot, *op. cit.*, 191, D.W. Brogan, 'France Under The Republic: The Development of Modern France' (1940), 653-4 and for a brief résumé of the financial scandals during this period, see Shirer, *op. cit.*, 191). The scandal implicated members of all three branches of government. This further added substance to the belief that the Republic was irredeemably corrupt (Azéma & Winock, *op. cit.*, 209-11).

<sup>65</sup> There were numerous leagues, including the Croix de Feu (under the leadership of La Rocque), Action Française (supported by right-wing deputies such as Xavier Vallat), the Camelots du Roi and Françisme (founded by M. Bucard). Some were openly Monarchist, whilst others merely sought the return of a strong executive. All, however, were against the Republican status quo and its perceived corruption (c.f. Shirer, *op. cit.*, 183-5, Carrot, *op. cit.*, 713-4 and A. Cobban, 'A History of Modern France' vol III, (1978), 142-4).

<sup>66</sup> These rallies were sometimes held on private land, as Werth, *op. cit.*, 60 notes; 'The Croix de Feu had numerous patrons among the wealthy landed proprietors, and it was usually on some "private" estate that the rallies were held - which in the eyes of the Croix de Feu leaders, rendered them perfectly legal.'

whole political system was now under attack and this is made particularly evident by the advent of street politics and the events of 6th February 1934.<sup>67</sup>

*The riot of 6th February and the political consequences*<sup>68</sup>

Under this pressure the Chautemps government resigned and Edouard Daladier took over. His attempts to appease public opinion as regards the scandals largely failed.<sup>69</sup> Indeed, his decision to remove the popular Prefect of Paris (Chiappe) from his position exacerbated matters and gave the extreme-Right yet another cause for which to attack the government. Thus, the Leagues marched in order to protest against the way Chiappe had been treated. Apart from his embarrassing involvement in the Stavinsky scandal, another reason Daladier removed Chiappe was because of his widely acknowledged leniency towards the Leagues, as well as his cordial relations with their leaders.<sup>70</sup> The Leagues grew in confidence as a result of the resignation of the Chautemps government, which they interpreted as a success for their style of street politics. Given this fervent atmosphere, a

---

<sup>67</sup> The Right became indignant and demanded that an inquiry into the Stavinsky affair should be held but the prime-minister (Chautemps) refused their demands. He eventually resigned as a result. Meanwhile, as part of the growing anti-Republican feeling, the Leagues swelled in number and took to the streets, with the growing support of public opinion; 'The public, especially in volatile Paris, was getting fed up with such doings. If Parliament and government would not clean up their own houses then the people of Paris might have to take to the street, as they had in 1789, 1830, 1848 and 1871.' (Shirer, *op. cit.*, 188).

<sup>68</sup> For accounts of the riot and its political aftermath, see generally, S. Bernstein, 'Le 6 Février 1934' (1975), M. Le Clère, 'Le 6 Février' (1967) and M. Charvardès, 'Le 6 Février 1934: La République en danger' (1966).

<sup>69</sup> In response to the Stavinsky scandal a series of marches were organised by the Leagues in Jan. 1934 (c.f. Bernard & Dubrief, *op. cit.*, 226 and Azéma & Winock, *op. cit.*, 15-17), some of these resulted in serious public disorder. Daladier sought a compromise by making a cabinet reshuffle but this only succeeded in alienating the Radicals (two of whom resigned from the government).

<sup>70</sup> Chiappe was removed, by being given 'promotion' as the French Resident-General of Morocco, which he refused (see Le Clère (1967), *op. cit.*, 112-3, for his caustic letter in response to the offer). The Prefect of the la Seine region also resigned in protest over the way Chiappe had been treated. Chiappe's dismissal was an attempt to appease the Socialists, who with some justification, complained of biased policing, as is noted by Bernard & Dubrief, *op. cit.*, 222;

'The police were far from neutral. Although many superintendents and inspectors, often radicals and Freemasons, disliked all troublemakers, Chiappe, the prefect of police, used the uniform branch only against the left, while the radical ministers turned a blind eye.', and Werth, *op. cit.*, 15, this time concentrating on the public disorder caused by the Monarchist leagues;

'The Royalist demonstrations in the streets had in the meantime, become, not only more frequent but more and more violent in character; they were popular with a large part of the public. The police, under M. Chiappe, treated the rioters with the utmost consideration.'

decision by Daladier finally to hold a parliamentary inquiry into the Stavinsky affair came too late to abate further public disorder.

This manifested itself in the riot of 6th February 1934 which was the worst outburst of public disorder in Paris since 1871. Fifteen people were killed and two thousand injured after the events of that night. Essentially, huge crowds gathered in different locations around Paris, these crowds consisted of League members and the general public. As the evening wore on, disorder ensued, the worst of which was a pitched battle on the Pont de la Concorde; the bridge leading to the National Assembly. The bridge, and the National Assembly building, were only just held by the police and the army.<sup>71</sup>

The riot has been stated to have had many consequences, including the re-uniting of the Left, culminating in the eventual development of the Front Populaire.<sup>72</sup> Of more relevance to this study was the manner in which the riot briefly established an alternative form of politics to that presented by the Republican form of government. Thus, although the Right was back in power, it had achieved this position not via traditional democratic means but through the use of mass street violence. The Republic had only just survived, but at a considerable cost to its credibility, as the most legitimate form of government.<sup>73</sup> The use of public assemblies in the street (and most

---

<sup>71</sup> For various accounts of the build up and the events leading up to the riot, see Bernstein, *op. cit.*, 155-86, Le Clère (1967), *op. cit.*, 129-166, Charvardès, *op. cit.*, 193-248, Carrot, *op. cit.*, 717-20, Bernard & Dubrief, *op. cit.*, 226 *et. seq.*, Bonnefous, *op. cit.*, 204 *et. seq.*, Azéma & Winock, *op. cit.*, 217 *et. seq.* and Werth, *op. cit.*, 17 *et. seq.* An eye-witness account of the violence is provided by Shirer, *op. cit.*, 195-201.

Events inside the parliament were also stormy, with the Daladier government having to survive three votes of confidence (c.f. Bonnefous, *op. cit.*, 207-11). Therefore, the government was under attack both politically and physically on 6th Feb. 1934.

<sup>72</sup> Bonnefous, *op. cit.*, 220-232, describes the continued violence after the 6th February and also how the Left united in their opposition to the deflationary decree-laws made by the new Doumergue government (see chap.IV, section II, *supra* for the words of defiance by the leader of the Popular Front, L. Blum). Chastenet, *op. cit.*, 213-4, records how the long-running conflict between the Socialists and the Communists was set aside in order to 'defend' the Republic against a perceived fascist threat. Bernard & Dubrief, *op. cit.*, 228, sum up how the Left viewed the riot;

'Whether or not the rising of 6th February was a fascist putsch, its historic role was to have prepared the way psychologically for the anti-fascist Front Populaire.'

The Left also reacted by engaging in public displays of strength, in the form of marches and general strikes, therefore, according to Werth, *op. cit.*, 21;

'...the overthrow of the Daladier Government by "the street" could not remain unchallenged as far as the Socialists were concerned..'

<sup>73</sup> The significance of the riot for parliamentary democracy and the Republic is summed up by Shirer, *op. cit.*, 192;

(Footnote continues on next page)

prominently marches) to achieve desired political change had proved to be successful. Essentially the parliamentary system of government had for the last two years been in competition with a more populist form of democracy, which on the 6th February had temporarily prevailed.

The succession of governments of the Right which came to power after the riot could count on the support of the Leagues but they found themselves under attack from a newly unified Left, which adopted the same methods of marches and rallies as the Right had done earlier. Aside from protesting against a perceived fascist threat to the Republic, the Left also vigorously attacked the deflation policies of these governments.<sup>74</sup> As far as party-politics were concerned, the struggle between Left and Right was now centred on whether the executive should be granted extraordinary legislative powers (i.e. the power to legislate by decree-law). Governments of the Right fell as Parliament continued to refuse to grant the powers sought.<sup>75</sup> The Left not only objected to the substantive policies of the Right (i.e. severe deflation), they were also against the intended manner of implementing their policies. More precisely, they were critical of the use of decree-laws, which they claimed were anti-Republican because they took power away from the

---

'It was the first time in the history of the Third Republic that a government, backed by a solid majority in both chambers, had given way to the menace of the streets. The Leagues had won their first victory. They had overthrown a 'leftish' government. The triumph wetted their appetite.'

Doumergue came to power after the riots; although he presented his cabinet as being a coalition of left and right, it was widely regarded as a right-wing government. Azéma & Winock, *op. cit.*, 217, stress that Doumergue was accepted by the Right because of the authoritarian conception of the Republic which he favoured. The orientation of the government to the Right can be seen firstly, by the way the activities (if not the membership) of the right-wing Leagues decreased and secondly, the eventual decision of the Socialists to leave the government, after refusing to vote in favour of the greater legislative powers demanded by Doumergue. The Socialists also distrusted Doumergue because of the support he enjoyed from the Leagues (c.f. Werth, *op. cit.*, 29-33).

<sup>74</sup> Although traditionally, it was the Right who favoured deflation and the Left who were against it (c.f. Cobban, *op. cit.*, 139), it was ironic that despite their opposition to such policies, when the Left had been in power (1932-34) they had pursued deflationary policies with at least as much vigour (see *supra.*).

<sup>75</sup> For an account of the party-political developments and the failure of successive governments during the period after the February riots, see Werth, *op. cit.*, 30-51. However, by way of a brief summary: Doumergue resigned because he was unable to secure the power to resort to referendums when parliament was unable to agree to certain legislative proposals. Flandin resigned as a result of a serious financial crisis involving the Bank of France's inability to cover maturing government bonds and the legislature's refusal to grant him plenary financial powers and Buisson's 'one-day' government fell for much the same reasons.

legislature and placed it in the hands of the executive - an executive dominated by the Right and backed by the often violent extreme-Right.<sup>76</sup>

It was in June 1935 that the new Laval government broke the deadlock by obtaining full legislative powers (i.e. the power to legislate via decree-laws).<sup>77</sup> The timing was fortuitous; just before the prorogation of Parliament for the summer recess. The power to legislate by decree-laws was granted in order to pursue the specific object of ensuring financial stability and the defence of the franc. The Left manifested their strong objection to the decree-laws by a series of mass marches, during which there were sporadic outbreaks of violence and rioting.<sup>78</sup> At the same time, relations between Laval and the Leagues became closer and the Leagues began to demonstrate their support for the government and to counter-demonstrate whenever the Left marched in protest.<sup>79</sup> The result was that violence and general public disorder continued throughout the summer.

It was in this context that the 1935 decree-law was passed. The Laval government gave a wide interpretation to the meaning of the defence of the franc and the decree-law was passed on 23rd October 1935, a mere eight days before Laval's plenary powers expired.<sup>80</sup>

---

<sup>76</sup> See also chap.IV, section II, *supra*.

<sup>77</sup> See Bonnefous, *op. cit.*, 339-347. The same author notes, at pg.341;

'Le Gouvernement avait donc les mains libres pour agir par les décrets-lois jusqu'au 31 octobre "pour assurer la défense du franc et la lutte contre la spéculation.'

With the Chamber dissolved on the 30th June 1935, the Laval government issued its first group of decree-laws; twenty-nine of them. Most prominent among the measures was a 10% reduction in the salaries of state-employees and an increase of 7% in property transfer tax.

<sup>78</sup> Werth, *op. cit.*, 50, notes;

'In Paris, there were a few protest demonstrations and more serious disorders broke out among the arsenal of workers at Brest and Toulon in the second week of August. There the "protest" against the cuts degenerated into rioting, and three people were killed in the protest.'

<sup>79</sup> See Werth, *op. cit.*, 51 *et. seq.*, for an account of the demonstrations and counter-demonstrations held during this period.

<sup>80</sup> In the preamble to the decree-law it is stated;

'Le caractère légal des ces mesures ne saurait être contesté, puisqu'elles tendent à renforcer le maintien de l'ordre public, condition essentielle du calme et de la confiance nécessaire pour permettre le redressement économique du pays.'

What remains unclear is why the decree-law was passed at this particular moment in time.<sup>81</sup> From contemporary accounts, the level of public disorder due to public assemblies was no more serious than before, indeed it was far better than the months immediately succeeding the February riot. It is true that the Radical Congress at Salle Wagram on 20th October 1934 had issued a strongly worded communiqué to Laval that he should tackle the Leagues.<sup>82</sup> However, it seems, *prima facie*, unlikely that first, Laval would have been sympathetic to such calls and secondly, that he would have responded so rapidly. Upon closer examination, it does nevertheless appear possible that Laval could have been convinced that something needed to be done to stop the continuing public disorder and that he did not want to run the risk that his coalition government - that was mainly of the centre-Right - might break up as a consequence of inaction as regards public order.

Support for this view that the decree-law was a concession to the Radicals in Laval's government, can be drawn from the events surrounding Laval's resignation. The Laval government fell on 22nd January 1936 as a result of legislation passed by the Minister of State, E. Herriot. He was himself a Radical and the legislation basically provided for the dissolution of paramilitary organisations; which were in effect the Leagues. Despite the fact that the statute had been passed, Laval refused to apply it. It is submitted that he refused to do so because of his sympathies and the political support he

---

<sup>81</sup> It is true, as Berthon, *op. cit.*, 138-9 notes, that a Bill to regulate the liberty to process was laid before Parliament as early as 7th March 1934 and that this failed to become law (c.f. Tercinet, *op. cit.*, 1014 and Bédier, *op. cit.*, 243-4 for further information on measures recommended by the commission of inquiry after the events of 6th Feb. 1934). However, the question remains, why did the Laval government decide to legislate so long after the worst of the public disorder?

Carrot, *op. cit.*, 727 suggests that the reasons were those of expediency: legislative backlog: 'Le gouvernement Laval, qui avait obtenu par la loi du 8 juin 1935 le pouvoir de prendre par décrets toutes dispositions ayant force de loi "pour lutter contre la spéculation et défendre le franc" était à même de faire aboutir un certain nombre de dispositions demeurées dans les cartons des ministères. Il en profita pour glisser parmi les nombreux textes parus en octobre 1935, des mesures tendant à renforcer le maintien de l'ordre public..'

However, this view is unsubstantiated and does not explain why the backlog of measures was not dealt with much earlier, for example on the 30th June, when it was noted (*supra.*) that the government issued twenty-nine decree-laws. Furthermore, given the already noted good terms that Laval enjoyed with the Leagues, it does not explain why he should issue a restrictive measure that so obviously would affect them as well as processions from the Left..

<sup>82</sup> Werth, *op. cit.*, 61.



enjoyed from the Leagues. As a result of his unwillingness to act, the Radicals left his government and Laval was forced to resign.<sup>83</sup>

This episode clearly illustrates the way that Laval was caught between appeasing the political centre/left and not antagonising the extreme-right. If this theory is accepted, the decree-law can be seen as a measure to ensure the continued support of the Radicals, who feared for the Republic. Therefore, for the first time, public demonstrations were placed under statutory regulation. However, at the same time, the terms of the decree-law left intact the wide degree of discretion that was available to the police authorities. Consequently, it was they who continued to decide whether the liberty to process could be exercised; in other words the Leagues could in practice carry on their activities.

It is suggested that in the absence of any further evidence surrounding the 1935 decree-law, it was a measure produced by reason of the particular circumstances described above. As such, the measure can be traced back to the events of February 6th and the continuous public disorder that ensued from then onwards.<sup>84</sup> It was a partisan measure in one sense but because of Laval's precarious political position it was one designed to achieve political compromise. The delay in implementing measures to regulate public processions and other forms of demonstrations can be interpreted as a reflection of the sympathetic attitude that the post-February 6th governments of the Right showed towards the Leagues. The Republic was no longer under attack, therefore measures to protect it were seen as unnecessary, as were, more specifically, measures to deal with public processions. This was so despite the resurgence of an united Left, which attempted to reinstate street politics. This time rival groups fought each other on the streets, unlike in February 1934, when the political system itself was the target of attack. The

---

<sup>83</sup> For an account of the circumstances surrounding Laval's resignation, see Chastenet, *op. cit.*, 127 *et. seq.* The statute in question was the Law of 10 Jan. 1936, which, according to Colliard, *op. cit.*, 757-8, provided that the government could dissolve associations that pursued any of the following objectives;

'...provoquer à des manifestations armées dans la rue - présenter, en dehors des sociétés de préparation militaire ou d'éducation physique agréées par le Gouvernement, par leur forme et leur organisation, le caractère, de milices privées ou de groupes de combat; - porter atteinte à l'intégrité du territoire national ou attenter par la force à la forme républicaine du gouvernement.'

<sup>84</sup> Some commentators, for example, Berlioz, *op. cit.*, 6, go further in claiming that the decree-law was the *direct* result of the disorder of February 6th.

events of this time were *extraordinary* and thus it must be noted that the decree-law is a legislative text passed with abnormal circumstances in view - a type of emergency measure.

Having analysed its original context, the actual content of the decree-law and the legal framework that currently regulates the liberty to process will next be examined.

### SECTION III THE CURRENT LEGAL FRAMEWORK

#### THE 1935 DECREE-LAW

Despite the apparent novelty of the measure - in that the decree-law was the first legal instrument to directly regulate the liberty to process - the decree-law adopted, sometimes with slight modifications, many of the previous practices and provisions of earlier laws.

#### *Prior declarations*

This can be clearly seen in art.1, which requires that the organisers of processions on the public highway have to make a prior declaration.<sup>85</sup> It can be thus claimed that the legislature formalised the prior practice of informal negotiation between organisers and police authorities. However, there is a difference; whereas there might previously have been a *discretion* to consult and negotiate with the relevant authorities, instead there is now an *obligation* to do so. Apart from formalising previous practice, the *substance* of practice was also amended. In effect, organisers of processions lose their previous position as bargaining partners (even if their position may have been a weak one, given the extensive powers enjoyed by the police) and instead, their role is reduced to that of merely informing the police.<sup>86</sup> It has also been claimed

---

<sup>85</sup> Processions, as well as other forms of group demonstration on the public highway, were submitted to the same requirement;

'...tous cortèges, défilés et rassemblements de personnes et, d'une façon générale, toutes manifestations sur la voie publique.'

Art.1(1), interestingly repeats that meetings on the public highway are banned by virtue of art.6 of the 1881 Act that regulates the liberty to meet.

<sup>86</sup> P.M. Martin, 'La déclaration préalable à l'exercice des Libertés Publiques', A.J.D.A.1975.436 at 438, in noting that the prior declaration requirement can be used as part of a punitive,

(Footnote continues on next page)

that the police now use their stronger bargaining position in the negotiation process in order to impose conditions on processions;

Or, de plus en plus souvent, les maires et les préfets se livrent au chantage suivant: "Vous passez par là où j'interdis la manifestation."<sup>87</sup>

The imposition of the prior declaration requirement has been criticised from the viewpoint that the decree-law now permits the police to in effect apply a practice of prior authorisations,<sup>88</sup> since upon hearing of a proposed march they can ban it (therefore refusing in effect to 'authorise' it). On the other hand, if they decide not to ban the march, it is claimed that this also, in effect, represents authorisation. It must here be underlined that since no mention is made in the decree-law of anything other than a prior declaration requirement, this criticism must be based solely upon the *practice* of police authorities. If this view is accepted, it provides another instance of the adoption of a former practice; that concerning the discretion on the part of the police to exempt particular marches from general bans. However, the critics generally do not appear to provide concrete evidence with which to substantiate their claims<sup>89</sup> but in the later examination of the case-law, it will be seen that there is evidence of such a practice.

---

preventative or hybrid legal framework, however asserts that a common characteristic of all prior declaration requirements is that they act as;

'...un moyen d'information de la puissance publique.'

As far as spontaneous marches are concerned (i.e. those that fail to be preceded by a prior declaration on account of their lack of prior organisation), the Minister of the Interior confirmed in the National Assembly in 1977 that they breached the terms of the decree-law and that those responsible for its breach could be prosecuted but that;

'Il appartient à l'autorité judiciaire de décider de l'ouverture de poursuites à leur encontre.'

(Rép. Quest. écrite M. Colin: J.O. débat Sénat 29 mars 1977, pg.351).

<sup>87</sup> D. Langlois, 'Le droit de manifester', *Après-Demain* no.219 (1979), 14 at 15. These conditions are said to weaken the effect of a demonstration by forcing it into deserted areas where without onlookers, the demonstration risks becoming;

'...une pièce de théâtre jouée devant des fauteuils vides.'

(pg.15)

<sup>88</sup> See for example, Dautan, *op. cit.*, 9.

'Sous le couvert d'une élaboration, le régime institué par le décret-loi du 23 octobre 1935 exige pratiquement une autorisation puisque l'administration peut interdire la manifestation dès que la déclaration en est faite.'

<sup>89</sup> An exception is provided by Tercinet, *op. cit.*, 1020, n.43, who presents some examples of ministerial communiqués in which government ministers refer to the 'authorisation' of marches. Although this is revealing of government attitudes and expectations, it is submitted that Tercinet's examples throw no further light on the question as to whether in *practice* organisers are obliged to seek prior authorisation from the police to march.

Nevertheless, the requirement of a prior declaration is different from that of a prior authorisation. Therefore, although Martin has pointed to the manner in which the effect of requiring a prior declaration can change as a result of the manner in which it is implemented, he nevertheless maintains that there is a fundamental distinction between prior declarations and authorisations. The former serves to inform the public authority of future activity, so that it is then in a position to decide whether to exercise its powers. However, at the moment of being correctly informed, the police authority cannot act, there must be a delay before it can intervene. In this way there is a formal difference between the informing process and any subsequent action taken by the public authority. On the other hand, prior authorisations do not have this formal separation between the obtaining of knowledge of the proposed activity by the authorities and the subsequent decision to act. A prior declaration gives the declarer the right (subject to possible *a posteriori* control) to carry out the proposed activity, whereas a prior authorisation means that the activity cannot be exercised prior to a positive intervention from the relevant public authority. There is consequently no difference between the period during which the public authority is informed and the subsequent decision.<sup>90</sup>

By reason of these differences, prior declarations are formally less restrictive than prior authorisations. The legislature can, however be criticised for shifting the balance of power in favour of the police as regards the regulation of the liberty to process by enacting an obligation to approach the police. Such an obligation increases the scope within which the police can operate an informal practice of prior authorisations. The scope for such a practice would have been reduced if the legislature had instead laid down that both organisers and police should seek to consult and negotiate before marches. Although it may be objected that such exhortatory terms are incompatible with statute, it is suggested that this would, on the contrary, have been the appropriate subject-matter for a circular. While the government has recently

---

<sup>90</sup> See generally, Martin, *op. cit.*, and Tercinet, *op. cit.*, 1020 & 1023. More specifically, Martin notes at pg.444;

'Si, en pratique le résultat obtenu peut être similaire, juridiquement il n'est pas acceptable de qualifier d'autorisation préalable le régime de la manifestation.'

and Berthon, *op. cit.*, 122 similarly asserts;

'Il était tout même utile de signaler la nuance, malgré l'analogie existant surtout, dans le cas d'arrêté général d'interdiction lorsqu'il y a un refus de l'autorité de lever cette interdiction et le cas d'interdiction subséquent à la déclaration.'

sought to encourage negotiation and consultation via advice in a circular, it will be seen that its terms once again allow the police to dictate terms, rather than facilitating negotiation between the parties.

Article 2(2) of the decree-law continues the shift in the balance of power by making it obligatory to supply information in the prior declaration that was previously and at least formally optional and subject to negotiation between organisers and the police.<sup>91</sup> While this accords with the logic of the informative function of the prior declaration, in that, as Martin states, for the police to Act, it must be informed in a detailed and precise manner,<sup>92</sup> this measure again evinces the public order emphasis in the decree-law.

The declaration is made to the local police authority; namely the mayor of the locality in which the march is to take place or the prefect, if the area is covered by the national police, this is also the case in Paris and the communes in the department of la Seine.<sup>93</sup> The declaration is made a minimum of three, or a maximum of fifteen days in advance of the march. Finally, art.2(3) requires that the police authority must immediately give the organisers a receipt, which can be used as evidence in any subsequent legal action.

#### *Local and traditional processions*

Aside from the formalising and restrictive effects of the prior declaration provisions, the decree-law seems to enact the case-law of the Conseil d'État regarding marches of a local-traditional character by subjecting them to less rigorous requirements. Consequently, the decree-law states that marches on the public highway, which conform to local traditions, are exempt from the obligation to make a prior declaration.<sup>94</sup> This category of marches is left

---

<sup>91</sup> The article reads;

'La déclaration fait connaître les noms, prénoms et domiciles des organisateurs et est signée par trois d'entre eux faisant élection du domicile dans le département; elle indique le but de la manifestation, le lieu, la date et l'heure du rassemblement des groupements invités à y prendre part et s'il y a lieu, l'itinéraire projeté.'

<sup>92</sup> *op. cit.*, 438 and at 439;

'En effet, dans la mesure où la puissance publique doit être informée, il est préférable qu'elle le soit avec précision.'

<sup>93</sup> Art.2(1).

<sup>94</sup> Art.1(3) reads;

'Toutefois, sont dispensées de cette déclaration les sorties sur la voie publique conformés aux usages locaux.'

(c.f. Tercinet, *op. cit.*, 1017).

undefined and it will be seen below how the courts have interpreted and applied the provision. However, the exemption clearly reflects the earlier noted perception as to the less problematic nature of local-traditional marches. The public disorder of the early mid-1930's would not have altered this perception, since as has been seen above, the violence did not result from marches celebrating religious and local traditions.

### *Banning powers*

Nevertheless, by virtue of art.3 both types of marches are subject to police powers to ban them;

Si l'autorité investie des pouvoirs de police estime que la manifestation projetée est de nature à troubler l'ordre public, elle l'interdit par un arrêté qu'elle notifie immédiatement aux signataires de la déclaration au domicile élu.

According to a *prima facie* reading of the decree-law, a ban does not have to be the *final resort* in order to maintain public order; in other words, the ban is not an exceptional measure. There is no requirement that the police must not have other possible measures available to maintain public order, but merely that the march is 'de nature à troubler l'ordre public'. As a consequence of this relatively low justificatory burden upon police authorities as far as the use of banning powers, the decree-law cannot be said to have enacted the previous case-law as regards local and traditional marches. This case-law had, on the contrary, laid down that the use of general public order powers was exceptional as regards these types of processions.

The decree-law is claimed to repeat the general public order powers/ duties of the police,<sup>95</sup> and thus it merely sets out the particular ways in which such a power is to be used as regards the liberty to process. This power cannot be excluded but only regulated.<sup>96</sup> However, it can be seen that unlike the liberty to meet, it was decided not to simply repeat in the text the general public order powers/ duties as far as the regulation of the liberty to process. The

---

<sup>95</sup> As is claimed by Montreuil, 'Manifestations', *op. cit.*, 8;

'Le texte ne fait que confirmer l'application du droit commun en matière de maintien de l'ordre public.'

and at pg.7;

''L'autorité investie des pouvoirs de police' en l'occurrence n'est pas autrement définie par le décret-loi du 23 octobre 1935 (art.3). En d'autres termes, ce décret-loi ne déroge pas plus au droit commun...'

<sup>96</sup> See Berthon, *op. cit.*, 75-86 and the explanation of public order in chap.IV, section III, *supra*.

legislature therefore took the opportunity to indicate the specific ways in which these powers should be exercised. The general public order powers are hence left intact but are modified. It therefore follows that although the decree-law specifically limits police intervention to bans, other forms of police intervention, such as the imposition of conditions as to the route of the march, could still be justified on the basis of the wider general public order powers/duties in response to circumstances that were not foreseen by the decree-law. Interestingly, whereas a prior declaration is required for processions on the public highway, the banning powers in the decree-law do not seem confined to processions in this location. Nevertheless, given the historical context of the enactment and the fact that the vast majority of processions take place on the public highway, it would seem that the measure is aimed at these kinds of processions.

Finally, even in communes where the mayor is the competent police authority, he/she must send a copy of the declaration or their decision to ban to the departmental prefect within twenty-four hours and it will be recalled that the prefect also has powers of substitution, even if he can no longer override the mayor's decisions. This means that although the prefect can ban a meeting where the mayor has decided not to, the prefect must refer a mayor's decision to the administrative courts in order to have it struck down.<sup>97</sup>

#### *Sanctions*<sup>98</sup>

The final aspect of the decree-law is the novel features it introduces as far as sanctions against the organisers of marches that breach the terms of the decree-law. The original provisions have however been repealed by the new penal code<sup>99</sup> and replaced by art.431-9 of that code. The original provisions will however be seen to substantially repeat the former provisions.

---

<sup>97</sup> See chap.IV, section III. *supra.*, and the examination of the case-law in this section, *infra.*

<sup>98</sup> Arts.5-7 of the original decree will not be dealt with as these concern the carrying of arms in a demonstration, which is beyond the scope of the liberty of *peaceful* assembly. However, it should be noted that these provisions were repealed and replaced by arts.104-108 of the former penal code, by virtue of art.12 of the Ordonnance. no.60-529 of 4th June 1960.

<sup>99</sup> Repealed by virtue of art.372 of Law no.92-1336 of 16th Dec 1992.

*(a) the original sanctions*

Originally the sanctions in art.4 of the decree-law read as follows;

Seront punis d'emprisonnement de quinze jours à six mois et d'une amende de 60F à 20 000F:  
1° Ceux qui auront fait une déclaration incomplète ou inexacte de nature à tromper sur les conditions de la manifestation projetée ou qui, soit avant le dépôt de la déclaration prescrite à l'article 2, soit après l'interdiction, auront adressé par un moyen quelconque, une convocation à y prendre part;  
2° Ceux qui auront participé à l'organisation d'une manifestation non déclarée ou qui a été interdite.

Tercinet<sup>100</sup> breaks down the sanctions created by art.4 of the decree-law into three specific offences; (1) the making of an incomplete or inaccurate prior declaration, (2) inciting a non-declared or banned march and (3) participation in the organisation of a non-declared or banned march. It is noted that the decree-law contained no provisions for the punishment of participants in non-declared or banned marches, therefore such participants may either have been entirely free from liability, as Tercinet claims,<sup>101</sup> or, as has been noted historically, liable for the offence of participating in an *attroupement*; an offence that is however not regulated by the decree-law.

More precisely, as far as the *attroupement* offence, it was claimed that the organisers of a banned march could be prosecuted for provoking an *attroupement* and the participants for constituting an *attroupement*. Before the new definition of *attroupement*,<sup>102</sup> it was unclear whether this offence had been abolished by virtue of the decree-law, or whether it continued to exist because the nature of an *attroupement* was itself uncertain. Consequently, if the offence was defined by a defiance of authority, this could be made out merely by the organisation or participation in a non-declared or banned march.<sup>103</sup> On the other hand, if an *attroupement* was constituted by an assembly that threatened public order, the mere commission of the offences in

---

<sup>100</sup> *op. cit.*, 102A.

<sup>101</sup> *op. cit.*, 1043-44.

<sup>102</sup> See note 32, *supra*.

<sup>103</sup> This was the view taken by Colliard, *op. cit.*, 746;

'La manifestation tenue malgré l'interdiction devient un *attroupement* illégal qui peut être dissout par la force.'

and by Burdeau, *op. cit.*, 226;

'Lorsque la manifestation a lieu sans avoir été déclarée ou après avoir été interdite, elle devient juridiquement un *attroupement* qui peut être dissout selon les règles valables pour celui-ci.'



art.4 would no longer be sufficient to maintain a prosecution for an attroupement.<sup>104</sup>

*(b) the new sanctions*

The sanctions in art.431-9 follow the same tripartite distinction as was noted in the art.4 sanctions;

Est puni de six mois d'emprisonnement et de 50 000F d'amende le fait:

1° D'avoir organisé une manifestation sur la voie publique n'ayant pas fait objet d'une déclaration préalable dans les conditions fixées par la loi;

2° D'avoir organisé une manifestation sur la voie publique ayant été interdite dans les conditions fixées par la loi;

3° D'avoir établi une déclaration incomplète ou inexacte de nature à tromper sur l'objet ou les conditions de la manifestation projetée.

Three changes have however occurred: firstly, the new article increases the severity of the sanctions. Therefore, whereas art.4 formerly provided for terms of imprisonment of between fifteen days and six months, a six month term is now provided for. In addition, the level of the fine has been raised from between sixty and twenty thousand francs to fifty thousand francs.

However, this stiffening of penalties is contrasted by the second change which is the abolition of the offence of *participation* in the organisation of a non-declared or banned procession. According to the current provisions, it is only *organisation* that is the object of sanctions.

A similar liberalisation can be seen in the repeal of the offence of inciting a non-declared or banned march, which constitutes the third change.

By reason of the fact that the new article focuses attention on organisers, the three types of offence will be typically committed by these kinds of people and not mere participators. In consequence, the case-law as to organisation under art.4 will still be of relevance and thus this will be examined below.

---

<sup>104</sup> Montreuil, 'Manifestations' *op. cit.*, 5 underlines this point;

'Répétons qu'une manifestation non déclarée, donc illicite, ou interdite par l'autorité de police ne saurait être considérée *ipso facto* comme un attroupement...Qu'une manifestation licite ou illicite ou interdite....dégénère parfois en attroupement ne saurait justifier une telle assimilation.'

As far as the continued application of the law on attroupements, the new definition of this offence in art.431 has been seen to clearly require a threat to the public peace,<sup>105</sup> therefore, disobeying the police is not sufficient to make out the offence. For the purposes of the liberty to process this means that the offence of organising or participating in a march that has been banned or not legally declared does not in itself constitute an attroupement. The provision can be also be seen to have adopted the view taken by the administration<sup>106</sup> and the judiciary.<sup>107</sup>

## ADMINISTRATIVE CIRCULARS

The legal framework that is laid down by the decree-law has been supplemented by two administrative circulars, that proffer non-legally binding guidance as to the application of the decree-law.

### *The Paganon circular*

The most important circular is of the 27th November 1935, issued by the Minister of the Interior Joseph Paganon. Despite its title, which refers to public and private meetings,<sup>108</sup> the circular proffers an explanation of the scope of the decree-law regulating the liberty to process on the public highway. It has already been noted in the previous chapter that the circular controversially interprets public meetings as being subject to the more restrictive terms set out in the decree-law.<sup>109</sup> Here, a more detailed analysis of the consequences of this circular for the legal regulation of the liberty to process will be undertaken.

According to the circular, the mayor has the power to ban demonstrations (and therefore marches) on private land, when these are likely to compromise public order.<sup>110</sup> It is an interpretation that exploits the above noted ambiguity

---

<sup>105</sup> See note 32, *supra*.

<sup>106</sup> Circular 85-180, *op. cit.*, 5;

'S'ils passent outre à l'interdiction les organisateurs et participants tombent sous le coup des pénalités prévues par le décret-loi du 23 octobre 1935...sans préjudice de la dispersion de la manifestation si celle-ci, par les troubles de la "tranquillité publique" qu'elle occasionne, se transforme en attroupement...'

<sup>107</sup> For example, Merabet Bourogaa et autres, Cass. crim. 23rd May 1955; Bull.crim.461, *infra*.

<sup>108</sup> See chap.IV, note 125, *supra*.

<sup>109</sup> See chap.IV, section III, *supra*?

<sup>110</sup> The occurrence of private processions during the 1930s is noted for example by Werth, *op. cit.*, 60;

(Footnote continues on next page)

as to whether the decree-law is applicable to marches beyond the public highway. This power is stated to have been established by a strong body of case-law.<sup>111</sup> Two aspects of this interpretation are worthy of further comment. Firstly, no case-law is offered by Paganon to support his claim as to the existence of police banning powers regarding marches on private land and in the course of the present study it has not proved possible to locate any such cases. However, given the already noted breadth of the general public order powers/duties, it may be claimed that this provides the basis for a power, when the police apprehend disorder, to ban marches on private land. However, regard to the case-law would show that the exercise of these powers is strictly scrutinised and subject to the doctrines of necessity and proportionality.<sup>112</sup> Nevertheless, what is open to criticism is the extension of police powers to marches on private land, in a circular that purports to offer guidance in the regulation of marches on the public highway. Therefore, once again the circular can be said to exceed its stated function by reading words into the decree-law.

Secondly, in merely requiring that public disorder be likely to be 'compromised' before the police can ban marches on private land, the circular advocates a more restrictive regime in comparison to that governing banning powers as far as marches on the public highway. It follows that for the latter there must be an apprehended disruption of public order, whereas for the former a mere likelihood of a compromise of public order is sufficient to justify a ban. If the terms of the banning powers in the decree-law are subject to the criticism that they allow the police authorities to employ bans as a first

---

'The Croix de Feu had numerous patrons among the wealthy landed proprietors, and it was usually on some 'private' estate that the rallies were held - which in the eyes of the Croix de Feu leaders, rendered them perfectly legal.'

As an example of the level of public disorder that sometimes resulted from such rallies, Werth, *op. cit.*, 60, also describes the events of 6th October 1935, when one thousand Croix de Feu members assembled for a march on a large farm at Villepinte, near Paris. In response, several hundred Socialists and Communists, led by the local mayor assembled outside the farm. The two sides fought each other and some shots were fired. Eventually, the Garde Mobile had to be called in to restore order and the mayor was later suspended from his duties by the Minister of the Interior.

<sup>111</sup> The circular reads;

'La jurisprudence est établie par de nombreux arrêts dont les considérants sont à retenir et qui précisent que le maire est fondé à interdire des manifestations sur des terrains privés quand elles sont susceptibles de provoquer une effervescence de nature à compromettre l'ordre public.'

<sup>112</sup> See chap.IV, section III, *supra*.

resort, this criticism applies with even greater force as far as the guidance given in the circular is concerned. For example, public order can often be said to be compromised but can still be maintained by the employment of less restrictive police measures than bans. Nevertheless, the meaning of the circular, on its face, is that the police are under no obligation to exhaust these other measures before issuing a ban and public order need not even be actually or likely to be threatened. The circular thus considerably expands the degree of discretion available to the police.

#### *The 1985 circular*

More recently, another circular has been issued by the Minister of the Interior as regards banning powers concerning processions. This is the previously mentioned circular of the 25th July 1985,<sup>113</sup> which advises departmental prefects of the criteria to be used before a march can be banned. This text confirms the analysis made above; that bans are seen by the administration as a measure of *first* resort. Consequently, prefects are advised that if the organisers of a march do not offer 'very serious guarantees' as far as public order is concerned, they have sufficient grounds to ban it.<sup>114</sup> No elaboration of the meaning of 'very serious guarantees' is provided and therefore there is no indication as to how organisers could offer such guarantees. The banning power thus becomes the first resort when these guarantees are not offered and the prefect is not placed under the obligation to at least investigate the use of other, less restrictive means, to secure public order before exercising his/her banning powers. In addition, the circular could be said to shift responsibility for maintaining public order during a march to the organisers. However, this self-policing role becomes problematic when disorder is threatened as a result of factors beyond the organisers' control; for example, a counter-demonstration. In such circumstances, it can once again be asked what are, according to the circular, acceptable guarantees.

---

<sup>113</sup> See chap.IV, *supra*.

<sup>114</sup> The circular reads at pg.4;

'Si les organisateurs n'acceptent pas de tenir compte des contraintes de sécurité et si l'ensemble des informations recueillies font apparaître que la manifestation ne présente pas de garanties très sérieuses sur le plan de l'ordre public, compte tenu des moyens dont vous disposez, vous serez fondé à prendre un arrêté d'interdiction.'

As with the liberty to meet, this circular also provides a summary of the law but interestingly it also advises that police authorities should engage in some form of negotiation process with organisers of marches;

En fonction des informations qu'elle détient, l'autorité compétente peut prendre contact avec les organisateurs afin de procéder avec eux à un examen des conditions de la manifestation, spécialement en ce qui concerne les lieux de rassemblement, l'itinéraire retenu et le moment choisi.

Il est indispensable d'appeler l'attention des organisateurs sur les problèmes de sécurité et, le cas échéant, de leur proposer de modifier les modalités de la manifestation.<sup>115</sup>

This can be seen as an attempt to fill a gap left by the failure of the decree-law and Paganon circular to mention consultation and negotiation, despite the fact that it was observed to be a practice prior the decree-law.<sup>116</sup> At the same time, the police are clearly in the stronger bargaining position (as was noted prior to the decree-law) by reason of their power to ban. According to the circular, recourse can be had to its exercise when negotiations have failed to produce 'very serious guarantees' as far as public order. The police are thus placed in a position in which they can *dictate* terms, as opposed to negotiating them.

Before turning to the case-law it should be mentioned that as with the liberty to meet, Montreuil has listed other laws and offences that could affect the exercise of the liberty to process.<sup>117</sup> However, once again the case-law shows that in practice they are not applied to this liberty.

## **CASE-LAW**

The cases appear to have dealt with six distinct but related aspects of the 1935 decree-law and consequently their analysis will be carried out by investigating the decisions in each of the following areas;

**The nature and scope of the local-usage category**

**The use of banning powers as regards normal marches**

**The use of banning powers as regards local-usage marches**

**The practice and enforcement of the prior declaration requirement**

**Liability and sanctions for breach of the decree-law**

---

<sup>115</sup> *op. cit.*, 5.

<sup>116</sup> See section II, *supra*.

<sup>117</sup> *op. cit.*, 'Manifestations', 10-11.

## The role of the *atroupement offence*.

### *The nature and scope of the local-usage category*

The evolution of this category of processions by the Conseil d'État has already been noted in the section concerning the history of the law relating to the liberty to process. It was also observed that the consequences of placing a procession within this category was to increase the justificatory burden on the police for interfering with such processions. However, the decree-law does not recognise any special position for such marches as far as banning powers are concerned. Instead the benefits that accrue to local-traditional marches are as regards prior declarations. However, this is still a less rigorous legal regime than for ordinary marches, therefore the cases under the decree-law will now be examined in order to see whether this category has been further elucidated.

In Abbé Nicolet<sup>118</sup> the court adverts, albeit briefly, to the content of the local-usage category and seems to continue its pre-1935 case-law. In this case, the Conseil d'État struck down a Mayor's decision to subject all processions on the public highway to a requirement to seek a prior authorisation. Only funeral convoys were exempted from this requirement. In the course of its judgement, the Conseil noted that processions having only a *traditional* character must also be placed within this exempted category. The judgment in this case may be taken as re-writing the local-usage category of the decree-law so that it became one of local and/or traditional usage.

The continuation of the previous case-law in this decision can be seen in the way the category is stated to consist of its former two elements: localness and tradition. Therefore, even though the decree-law only refers to locality, tradition is reintroduced by the court. The re-expansion of the category is effected by providing that the two elements need not be present at the *same time*, so that the local-usage category can be constituted by local and/or traditional marches.

The only other aspect of the nature and scope of the category in question that the courts have dealt with is the question of whether a local-usage procession

---

<sup>118</sup> C.E. 4th Feb. 1938; D.H.280.

can lose this status if it is not carried out for a long period of time but where this lapse is either due to a banning of the specific procession or of a category of processions to which it belongs. The earliest decision on this point, under the 1935 framework was Abbé Chapalain,<sup>119</sup> in which the Conseil struck down a Mayor's refusal in 1934 to rescind a ban on all processions on the public highway in the locality that dated from 1903. The court's decision was based upon a finding of fact that the continued effect of the bans was not justified by any public order considerations. The Conseil also noted that the bans made no exception for processions that were linked to local traditions, or which had a traditional character and that processions of this nature did not lose their character as a result of their forced interruption by reason of a decision to ban them.<sup>120</sup>

*The use of banning powers as regards local-usage marches*

The pre-1935 case-law had required that the banning of proposed marches could only be justified by the need to maintain public order. This meant that a higher burden of justification was placed on police than for other kinds of marches - these being at best merely tolerated, as opposed to being seen as a right.

To a large extent, the decree-law adopted, by virtue of art.3, this higher standard but applied it to *all* processions. In consequence there is now a uniform criteria for the use of banning powers for all types of processions on the public highway. Thus, this article provides the police authorities with banning powers if a proposed procession is apprehended to be likely to threaten public order. The consequences of membership of the local-usage category have therefore been altered by the decree-law, so that according to its provisions, a characterisation of a procession as being of a local-usage character only affects the organisers' obligations as far as the prior declaration requirement in art.1 is concerned.<sup>121</sup>

---

<sup>119</sup> C.E. 14th Feb. 1936; Rec.Leb.205

<sup>120</sup> See also Abbé Blanchard, C.E. 22nd Jan. 1947; Rec.Leb.583, Guiller, C.E. 2nd July 1947; Rec.Leb.293, Abbé Délusseau, C.E. 12 Dec. 1947; Rec.Leb.471, Abbé Laurent, C.E. 14th Jan 1949; Rec.Leb.18, Duranton de Magny, C.E. 4th Nov. 1959; A.J.D.A.1960.II.60., and Rastouil, C.E. 3rd Dec. 1954; Rec.Leb. 639.

<sup>121</sup> See *infra*.

While, the *prima facie* effect of the 1935 decree-law is to remove the previous presumption that local-usage marches did not present a threat to public order, the Conseil's early decisions continued to insist upon an exception for these types of procession. This can be seen in Abbé Marzy,<sup>122</sup> in which the Conseil held that a mayor's ban of all religious processions was not only ultra vires the decree-law but was also illegal by reason of the measure's failure to provide for exceptions as far as 'traditional' marches were concerned.<sup>123</sup> It would seem that the Conseil was relying on its earlier case-law in order to support its contention as to the need for a special category of traditional marches - even though the decree-law which did not mention such a category - which could escape the reach of the general ban. This reflected a view that such marches were still not generally a threat to public order.

More recently, however the Conseil has not mentioned this category. In Union des syndicats ouvriers de la région parisienne C.G.T. et sieur Hénaff,<sup>124</sup> in upholding a ban of a traditional union march through Paris, the Conseil did not mention any presumption or special status for local-usage marches. Instead, the ban was justified by the evidence that the prefect had acted to maintain good order and public peace. Robert and Duffar cite this case as an example of a change in attitude by the Conseil,<sup>125</sup> so that traditional and local marches are increasingly viewed as threatening public order. The result is that the lower standard of protection as regards bans made under the decree-law is now applied to the formerly, more strongly protected, local-usage category.

The present weaker protection accorded to local-usage processions under the 1935 legal framework is highlighted in Legastelois,<sup>126</sup> in which the Conseil upheld a mayor's refusal to authorise a procession on the occasion of a church fête in the two main streets of the commune. Leaving aside the problematic

---

<sup>122</sup> C.E. 25th Jan. 1939; Rec.Leb.709.

<sup>123</sup> It should also be noted that in the earlier case of Abbé Chapalain, *op. cit.*, the Conseil disapproved of the absence of an exception for processions linked to local traditions or of a traditional character from a general ban on processions on the public highway.

<sup>124</sup> C.E. 19th Feb. 1954; Rec.Leb.113.

<sup>125</sup> *op. cit.*, 581;

'...le Conseil d'État, tenant compte de l'évolution actuelle des mœurs, paraît admettre plus largement, même pour des défilés traditionnels, l'existence d'une menace pour l'ordre public de nature à justifier légalement l'interdiction de la manifestation...'

<sup>126</sup> C.E. 21st Jan. 1966; Rec.Leb.45.



legal basis for the authorisation procedure in the instant case, the inconvenience caused to traffic was accepted as a legitimate concern and no special category for local-usage marches was mentioned in the court's judgment (this was even though art.2 of the mayor's decision did provide for possible exceptions to be made for traditional marches organised by committees of local interest).

It can be argued that a local-usage category would have been irrelevant to the decision in this case because it was public order in the wider sense, which includes traffic,<sup>127</sup> that was in issue. The local-usage category is only of relevance as regards the narrow conception of public order and the category was seen to have been developed because of a view that there was a small likelihood that these types of processions would threaten public order in this sense. It would seem to follow that the local usage category is of less importance in the face of inconvenience to traffic. As was noted by the Commissaire du Gouvernement in the instant case,<sup>128</sup> the mayor's decision was taken in the light of the *growth* in local traffic and the *increase* in the risk of accidents; a fact which the parties did not contest. It could therefore be argued that given the change in methods of transport, an insistence on a local-usage category which is based on former concerns and perceptions as to physical violence has little or no affect when the reason for the ban are traffic considerations and no longer violence.

It is conceded that the logic of this point cannot be challenged but it is suggested that historically the local-usage category has not only reflected a perception that they would not give rise to violence but such processions have also been perceived as important to local life.<sup>129</sup> This local importance still carries some weight against an argument based upon traffic concerns but it cannot exert its force, or pull, unless the local-usage category is present in order to provide a platform for this contention. It is not suggested that traffic concerns should always be outweighed by the exercise of local-usage marches. The claim is rather the more modest one; that the full significance of local-usage processions was not recognised in this case because the weighing process between local importance and traffic considerations was omitted. This

---

<sup>127</sup> See chap.IV, section III, *supra.*, for an explanation of the wider notion of public order.

<sup>128</sup> J.C.P.1966.II.14568.

<sup>129</sup> See chap.IV, section II, *supra.*, for arguments as to the rationale for this category.

was due to the omission of a local-usage category in the legal framework set out by the decree-law.

The differences in Abbé Marzy and Union des syndicats ouvriers de la région parisienne C.G.T. et sieur Hénaff may be reconciled if the former case is seen as reflecting the pre-1935 case-law because it is closer in time to that body of liberal decisions. This can be contrasted with the latter case, where perhaps the Conseil had, by that time, had an opportunity to note the clear absence of the local-usage category as regards bans within the decree-law framework, as well as the growth in vehicular traffic. However, cases decided by the Conseil between the dates of these two cases reveal another possible explanation for the difference in the court's reasoning, which concerns religious marches.

All the local-usage cases decided between the passing of the decree-law and the handing down of the decision in Union des syndicats ouvriers etc. concerned religious marches.<sup>130</sup> The Conseil laid down the same formula in each case: that as a result of arts.91 & 97 of the 1884 Act (police public order powers and duties at that time), and the 1905 Act, art.27 (the separation of Church and State), the police could ban processions. Such action was justified as long as police reasoning was based upon the necessity to maintain public order. The 1905 Act was seen as protecting the liberty of religious worship but police intervention was provided for by virtue of art.27. Both this article and the general public order powers/duties were therefore seen as requiring concrete public order justifications before the police powers which they conferred could be exercised. The degree to which the Conseil would review the public order reasons offered by the police as far as religious processions is clearly seen in the early case of Abbé Olivier.<sup>131</sup> In this case the mayor tried to impose a condition on funeral processions and purported to be acting in order to maintain public order. The actual condition was a ban on members of the clergy accompanying such processions by foot, whilst dressed in their religious vestments. The court found that the mayor was acting *ultra vires* the general public order powers<sup>132</sup> since there were no real public order

---

<sup>130</sup> For example, Abbé Blanchard, *op. cit.*, Abbé Laurent, *op. cit.*, and Abbé Délusseau, *op. cit.*

<sup>131</sup> C.E. 19th Feb. 1909; Rec.181.

<sup>132</sup> *op. cit.*, 187;

'...aucun désordre ne s'était antérieurement produit sur le passage du clergé dans les convois funèbres; qu'ainsi le maire a usé des pouvoirs, qui lui sont conférés par l'art. 97 de la loi du 5 avr. 1884, dans un but autre que celui en vue duquel ils lui ont été donnés...'

considerations upon which the decision was based. The court found that the decision merely reflected the municipal council's desire to reduce the differences between secular and religious funerals, as a result of the formal separation between Church and State.

The later cases continue to apply this higher level of protection to religious marches<sup>133</sup> but the Conseil seems to see itself as upholding the liberty of religion rather than the liberty to process. Thus, a possible explanation for the difference between Abbé Marzy and Union des syndicats etc. is that the former, because of its religious nature, was accorded a higher level of protection, whilst the latter, because of its secular nature, was not seen as raising the freedom of religion, as protected by the 1907 statute. It was therefore given less protection vis à vis police banning powers. Thus, although in Abbé Marzy the liberty to process was mentioned, the court can be said to really have religious freedom in mind.

Within the category of local-usage marches, religious processions consequently still have a more secure status, since because of their religious element, they can always rely on the principled protection accorded by the 1905 statute and the case-law concerning it, in which the judiciary has insisted on a special category for these processions vis à vis bans. The existence of a statutorily recognised right also makes this a pedigree human right in the French legal system. This is to be contrasted with the weaker position of secular marches, including those of a traditional and local character under the decree-law. The Conseil's early interpretation was that nevertheless local-traditional usage were still important vis à vis bans but recently its view can be seen to have changed.

*The use of banning powers as regards normal marches*

The cases on this issue can be said to have concerned four different aspects: the grounds upon which a ban is made; the kind of bans that can be made, who may ban and finally emergency procedures for reviewing bans. These will be looked at in turn.

*(a) the grounds upon which bans are based*

---

<sup>133</sup> See cases cited in note 130, *supra*.

For secular marches it is clear that they are subject to the banning power set out in art.3 of the decree-law. It has been noted that the decree-law does not indicate that bans are a last resort. This lower standard in the decree-law, as compared to the liberty to meet, reflects the lower standard concerning normal processions which were at best only tolerated by the authorities. It would also seem that the Conseil has accepted that the police authorities have a choice as to whether to ban processions using their general public order powers/duties or using these same general powers but as formulated in art.3 of the decree-law. Therefore, the banning of marches on a specific day in the year using the general public order powers was upheld in Storez et autres.<sup>134</sup> The consequences of the use of these powers was that there was no requirement to notify the organisers (as under the decree-law) and other conditions could be imposed by the police.

Despite the relatively less strict requirements for the use of banning powers in the decree-law, the Conseil may have introduced a concept of proportionality as far as their exercise. Thus, in Anciens Combattants de Grondrecourt,<sup>135</sup> the Conseil struck down a mayor's decision to ban all processions from 10am-12pm on Armistice Day, with the exception of official processions. The Conseil accepted that it was within the mayor's powers to reserve a time for the official procession in order to avoid too many processions taking place at the same time, which could in turn have resulted in public disorder. However, it felt that a ban of all marches for an entire two hours was excessive in comparison to the object to be achieved.<sup>136</sup> The Conseil therefore introduced a requirement of proportionality but it is not clear from its judgement whether the mayor was purporting to act under the 1935 decree-law, or the general public order powers/duties. As a result, it remains only a possibility that the Conseil has interpreted art.3 as subject to a proportionality requirement.

---

<sup>134</sup> C.E. 26th June 1937; Rec.Leb.627. The mayor banned;

'...les discours dans les rues et sur les places publiques, au cours de la journée du 14 juin 1936, les cortèges, attroupements ou autres manifestations de nature à troubler la sûreté, la tranquillité publique et la commodité de passage, le port d'emblèmes ou de drapeaux autres que le drapeau tricolore, et la vente d'insignes, pochettes - surprises ou autres...'

<sup>135</sup> C.E. 3rd April 1940; Rec.Leb.115.

<sup>136</sup> The court stated;

'...il résulte de l'instruction qu'en interdisant tout autre cortège que ce dernier pendant deux heures entières, le maire est allé manifestement au delà de ce que justifiait le sauvegarde des intérêts dont il est parlé ci-dessus et qu'il a ainsi excédé ses pouvoirs...'

At the same time, the courts have been strict in requiring that public order reasons support a decision to ban a procession.<sup>137</sup> Therefore, in a recent decision by the Administrative Tribunal of Nantes,<sup>138</sup> the court upheld an injunction to suspend a mayor's ban of a proposed march in a commune in support of the opening of a state school.<sup>139</sup> It was accepted that the mayor had banned the march because it was organised by persons who were from outside the commune. The court struck down the mayor's decision, on the basis that bans could not be based on this ground. Therefore, this case seems to confirm that banning powers under the decree-law are limited to the public order reason set out in art.3 of that measure.

This view is further supported by the decision of the Conseil d'État in Commune de Vertou,<sup>140</sup> Although this case involved a static demonstration, the law in this case is still of relevance, given the already mentioned definition of processions in French law. The demonstration had been planned by 'l'Association pour la protection de la vallée de la Sèvre', in the Commune of Vertou. It was then banned by the mayor but the decision was struck down by the Nantes Administrative Tribunal and the mayor then appealed against

---

<sup>137</sup> It has been strongly underlined that banning powers are only to be exercised upon the basis of *public order* considerations, irrespective of whether the police act under art.L.131-2 of the Code des Communes or the 1935 decree-law. The court therefore struck down a ban made on the basis of the mayor's apprehension that a march was unconstitutional; Belmas et Brégeon, Trib. corr. Valence 7th April 1950; Gaz.Pal.1950.2.187, relying on Dames Pérot & Salière, Trib. de simple Police de Chalons-sur-Marne 7th Dec. 1949; Gaz.Pal.1950.1.65 (c.f. Société "La Fanfare de Delettes", C.E. 5th April 1940; Rec.Leb.133, in which the Conseil held that where a mayor refused to authorise a musical society's procession in order to favour a rival local society, this was illegal).

The opposite decision was reached in Assoc. des Combattants de la Paix et de la Liberté et autres, (C.E. 26th Oct. 1956; Rec.Leb.391). In this case the Conseil upheld circulars made by a number of prefects which prevented peace organisations from holding a 'vote for peace' during a series of demonstrations on 'Peace Day'. The circulars also banned the use of official electoral vote slips and informed mayors that they should not put local authority buildings at the disposal of these organisations for the purposes of voting. The Conseil upheld the circulars on the basis that their aim was to prevent an *unconstitutional* referendum (contrary to art.3 of the 1946 Constitution, which, *inter alia*, prevents a section of the public from exercising the sovereignty that belongs to the French people). The vote for peace was a form of consultation of the people and therefore a referendum outside the terms of the constitution. Therefore, restrictions on the liberty to process were upheld on the basis of the constitution. This once again illustrates that the French notion of public order encompasses more than merely physical violence.

<sup>138</sup> 10th Oct. 1985; Juris-Data n.043739.

<sup>139</sup> The earlier interim injunction was granted by the same court: 8th March 1985; Juris-Data n.043738.

<sup>140</sup> C.E. 12th Oct. 1983; R.F.D.A. 1983, n.437; Gaz.Pal.1984.1.212.

the Tribunal's decision. The Conseil d'État upheld the original ban on the basis that the object of the assembly was to illegally threaten private property but which, in turn, threatened public order. Thus the mayor's decision was based upon public order considerations which were in turn based upon the illegal threat to private property, as is evidenced by the organisers' slogans and general purpose.<sup>141</sup>

*(b) what kind of bans*

Another interesting feature of the formulation of the banning powers in art.3 is that from a *prima facie* reading, bans can only be made as regards specific marches. As a consequence, general bans appear to be *ultra vires* the decree-law.<sup>142</sup> The specific nature of bans under this measure can be contrasted with the possible scope for general of bans via the general public order powers/duties.<sup>143</sup> As far as the decree-law is concerned, this *prima facie* reading has not been so clearly supported by the case-law. In Abbé Marzy, the Conseil struck down a general ban made on the basis of the decree-law but it is unclear as to whether this was by reason of the general terms of the ban or because of the court's finding of a lack of public order justifications for the ban. In other words, the case could be interpreted as permitting general bans if backed up by the legitimate public order concerns of art.3.

This uncertainty is further compounded in Belmas et Brégeon.<sup>144</sup> As will be seen below, this case's central concern is with prior declarations. However it follows that the court is clearly discussing the decree-law, since it is only this enactment that lays down a prior declaration requirement. However, according to the facts in the case, the prefect had issued a general ban. This would either indicate that the prefect, although purporting to act according to the terms of the 1935 decree-law, had in fact exercised his general police

---

<sup>141</sup> The court stated;

'Considérant qu'il ressort des pièces versées au dossier que la manifestation prévue pour le 21 juin 1980 dans la commune de Vertou avait pour objet, selon les mots d'ordre lancés par ses organisateurs, de porter une atteinte illégale aux propriétés privées; qu'elle présentait ainsi une menace à l'ordre public...'

<sup>142</sup> Art.3 lays down that if the relevant police authority apprehends that a march is likely to breach public order, it can ban it. This evinces a clear intention of *specificity*.

<sup>143</sup> The use of general bans under the general public order powers/duties has been affirmed in many cases; for example, Legastelois, *op. cit.*, Storez et autres, *op. cit.*, Guiller, *op. cit.*, and Anciens Combattants de Gondrecourt, *op. cit.*, even though the Conseil has been seen to be hostile towards them and as a result they are more difficult to justify, see section II, *supra*.

<sup>144</sup> *supra*.

powers outside this measure or that the court accepted that general bans were permitted within the framework of the decree-law. In the latter case of Dupont et autres,<sup>145</sup> the mayor was clearly purporting to exercise his decree-law powers in attempting to sanction the respondents for breach of the decree-law. However, the court, yet again, made no reference to the previous general ban of public processions that had been made by the police and which was the basis of the prosecution. This further illustrates the willingness on the part of the courts to permit the police to make general bans, despite the fact that the decree-law limits the police to specific bans.

The courts' seeming unwillingness to insist upon the legal source of the banning powers may be linked to the fact that the powers under the decree law are the same as the general public order powers, except that the decree-law merely purports to more tightly regulate their use. The general powers are therefore always in the background to meet unforeseen circumstances. At the same time, it can be argued that the liberty would be accorded greater respect if the courts insisted that bans, which are clearly foreseen by the decree-law, should be based on the more restrictive terms of the 1935 measure, unless special circumstances required that the police had to have recourse to their general powers.

*(c) who may ban*

An interesting recent case is that of Commune de Montgeron,<sup>146</sup> Apart from the grounds upon which bans can be made, this case raises the issue of the division of competences as between the mayor and the prefect. The case essentially concerns a dispute between the mayor and the departmental prefect as to which had the power to ban marches in communes with a national police force. Thus, despite the fact that a prior declaration for a proposed march was made in accordance with the provisions of the 1935 decree-law, the mayor purported to ban it on the basis of his general public order powers/duties. More specifically, the mayor, acting in an area with a national police force, sought to rely on art.L.131-2-1° of the Code des

---

<sup>145</sup> Cour d'appel (ch. corr.) 24th Jan. 1951; Gaz.Pal.1951.1.262.

<sup>146</sup> C.E. 28th April 1989; Req. no.74018; R.F.D.A. 1989.557; J.C.P. éd. G.IV.218; Rec.Leb.119 and A.J.D.A.1989.644.

Communes, by which he is charged with ensuring safe and efficient traffic circulation.<sup>147</sup>

The court accepted that the mayor was charged with duties as regards traffic circulation under art.L.131-2-1° and that the mayor kept this competence even in areas with a national police force by virtue of art.L.132-8 of the Code. This view, it will be recalled is in accordance with the partial transfer of competences in national police areas.<sup>148</sup> However, at the same time art.L.132-8 placed the control of 'occasional assemblies' in the hands of the prefect.<sup>149</sup> Thus, one reason for the Conseil's finding that the mayor was incompetent to ban the march was because in the instant case it was an *occasional* one. All other kinds of marches (i.e. those of a regular and periodic nature) are therefore the responsibility of the mayor.

A second reason was that according to art.2 of the decree-law, the prior declaration is to be made to the prefect or sub-prefect in those areas with a national police force. It was therefore held that it was the prefect who had powers to ban processions in this area under art.3.<sup>150</sup> Art.2 was therefore interpreted as indicating who was the relevant police authority according to the terms of art.L.132-8. This case highlights the complexities involved in the area of bans, which is compounded by the existence of two police authorities.

---

<sup>147</sup> See chap.IV, section III, *supra*..

<sup>148</sup> See chap.IV, section III, *supra*.

<sup>149</sup> Art. L.132-8 reads as follows;

'Le soin de réprimer les atteintes à la tranquillité publique, tel qu'il est défini à l'article L.131-2-2 et mis par cet article en règle générale à la charge du maire, incombe à l'Etat seul dans les communes où la police est étatisée.

Dans ces mêmes communes, l'Etat a la charge du bon ordre quand il se fait occasionnellement de grands rassemblements d'hommes.

Tous les autres pouvoirs de police énumérés à l'article L.131-2 sont exercés par le maire y compris le maintien du bon ordre dans les foires, marchés, réjouissances et cérémonies publiques, spectacles, jeux, cafés, églises et autres lieux publics.

Les forces de police étatisées sont chargées notamment, d'exécuter les arrêtés de police du maire.'

<sup>150</sup> The court stated;

'Il résulte de ces dispositions que, dans les villes où est instituée une police d'État, l'autorité préfectorale a seule qualité pour prononcer l'interdiction d'une manifestation sur la voie publique de nature à troubler l'ordre public et que le maire est, dans ces mêmes communes, incompetent pour prononcer une telle interdiction, même en se fondant sur les dispositions de l'article L.131-2-1° du Code des communes.'



In any case, it should be recalled that the prefect may substitute for the mayor if the latter decides not to ban a procession,<sup>151</sup> as for example in Assoc. des combattants de la Paix et de la Liberté et autres.<sup>152</sup>

*(d) emergency review procedures*

Despite the possibility that the courts will overturn bans on marches, it has been noted that, as with the liberty to meet, these decisions may often come too late and therefore be of little more than a symbolic victory because in practical terms the liberty has been restricted. However, recent administrative reforms have sought to improve this situation. More precisely, the recent introduction of the *déféré préfectoral*,<sup>153</sup> which consists of a kind of emergency administrative review procedure where a civil liberty is restricted by, *inter alia*, local police decisions, may be of considerable use as regards this problem.

A good example of the working of this new procedure can be seen in the already mentioned case of Commune de Montgeron.<sup>154</sup> The facts of the case in more detail were that the mayor of Essonne had banned a proposed march by the local chapter of the Ligue des Droits de l'Homme, which was to commemorate the memory of Pierre Mendès-France. Using the new procedure, the prefect sought, and was granted, an injunction by the administrative court to suspend the mayor's decision.<sup>155</sup> The mayor's ban was held to be illegal at the full hearing<sup>156</sup> and the mayor then appealed to the Conseil d'État to have the Tribunal's decision struck down and the original ban reinstated. The arguments presented before the Conseil have been noted above but what is of importance here is the *time periods* in which the decisions involved in this case were taken and especially the time in which the first injunction on the mayor's ban was granted.

---

<sup>151</sup> See chap.IV, section III, *supra*. and Dautan, *op. cit.*, 9;

'Au cas où le maire n'a pas jugé opportun d'interdire la manifestation, le préfet en vertu de ses pouvoirs de tutelle peut lui interdire de mettre les locaux publics à la disposition des organisateurs..'

<sup>152</sup> C.E. 26th Oct. 1956; Rec.Leb.391.

<sup>153</sup> See chap.II, section II, *supra*.

<sup>154</sup> *op. cit.*

<sup>155</sup> Commr. de la République du Département de l'Essonne c. Commune de Montgeron, Trib. Admin. Versailles 21st Oct. 1983 n.5396.

<sup>156</sup> Trib. Admin. Versailles 5th July 1985.

Therefore, on the 20th October 1983, the mayor banned the march which was scheduled to take place on the 22nd October. The request for an interim injunction was made on the 21st October and the President of the Tribunal granted an interim injunction the next day, so that the march could take place as planned.<sup>157</sup> The injunction was therefore granted twenty-four hours after the ban and it will be recalled that the administrative court has up to forty-eight hours to take a decision,<sup>158</sup> so that even in the case of the maximum delay, the new procedure is a considerable improvement on the normal application for judicial review, which usually requires at least three months before a decision is handed down.<sup>159</sup>

The new procedure also has another advantage which is that there is a presumption in favour of human rights. Thus, it will be recalled that an interim injunction *must* be granted by the court where it is shown that there is a likelihood that a human right will be infringed.<sup>160</sup> This can be contrasted with the normal interim injunction, which it will be recalled is an *exceptional* measure that also depends on two conditions being proved to exist.<sup>161</sup>

#### *The practice and enforcement of the prior declaration requirement*

Art.1 of the decree-law lays down the requirement of a prior declaration for non-local-usage marches on the public highway, whereas art.2 lays down the conditions and form of this declaration. The criticisms that the prior declaration requirement allows the police to instigate a prior authorisation regime have been mentioned and the case-law on this requirement will be examined here with this in mind.

The case-law shows that the judiciary, whilst making it clear that the police can require prior authorisations when exercising their general public order powers / duties,<sup>162</sup> have not been as categorical as regards their use within the

---

<sup>157</sup> Chabanol, *op. cit.*, 452;

'L'intervention du juge, extrêmement rapide, a pu peser sur le cours des événements et autoriser l'exercice d'une liberté publique au lieu de se borner à constater que cet exercice avait été illégalement mais irrémédiablement perturbé.'

<sup>158</sup> See chap.II, section II, *supra*.

<sup>159</sup> See Etchegaray, *op. cit.*

<sup>160</sup> See chap.II, section II, *supra*.

<sup>161</sup> See chap.II, section II, *supra*?

<sup>162</sup> In the following cases the court accepted the implementation of a prior authorisation requirement before a march on the basis of their general public order powers / duties; Pitou

(Footnote continues on next page)

1935 decree-law framework. As regards the latter, the Conseil d'État ruled in Abbé Nicolet,<sup>163</sup> that a mayor could only impose a prior authorisation requirement using his/her general public order powers/duties. The decree-law gave the police authorities no power to require prior authorisations, it only provided for prior declarations.

This clear ruling as to prior authorisations is to be contrasted with the more recent case handed down by the Nancy Court of Appeal in Dupont et autres.<sup>164</sup> This case has already been mentioned as regards the duty to notify the organisers of a decision to ban a march, which is laid down in art.3 of the decree-law. However, although in this case it was noted that the organisers of the 'Journée de la paix' march had not requested prior authorisation from the mayor, the court did not hold that such a requirement was ultra vires the decree-law. Indeed, no reference to the fact that a prior authorisation practice had been adopted by the police was made in the instant case.

Given that the court which handed down this judgement is lower than the Conseil d'État (although it must be remembered that the two courts are from separate jurisdictions) and the fact that the prior authorisation was not central to the dispute in hand, it could be claimed that it is unlikely that Dupont et autres lays down good law. However, the case is of interest because it reveals police practice and also judicial unconcern as far as such practices. Therefore, a practice of requiring prior authorisations could be said to have been imposed by the police authorities, even though, according to the terms of the decree-law and the supporting interpretation in Abbé Nicolet, such a practice is illegal. Furthermore, even if such a practice is not widespread, the discretion that the police authorities enjoy, which permits them to subject the liberty to process to the wider terms granted by their general public order powers/duties, means that the imposition of prior authorisations is always within the police's discretion.

---

C.E. 9th June 1937; Rec.Leb.574, Société 'La Fanfare de Delettes', *op. cit.*, Guiller, *op. cit.*, Rastouil, *op. cit.*, and Legastelois, *op. cit.*

<sup>163</sup> *op. cit.*

<sup>164</sup> *op. cit.*

*Liability and sanctions for breach of the decree-law*

The new penal code has been seen to have modified the sanctions originally found in the decree-law so that it is organisers that are generally sanctioned. At the same time, the former article in the decree-law was seen to have contained similar offences aimed at organisers and so the subsequent case-law may still be of relevance as regards the new sanctions.

It will be recalled that the first offence is that of organising a demonstration without first having made a prior declaration (art.431-9(1)). The offence in art.431-9(1) also requires that there is the *organisation* of a demonstration which has not been legally declared but since organisation is a key element in the next offence, it will be dealt with when this offence is analysed. Here attention will be focused on the failure to make a prior declaration.

It has been held that in certain circumstances, the failure to make a prior declaration will not lead to criminal liability. Thus, in Belmas et Brégeon<sup>165</sup> the defendants had clearly breached the terms of art.4, in that after the march had been banned, they invited people to take part in it. The question facing the court was whether the defendants could also be prosecuted for failure to make a prior declaration. The court held that the defendants were released from their obligation to make a prior authorisation because the march had been already banned two days before the organisation and encouragement to participate in the march had occurred.<sup>166</sup>

It was further stated that the purpose of the prior declaration in the context of the decree-law was an informative and facilitative one. This meant that once the police had been made aware of a forthcoming march, they were then placed in a position to decide whether to ban the procession. In the instant case, the police were already aware of the proposed march and they had already exercised their banning powers, therefore the court found that the function of the prior declaration had been served. The defendants could only be prosecuted for their encouragement after the ban and not an additional offence of failing to make a declaration to the police.

---

<sup>165</sup> *op. cit.*

<sup>166</sup> See also Izaute, Cour d'Appel Bordeaux 18th July 1950; D.1951.41.

The second offence is that of having organised a demonstration that has been legally banned (art.431-9(2)). Under the repealed art.4(2), it was, *inter alia*, an offence to participate in the organisation of a demonstration that had been banned. It can be claimed that this offence has been replaced by a simpler organisation offence and therefore the case-law under the former article concerning organisation can be of guidance to how the new provisions will be applied.

The court gave its opinion for the first time as to what is meant by 'participation in the organisation' in Calas,<sup>167</sup> Although this case concerned a static demonstration, its reasoning is still applicable to mobile demonstrations (i.e. processions). Calas had been found guilty of, *inter alia*, participating in the organisation of a non-authorized assembly on the public highway, contrary to the decree-law. According to the findings of fact, a demonstration had been organised in a town square after the close of an earlier political event. This demonstration caused an assembly to form on the public highway, which refused to disperse until the police were forced to disperse the crowd by force. Two of the defendants, Turrière and Gravié, had spoken at this assembly, whereas Calas had distributed leaflets calling for people to assemble.

The court held that the fact that Turrière and Gravié had spoken at the demonstration did not in itself constitute 'participation in the organisation' of the assembly. Speaking and participation were held to be two different activities. On the other hand, the claim by Calas that he was not the instigator of the demonstration could not be upheld, not least because of his distribution of the leaflets and his later admission in a newspaper that he was the organiser. The distribution of the leaflets was interpreted as a step in preparation (and therefore organisation) of the demonstration.

This finding clearly shows that the court relies in each case on an interpretation of different fact situations. The court is constantly searching for the dividing line between mere participation and organisation. This can be further illustrated in Merabet Bourogaa et autres.<sup>168</sup> The respondents in this case appealed against the decision of the Tunis Cour d'Appel which found

---

<sup>167</sup> Cass. crim. 23rd Feb. 1954; D.1955.465.

<sup>168</sup> *op. cit.*

them guilty of participating in the organisation of a non-declared march. They alleged in their defence that they were merely participants in the march. The respondents were four local councillors and according to the facts of the case, they marched at the head of a procession to the police headquarters in order to protest against the arrest and detention of a person who had been arrested for affixing what were considered to be subversive posters on local buildings. The court accepted the evidence from eye-witnesses that the respondents not only *physically* lead the three hundred strong march but also that they were its organisers. The four were also seen to have stirred up the crowd and invited those that they passed to join the march. After the four entered the police headquarters and demanded to be heard, the crowd became aggressive and police reinforcements had to be called in.

In upholding the finding as to organisation, the court decided how far the four councillors had gone beyond the point of mere participation. It would seem that it was the particular combination of factual circumstances that led the court to its decision. For example, others among the crowd may have encouraged passers-by to join in the procession but given that they were not at the head of the march and did not stir up the crowd, they could not have been said to have been organisers. In addition, perhaps the fact that the respondents were not ordinary citizens and could be said to have carried some influence with the crowd, militated in favour of a finding of organisation, rather than their simple participation as local councillors, as the respondents had pleaded.

If the two cases above present problems as to predictability, no further guidance is provided by the court in M.P.c. Texereau et autres.<sup>169</sup> The court held here that the mere agreement in a public meeting, by representatives of different organisations, to hold a non-declared march and the promise by certain persons to participate in this march, was insufficient to constitute 'organisation' within the terms intended by art.4(2). The court can be said to have decided in this case that the respondents were still taking *preparatory* steps towards the organisation of an illegal march, as opposed to *actual* organisation.

---

<sup>169</sup> Trib. corr. Albi 5th July 1957; J.C.P.57 éd. G.IV.175.

From these cases, it would seem that the courts have formulated a two-stage approach to the question of organisation that may be of help in the future in deciding who and what constitutes organisation under art.431-9. Firstly, they will review the particular fact situations in order to decide whether the facts support a finding of participation,<sup>170</sup> as opposed to organisation. Secondly, the court will interpret the defendant's actions in order to decide whether they are steps preparatory to organisation or activities in the course of organisation.

The last offence is that of having made an incomplete or inaccurate prior declaration (art.431-9(3)). This is almost an exact repetition of art.4(1), except that this provision also contained the offence of not having made a prior declaration, which is now dealt with in art.431-9(1). However, no cases seem to have dealt with this offence under the decree-law.

#### *The role of the attroupement offence*

It was noted above that those who participated in or incited banned marches on the public highway were sometimes prosecuted for the offence of provoking an attroupement. Participation could also fall foul of art.4(2) of the decree law (participation in a non-declared or banned demonstration). However, this overlap no longer exists, given that the new offences in art.431-9 do not sanction mere participation and the attroupement offence is now clearly defined in art.431-3 as requiring an element of disorder, so that a mere ban is not a sufficient condition to constitute an attroupement. Therefore, a clear separation is established between the *public order offence* of attroupement<sup>171</sup> and the offences committed by those who while seeking to *peacefully* process have not followed or have actively breached the conditions laid down in the decree-law.

However, the distinction between public order and the liberty seems to have been recognised by the courts before the new formulation of the attroupement offence and this recognition can be said to represent a change in attitude towards the liberty as compared with tendency in the past to use the

---

<sup>170</sup> See also Ramires, Cass. crim. 23rd March 1953; Gaz.Pal.1952.2.45 and Pelissier, Cass. crim. 26th July 1955; J.C.P.55 éd. G.IV.133

<sup>171</sup> See *supra*. As far as the former offence of inciting an attroupement, there is now only an offence of inciting an *armed* attroupement (art.431-6).

atroupement offence to repress processions. The role of the atroupement offence can thus be said to have been considerably reduced.

Thus, the courts overturned convictions where the first instance court has refused to review the facts in order to determine whether there was actual or threatened public order. As a consequence, the fact that a banned march took place on the public highway was not sufficient to constitute an atroupement. This has been held in Portet et autres<sup>172</sup> and Puaux.<sup>173</sup> In each case the court reviewed the facts to see if this constitutive element of an atroupement was present, if not, it was held that only an art.4(2) prosecution (for participation in a banned march) could be brought. The element that distinguishes the two offences from each other is clearly seen to be public order: a banned march that nevertheless takes place on the public highway may present no danger to public order but in order to legally constitute an atroupement it must have been likely to breach public order. Moreover, this public disorder must be of such a degree as to qualify the assembly as an atroupement. This is a finding of fact in each case but the decision by the police will be struck down unless regard has been had to these questions and the Conseil will also overrule the findings of the lower courts unless these issues are reviewed.

#### A SUMMARY

The regulation of the liberty to process is different from that of the liberty to meet. The liberty to meet and the liberty to process are recognised as distinct human rights, even though they share *assembly* characteristics. This difference infuses the history of their legal regulation. In addition, there is no statement of principle to the effect that priority should be given to liberty.

Secondly, the legal framework is the product of concern about public disorder, whereas the 1881 Act was seen to be conditioned by a belief that meetings no longer posed a public order threat. It is only comparatively recently that a distinction has been made between public order offences involving violence and peaceful marches; this once again reflects the tendency not to prioritise the liberty to process.

---

<sup>172</sup> *op. cit.*

<sup>173</sup> Cass. crim. 25 March 1954; D.195.402.



Thirdly, the regulation would appear to be less specific because it refers to demonstrations, rather than marches. Demonstrations have been seen to be a wide category of which processions are but one aspect. However, given the historical circumstances surrounding the regulation of the liberty to process it would seem that it was processions that were in the forefront of the government's mind when it laid down the legal framework for demonstrations in 1935. Thus, it can be claimed that the current legal framework is actually rather specific and takes into account the specific context and needs of the liberty to process.

# PART THREE

## COMPARATIVE EVALUATION

The law regulating the liberties to meet and process in France and England is compared here. The resulting findings will then be applied to the two practical concerns of the Bill of Rights debate in the UK and the protection of human rights in the EU. **Chapter VI** sets out the criteria that will be used for comparison and which are derived from the jurisprudential theory of civil liberties adopted in this study. In addition, the role of US and ECHR case-law, as high standards against which these criteria and their legal consequences can be compared will be explained. A first comparison is also made as regards the status and definition of the liberties in France and England. Thereafter the chapters look at regulation at different time periods. Thus, **Chapter VII** looks at the legal position before the exercise of the liberties, **Chapter VIII**, during their exercise and **Chapter IX** after their exercise. In **Chapter X** conclusions are drawn as to the application of theory to the two practical issues and the consequent need to apply theory as regards civil liberties in England.

## CHAPTER VI

# COMPARATIVE CRITERIA, LEGAL STATUS AND STRUCTURE

### INTRODUCTION

The criteria that will be used to compare and evaluate the regulation of the liberty to assemble will be firstly set out in this chapter. These criteria are derived from the jurisprudential theory of civil liberties adopted in this study and so provide a concrete example of the use of theoretical insights in order to formulate practical means to protect human rights. In order to gauge the degree to which these theoretically-based measures protect the liberties to meet and to process, the US and the ECHR case-law will in turn be used to evaluate them. This is because they are recognised as providing high standards of protection.

The second aim of this chapter is to compare the status of the liberty to assemble in the two legal systems, using the criteria that has been set out and finally a comparison will be made of the way the liberty is defined. This involves an investigation and comparison of its structure. Then it will be possible to make a decision as to which term should be used to refer to the liberty, as opposed to the interchangeable terms that have been used up until now.<sup>1</sup>

The status and definition of the liberty to assemble can be seen as having in common the fact that they are distinct from the more technical issues that will be compared in chapters VII-IX below. This is because they raise *a priori* issues, which make sense of these latter technical or 'mechanical'<sup>2</sup> aspects of regulation. To take a simple example, comparing to what extent meetings are banned on the basis of official discretion seems a meaningless exercise unless it is clear that meetings are valued activities, that are so highly valued as to be protected as a human right. Concern as to the grounds upon which restrictions are based thus makes sense when the status and structure of the

---

<sup>1</sup> Chap.III, section II, *supra*.

<sup>2</sup> Bailey *et. al., op. cit.*, 146, speak of the 'mechanics of protest' as including the following questions: 'how many protesters? where are they? are they disorderly? are they violent?'

human right is known. In other words, these theoretical issues precede regulation.

## SECTION I COMPARATIVE CRITERIA

The jurisprudential theory that has been formulated in this study indicates a series of measures and standards by which the liberty to assemble should be regulated. These will be used to compare French and English law and to evaluate it. These legal measures act as comparative criteria and the fact that they are derived from theoretical insights constitutes a central example of the attempt to apply theory to practice. It should be noted that if the criteria are explicitly derived from jurisprudential theory, comparative theory has played an implicit role in pointing to French law as a useful system for comparative purposes, despite belonging to the civil law family.

The criteria are set out in Table I below and will be outlined here but their nature and scope will be seen in greater detail when they are actually employed. These criteria will be continually referred to in the next chapters of comparative evaluation. In order to avoid repeating each time the theoretical significance of each element, their jurisprudential background has been explained here and it is hoped that during the ensuing investigation of what are often complex legal provisions, this explanation and the accompanying Table will be recalled and returned to by the reader.

**Table I**

<b>Emphasis on difference and the specific</b>	<b>Importance of human rights as social values</b>	<b>Political and social change</b>
<i>concentration on particular human rights</i>	<i>legal status</i>	<i>statutes</i>
<i>legal recognition of specific human rights</i>	<i>exacting judicial review</i>	<i>consultation and negotiation</i>
<i>detailed and specific legal regulation</i>	<i>restriction as a last resort and clear balancing of values</i>	<i>restrictions by politically accountable bodies</i>
<i>local interest</i>	<i>non-discrimination</i>	
	<i>priority use of certain locations</i>	

## **AN EMPHASIS ON DIFFERENCE AND THE SPECIFIC**

As can be seen from Table I, the theory supports an emphasis on specific human rights. It will be recalled from chapter I that the theory was seen to justify the investigation of specific human rights. This was presented as an alternative strategy to the general approach taken in the Bill of Rights debate and as justifying the study of the liberty to assemble as an example of this specific approach.

The criteria that follow from this are firstly, specific analysis, which means the degree to which the law recognises that there are particular and specific human rights, rather than general rights that contain a series of different but related rights.

Secondly, there is a preference for the legal mention of specific human rights. In consequence, these rights should have a legal status and not be obscured behind broadly formulated human rights.

Thirdly, theory supports detailed regulation that takes account of the specific contexts and needs of each particular civil liberty. Thus, what will be examined is the degree to which the law regulates the specific aspects and problems of this liberty.

Fourthly, it will be recalled that the emphasis given to the specific in the study is part of an attempt to bring difference to the fore where it has been hidden behind generality. This was seen as a preference for what was termed the 'local narrative'. This aspect of the theory results in a concern to regulate the liberty by looking at the local circumstances involved. Therefore, those persons in the locality that will be affected by meetings and processions should be heard and the authorities that have the power to restrict their exercise should also be local so that they can better take account of what the local circumstances require. This is important because circumstances may differ widely between different areas and times and it will be easier for those on the spot - officials and ordinary citizens to gauge these particular circumstances. The degree to which French and English law provide for the 'local narrative' will therefore be investigated.

## **IMPORTANCE OF HUMAN RIGHTS AS SOCIAL VALUES**

The jurisprudential theory also underlined the importance of human rights because firstly, they are ultimately a means to achieve social and political change and secondly, they are constructed by communities and represent the values that a community considers to be so fundamental that they should be accorded higher protection. Despite the contingency that was said to be an aspect of these socially constructed civil liberties, the theory has emphasised that human rights should be protected because they are the values of society. Seeing human rights as social values of this kind leads in the present context to a preference for measures that reflect the importance of the liberty to assemble. This is firstly achieved by granting a legal status to the liberty, thus it will be seen how far this is the case in France and England.

More specifically, the law should also recognise this importance by providing for exacting judicial review. What does this mean in the context of the liberty in question? A detailed response will be made in the following chapters but essentially it means that the legal systems will be compared in order to ascertain the degree to which restrictions of the liberties can be challenged and the degree to which restrictions can be reviewed. The greater the capacity to challenge and the more exacting the review, the greater the degree of importance that can be said to be accorded to these liberties. This in turn reflects the view that human rights are of such importance that their restriction must be strictly reviewed. Another point follows on from this and can be seen in the requirement that restrictions of the liberty, such as bans, should be a last resort. This is a requirement that can form part of the substance of judicial review but it is also important to see how far the police are guided by such a requirement, so that they may only have recourse to such measures in the final instance. Consequently, French and English law will be comparatively evaluated according to the degree to which they give priority to the rights to assemble by only permitting their restriction as the last possible means to secure another and more important value, such as the maintenance of public order.

Another principle that flows from the theory is that of a balancing or reconciliation of competing values. Human rights are values but it has been argued that other values, such as public order in the case of the liberties to

assemble, sometimes conflict with their exercise.<sup>3</sup> In therefore deciding whether the liberties are to be exercised and thus accorded more weight than a competing value or restricted and so subordinated to other values, the theory requires that this balancing is made clear. It will be recalled that it also requires that the importance of the liberties is recognised and this means here that the decision-maker must accord the liberties a weight in the balancing process which in turn reflects their social importance. The greater the degree of transparency in this balancing process the clearer will be the link between the liberties and the social and political forces that have constructed them, as well as the changes in the social value accorded to these rights.

A comparison will also be made of the degree to which discrimination as to who may exercise their rights is limited. Deciding that some persons may meet or process, while others may not may be inevitable given public order considerations and limited resources. Nevertheless, the theory supports a general prohibition on discrimination where it is based on considerations, such as the political views of the participants, that cannot be said to uphold other social values like public order or a fair distribution of scarce resources.

A final criteria concerns the locations in which the liberties can be exercised. If the law recognises the importance of the rights to assemble, it should accord them a priority when deciding if they should be exercised in locations for whose use there is strong competition. This is not to say that the exercise of the liberties should always override other uses but that in the decision-making process it is recognised that the liberties are social values. This should result in their exercise only being overridden by other important values. The theory also favours measures by which authorities set aside certain locations in which meetings and processions have priority. This results in a positive obligation on the authorities, as opposed to the negative obligation of non-interference.

### **POLITICAL AND SOCIAL CHANGE**

The theory has insisted that human rights are subject to change. By reason of being socially constructed values they may one day no longer reflect the values of a community or may have to give way to new or competing values.

---

<sup>3</sup> Chap.III, section I, *supra*.

In other words, the social values of a community are subject to change and thus the values of today are contingent. Therefore, human rights are related to political and social change. One result of this view is that the theory supports the use of detailed statutes to regulate the liberty because these are more likely to represent the political choices of a community and more importantly, they can be more readily changed by the political process. Statutes can be repealed and amended more easily than other types of measures that seek to entrench liberties beyond political and social change. What follows is a comparative criteria that looks at the degree to which the specific context of the liberty is regulated by statute.

A second criteria is the degree to which a framework of consultation and negotiation between participants, interested and effected parties and the authorities is provided for as regards restrictions of the liberty. Such a process reflects the an interest in according as much of the decisions concerning the regulation of the liberty to the community. It also reflects the contingency/unfixed nature of this right, since in this process it is must be weighed against other countervailing values in society.

Finally, it follows that restrictions on the liberties should be taken by locally accountable bodies or persons. In this way decisions to restrict the liberty, given the imperfection of present structures of democratic representation, are taken by the representatives of the community. The result is that the political and social element of human rights is retained in its regulation - in other words, it is the community that decides whether it should be restricted. This is not to be confused with a claim that human rights are merely what the majority decides. Rather the claim is that as far as possible local and affected interests should be involved and heard but they are at the same time to be constrained within a legal framework that generally accords importance to the liberties to assemble. It then follows that in the particular decisions that need to be made as regards meetings and processions within this framework, local and accountable interests should play an important role, along with central or national interests.

#### **A WORD CONCERNING METHOD**

As will have been noted, theory sometimes indicates precise legal mechanisms, such as statutory protection, while on other occasions it simply indicates more general methods that should be pursued, as for example is the



case with judicial review. In order to gauge the degree to which these theoretically derived criteria and measures would protect the liberty they will be evaluated by comparing them with commonly accepted standards of protection. These consist of the case-law from the United States of America and the ECHR concerning the liberty to assemble.

The use of such criteria should not be seen as an adoption of the way human rights are constructed in these systems. For example, the use of US case-law to see how questions of location are regulated does not endorse the theory that supports the review of human rights by the Supreme Court, by which it may strike down statutes. Such an adoption would contradict the theoretical view that has been formulated here. But at the same time, it should be recalled that what is offered is but *one* possible jurisprudential view and that given another view, different protections of human rights could be accounted for. The more fundamental aim is to show that theory can be of use to practice.

Another aspect of the method to be used in comparing French and English regulation of the liberties to meet and to process is that the starting point will be taken from the problems identified in England and so it will then be seen how these problems are dealt with in France.<sup>4</sup>

In England this is an area of law which consists of a complex battery of regulations of both a statutory and common law nature. It is therefore difficult to approach the matter in a systematic way. This difficulty is however compounded by the fact that few commentators in England specifically deal with the liberties in question. Instead, there is a tendency to deal with public order or at best the right to protest. More to the point, because they focus on public disorder and not the rights to peacefully assemble, these approaches are claimed to be of little use in highlighting the specific legal mechanisms that are required to regulate the liberties. Thus, while it is conceded that public order plays an important role in the regulation of these rights, it is not claimed to be a central one.

---

<sup>4</sup> Therefore it will be noted that both the issues of prior declarations, notice and authorisation and that of public and private assemblies will not be centrally dealt with as these have not been issues of great concern in England.

The method adopted by Bailey *et. al.* suffices as an example of the dominant English approach. Under the heading 'Public Order' they analyse the regulation of 'Demonstrations and riots' and the 'Freedom of association', before finally studying 'Public meetings and processions'. This final category is then further divided into three sections - location, conduct and preventative powers.<sup>5</sup> Why is this classification not suitable? The answer is that the rights to assemble are located in the gaps left by measures to control violence. It thus becomes easy to view the exercise of the liberties as a public order problem when in fact the vast majority of public meetings and processions pass off peacefully.<sup>6</sup>

Therefore, the fundamental problem with the public order approach is that it does not accord sufficient weight and importance to the liberties to assemble. Thus, for example, an analysis of the public order offences that involve violence, such as riot, violent disorder and affray, is of little relevance to those who seek to assemble *peacefully* and the liberties to assemble are about these activities.<sup>7</sup> It is true that the liberties very much exist within the context of the police view as to what is peaceful or violent but this does not mean that the liberties are the same as these public order offences. Those that seek to assemble peacefully are not claiming a right to riot or a right to violent protest, rather they seek to exercise the right to peacefully assemble and the focus of the analysis should consequently be on the ways that such exercise is guaranteed and restricted.

In the light of these criticisms, this study adopts a perspective that tends to be lacking in studies of the liberties to assemble in England precisely because the subject is approached from the point of view of public order. In consequence, the method adopted here begins from the point of view of those wishing to organise and or participate in a peaceful assembly. As a result, the liberties are divided up into a series of regulations that such persons may confront *before, during* and *after* an assembly, in other words at different stages of the assembly.

---

<sup>5</sup> *op. cit.*, 146 *et. seq.*

<sup>6</sup> A fact that is noted by the police; see the annual Reports of HM Inspectorate of Constabulary.

<sup>7</sup> Chap.III, section II, *supra*.

This method is adopted because it stresses the peaceful nature of assembly; those wishing to assemble are not seen at the outset as presenting a public order problem. On the contrary, this view puts into sharp relief the arguments that will need to be presented in order to restrict these valued activities. In other words, this approach according to the different periods of time and the organiser/participant perspective is argued to shift the balance away from public order and towards civil liberty. Therefore, restrictions on the grounds of public order will still be of relevance but the perspective used here focuses on an investigation of the arguments and justifications that will need to be provided before restrictions can be accepted on these grounds.

A general outline of the topics concerning the regulation of English law in the proceeding chapters is set out in Table II below.

Table II

	Meetings	Processions	Meetings and Processions
<b>Chapter VI Status and structure</b>			<i>statutory protection and mention. plural structure. central aspects of the liberties to meet. relatively independent aspect of freedom of expression.</i>
<b>Chapter VII Before</b>	<i>trespass statutory and common law obstruction</i>	<i>reasonable user of the highway and private property rights</i>	<i>bans conditions</i>
<b>Chapter VIII During</b>			<i>breach of the peace disrupting public meetings obstruction offences under the Public Order Act 1986 conditions</i>
<b>Chapter IX After</b>		<i>offences under the POA 1986</i>	<i>binding over powers</i>

It will be seen that in looking at the regulation of the liberty a distinction is sought to be maintained between meetings and processions in order carry out a specific analysis. However, since the starting point is English law, this distinction will not always be made. Thus, as regards chapter VII on regulations before assemblies it will be seen that as far as bans and conditions a distinction is generally not made between meetings and processions but as regards issues concerning location, a clearer division exists between the two types of assembly. Similarly, the law on restrictions during assemblies does not make a distinction. On the other hand, in chapter IX, which concerns the

law after the liberty to assembly has been exercised, it will be seen that specific sanctions are envisaged as regards the processions.

After these areas of regulation in England that are set out in Table II have been compared with France using the jurisprudentially derived criteria, the US and ECHR will be used to evaluate the standards and mechanisms of protection that are developed. The general scheme of this evaluation is set out in Table III. This shows the aspects of French and English law that are compared with the relevant elements of US and ECHR law. These elements and their relevance will of course be explained in the course of the comparison but as certain elements, such as the hecklers' veto arise on more than one occasion, Table III is also intended as a point of reference.

**TABLE III**

<b>Areas of English/French law evaluated</b>	<b>United States case-law</b>	<b>ECHR case-law</b>
<i>status and structure</i>	<i>legal status</i>	<i>legal status</i>
<i>location</i>	<i>non-communicative impact restrictions. public forum.</i>	
<i>bans and conditions</i>	<i>prior restraint. vagueness. overbreadth. hecklers' veto. judicial review.</i>	<i>necessity. proportionality. hecklers' veto. general bans. judicial review.</i>
<i>conduct regulations</i>	<i>communicative -impact regulations: clear and present danger. fighting words. last resort. non-communicative impact regulations: public order. official discretion. hecklers' veto. judicial review.</i>	<i>hecklers' veto</i>
<i>sanctions</i>		<i>terms prescribed by law.</i>

More specifically, Table III shows how English and French law, once they have been compared using the criteria set out in Table I, will then be evaluated against US and ECHR case-law. Thus, for example, it will be seen to what extent the evaluations made by the theoretically derived criteria as regards the location of meetings and processions grant as high degree of

protection as that in the United States. The ECHR will not be referred to here however because there has been no case-law on this aspect of regulation.

The fact that on occasion US and ECHR law is not of relevance is most clearly seen as regards the status and structure of the liberty to assemble. It will be seen that theory advocates a view of the liberty that is incompatible with the view in either the US or ECHR. As a result, these systems cannot be turned to as comparative criteria in order to evaluate what the theory supports.

It will be noted that the division between subjects differs from that in Table II which set out how French and English law are compared. For example, conditions are compared without making a distinction between these restrictions before and during assemblies. This and other such differences reflect the occasions in which the US and/or ECHR case-law do not make the same distinctions as in English law. Therefore, in this case, the same general comments that will be made as regards conditions in chapter VII (regulation before assemblies) can be applied to conditions imposed during an assembly in chapter VIII.

Having set out the comparative criteria and methodology that will be applied in this part of the study, the next two sections make a comparison of the more theoretical aspects of the liberty to assemble: its legal status and its structure.

## SECTION II THE LEGAL STATUS OF THE LIBERTY

This section compares the status of the liberty in question: it investigates whether the liberties enjoy a legal, moral or constitutional status in the two jurisdictions and which status is best according to the criteria derived from the jurisprudential theory that was formulated in chapter I.

The first task will be to set out the English position before then evaluating it against that of France. As already stated, the English perspective of this study will mean that only a brief summary of English law will be provided.<sup>8</sup>

---

<sup>8</sup> See Introduction, *supra*.

## THE POSITION IN ENGLAND

The status of the liberties to assemble in England can be characterised as being uncertain and it is generally not addressed. To some it is clear that these rights do not have a common law, statutory or constitutional status.<sup>9</sup> However, others have claimed that these rights have common law status. For example, in Hubbard v Pitt, Forbes J recognised the liberty to assemble<sup>10</sup> and other cases have been pointed to in which the judiciary has spoken loosely about the rights to meet and process.<sup>11</sup> This would therefore seem to provide grounds for arguing that the liberty in question has a common law status.

An attempt has also been made to argue for a common law status of a more limited liberty to process on the public highway. This has been based on the privileged position that processions have traditionally enjoyed because they involve passing and re-passing, for which use the public highway is dedicated. The result is that processions are claimed to fall within the common law right of passage. However, it follows that if this limited common law status is accepted, there can be no similar status for the liberty to meet by reason of its stationary nature.<sup>12</sup>

---

<sup>9</sup> For example, E.R.H. Ivamy, 'The Right of Public Meeting' C.L.P. [1949] 183, 192; G. Robertson, 'Freedom, The Individual and the Law' (1989), 67;

'Although the virtues of peaceful protest are frequently extolled, there is in England no legal right of peaceful assembly or procession or...even to hold meetings in public places. Cars and horses have more legal rights on the highway than people..',

and P. Wallington, 'Injunctions and the Right to Demonstrate' 35 C.L.J. [1976] 82, 94;

'In England, in the absence of constitutional guarantees, the question is how far there is a legal prohibition on demonstrations. Liberty exists in the interstices of the substantive law, which might be concerned with quite another matter: its recognition may be assisted by presumptions in favour of liberty in the construction of a statute, but *not by the assertion of a countervailing right...*' (emphasis added).

<sup>10</sup> [1976] 1 Q.B. 142, 156;

'There is indeed, it seems to me, a democratic right to public assembly, and any attempt to suppress the meeting together of members of the public merely because it is a public meeting would rightly be regarded as tyrannical.'

In addition, Lord Denning MR, in the appeal of this case, at 178, agreed with the comments of the Court of Common Council of London after the 'Peterloo Massacre' in recognising "the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances." Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern.'

<sup>11</sup> See Roskill and Cumming-Bruce LJ in Verrall v Great Yarmouth B.C. [1981] 1 Q.B. 202 and Otton J in Hirst v CC of West Yorkshire (1986) 85 Cr.App.Rep. 143.

<sup>12</sup> For example, A.L. Goodhart, 'Public Meetings and Processions' 6 C.L.J. [1937] 161, 169;

'As A, B and C have each separately the right to pass and repass on the highway, there is nothing illegal in their doing so in concert, unless their procession is illegal on some other ground.'

(Footnote continues on next page)



The other assertions as to the status of the liberties in England appear to be based upon claims that they have a non-legal status but nevertheless are recognised by the legal system. More precisely, it is sometimes stated that they are not derived from the traditional sources of law (statute, common law or the constitution) but instead are merely political values, which, on occasion, the legal system responds to. Therefore, Thornton asserts that the very imposition of conditions on assemblies in the Public Order Act 1986 (POA) (*infra.*) is an acknowledgement of these rights in general terms.<sup>13</sup> Similarly, Williams points to the police refusal to ban a National Front march in Lewisham, South London as reflecting concern about upholding the liberty to assemble.<sup>14</sup> According to this point of view the liberty to assemble is invisible from a legal perspective but exerts some kind of gravitational effect, so to speak, on the legal system. A final illustration of this view again comes from Williams, this time quoting from the Government's 1985 White Paper;

rights of peaceful protest and assembly are amongst our fundamental freedoms: they are numbered among the touchstones which distinguish a free society from a totalitarian one.<sup>15</sup>

Whether it is accepted that these rights have either a common law or statutory existence, it must be recalled that by reason of the UK's obligations under the European Convention, the liberty to assemble must not be infringed. It follows that in the face of violation it must be protected and that in turn it must have some kind of legal status. However, the Convention does not state what this should be, therefore the uncertainty of English law remains unresolved.<sup>16</sup>

---

and see generally, chap.VII, *infra.*

<sup>13</sup> P. Thornton, 'Public Order Law' (1986), 151;

'There is no statutory right of assembly either in the Public Order Act 1986 or elsewhere. Nor does the common law specifically recognise the right of assembly (or free speech). Nevertheless, the existence of the right of public assembly has been recognised by judicial decision, extra judicial opinion, and art.11 of the European Convention on Human Rights. Furthermore, the creation for the first time of statutory controls on public assemblies suggests that their legality is not in doubt, subject to the fulfilment of the specified consideration.'

<sup>14</sup> D.G.T. Williams, 'The Law and Public Protest' in 'The Accountability of the Police: Two Studies' (1978), 36.

<sup>15</sup> D.G.T. Williams, 'Processions, Assemblies and the Freedom of the Individual' [1987] Crim.L.R. 167 quoting from the Government's 'Review of Public Order Law', Cmnd. 9510 (1985) at para. 1.7.

<sup>16</sup> See arts.13, 17 & 18 of the Convention.

## COMPARING FRANCE AND ENGLAND

In contrast to England, France gives a more certain legal status to the liberties under study and it is consequently to be preferred, since this reflects the social value of the liberty. Thus, the liberty to meet is clearly given a legislative status by virtue of the 1881 Act and arts. 431-1 & 2 of the new penal code.<sup>17</sup> This is further supported by cases such as Benjamin which mention that the liberty is based upon the 1881 Act<sup>18</sup> and statutory protection accords a high status to human rights in French law.<sup>19</sup> This more certain position results in an unanimous acceptance of its existence by the legal commentators.<sup>20</sup> Even the liberty to process, which has a lower status than the liberty to meet,<sup>21</sup> enjoys more certainty as to its legal existence than its English counterpart. Its position has been seen to have been greatly strengthened recently by its inclusion in art. 431-1 of the new penal code.<sup>22</sup> Nevertheless, despite this statutory mention, it lacks the type of bold declaration that is found in art.1 of the 1881 Act as regards the liberty to meet.<sup>23</sup> Only time will tell whether legal commentators will cease referring to the liberty to process as a mere tolerance on the part of the authorities<sup>24</sup> and whether they will view the new penal provision as a signal that the liberty should now be considered to be a pedigree liberty. If this were to occur the liberty to process would have the same legal status as the liberty to meet.

The relatively weaker position of the liberty to process in France vis à vis the liberty to meet is in large part due to the different contexts surrounding the legal regulation of the two liberties. Thus, whereas the 1881 Act was passed in the relative calm of the early years of the Third Republic, during a period in which meetings were no longer viewed as a serious public order problem, the 1935 decree-law, was issued as a response to one of the most violent periods that the Third Republic was to ever see. Similarities between this historical context and that surrounding the passing of the Public Order Act 1936 are clear. This statute was passed in response to the public disorder concerning

---

<sup>17</sup> Chap.IV, section III and see chap.VIII, section II, below.

<sup>18</sup> Chap.IV, section III.

<sup>19</sup> Chap.II, section II.

<sup>20</sup> Chap.IV, section I.

<sup>21</sup> Chap.V, section III

<sup>22</sup> Chap.V, section III.

<sup>23</sup> 'Les réunions publiques sont libres.'; see Chap.IV., section III.

<sup>24</sup> Chap.V, sections II & III.

Fascist and anti-Fascist groups, especially in the East of London. It was also a measure that was rushed through Parliament and in a different way the decree-law also avoided parliamentary scrutiny.<sup>25</sup> The results are measures that have public order and not civil liberty as their primary concern. In France, this historical legacy has been improved by later enactments but this legacy falls more heavily on the liberty to process. In England, on the contrary, it is both types of assembly rights that are affected and in the next chapters it will be seen that the advent of the Public Order Act 1986, continues this emphasis on public order.

A further point can be made as regards the traditional position of the liberty to process in France which can be contrasted with its position in England. The liberty may enjoy a more certain legal position in France but in comparison to England it enjoys a weaker position as regards the public highway. This point will be developed at greater length in Chapter VII below but here it suffices to note that the reason for the difference in France is because of differences in statutory status; in other words, because of different positions in the hierarchy of human rights. In France human rights have been seen to be traditionally protected by statute<sup>26</sup> and up until recently (i.e. the enactment of art.431-1) a statutory status has been lacking for the liberty to process.

When these reasons for the difference in treatment are compared with those in England, it will be seen that there they are based upon the priority given to the common law rights of passage.<sup>27</sup> Thus, in England there is a difference between the liberty to process on the public highway, which has a common law existence and the liberty to meet which traditionally lacks a legal existence even at this level. More importantly, this reasoning does not seem to advert, to a theory as to how human rights should be protected. There is a lack of a legal principle, as in France (i.e. the principle of statutory protection), that decides if human rights have a legal status, instead the best that the liberties can hope for in England is to be declared to be *part* of the rights of passage at common law. Even if such an existence were obtained, it is seriously doubted that the liberties would then be accorded the status of

---

<sup>25</sup> See generally, Supperstone, *op. cit.*, 50, Williams (1967), *op. cit.*, 21-4, 57 & 216-19 and Kidd, *op. cit.*, 68-75.

<sup>26</sup> Chap.II, section II,

<sup>27</sup> See chap.VII, *infra*..

human rights.<sup>28</sup> This would seem to have been the fate of the liberty to process. As a consequence, arguments that assert its compatibility with the rights of passage on the public highway have not advanced the arguments that it is a human right within the English legal system. The importance of the liberty comes from a strictly non-human rights perspective.<sup>29</sup> It follows that in order to accord a legal status to the liberties to meet and process, England needs a politico-legal principle which can admit human rights *into* the legal system; a means by which their value can be legally recognised.

What should this principle be? A look at France has shown that legal status can be achieved via statute. This challenges the dominant view that constitutional enactments are the best way of introducing human rights into the English legal system.<sup>30</sup> French law at least provides that statute is the means by which human rights fully enter into the legal system. Furthermore, it can be argued that given firstly, the traditional hostility to higher law, secondly, the fears as to the competence of the judiciary to interpret broad constitutional texts and thirdly, the tradition of parliamentary sovereignty,<sup>31</sup> statutory enactments are particularly suited to the English legal system.<sup>32</sup>

Therefore, a detailed statute containing the liberties could be altered by a later statute, thereby not challenging parliamentary sovereignty. Statutes also allow for detail (in the forthcoming chapters the extent of the detail required

---

<sup>28</sup> The common law rights of passage are not generally seen to be human rights. However, an exception, but without further justification, is the statement by J.S. Hall, 'The Right of Passage' in J.W. Bridge, D. Lasok, D.L. Perrott & R.O. Plender, 'Fundamental Rights' (1973) 124;

'The right to walk and ride is of immemorial antiquity and was essential for the economic and social life of the community. With changes in the function and use of property and the advent of mechanised transport footpaths and bridleways survive as one of the "fundamental rights" ...'.

<sup>29</sup> Thus the compatibility of the liberty to process with the common law rights of passage has been used rather defensively in order to assert that they are *not* illegal activities on the public highway, which results in the liberty being treated as a negative liberty; see for example, Goodhart, *op. cit.*, 169.

<sup>30</sup> As presented, for example, by Charter 88, *op. cit.*, and from an academic perspective, see Stevens & Yardley, *op. cit.*, 182, Robertson, *op. cit.*, 387 *et. seq.*, and chap.II, section I.

<sup>31</sup> See Chap.X, *supra*.

<sup>32</sup> Moves in this direction may be evinced by s.43 of the Education (No.2) Act 1986 which lays down freedom of speech in universities and other higher education establishments (c.f. R. v University of Liverpool, ex. p. Caesar -Gordon [1990] 3 All E.R. 821) and the Labour Party has proposed to enact six statutes in order to guarantee certain freedoms rather than a Bill of Rights, see The Charter of Rights: Guaranteeing Individual Liberty in a Free Society, Labour Party Document (1990).

will be revealed), which the constitutional form seems less suited to. Moreover, the judiciary would have before them the kind of text which they are supposedly more competent to interpret.<sup>33</sup> Finally, the jurisprudential point can be made that statutes constitute a practical implementation of one of the theoretical insights that have been raised in this thesis. Given that human rights are viewed as contingent and socially constructed values,<sup>34</sup> the best way to reflect this *theoretical* nature in the *practice* of human rights law is therefore claimed to be via the instrument of statute, which can be more easily altered to reflect changes in social values than can constitutional enactments.<sup>35</sup> This has been shown to be the very course that France has adopted as regards the liberty to meet and to a lesser extent for the liberty to process. In addition, this theoretically attractive legal method of protection has been revealed by applying comparative theory to civil liberties.

The above suggestions can be illustrated by a concrete example. If the case of Hubbard v Pitt is recalled it will be remembered that some of the judges, notably Lord Denning and Forbes J asserted that the right to assemble was involved in this case.<sup>36</sup> However, these assertions seem to lack any legal foundation and since the appellants were not mobile it does not seem possible to place their activities within the common law right to pass and re-pass on the public highway.

How would the enactment of a statute that, for example stated, along the lines of art.1 of the 1881 Act in France, that 'the liberty to assemble on the public highway is free from legal restriction, except on the following grounds...' improve matters? Or in the alternative, a statute that asserted a prohibition against interference with this liberty before going on to detail the grounds of any limitations on the liberty? If such a statute had been available, the appellants and those judges in favour of the liberty in the instant case would have been able to argue that the liberty had a *legal* existence - that it had a legal weight to be counterbalanced against other legal considerations. They would also have been able to present the liberty as being *independent* from the right to pass and re-pass which would have meant that the stationary

---

<sup>33</sup> See Zander, *op. cit.*, 57-64 and Lord McCluskey, *op. cit.*, 31-40.

<sup>34</sup> Chap.I, sections II & III.

<sup>35</sup> For a recent criticism of the rigidity of constitutional enactments, see Waldron, (1993), *op. cit.* 18.

<sup>36</sup> See note 10 *supra*.

assembly in the case would not have needed to be justified from the relatively weak position of presumed illegality.

Moreover, the judges would have been made aware that the case involved a valued activity that is valued by the wider political community. This would have been evinced by an instrument from the parliamentary representatives of this community that guaranteed the right; in other words, statute. These differences may not have altered the actual result of the case but it would have considerably changed the nature of the reasoning used and significantly redressed the imbalance against the liberty to assemble.

Having compared attempts to accord a *legal* existence to the liberties under study, mention should be made of the fact that unlike France there has been no concerted attempt in England to argue for the *constitutional* status of these rights. It will be recalled that in France this was mainly sought by asserting that the liberties were protected by art.11 of the 1789 Declaration: the right to the free communication of thoughts and opinions.<sup>37</sup> However, a review of the case-law regarding the liberties to meet and to process shows that both the administrative and ordinary courts invariably do not make reference to the 1789 Declaration. In addition, it would seem that the result of the Cc's case-law is that statutory protection is of greater importance, since it is by reason of this level of legal status that it considers a human right to have been legally constituted, that is to say that it is within the legal system.<sup>38</sup> This view would also appear to be supported by the commentators when they assert a hierarchy between legally defined liberties at the top and simple tolerances or undefined liberties of a lesser value.<sup>39</sup> This development may be seen as yet further evidence and support for the importance of statutes in the protection of human rights.

There is one last fundamental difference in the status and value accorded to the liberty to assemble in France and England that results from a different conception of public order in the two legal systems and which also concerns its status vis à vis public order. Public order presents a value that is most commonly the reason for the restriction of the liberty. As such it can be seen

---

<sup>37</sup> Chap.IV, section I and chap.V, section I.

<sup>38</sup> And is thus a PFRLR; see chap.II, section II.

<sup>39</sup> Chap.II, section II.

as a countervailing value.<sup>40</sup> This in turn means that a major element in the context of the liberties to meet and protest is that of violence; in that the liberty can only be legitimately exercised if it is peaceful and does not result in public disorder. Public order thus constitutes one of the most important limits on the exercise of the liberty to assemble. Furthermore, it is seen in both England and France as a non-human right consideration; a collective interest. Therefore, the community is seen as having an 'interest' in keeping the peace and maintaining public order but is not commonly said to have a right to public order. It should be underlined that it would be possible for the public peace to be formulated in human rights terms but this is not commonly the construction in either England or France. Thus, in both jurisdictions public order forms a contextual limit on the liberties. This is referred to in England in the language of 'balance' and in France as a 'conciliation' between the human rights and this collective or social interest. The terminology is at first sight strikingly similar, however the difference that should be noted is that in France public order seems to be more expansive and therefore less antagonistic to civil liberties than in England.

As has been seen, Benjamin presents a classic example of the French notion of public order and the consequent conciliation of the liberty to meet with the needs of public order.<sup>41</sup> This view would seem to be close to the English notion of balance. However, Ktisiaki has pointed out that the courts view public order as a wider notion in which public peace and the exercise of civil liberties are in an antagonistic but complementary relation. It is the conciliation of these elements that results in public order.<sup>42</sup> It therefore follows that the undue restriction of liberty violates public order because this notion makes no sense unless it serves to guarantee a minimum level of peace such that citizens can exercise their rights. On the other hand, the extension of the uninterfered exercise of civil liberties to such an extent that citizens are threatened by violence also violates public order because the notion also encompasses the peaceful exercise of civil liberties on the part of all, which violence prevents. Civil liberty and public peace may be antagonistic but according to the French conception of public order they each provide the 'raison d'être' of the other.

---

<sup>40</sup> Chap.III, section III.

<sup>41</sup> Chap.IV, section III.

<sup>42</sup> Chap.IV, section III.

By contrast, English law does not have this broader view; therefore public order is presented, without more, as a collective interest in peace that is usually antagonistic to human rights.<sup>43</sup> Although, the two must be balanced against each other and a compromise sought in which there is give and take on both sides, public order is a narrower notion which is put on one side of the equation against civil liberty on the other.

What is the relevance of this difference? The response is that the liberty to assemble is consequently accorded a different status and value in the two legal systems. Firstly, those in a position to limit the liberties may, under the French formulation, feel directed to be especially careful of limiting the liberties them on the basis of public disorder and also they might feel the need to provide stronger justifications before doing so. They are directed to see public order as *servicing* civil liberty; as securing the conditions by which it can be exercised. In order to restrict the liberties they would then have to show that in doing so they were in effect trying to securing these conditions.

Secondly, if the liberty to assemble is restricted, it will be clear that a controversial choice has been made: a human right that represents a socially valued activity has been limited by a social concern to prevent violence. The choice is stark and explicit but equally controversial; it may be disagreed with but it must as a consequence be justified and the grounds upon which it is based can be reviewed to check that the appropriate reasoning has been undertaken. Therefore, the more rigorously formulated French doctrine makes this contested choice explicit and its more expansive terms are

---

<sup>43</sup> For example, A.T.H. Smith, 'Offences Against Public Order including the Public Order Act 1986' (1987), 9 states

'..the task for the law... is not so much the striking of a single balance or compromise, but of establishing a framework of checks and balances within which the competing interests are legally accommodated.'

and Bevan, *op. cit.*, 164;

'There is a need for a shift of emphasis in the balancing process so that the interests of public safety and good order should prevail only where they are threatened by disturbance and disorder of a serious and not merely inconveniencing and annoying nature.'

Finally, Williams (1967) *op. cit.*, 9 asserts;

'The law of public order in this country is a compromise. It seeks to balance the competing demands of freedom of speech and assembly on the one hand and the preservation of the Queen's Peace on the other. A satisfactory balance has rarely been attained...'



claimed to be more capable of directing decision-makers to uphold liberty as in itself giving effect to public order.

These two claims may be illustrated by a comparison of Benjamin with the English case of Duncan v Jones.<sup>44</sup> If the former is translated into English terms, it can be seen to have called for a balancing of the liberty to meet against public order. However, the decision in Benjamin, while accepting that public order was a relevant consideration, went on to emphasize that public order had to be reconciled with 'respect' for the liberty to meet. It follows that the court's judgement can be seen as a conciliation of these two values, respect for which constitutes public order. This view has only been hinted at in England, most notably by Lord Scarman;

Amongst our fundamental human rights there are, without doubt, the rights of peaceful assembly and public protest and the right to public order and tranquility. Civilised living collapses - it is obvious - if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. But the problem is more complex than a choice between two extremes - one, a right to protest whenever and wherever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstructive pressure of the protesting procession. *A balance has to be struck a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens, who are not protesting, to go about their business and pleasure without obstruction of inconvenience.*<sup>45</sup>

The last sentence of this statement adumbrates the French notion of public order by which those engaged and not engaged in exercising their rights to assemble have their rights considered as part of the effort to maintain public order. Consequently, public order is more than merely the prevention of violence: it is the totality of *interests* that must be balanced against each other. Benjamin showed firstly, that claims to restrict liberty on the grounds of violence will not be accepted without more and secondly, will be narrowly construed. The result is that the liberty to assemble is valued even when exercising public order considerations because it is a component of public order. A conciliation must be carried out with the recognition that one value only makes sense with the interplay of the others and that no one value can always trump but that strong arguments are required for certain values, such as the liberty to assemble to be overridden. The result is uncertainty and

---

<sup>44</sup> [1936] 1K.B. 218.

<sup>45</sup> The Red Lion Square Disorders of 15 June 1974: Report of Inquiry by the Rt. Hon. Lord Scarman, Cmnd.5919, 1975, para.5.

controversiality but then this is claimed to be the 'stuff' of rights and should therefore be made clear. It is clearly the case in the French regulation of the liberty.

Duncan v Jones provides a striking contrast in which one of the judges refers to the circumstances as presenting a 'plain case'<sup>46</sup> and any hint that the Divisional court was here engaged in balancing public order against the liberty to meet is forcefully denied by the rejection of the view that the case involved 'what is called the right to public meeting.'<sup>47</sup> The court went even further by asserting that beyond the facts of the instant case, English law itself does not recognise 'any special right of public meeting for political or other purposes.'<sup>48</sup> Having thus firmly shut the door on any balancing or recognition of the existence of human rights, the court then asserted the needs of public order. The judges were then satisfied that at the material time the police were doing their duty;<sup>49</sup> preserving the peace - without paying attention to the existence of other values in the case. What is the result? Public order means obeying the police because they are

the arbiters of what political or religious sects shall and shall not be accorded the rights of freedom of speech and assembly.'<sup>50</sup>

In consequence, there is a risk that public order becomes the 'quietism' feared by Lord Scarman. It will be seen below that this case and its conception of a near absolute public order value, combined with its narrowness has allowed the courts to effectively restrict the liberties to assemble whilst claiming that they are not even involved.<sup>51</sup> More fundamentally and to close the discussion of the status of the liberty to assemble, despite a similar surface rhetoric in the two countries, the French notion of public order accords a greater value than does the English notion. The French notion is more sympathetic to civil liberty than is that of England and thus it is preferred.

---

<sup>46</sup> *op. cit.*, 223, per Humphrey J.

<sup>47</sup> *op. cit.*, 222, per Lord Hewart CJ.

<sup>48</sup> *op. cit.*, 222, per Lord Hewart CJ.

<sup>49</sup> *op. cit.*, 223, per Singleton J.

<sup>50</sup> Kidd, *op. cit.*, 24.

<sup>51</sup> An example is Moss v McLachlan, see chap.VIII, *infra*.

## HIGHER STANDARDS: US AND ECHR

France therefore accords a more certain legal status to the liberty to assemble than does England and given the theoretical preference for reflecting the social value of the liberty, French law is considered to be better. French law also compares well with the legal status accorded in the US and the ECHR. It will be recalled that in the US the right to peaceably assemble is included as one of the rights in the First Amendment of the Constitution, whereas art.11 of the ECHR mentions the right to peaceful assembly.<sup>52</sup> French law clearly accords the liberty a legal status but one that is inferior to that of the United States, where a constitutional status is granted. However, a constitutional status which fixed rights to the degree of that in the US would infringe the contingent and political conception of human rights that is supported by the theory in this work. As a result, the French status is to be preferred to that of the US. As far as the ECHR, similar remarks pertain. Thus, French law, like the ECHR provides a formal recognition of the liberty but the status of art.11 as overriding member state laws would mean that it has a higher status than statute. The ECHR is therefore incompatible here with the theoretical view of civil liberties.

### SECTION III STRUCTURE: THE LIBERTIES TO ASSEMBLE

So much for the legal status of the liberties to assemble in France and England. Another issue will now be looked at: that of the structure of the liberty in question. In the discussion above as to the legal status of the right to assemble, it has been assumed that its structure is settled but it will be recalled that questions were raised in chapter III: as to whether it is a single, unified right, what are its distinguishing characteristics, what values among the many illustrated above does it function to serve and what are the range of activities that it protects etc. These questions will be looked at in this chapter.

The questions can be broken down into the following (1) does the liberty to assemble represent a *single, unified* liberty or does it represent a series of *distinct* liberties, including most centrally the liberty to process and the liberty

---

<sup>52</sup> See Chap.III, section I.

to meet? (2) has the liberty been constructed as an *independent* liberty, distinct from other liberties, more specifically freedom of speech? (3) what valued function does the liberty perform - it was seen that a number of possibilities exist, among these are democracy, protest, safety-valve and expression functions or combinations thereof. Questions (1) and (2) concern *content*, whereas question (3) is directed to *function*. These will be analysed in turn.

## FRANCE AND ENGLAND COMPARED

### *Content*

#### *(a) a single liberty or a plurality of liberties?*

This is a question whose response suffers from the tendency of not adverting to theory in English human rights law. The result is that while some commentators, such as Supperstone, speak of the freedom of assembly and claim that this

may be taken to include public meetings, processions, and other types of assembly in the broadest sense of the word.<sup>53</sup>

which would seem to indicate a single liberty but one that encompasses several activities, the question left unanswered as to what unites or justifies the presence of these different liberties within this category? Without a theoretical inquiry this question cannot be answered.

Similarly, Goodhart asserts that the law regulating meetings and processions is different but that they have often been confused. He therefore advocates studying the two separately.<sup>54</sup> This is also the method adopted by Bevan.<sup>55</sup> Once again a lack of a theoretical basis becomes evident. The justification for treating activities separately is merely presented as a given - simply that the

---

<sup>53</sup> *op. cit.*, 25, n.1. The author expands upon the notion of assembly at pg.31 by contrasting its breadth with the narrower notion of meeting which he claims belongs within it; '...the term "meeting" connotes prior or contemporaneous organisation, with an order of business however informal and the transaction of business including delivery of speeches and the passing of resolutions. The concept of assembly is probably wider and includes any coming together of persons. Thus it includes processions, political vigils, prayer meetings, demonstrations, a group at a cenotaph ceremony, sandwich-board men walking in a line, and a cycling club en route. An assembly is complete, as it were, by collection or aggregation: no form or object in coming together is required.'

<sup>54</sup> *op. cit.*, 161-2.

<sup>55</sup> *op. cit.*, 167.

law treats them separately. There is no further inquiry as to the justification for this distinction.

On the one hand, these remarks can be viewed as claims to the existence of two distinct liberties. However, on the other hand, as noted above, on the occasions when the judiciary have made reference to the liberty, their remarks indicate a single liberty.<sup>56</sup> On other occasions, the terminology becomes even more confusing with talk of liberties to protest and demonstrate.<sup>57</sup> Furthermore, the word 'assembly' is often restricted to meaning stationary gatherings, as in s.14 of the Public Order Act 1986 (*infra.*). This looseness of meaning can also be seen if reference is made to the remarks of Lord. Elwyn-Jones in the House of Lords debate on the 1986 Act, in which he refers to

the right to freedom of speech and lawful protest, the right of public assembly and of procession, all the hallmarks of a democratic society<sup>58</sup>

Again no reference is made to what justifies these distinct rights and the characteristics that distinguish them from each other. It would therefore appear that there is no agreement in England as to the structure of the liberty.

How is this position compared with that in France? Although the response there is by no means uniform, or certain, it is suggested that French law generally displays a pluralistic view; in that the liberty to assemble is seen as a broad category that contains other liberties, most prominently the liberties to process and to meet. This view is evidenced by the following points.

Firstly, it has been noted that French theorists on civil liberties invariably treat the liberty to meet and the liberty to process as two separate aspects within a broader category of the freedom of expression<sup>59</sup> and indeed Costa was seen to have gone even further by treating the two as separate liberties within a wider category of group liberties.<sup>60</sup> Secondly, the distinction that is made between the two activities has a long pedigree, for example, it can be seen in

---

<sup>56</sup> See for example, note 10, *supra.*, where Forbes J and Lord Denning speak about a *right*, as opposed to *rights* to assemble.

<sup>57</sup> Alderson, *op. cit.*, 29 and Robertson, *op. cit.*, 66 *et. seq.*

<sup>58</sup> H.L. Deb., Vol. 481 col. 749, Oct. 29th 1986.

<sup>59</sup> See chaps.IV, section I and V, section I.

<sup>60</sup> See chaps.IV, section I and V, section I.

the studies of Baffrey, Le Clère and Mousset in the 1930's.<sup>61</sup> Tercinet has also noted that the liberty to process was mentioned separately from the liberty to meet in government debates.<sup>62</sup> Furthermore, the difference between the two can be supported by the fact that there exist separate laws regulating meetings and processions and one can also point to the criticism that resulted from the administration's mixing of these laws in the Paganon circular.<sup>63</sup>

Thirdly, a distinction in practice (i.e. by legal commentators, judges and government) is supported in France, unlike England, by theory. Therefore attempts have been seen to have been made to isolate the characteristics of meetings (momentary, organised, intentional and specific goal)<sup>64</sup> and processions (demonstration, mobility, expression of a collective will and the use of the public highway as a location).<sup>65</sup> Cases have dealt with the delicate issues of the degree to which these elements need to be present in differing factual circumstances. This emphasis on definition must be contrasted with the position in England. There, any definitions that exist are either circular (as in the definition of a public procession in S.16 of the POA 1986 as being 'a procession in a public place'),<sup>66</sup> assume a pre-existing definition (for example, 'assembly' remains undefined in the definition of a public assembly in S.16 of the POA 1986: 'an assembly of 20 or more persons in a public place which is wholly or partly open to the air;'), partial, as in Flockhart v Robinson<sup>67</sup> (concerning 'organisation' for the purposes of imposing sanctions on the organisers of an illegal procession, *infra.*) or merely rely on dictionary meanings, as per Lord Denning MR in Kent v MPC<sup>68</sup> (defining a procession via the dictionary definition as 'a proceeding of any body of persons in an orderly succession').

There is a lack of overall attention to defining the liberty by focusing on the nature of the interests that are claimed to be protected. By way of an exception to this tendency, Smith is found isolating certain, specific

---

<sup>61</sup> Respectively, *op. cit.*, 7, *op. cit.*, 5-7 and *op. cit.*, 7.

<sup>62</sup> *op. cit.*, 1011.

<sup>63</sup> See chaps.IV, section II and V, section II.

<sup>64</sup> Chap.IV, section I.

<sup>65</sup> Chap.V, section I.

<sup>66</sup> See Ward v Holman [1964] 1 Q.B. 580.

<sup>67</sup> [1950] 2 K.B. 498.

<sup>68</sup> (1981) Times, 15th May.

characteristics: 'an assembly need not have a common purpose' and doubting if moving in a circle could constitute a procession because the term denotes moving from one location to another.<sup>69</sup> Williams provides yet another example with his claim that processions require some element of organisation.<sup>70</sup> It follows that on the rare occasions that commentators and judges in England advert to definitional questions, they do not do so to anything like the same extent as their French counterparts. It is by adverting to theory that French law is able to make a relatively certain distinction between meetings and processions so that in turn two separate but related human rights can be identified and regulated.

*(b) an independent liberty?*

In England, among those that actually identify a category called the liberty to assemble, as opposed to 'public order', the majority do not view it as an independent liberty. Most commonly it is seen as being an aspect of the freedom of speech.<sup>71</sup> However, in France it will be recalled that processions are defined as a form of demonstration which entails the expression of a collective opinion and the liberty to meet is seen as being an aspect of the liberty of expression.<sup>72</sup> It appears that in France the liberties enjoy a relative independence - they are specifically valued means of expression - very much along the lines advocated by Baker, who sees the liberties as protecting substantively valued behaviour<sup>73</sup> but they are seen as specific and important forms of expressive activity. The importance of meetings and processions is such that they are often even given a separate mention as from the liberty of expression. Evidence to support this claim can be seen in the tendency in the case law not to invoke the freedom of expression and the above noted existence of legal enactments, including art.431-1 of the new penal code, which protects the rights to meet, process and the liberty of expression as separate liberties.<sup>74</sup> The French construction of the liberties emphasises their communicative qualities but does not limit this communication to speech. At

---

<sup>69</sup> Smith, *op. cit.*, 138 & 144.

<sup>70</sup> (1967) *op. cit.*, 62-3 and see Supperstone, note 53, *supra*.

<sup>71</sup> For example, Wade, 'The Law of Public Meeting' [1938] 2 M.L.R. 177, Williams, (1967), *op. cit.*, 10, Bevan, *op. cit.*, 163-4 and for the Government's view, see Bonner & Stone, *op. cit.*, 229-30.

<sup>72</sup> Chaps.IV, section I and V, section I.

<sup>73</sup> Chap.III, section II.

<sup>74</sup> Chaps.IV, section III and V, section III and see *infra*.

the same time, the mode of expression that meetings or processions constitute is so highly valued as to be considered to be relatively independent of the liberty of expression.

From the theoretical perspective of analysing the specific qualities of the liberty to assemble, it would appear that the French view should be adopted because this provides an account of why the liberties to assemble are accorded such high value as to be human rights. It also avoids the earlier raised problem of having to distinguish speech from conduct,<sup>75</sup> which would make the protection of the liberties dependent on this somewhat unsatisfactory and problematic distinction. This view also leaves intact the possibility that expression then performs the many valued functions claimed of free speech (see *infra.*).

Therefore, the term the liberty of expression is claimed to represent a bundle of relatively independent but related liberties.<sup>76</sup> As a consequence, the term can encompass such a wide range of activities as to be almost meaningless and it is only by uncoupling and separating out the particular activities contained therein that any sense can be made of the term, such that it can have relevance for legal practice. The result is that the liberties to assemble are isolated as important components that require specific legal regulation, given the specific way in which they provide for expression.

#### *Valued function*

This has been one of the least satisfactory areas of comparison. English law shows that there is no agreement as to what values the liberties function to secure, except that they generally secure expression. However, beyond this, views radically diverge as to the value of expression (a value in itself or an instrumental value that secures other more fundamental values: protest, democracy, a safety valve, truth etc.).<sup>77</sup> Strangely, this issue does not appear to have been addressed in France. However, it might be said that given the already-mentioned claim that elements of the freedom of expression are part of the definitions of the liberty, expression is seen as the value of the liberty.

---

<sup>75</sup> Chap.III, section II.

<sup>76</sup> The freedom to associate, freedom of information, freedom of the press, freedom of speech and religious freedoms are among the most obvious examples.

<sup>77</sup> Chap.IV, section I.



However, if this point is conceded, there is still the further question as to the function of expression, which has been responded to with a diversity of opinions.<sup>78</sup>

Comparison on this issue would therefore have to conclude that a plurality of expression functions is the function of the liberty. Thus meetings and processions can be the means to express protest, provide a safety valve for pent-up frustrations and anger, aid the democratic process or the self-achievement of participants and organisers, or combinations thereof, as well as other traditionally claimed functions of the freedom of expression. Nevertheless, the jurisprudential criteria insists that these diverse valued functions should all serve the value of social and political change. They should allow members of the community to challenge dominant views and to change accepted values.

Although the liberty to assemble is in turn generally seen as part of the right to free speech in England, in France there has been noted to be an implicit recognition that the liberty, if not completely independent, is *relatively* independent. This means that while it is seen to be a part of the liberty of expression, it is seen to be an aspect that merits being regulated and mentioned independently. The French view can therefore more easily accommodate the above-formulated view of the liberty. Thus, like the view favoured by theory, the French law recognises that the liberty performs expressive functions that go beyond merely speech but at the same time justify an independent mention and regulation as apart from expression.

These comparative conclusions as to the content and function of the liberty now provide the basis for the resolution of some questions that were earlier raised as to the structure of the liberty to assemble.

### ANSWERING LONG POSED QUESTIONS

From the time that the point was raised in chapter III, this study has attempted not to foreclose and prejudge the question of whether there is a single *liberty* to assemble or rather *liberties* to assemble. To this effect, terms have been used interchangeably. However, now that a comparison has been

---

<sup>78</sup> Chap.III, section II.

undertaken between England and France, a choice can be made but this will be an informed choice; informed by the jurisprudential theory of human rights that has been applied throughout this work. The choice is therefore a normative one: what *ought* to be the structure of the liberty under study, given the jurisprudential view of civil liberties adopted here. Comparison is therefore *only* half the story; it provides options from among which a choice can be made but it does not necessarily indicate that the best conception of the liberties is to be found in either France or England because there must also be evaluation.

Henceforth, the terms the *liberties/rights to meet and process* or, in the alternative, the *liberties/rights to assemble* shall be employed. This reflects the view that it is better to have a series of distinct but related rights. In this way the liberties can be more meaningfully treated as legal categories and legal regulation can take account of their specific needs. This is not to deny that they are related, indeed they are both viewed as forms of assembly. However, to insist upon a single liberty to assemble would be to deny the differences between meetings and processions that have been revealed and will be further seen in the next chapter. The term 'assembly' may then be employed as a general label, much like Costa's 'group liberties'<sup>79</sup> in order to designate a series of more precise human rights to which the liberties to meet and process belong.

Such a choice encourages a closer investigation into the particular problems, content and functions of the two valued activities. As such, it is an application of the jurisprudential theory that emphasises the specific, displays a preference for 'local narrative' and for breaking down broad and general categories in order to investigate particular needs that may arise when previously hidden differences are revealed.<sup>80</sup> The tendency in studying civil liberties in England to treat them as a homogenous category that is susceptible to the same problems and resolutions has been shown to distort the way that human rights are actually constructed as social values and obscures what these values are held to be. In short, the fact that at an abstract level these values serve the same or similar purposes has been allowed to obscure particularity and distinctness on a practical level.

---

<sup>79</sup> Chaps.IV, section I and V, section I.

<sup>80</sup> Chap.I, sections II & III.

Apart from being jurisprudentially justified, this preference for the pluralistic view is also peculiarly compatible with another practical measure that is generated by theory: that human rights can be better protected by detailed statutory enactments. Thus, attention has been turned away from the US, where English theorists have traditionally firmly placed it,<sup>81</sup> to France with its tradition of statutory protection.<sup>82</sup> In addition, a broad legal category such as that provided by art.11 of the ECHR in which, *inter alia*, a right to assemble is protected does not allow for a concentration on the specific and particular activities that this includes, for this reason it is jurisprudentially objectionable.<sup>83</sup>

Furthermore, the formulation in the ECHR is rejected on practical grounds because it does not provide the same detailed framework and directions to citizens and state officials as can be provided in a statute and as has been done for the liberty to meet in France. These practical disadvantages will be continually encountered in the next chapters, however, here it can be briefly noted that in the US the judiciary has had to fill in the gaps that have been left by the broadly worded First Amendment, which, *inter alia* protects the 'right of the people to peacefully assemble'.<sup>84</sup> It will be seen that the differing factual circumstances of cases make detailed adjudication and decisions concerning assembly rights unavoidable. Statutory enactments show the judges enmeshed in detail and compromise, whereas in the US judges can conceal the exact same types of decisions behind a broad and fixed constitutional enactment. The result is that change has to be camouflaged as giving effect to what is pre-existing in the Constitution. Human rights have been shown in this study to be centrally about values but these are values that change in response to social changes. This fact is brought to the surface more easily by statutory enactments that are subject to repeal and amendment. In turn, this form of protection is better suited to specific, more precise liberties.

---

<sup>81</sup> Chap.II, section I.

<sup>82</sup> Chap.II, section II.

<sup>83</sup> Art.11 covers the freedom of assembly and association. Leaving aside the breadth of activities encompassed within the latter freedom, the simple reference to the liberty to assemble is contended to be too broad and general to allow for the kind of detailed protection that is argued for here. However, it will be seen that in certain respects the detail has been provided by the case-law under this article.

<sup>84</sup> For a criticism of such generality, see Waldron, (1993), *op. cit.*

Opting for a pluralistic view of the liberties, based on jurisprudential analysis also justifies a second choice that has to be made as to whether or not the liberties to meet and process are independent liberties. It has been seen that this issue has by no means any clear cut response in either England or France but after comparing the two it was suggested that there are grounds for believing that in France there is a stronger tendency to favour the independent view. Once again, from the jurisprudential perspective of an interest in difference and the particular, this view is to be preferred. However, this degree of independence is limited by a view, as shown in the two jurisdictions, that meetings and processions are different forms of expression and this common function tends to deny or obscure the differences between the activities.<sup>85</sup>

Nevertheless, this does not mean that the liberties are or simply constitute freedom of speech. Unique and valued activities are involved when assembly rights are exercised, if this were not the case, it could be asked why the message of a march is simply not broadcast or published, instead of people going to the effort of marching? The response is that the way of communicating the message, via a collection of persons, changes the message.<sup>86</sup> Moreover, it has been noted that both historically and in contemporary times meetings and processions have often proven to be the means by which citizens have chosen to convey their views<sup>87</sup> and if, as was noted in chapter I, human rights are still to be available as a means of achieving social and political change,<sup>88</sup> then channelling communication through unconventional and unsupervised channels may have more effect than doing so through established channels, such as the media.

---

<sup>85</sup> This is also the view in the US, see T. Scanlon, 'A Theory of Freedom of Expression' 1 *Philosophy & Public Affairs*, 1971-72, 204, especially, 206.

<sup>86</sup> See Baker's theory in chap.III, section I and Murdoch, *op. cit.*, 173, 174;

'It might be thought that freedom of protest is simply one aspect of the more general right of freedom of speech. Restraints on protest may be applied as a form of "pre-publication" censorship, or as "post-publication" penalties enforced by the courts. But protest involves the *communication* of ideas, not their formulation or validity. This aspect of human rights is about the *means* of persuasion or airing grievances, and public protest is seen as a distinct human right worthy of individual treatment.'

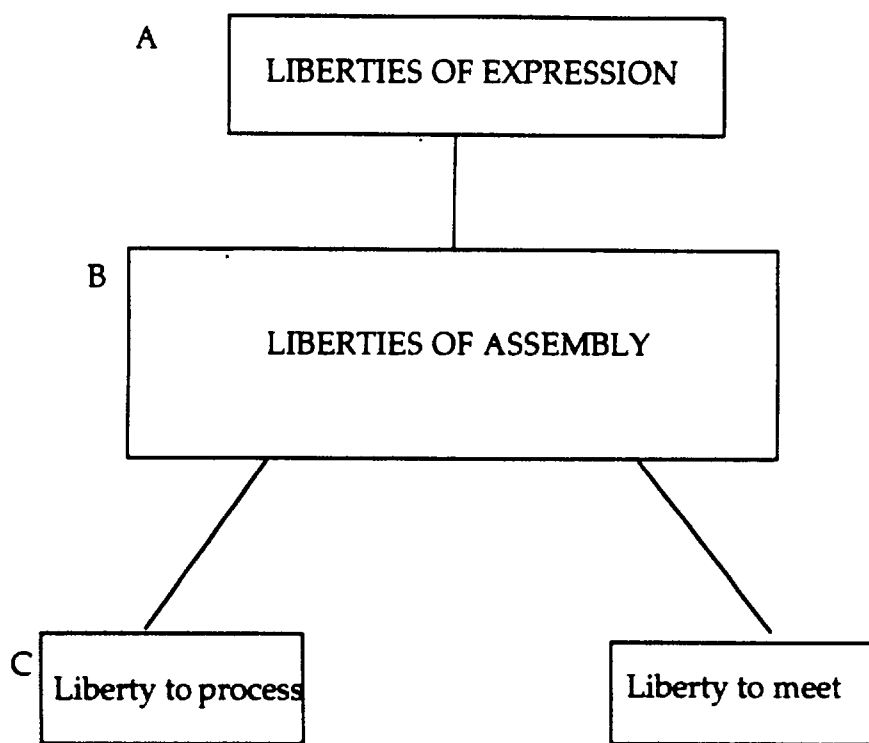
<sup>87</sup> Chap.III, section I and c.f. J. Murdoch, *op. cit.* 173 and J. Alderson, *op. cit.*, 29.

<sup>88</sup> Chap.I, section III.

For these reasons the view that the liberties to assemble are merely 'expression plus'<sup>89</sup> is rejected in favour of seeing them as belonging to an extremely wide category of rights that involve communication but which because of their diverse means of communication justify an independent existence.

Two questions as to the structure of the liberties to assemble have been answered using the comparative method and jurisprudence. The responses may be diagrammatically presented as follows

FIGURE A



Three levels of abstraction, (A), (B) and (C) can be seen. At the highest level (A) is found the liberty of expression. It is an abstract and broad category which encompasses a series of different human rights, these are of a less abstract nature but are still very broad. They are located at level (B), and

---

<sup>89</sup> This is a modification of the phrase 'speech-plus' which was used in Cox v Louisiana, 379 U.S. 536 (1965) at 555.

among which the liberties to assemble are to be found. Other liberties at this level would include for example, press freedom, free speech and the freedom of association. What this study urges is for yet further specificity in order to better protect civil liberty. The result is a third level (C) where the liberties to meet and process are located. These have been claimed to be central aspects of the liberties to assemble found at level (B). Thus, this study has investigated the regulation of *certain* aspects of this broad category. However, other activities, such as occupations, sit-ins and pickets are also located at level (C). Clearly, the move from level (A) to (C) is an exercise in analysing civil liberties with increasing specificity.

#### **HIGHER STANDARDS: US AND ECHR**

The preference for a differentiation between the liberty to meet and the liberty to process, as well as the pluralistic view of the liberties to assemble is not how these rights are mentioned in the US and ECHR systems. Thus they cannot be used as higher standards of comparison. The jurisprudential view of this work justifies the preferences that have been expressed but it is conceded, as already noted that an alternative theoretical perspective would justify an alternative construction of the liberties. Therefore, all that is asserted here is that French law better meets the criteria laid down by this perspective.

## **CHAPTER VII**

### **COMPARING REGULATION OF THE LIBERTIES: BEFORE MEETINGS AND PROCESSIONS**

#### **INTRODUCTION**

The analysis of regulations before meetings and processions begins with the regulation of location in section I. This will be seen to be regulated by a complex battery of laws. Before an assembly takes place the authorities may ban it or impose conditions upon it. Banning powers are thus investigated in section II and section III examines conditions. It will be recalled that the general structure of the analysis is set out in the previous chapter in Table II and the main features of the comparisons made with US and ECHR law are set out in Table III.

#### **SECTION I**

##### **THE LOCATION OF ASSEMBLIES**

The analysis of location will first look at liberty to meet and then the liberty to process because in English law they are subject to different legal regulation.

#### **THE LIBERTY TO MEET**

In England the liberty to meet can be widely regulated as concerns its location. Bylaws, statutes and the common law can all be applied to prohibit meetings held in certain areas. At the same time, the location of a meeting may be crucial to the organisers, in terms of publicity and effectiveness. Who makes these decisions and on what grounds are they based? These issues will be looked at here.

It will be also be seen to what extent the authorities do and should provide locations and premises for meetings and whether citizens should be granted a right of access to certain premises in order to hold meetings. These two related questions have come to be known as 'public forum' regulation.

Finally, English regulation in this area is identified as being strongly conditioned by a property conception. The result of this conception is that government authorities are treated as owners of private property whose

rights are not to be interfered with by the exercise of the liberty to meet. In comparison, such a view is not present in France. This fact is linked to a conception of the public domain which is claimed to be in turn linked to the French theory of public law. French law then compares well, using the US case law as a comparative criterion. It is shown that in both these jurisdictions the discretion that is left to government authorities is more narrowly drawn and subject to more extensive judicial review than is the case in England.

### *The positions in England*

Those that seek to exercise the liberty to meet and thereby organise a meeting in England must do so in the area of legality that remains after statute and common law.<sup>1</sup> Choosing a location can as a result be problematic. The body of laws concerning location has been treated at great length elsewhere,<sup>2</sup> therefore instead of repeating these restrictions in detail here, they shall be presented more briefly as part of the comparison with those in France.

It must be first noted that a meeting that takes place on the public highway in England can immediately constitute a civil wrong because it is a trespass. This common law offence is essentially part of the law of property. The public highway is invariably owned by the local authority (acting as the highway authority) but the public enjoy a common law easement or right of passage. Therefore the public is permitted onto the highway in order to pass and repass. Consequently, to perform other activities on the highway is to breach these terms of entry onto the highway and constitutes a trespass. The local authority can then have recourse to civil remedies (declarations and injunctions) and also the remedy of self-help: it can attempt to remove the trespassers by reasonable force.<sup>3</sup> Although the action has never been used in a reported case against meetings, it sets the context of restriction that characterises regulation.<sup>4</sup>

---

<sup>1</sup> See Wallington, *op. cit.*, quoted in chap. VI, note 9, *supra*.

<sup>2</sup> For example, Supperstone, *op. cit.*, Williams, *op. cit.*, (1967), Sherr, *op. cit.*, (1989), Bailey, *et. al.*, *op. cit.*, (1991), 161-238, Thornton, (1987), *op. cit.*, R. Card, 'Public Order: The New Law' (1987), Smith, *op. cit.* and J. Marston 'Public Order: A Guide to the 1986 Public Order Act' (1987).

<sup>3</sup> See Goodhart, *op. cit.*, 162-4, Wallington, *op. cit.*, 95-7 and the cases of Hickman v Maisey [1900] 1 Q.B. 753 and Hadwell v Righton [1907] 2 K.B. 345, 348.

<sup>4</sup> The fact that there are no reported cases in which the local authority as the owner of the public highway have sued for trespass against a meeting is claimed by Wallington, *op. cit.*, 96-97 not to be surprising, given the technicalities involved in this action.

Smith, *op. cit.*, 5-6, responding to Lord Scarman's view that police conduct and their use of police powers in this area is more important than the law, notes;

(Footnote continues on next page)



Other restrictions on meetings on the public highway also exist and again although rarely used, are indicative of the regulatory environment. Firstly, the Highways Act 1980 S.137(1) makes it a criminal offence to wilfully obstruct the free passage of the highway without lawful authority or excuse. The offence has been used against static assemblies.<sup>5</sup> Essentially, the same offence is found in the bylaws and statutes that provide for local regulations to be made.<sup>6</sup> Secondly, there is the common law offence of public nuisance, this is based on an obstruction of the highway caused by its unreasonable use.<sup>7</sup> It is widely accepted that meetings are not considered to be reasonable

---

'...the law establishes a framework by which the standards of police conduct are guided and shaped, and against which they are measured.'

<sup>5</sup> For more information on this statutory offence, see Sherr, *op. cit.*, 134-37, Bailey *et. al.*, *op. cit.*, 164-8, Smith, *op. cit.*, 198-206 and Supperstone, *op. cit.*, 77-81. The offence has a long pedigree as can be seen by its use against public meetings in Homer v Cadman (1886) 16 Cox CC 51 and Arrowsmith v Jenkins [1963] 2 Q.B. 561, respectively under S.72 of the Highways Act 1835 and S.121(1) of the Highways Act 1959 which both constituted the offence found in the current statute.

<sup>6</sup> For examples of bylaws, see Supperstone, *op. cit.*, 82. The Town Police Clauses Act 1847, S.28 creates an offence of obstructing any public footpath or other public thoroughfare by means of objects therein listed, or by 'other means'. (This Act applies to boroughs and urban districts outside London but the same provision exists for London by virtue of S.54(6) of the Metropolitan Police Act 1839). Could the latter refer to obstructions caused by meetings? Supperstone argues that 'other means' should be interpreted *ejusdem generis* with the preceding list so that the offence would not be applicable to meetings (*op. cit.*, 81). Section 21 of this same Act provides that the police can make regulations to prevent obstructions of the streets (*op. cit.*, 61-82). The power in London is found in the Metropolitan Police Act, s.52.

<sup>7</sup> To cause or incite a public nuisance is a crime. The offence differs from trespass in that public nuisance is an interference with public rights on the highway, whereas trespass is an interference with the private rights of the owner (Wallington, *op. cit.*, 95). The offence should not be confused with private nuisance; as Smith, *op. cit.*, 206 notes, private nuisance is a tort and can be actioned by an individual once the crime of public nuisance has been proved and he/she can show that they have suffered special damage. Public nuisance has been defined as '...an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.'

(Stephen's Digest 9th ed. 1950, art.235).

It will be noted that the offence can (and indeed does) cover a wide variety of acts (c.f. Smith, *op. cit.*, 206, n.69 and Supperstone, *op. cit.*, 74, n.9). However, as regards meetings on the public highway, it covers interference with the public right of passage and repassing on the public highway. The interference must result from unreasonable user and reasonableness is judged from the public's interest. The obstruction must be actual and substantial (c.f. Goodhart, *op. cit.*, 165 *et. seq.*, Smith, *op. cit.*, 206-9 and Supperstone, *op. cit.*, 74-81).

The width of common law nuisance appears to be one feature by which it may be distinguished from statutory obstruction offences. Therefore, both concern obstructions but the statutory offences are more specific, whereas the common law offence covers obstruction as part of a wide range of illegal activities. Another distinguishing characteristic is that public nuisance requires *actual* obstruction but this is not the case for the statutory offences (c.f. Smith, *op. cit.*, 199-208). Essentially, the offence calls for

'...a value judgement as to the reasonableness of a particular behaviour.'

(Footnote continues on next page)

user of the highway. The paramount importance that is traditionally given to passage results in marches enjoying a more favourable position (*infra.*) and meetings are therefore seen as being of a greater threat to the rights of passage.<sup>8</sup>

### *France and England compared*

In France the position at first sight seems equally restrictive. It will be remembered that by virtue of art.6 of the 1881 Act, meetings are prohibited from the public highway (this is repeated in the 1935 decree-law). The first thing to therefore note is that this restriction is carried out in a statute that was purposely drafted to regulate the liberty to meet. On the other hand, English law regulates the liberty by employing laws that were not passed with the liberty in mind.<sup>9</sup>

However, the real differences lie in the greater control of discretion and the lack of a private property conception in France. It will be recalled that local authorities in France enjoy a discretion to authorise meetings on the public highway. This discretionary power was seen to be at the centre of the dispute in Mutuelle nationale des Etudiants de France. Meetings can be permitted if

---

(Supperstone, *op. cit.*, 75).

<sup>8</sup> Public nuisance firstly requires an obstruction that is secondly caused by the unreasonable user of the highway. It has commonly been stated that because processions involve movement they are not *prima facie* unlawful, whereas a meeting is unlawful because its stationary nature renders it an unreasonable use of the highway. For example;

'A procession...which allows room for others to go on their way is lawful: but it is open to question whether a public meeting held on a highway could ever be lawful, for it is not in any way incidental to the exercise of the right of passage.'

(Lord Scarman *op. cit.*, para.122),  
and Goodhart, *op. cit.*, 171;

'As a public meeting is not one of the uses for which the highway has been dedicated, it is a nuisance if it appreciably obstructs the road...But, and this is most important, in the case of a procession the test is whether in all the circumstances such a procession is a reasonable user of the highway, and not merely whether it causes an obstruction.'

This view has not been without criticism;

'The test should not be whether a demonstration is something reasonably incidental to passage, but whether it is reasonable in the context of the rights of the highway users generally. If nobody is obstructed, it will be reasonable. If passers-by must make a detour, their inconvenience should be balanced against the interest in allowing demonstrations.'

(Supperstone, *op. cit.*, 126 and c.f. Williams, (1967), *op. cit.*, 209 & 216).

There have also been judicial statements to the effect that the rights of passage on the highway include other activities beyond simply passing and repassing, e.g. Lord Esher MR (dissenting) in Harrison v Duke of Rutland [1893] 1 Q.B. at 146-7 (c.f. Supperstone, *op. cit.*, 47), however the traditional view remains.

<sup>9</sup> Sherr, *op. cit.*, 60 notes;

'Much of the effective law has grown out of historical usage intended for purposes quite different from the controlling of demonstration and protest.'

they are judged not to be unduly restrictive.<sup>10</sup> However, a discretion to allow meetings on the public highway, even where they cause an obstruction (at common law or statute) is also in practice enjoyed by the police in England.<sup>11</sup> Thus in Arrowsmith v Jenkins, the courts refused to accept that previous forbearance on the part of the police of obstructions caused by the appellant on the public highway could crystallise into some form of immunity from later prosecution for that offence.<sup>12</sup> If discretion exists in both jurisdictions, why is it claimed that French law is better? The response points to the fact that in France discretion is much more readily subject to review than in England.<sup>13</sup> Secondly, the courts have refused to countenance discrimination

---

<sup>10</sup> Chap.IV, section III.

<sup>11</sup> The police and local authorities can decide whether to permit activities which cause public nuisances on the highway but this is very much an extra-legal exercise of discretion. Therefore, the fact that a local authority authorises an obstruction cannot be used by way of a defence in criminal proceedings (Redbridge LB v Jacques [1970] 1 W.L.R. 1604 and Cambridge and Isle of Ely CC v Rust [1972] 2 Q.B. 426) and the police cannot, from a strict legal perspective, authorise a meeting that would be an unreasonable obstruction (and thus authorise a public nuisance and/or a statutory obstruction) but the position is in practice different;

'If the traditional view is accepted, that all meetings on the highway are unlawful, neither the highway authority nor the police have the power to authorise them. However, often in practice, if no serious obstruction is caused and there is not likely to be a breach of the peace, meetings take place with the tacit approval of the police.'

(Supperstone, *op. cit.*, 80).

<sup>12</sup> [1963] 2 All E.R. 210. The case involved a prosecution for statutory obstruction and has been much criticised because the courts condoned the exercise of the liberty to meet as being dependent on police discretion (Supperstone, *op. cit.*, 80-1). The court refused to investigate the appellant's allegation of police partiality, as per Lord Parker CJ at 211;

'For my part, I think that the appellant feels she is under a grievance which she puts in effect in this way - "Why pick on me? There have been many meetings held in this street from time to time. The police, as on this occasion, have attended those meetings and assisted to make a free passage" and she says that there is no evidence that anybody else has ever been prosecuted. "Why pick on me?", she says. That, of course, is nothing to do with this court. The sole question here is whether she contravened S.121(1) of the Highways Act, 1959.'

Williams, *op. cit.*, 211 objects to the court's refusal to look into the question of discrimination and adds (at pg.212);

'...it would certainly seem to be desirable that the courts should show readiness to admit the reasonableness, or fairness, of the decision to prosecute as a factor in determining the reasonableness of the alleged obstruction.'

<sup>13</sup> The much noted reluctance of English courts to review police discretion is evidenced by Williams, (1987), *op. cit.*, 178-9 and Smith, *op. cit.*, 177 points to the increased willingness only recently to subject police decisions to judicial review (citing Mohammed-Holgate v Duke [1984] A.C. 437). He notes that the courts require that a constable's decision is made upon reasonable grounds and that once he/she has come to a reasonable conclusion, the decision he/she takes must be reasonable. However, he notes that this is merely procedural review (at pg.178) and that the courts are 'diffident' about interfering in police decisions for a number of reasons (pg.179). Furthermore, it seems likely that the courts would be unwilling to review such a wide degree of discretion as enjoyed by the police as regards meetings located on the public highway.

(Footnote continues on next page)

on the part of the police in the exercise of their discretionary powers.<sup>14</sup> Although, this principle has yet to be tested in France as regards the regulation of locations, it is a firmly established principle and this should ensure that in the future it is extended to this area. Exacting judicial review and the prohibition against discrimination will be recalled to be supported by theory and its for this reason that they are preferred here.

The continuing view that government authorities should be treated as private property holders, directly supports the very wide degree of discretion enjoyed by them under English law. Such a view is not accepted in France, despite several statutes that could perhaps be applied to restrict the location of meetings.<sup>15</sup> Instead a public law perception prevails, in such a way that public authorities must exercise their discretion according to certain values - i.e. non-discrimination.<sup>16</sup>

Aside from the public highway, English law also restricts meetings from other areas. These restrictions are of varying degrees; ranging from absolute prohibitions to requirements to seek permission.<sup>17</sup> Where these same type of

---

The English position can be contrasted with that of the French where police decisions and public order are viewed as 'traditional' areas of judicial review (see Ktistaki, (1991), *op. cit.*, 89 *et. seq.* and J.M. Aubry & R. Drago, Traité des Recours en matière Administrative (1992), 524 *et. seq.*). In addition, where a civil liberty is involved police decisions must be *necessary* and *proportional*, having regard to the risk of public disorder and the value of the liberty in question (c.f. *op. cit.*, 94 *et. seq.* and chap.IV, section III). From this strong position of judicial review it is but a small step to control wider discretion, as will be seen below.

<sup>14</sup> See Communes de Tourrettes-sur-loup, *op. cit.*, in chap.IV, section III, *supra.*

<sup>15</sup> It will be recalled that the public highway is state property in France (c.f. art.538 of the Civil Code and Ordinance No.59-115 of 7th Jan. 1959, art.1; chap.V, section I) and that in addition there are prohibitions against causing an obstruction on the public highway; 'Quiconque aura, en vue d'entraver ou de gêner la circulation, placé ou tenté de placer, sur une voie ouverte à la circulation publique, un objet faisant obstacle du passage des véhicules ou qui aura employé ou tenté d'employer un moyen quelconque pour y mettre obstacle, sera puni d'un emprisonnement..' (Code de la route, Art.L.7).

Nevertheless, despite the existence of these offences, no cases or documentary evidence has been found showing that these are in practice used to prosecute those that meet on the public highway.

<sup>16</sup> The principle prohibition against discrimination by police authorities was noted above in Communes de Tourrettes-sur-loup and Préfet du Finistère (chap.IV, section, III).

<sup>17</sup> For an example of an absolute prohibition, see the prohibition of meetings and processions in the precincts of the Houses of Parliament. This is renewed each year by Sessional Orders from both Houses and is put into effect by the Metropolitan Police Commissioner via directions made under S.52 of the Metropolitan Police Act 1839 (see Bailey *et. al. op. cit.*, 173 and Papworth v Coventry [1967] 2 All E.R. 41).

Parks and open spaces are generally under less severe restrictions, although it has been held that there is no right to hold meetings in Trafalgar Square (R v Cunninghame Graham and (Footnote continues on next page)

restrictions exist in France, there is a strong likelihood, according to the authority of Commune de Tourrettes-sur-loup, that they must be justified on the grounds of public order or considerations of practical management and administration. This latter requirement may be quite wide and so could include inconvenience and the obstruction of the general public. However, once again the risk that officials will abuse this power by unduly restricting the liberty to meet is reduced by reason of a more expansive judicial review than that in England.<sup>18</sup>

French law requires that restrictions also be shown to be the minimum necessary to secure public order and must be proportional to the importance of the liberty and the evil that it is sought to avoid. These principles similarly apply to restrictions on the grounds of the administration and management of a location. Judicial review in France is also more exacting because it involves a review of the merits of the case where a civil liberty is involved. Thus it has been seen that there is a sliding scale of judicial review, which is at its most demanding when human rights would be restricted.

It is therefore likely that the courts will more strictly review restrictions on the grounds of public order and administrative and managerial necessity than their counterparts would review the reasons for restrictions in England. This is because English judicial review is primarily procedural, as will be seen as regards the review of other aspects of regulation and the doctrines of proportionality and necessity have only recently been applied by the courts.<sup>19</sup>

---

Burns (1888) 16 Cox CC 420 and Ex. p. Lewis (1888) 21 Q.B. 191, c.f. Williams, *op. cit.*, 73-86). Written permission can be sought from the Secretary of State for the Environment by virtue of the Trafalgar Sq. Regulations 1952 S.I. No. 776. The same regime exists as regards Hyde Park (c.f. Bailey v Williamson (1873) L.R. 8 Q.B. 118, the Royal and Other Parks and Gardens Regulations 1977 S.I. No. 217 and Williams, *op. cit.*, 70-3).

Only on one occasion does English law grant a right to meet in the strict legal sense. This is by virtue of S.95 of the Representation of the People Act 1983 (as amended). This statute grants candidates at parliamentary elections the right to hold election meetings in local authority schools and premises. Thus, the wide discretion that is normally enjoyed by the local authority is here strictly curtailed.

<sup>18</sup> The prohibition against discrimination by government authorities is a principe général du droit, more specifically, that of equality before public services. Examples of its application can be found in C.E. 10th May 1912 Abbé Bouteyre Rec.553, C.E. Ass. 25th June 1948 Société du Journal 'L'Aurore' Rec.289 and C.E. sect. 9th March 1951 Société des Concerts du Conservatoire Rec.151. and see chap.IV, section III.

<sup>19</sup> See P. Cane, 'An Introduction to Administrative Law' (1992), 216 and J.L. Jowell & A. Lester QC. 'Proportionality: Neither Novel or Dangerous' in J.L. Jowell & D. Oliver (eds.), 'New Directions in Judicial Review', (1988), 51.

It has been seen that France compares favourably with England as far as restrictive regulations concerning locations and now it will be seen that French practice in this area, also matches the high standards developed in the US case law. French regulation is supported by theory, thus in comparing it with the US it is the theory, as well as French law that is being evaluated.

### *High standards: the US*

Since the ECHR has not dealt with the issue of the location of the liberty to meet, only US case-law will be examined. Furthermore, the issue of the public forum will be dealt with further on, as this concerns both meetings and processions. American theorists display a great degree of sophistication in the analysis of the case law in this area. Tribe provides typical example. He claims that government restrictions in this area are aimed at the 'noncommunicative impact' of assemblies, which are seen as communicative activities. Here are grouped restrictions that whilst not aimed at the ideas or information contained in assemblies, have the effect of discouraging their communication. Restrictions as to location therefore fall into this category and Tribe goes on to argue that the court must here balance competing interests. In this connection, he states that the Supreme Court has developed a kind of rule of thumb that a regulation is constitutional as long as it does not unduly constrict the flow of information and ideas.<sup>20</sup>

---

<sup>20</sup> Tribe, (1988), *op. cit.* Adopting the view that freedom of speech is '...shorthand for the entire collection of freedoms...secured from government interference by the first amendment.'  
( at pg.75),

Tribe asserts that there are two ways that government can abridge speech. The first method is aimed at ideas or information. The second method is not aimed at ideas or information but the government restricts the flow of information while pursuing other goals. This second method of restriction is aimed at the 'noncommunicative impact' of speech (pgs.789-90). It would thus appear that restrictions on the locations of meetings based on the apprehension of public disorder or obstruction are restrictions of the second kind. In such cases, the courts must balance interests;

'Where government aims at the noncommunicative impact of an act, the correct result in any particular case thus reflects some "balancing" of the competing interests; regulatory choices aimed at harms not caused by ideas or information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas. In such cases, the first amendment does not *unduly* make the choice, but instead requires a "thumb" on the scale to assure that the balance struck in any particular situation properly reflects the central position of free expression in the constitutional scheme.'

Corresponding to these two forms of restriction, Tribe sees the court as having developed two ways of resolving 1st Amendment claims. The resolution of noncommunicative impact issues is termed 'the track two' approach - a regulation is therefore constitutional, as long as it does not unduly constrict the flow of information and ideas (pgs.791).

How is this level of theoretical sophistication supported in the case law? The courts have laid down a prohibition against the uneven application of a restrictive regulation between different persons and groups. Therefore, in Cox v Louisiana, the court stated that a uniform, non-discriminatory ban on all processions and meetings on city streets and in other public places under an obstruction of the highway statute would be unconstitutional.<sup>21</sup> In Cox v New Hampshire, the court upheld a 'reasonable' and 'non-discriminatory' permit requirement for the holding of parades as a proper municipal regulation of the use of the streets.<sup>22</sup> The courts will therefore uphold non-discriminatory measures that seek to regulate meetings because of the need to 'manage' certain locations.<sup>23</sup>

Essentially, this approach is very similar to that seen in France - locations must be administered and managed to ensure the fairest and best possible usage between citizens but in pursuing this aim, discrimination will not be tolerated, as this indicates an abuse of administrative prerogative.

Aside from discrimination, another similarity can be found as regards regulations imposed because of public order reasons. In both jurisdictions such justifications can be upheld if they are valued more than the civil liberty in the specific circumstances. Therefore, as in French law, administrative and managerial requirements (e.g. traffic control) and public order are accepted values that may be weighed against the values served by the liberty to meet. In the US these two broad interests are generally referred to as significant government interests.<sup>24</sup>

In effect, what occurs is that different values are weighed against one another in France and the US. This process occurs in England but the value of the liberty to meet is only put into the balancing equation with some difficulty. The police and local authorities carry out the balancing, as in Arrowsmith and as that case shows and the liberty in question is not always accorded a fair

---

<sup>21</sup> 379 U.S. 536 (1965).

<sup>22</sup> 312 U.S. 569 (1941) (c.f. M.G. Abernathy, 'Civil Liberties Under the Constitution' (1977), 421).

<sup>23</sup> Thus in Cox v New Hampshire, *op. cit.*, Hughes J upheld the conviction of eighty six Jehovah's witnesses for parading without a permit. The 'licensing' procedure was said to afford the opportunity for proper policing, the prevention of confusion and the overlapping of assemblies.

<sup>24</sup> See for example, Heffron v International Soc. for Krishna Consciousness, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed. 2d 298 (1981).

value. A fair value means that a weight that accords with the liberty to meet being a social value. In England and France the liberty to meet is claimed to have been determined by socio-political forces, it is seen as securing values that make it worthy of protection. This is the view in England but it has not been accompanied by institutional arrangements that can reflect and protect this socially accorded value. While US practice is at odds with the jurisprudential theory in this study, in that it attempts to hide the contingency of human rights by fixing them in a non-politicised and relatively fixed constitution, it at least, along with France has laid down a set of rules by which human rights can prevail and be clearly weighed against countervailing interests.<sup>25</sup>

This analysis of general location restrictions of the liberty to meet can be concluded by noting that in England the battery of laws and the prevalent private property view have combined to allow the police and local authorities to make decisions as to where meetings will take place. These decisions can be exercised with a wide degree of discretion, which is subject to minimal review. The liberty to meet does not appear as a valued interest that can be counterbalanced against public order and the rights of passage. This position has been compared unfavourably with that in France and it has been seen in turn that French law compares well with US law, as seen as an example of a legal framework that protects the liberty to meet to a high standard.

## THE LIBERTY TO PROCESS

Before going on to look at the regulations regarding the location of processions, it should be noted in passing that by virtue of S.11 of the Public Order Act 1986, written notice has to be given to the police six days before a public procession is intended to take place. However, S.11(2) exempts processions that are 'customarily held' in the area and funeral processions from this requirement.

---

<sup>25</sup> Frankfurter J stated in Dennis v United States 341 U.S. 494;

'The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.'

Despite the incompatibility of the U.S. institutional structure with the theory adopted here, this dictum indicates the clear political choices that are involved in regulating human rights. France and the U.S., in their different ways permit these choices to be made, the same is less true in England.



Returning to the regulation of locations, just as the location of a meeting can be of great importance to its organisers, the same holds true for the exercise of the liberty to process. However, in practice, given the size and mobility of the majority of marches, the desired location will more often than not be the public highway. Much the same remarks that were made above concerning restrictions of the location of the liberty to meet in England can be made here with one important qualification that alters the way in which marches on the public highway are viewed and treated. This qualification is linked to the private property view.

As for the position in France, it will be seen that processions are commonly seen as being exercised solely on the public highway. Finally US law views the liberty to process as an activity that has a normal and justifiable home on the public highway.

Therefore, in general both in France and England processions on the public highway benefit from a more liberal regime than that of the liberty to meet. However, the extent of this liberality differs between the two jurisdictions and the reason why will be revealed.

#### *The position in England*

It was seen above as regards meetings that English law is strongly influenced by a private property approach to locations, and that this extends to the public highway. For this reason meetings are widely considered as *prima facie* unlawful because they go beyond the purpose for which the general public is allowed to use the local authority-owned highway. This purpose is that of passing and repassing. Meetings, by virtue of their stationary nature, breach the terms of this common law licence.

However, what about mobile assemblies, in other words, processions? Here, the position has traditionally been seen differently. By reason of their mobility, processions on the public highway may constitute a normal user of the public highway and can be lawful. In fact, it may be said that whereas meetings are *prima facie* unlawful, marches, on the other hand, are *prima facie* lawful. The result is that processions have enjoyed a more liberal regulatory

framework because they are perceived, *a priori*, to be compatible with the common law rights of passage.<sup>26</sup>

This liberal framework is illustrated by the way the common law and statutory offences that were applicable to meetings held on the public highway are only made out as far as processions where the prosecution authority has *proved* that the procession went beyond the purposes of the public highway. In other words, the onus of proof that rests on those exercising the liberty to meet is shifted to the police and prosecution authorities as far as the liberty to process is concerned.

Therefore, under both common law public nuisance and the statutory offence of obstruction of the highway, the fact of an obstruction is not sufficient, what must also be proved is that the obstruction was the result of an *unreasonable user*.<sup>27</sup> Failure to address this issue of reasonableness has been held to be fatal to a prosecution.<sup>28</sup> However, that processions are only *prima facie* lawful is underlined by the case of Tynan v Balmer,<sup>29</sup> in which it was held that pickets moving in a circle were guilty of a public nuisance/obstruction of the highway. The circular movement was not reasonable user because the passing and repassing was not for the purpose of travel. The court in this case can be seen to have accorded the picket *prima facie* legality (because of the passing and repassing) but then to have subjected the activities to a closer investigation (the *purpose* of the passing and repassing). This case follows the logic of Hickman v Maisey, although this time a civil case, where the defendant was found guilty of a trespass on the plaintiff's land: his passing and repassing were for the purposes of spying on the plaintiff's race-horses and not for travel. As a result, he was found to have exceeded the licence to

---

<sup>26</sup> See, for example, Goodhart, *op. cit.*, 169 & 171, Williams, (1967), *op. cit.*, 63 & 213, Supperstone, *op. cit.*, 32, Smith, *op. cit.*, 131, Thornton, *op. cit.*, 134 and Lowdens v Keaveney [1903] 2 I.R. 82.

<sup>27</sup> See Nagy v Weston [1965] 1 W.L.R. 280, per Parker CJ at 284;

'There must be proof that the use in question was unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction.'

<sup>28</sup> See, R v Clark (No.2) [1964] 2 Q.B. 315.

<sup>29</sup> [1967] 1 Q.B. 91.

enter the plaintiff's land. Here once again the *purpose* of the passing and repassing was investigated.<sup>30</sup>

The element of mobility that constitutes processions may therefore be enough to secure *prima facie* lawfulness but any movement must still be within the terms of the private property right. Consequently, the favoured position enjoyed by processions is clearly not because of a view that they are a better means of exercising the liberty to assemble than meetings. In other words, processions are favoured in England because of *non-human* rights considerations.<sup>31</sup>

#### *France compared*

Before comparing the regulation of locations, it should be noted that the English exemption from the written notice requirement, for commonly or customarily held processions in S.11(2) of the POA 1986 is mirrored by the exemption for local and traditional marches as far as the prior declaration requirement is concerned.<sup>32</sup> This would seem to confirm the suggestion that these types of procession are not generally viewed as raising public order problems.

Returning to locations, it will be recalled that processions in France are commonly defined as mobile demonstrations that take place on the *public highway*.<sup>33</sup> Thus the French regulation of location only concerns the public highway. Processions enjoy a privileged position in comparison to meetings because the latter, as was noted above, are prohibited from taking place on the public highway (although there is a discretion to permit them).

It can therefore be said that both England and France privilege processions on the public highway over meetings. It is unclear why this in France since, this

---

<sup>30</sup> [1900] 1 Q.B. 752 and c.f. Harrison v Duke of Rutland [1893] 1 Q.B. 142, especially Lopes LJ at 154;

'If a person uses the soil of the highway for any purpose other than in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil...'

<sup>31</sup> It will be seen below that statute has to some extent reduced the favoured position of processions at common law as far as the imposition of bans and conditions are concerned.

<sup>32</sup> Chap.V, section III.

<sup>33</sup> See, chap.V, section I.

location is merely mentioned in its definition by legal commentators and the decree-law without explanation. However, French law would seem preferable in that the law grants it a clear location; the public highway. In England, the right to process is permitted as far as it is consonant with a property right, as is illustrated by Tynan v Balmer, and it would appear that this does not accord the right to process a weight that reflects its social value. More precisely, the private property view sees it as a particular means of travel and little more. Such a view therefore ignores the valued functions performed by the liberty.

Furthermore, it would seem that in France aside from public order, processions on the public highway can only be restricted for administrative and managerial considerations. This is not the case in England, where the private property conception results in restrictions to uphold this value. Therefore while it is clear that the common law offence of public nuisance is aimed at preventing disruption,<sup>34</sup> the same cannot be said for statutory obstruction, where it has been stated (albeit obiter) that no one need actually have been obstructed in order for the offence to be made out.<sup>35</sup> Trespass can also be made out without an actual obstruction.<sup>36</sup> The result seems to be that even where a procession causes no obstruction (i.e. causes no inconvenience and disruption), there may still be liability for the offence obstruction. The conclusion must be that property rights on the public highway can justify more restrictions than is the case in France.

---

<sup>34</sup> This follows from cases such as Bartholomew [1908] 1 K.B. 554 in which it was held that public nuisance requires an *actual* obstruction and c.f. Dymond v Pearce and others [1972] 1 All E.R. 1142.

<sup>35</sup> Gill v Carson and Nield [1917] 2 K.B. 674 and Nagy v Weston [1965] 1 All E.R. 78. As Supperstone, *op. cit.*, 77 observes, the question of whether there is an obstruction or not would seem to go to the issue of reasonable user (c.f. Lord Parker in the latter case, at 284). Therefore, although it may be difficult to establish a public nuisance without an actual obstruction, this is *not* a necessary element of the offence.

It is furthermore suggested that the tendency of the courts to find a statutory obstruction even where the obstruction is partial and / or temporary reveals that the offence is not aimed solely at inconvenience to passers by (c.f. Homer v Cadman *op. cit.*)

<sup>36</sup> See Goodhart, *op. cit.*, 162;

'If the highway is used for any purpose other than travel a trespass is committed even though no one is obstructed and no injury is done.'

To illustrate this point, he cites Hickman v Maisey, *op. cit.*;

'...in this case it was held that a racing tout, who walked up and down the highway for the purpose of watching horses which were being trained in an adjoining field, committed a trespass against the owner of the land on which the highway was situated *even though his act obviously was in no way injurious to the owner or an interference with the use of the highway.*' (emphasis added).

As between the two jurisdictions, French regulation would appear to be better because it does not appear to subordinate the liberty to process to property rights. Instead it will be recalled that the restrictions are limited to two grounds (see *infra.*) and that the courts will review decisions to restrict the liberty in such a way as to balance them against countervailing values. In England no such balancing occurs as far as property rights are concerned, so that a finding that they have been interfered with justifies the restriction of the liberty.

## HIGHER STANDARDS: THE PUBLIC FORUM

The public forum doctrine concerns the degree to which citizens have access to certain areas in which to hold meetings and processions and as a counterpart, the degree to which these areas are provided by the government authorities. This doctrine originated in the US, where it was felt that certain locations should exist in which assemblies enjoyed a privileged position and where government restrictions would need to be more strongly justified. In addition, it was felt that such areas should be set aside to facilitate the exercise of the liberties. The public forum doctrine, can therefore be seen as having a protective aspect and an aspect that is concerned with affirmative action.<sup>37</sup>

---

<sup>37</sup> For the origins and development of this doctrine, see Barnum, *op. cit.*, 314-8 and Tribe, *op. cit.*, 986 *et. seq.*, who defines the doctrine as requiring '...that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication - such as in those places historically associated with first amendment activities, such as streets, sidewalks, and parks - especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels.' (pg.987).

It has also been stated that;

'The animating idea was that government does not have absolute control over public speech on its property.'

(M. An 'Free Speech, Post Office Sidewalks and the Public Forum Doctrine - *United States v Kokinda* 110 S.Ct. 3115 (1990)' in Harv.Civ.Lib.Rev. 26 [1991] 633, 634).

The seminal case in this area is Hague v CIO 307 U.S. 416 (1939) in which Roberts J at 515-6 stated;

'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.'

One criticism of the doctrine that can be made is that if assemblies were limited to public forums, this might seriously limit the messages that they seek to convey to the wider public.

Such messages are sometimes conveyed by causing inconvenience or shock;

'An intrinsic strategic feature of any well-planned or purposeful modern protest is surely to cause society at large (or at least some of its members) a certain amount of both physical and psychological discomfort...Moreover, even supposing it were not true that access to the streets, as such was essential to the attainment of modern protest goals, it remains a fact that highly ritualised or formalised expressions of dissatisfaction will have perhaps the least impact of all. Once allowance is made for the need to permit not only freedom of expression in society, but also freedom of *effective* expression, then the statutory provision of official public forums may be viewed by some as less than wholly satisfactory.'

(Barnum, *op. cit.*, 321).

Given these dangers, it is suggested that assemblies should not be *restricted* to public forums, instead public forums are seen as being beneficial because they provide additional locations where assemblies can take place.

### *France and England compared*

In England there is no general legal obligation to provide locations in which meetings can be held. This situation is subject to the already noted exception that is provided for election meetings, by virtue of SS.95 & 96 of the Representation of the People Act 1983 (as amended by the Representation of the People Act 1985). The effect of this Act is stated by Marston to be as follows;

Candidates in Parliamentary and local elections may use certain local authority rooms for the purposes of holding public meetings in connection with their candidacy.<sup>38</sup>

As regards election meetings, local authorities lose the discretion that they normally enjoy (*supra.*). The result is that there are much tighter limits on the regulations that can be imposed on election meetings; once again Marston notes,

A local authority may not impose a ban on a particular group (or on all groups) based on irrelevant considerations such as political views, or even for reasons which might be considered relevant, e.g. the risk of disorder.<sup>39</sup>

The result is a right of access to local authority premises. The English position as regards election meetings accords with the position as regards meetings in general in France but goes even further by refusing to accept public disorder as a ground for refusing access. Nevertheless, it should be noted that English law still treats the local authority as a private citizen that owns property; thus breaches of this statutory duty lie in private law and not public law.<sup>40</sup>

However, this is very much an exceptional state of affairs and one that therefore reflects the importance accorded to electoral meetings. For other types of meetings, the public forum doctrine is not accepted. Despite strong calls for an obligation to provide assembly facilities and for rights of access to certain areas by both the judiciary and legal commentators,<sup>41</sup> local authorities

---

<sup>38</sup> Marston, *op. cit.*, 112.

<sup>39</sup> *op. cit.*, 112.

<sup>40</sup> The use of private law remedies in this area is illustrated in Webster v Southwark BC [1983] Q.B. 698, Webster v Newham BC (1980) Times, 22 Nov. Ettridge v Morrell (1986) 85 L.G.R. 100 and Verrall v Great Yarmouth [1981] Q.B. 202.

<sup>41</sup> For example, Lord Scarman recommended the provision of 'speakers corners' (*op. cit.*, para. 134(7)) and Supperstone, *op. cit.*, 41. E.C.S. Wade, 'The Law of Public Meeting' 3 M.L.R. [1938] 177, 180 and Bevan, *op. cit.*, 177 are amongst the many academics that have over the years called for the introduction of a right of access and the provision of facilities to hold meetings.

enjoy complete discretion as to whether to allow the use of halls or other areas which they own. There is even some evidence that this discretion has in the past been used as a preventative power.<sup>42</sup>

Even on the rare occasions when local authorities decide to create public forums, regulation is still permissible. This was the case in De Morgan v Metropolitan Board of Works<sup>43</sup> where by virtue of two local Acts, Clapham Common in South-West London was dedicated to the use and recreation of the public as an open and unenclosed space in perpetuity. However, a bylaw required that the permission of the local authority be granted before a speech could be made there. On appeal against a conviction for delivering a sermon without permission, De Morgan sought to have the bylaw declared ultra vires the two Acts. The court upheld the bylaw, stating that regulations were lawful in order to ensure the use dedicated in local Act and that furthermore, without regulation, such use might become impossible.

Cases such as these confirm the lack of any rights of access enjoyed by the general public, even where public forums are created. Alternatively, they can be seen as stating that even in public forums, where a right of access is not granted but facilities and land are put at the disposal of the general public, restrictive regulations may still be applied. In De Morgan, the regulation was based on administrative/managerial considerations<sup>44</sup> and it is suggested that public order would also be an acceptable reason. If decisions as to location were limited to these considerations, the English position would be very similar to that in France but it should be once again underlined that government authorities can discriminate and their decisions are subject to a less robust judicial review.

The French approach has been seen to be one that seeks to limit discretion in order to minimise the risk of discrimination and one in which public order and managerial considerations are normally the only generally accepted justifications for restricting meetings and processions. There is no explicit

---

<sup>42</sup> See Williams (1967), *op. cit.*, 65-66.

<sup>43</sup> (1880) 5 Q.B. 155, 49 L.J.M.C. 51, 42 L.T. 238, 44 J.P. 296 and see also Brighton Corpn. v Packham (1908) 72 J.P. 318 and cases cited in Bailey *et. al.*, *op. cit.*, 170.

<sup>44</sup> As was stated by Lush J in the case;

'Modes of user which, if enjoyed without limitation as to time or place, would unduly interfere with the comfort and enjoyment of others, such as riding, boating, cricketing, bathing, and the like, are put under reasonable restrictions.'



public forum doctrine but nevertheless it could be said that a right to hold peaceful assemblies which do not conflict with the use of the location (or cause undue inconvenience) by others does exist. Therefore, a right can be said to derive from the circumstances in which neither of the two justifications can be relied upon in order to restrict assemblies on government property. Such circumstances are constituted by the kind of assemblies of the quality just described (i.e. peaceful) and so those refused access to local authority property would have a strong claim against the refusing authority. Indeed, this claim might be so strong as to be called a right.<sup>45</sup>

#### *The US compared*

In the US the public forum doctrine has developed more as regards claims that citizens have a right to use certain locations to assemble. Therefore, strong justifications for restrictions on the liberties to meet and to process in these locations have to be provided. Stated in these terms, the doctrine looks very similar to the position in France.

This can be illustrated by looking once again at Cox v New Hampshire.<sup>46</sup> It is clear from this case that a public forum is not a legal vacuum, where there can be no regulation of the location/forum whatsoever. The Supreme Court recognised in this case that a statute could be enacted that sought to prevent serious interference with the normal use of parks and streets and furthermore that there was nothing unconstitutional about a provision that provided for a fee to be charged for the use of a forum. However, any restrictions that were imposed had to be reasonable, in that firstly, they were not to be imposed because of the content of the assembly. Secondly, they must serve significant government interests and thirdly, that while doing so, they must leave open 'ample alternative channels for the communication of information'.<sup>47</sup> The reasonableness that is required of the restrictions comes very close to the French prohibition against discrimination, the acceptance of public order and managerial reasons as the sole grounds for restrictions and the doctrines of

---

<sup>45</sup> What results is a right to assemble in parks, open spaces and local authority halls and meeting rooms. This right exists in the space left between non-peaceful and unduly disruptive assemblies. This right would prevail against a local authority which decided to refuse permission to assemble in a park for example, on grounds other than the two just mentioned.

<sup>46</sup> *op. cit.*

<sup>47</sup> For a further example, see Clark v Community For Creative Non-Violence 468 U.S. 288 (1984).

proportionality and necessity. The French position may even be said to accord greater protection as a result of the recent US case of Ward v Rock Against Racism in which the Supreme Court stated;

Lest any confusion on the point remain, we affirm today that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.<sup>48</sup>

The result of this case is that restrictions that are non-discriminatory and serve significant government interests may restrict the liberties more than is strictly necessary.<sup>49</sup>

However, the US position is clearly stronger than that in France and England when it comes to nominating locations that are to be considered as public forums. In the US it was decided as long ago as 1939 that public highways and parks were public forums. This point was made by Roberts J in Hague v CIO,<sup>50</sup> who by rejecting the view that government authorities should be treated as private property owners, laid the legal foundations for the doctrine of the public forum.<sup>51</sup>

More recently, in Perry Education Association v Perry Local Educators Association,<sup>52</sup> per White J, the case law on the issue has been synthesised and the Court has set out three categories of fora, which Tribe summarises as follows;

(1) traditional, 'quintessential public forums' - 'places which by long tradition or by government fiat have been devoted to assembly and debate,' such as 'streets and parks'; (2) 'limited purpose' or 'state-created semi-public forums opened for use by the public as a place

---

<sup>48</sup> 491 U.S. 781 (1989). Translated into French law terms, this case asserts the continued importance of the principle of necessity but restricts the application of the principle of proportionality.

<sup>49</sup> This signals a clear retreat from Frisby v Schultz 487 U.S. 474 (1988), per O'Connor J; 'A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy.', and the approach in Schneider v State, 308 U.S. 147 (1939).

<sup>50</sup> *op. cit.*

<sup>51</sup> The common law concept that government should be treated as a private property owner had been previously adopted by Holmes J in Massachusetts v Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895) and affirmed by the Supreme Court on appeal (167 U.S. 43, 17 S.Ct. 731, 42 L.Ed. 71 (1897)) but was finally overruled by the instant case.

<sup>52</sup> 460 U.S. 37 (1983).

for expressive activity,' such as university meeting facilities or school board meetings; and finally, (3) public property 'which is not by tradition or designation for public communication' at all.<sup>53</sup>

Despite criticisms as to the criteria used to place certain locations in these categories,<sup>54</sup> the clear identification of parks and streets as public forums means that assemblies held in those locations can immediately benefit from increased protection. The position is not so clear cut in France and certainly not in England. There is no explicit identification of areas in which the liberties to assemble are especially protected. Put simply, French law would seem to better protect liberties when it comes to the reasons for which the liberties can be restricted in public fora but US law seems to provide a higher standard of protection by clearly setting aside areas in which their exercise is a priority, thus better reflecting their social importance.

### A SUMMARY OF LOCATION RESTRICTIONS

English law has a central theme that runs through the regulation of the location of assemblies: the view that the property of state authorities (the public highway, parks, open spaces, halls and other premises) should be treated in legal terms as private property. Thus, the liberties to assemble are exercised *after* these property considerations have been taken into account. Admittedly, the common law offences of trespass and public nuisance are rarely (and never in the case of the former) applied to assemblies but the same cannot be said of statutory restrictions such as those set out in the Highways Act 1980<sup>55</sup> and local Acts and bylaws.<sup>56</sup>

It may be claimed that this problem results from the oft-cited lack of a distinction between public and private law.<sup>57</sup> This claim may be exaggerated

---

<sup>53</sup> *op. cit.*, 987.

<sup>54</sup> For example, *M. An, op. cit.*

<sup>55</sup> As well as other statutes that contain similar provisions; see note 6 *supra*.

<sup>56</sup> See *Bailey et. al.* 170 and *Supperstone, op. cit.*, 82 for examples of local Acts, bylaws and cases in which they have been challenged, invariably unsuccessfully.

<sup>57</sup> For the classic expression of the denial of this distinction, see A.V. Dicey, 'Introduction to the Study of the Law of the Constitution' (1897), chap.XII. See also J.D.B. Mitchell, 'The Causes and Consequences of the Absence of a System of Public Law in the United Kingdom' [1965] P.L. 95 and C. Harlow, '"Public" and "Private" Law: Definition Without Distinction' 43 M.L.R. [1980] 241;

'When in England we talk about "public law" we all know roughly what we are talking about and this is normally enough for U.S. We do not need to define the term more precisely because, although we may sense in the common law a latent distinction between the "public" and the "private," we do not use these terms as classificatory terms of art in the same way, for (Footnote continues on next page)

but in any case the prevalence of the private property perspective in English law may be more directly attributed to the relative lack of importance of civil liberties in English law, so that there is little with which to provide a counterbalance to this view.<sup>58</sup>

On the other hand, in France a serious attempt is made to give the liberties to meet and process a weight that accords with the importance social forces have given them. Legal regulation as to location has been limited in order to give effect to this social importance. In concrete terms, the liberties to assemble are weighed against managerial considerations and public order. Regulations must also be 'narrowly tailored', to adopt the American terminology. Although, France does not have a public forum doctrine as such, it does prevent the kind of discrimination by government authorities that has been permitted in England and it does this via public law remedies. In England discrimination is the prerogative of the private individual: he/she can refuse to permit assemblies on his/her property if he/she disagrees with the purposes of the assembly or the views of its holders. Hence remedies against such refusals lie in private law. Discrimination is not generally remedied by private law. Even in the exceptional case where the government landowner is under a legal obligation to permit assemblies (as in some local bylaws and Acts), the applicable *ultra vires* doctrine does not require that regulations as regards managerial concerns and public order be the minimum necessary or proportional; in other words, that they be 'narrowly tailored'. They may therefore restrict the liberties in question.<sup>59</sup>

---

example, as we use the terms "contract," "tort" and "crime". Nor do legal consequences usually flow from the distinction.'

(pg.241).

<sup>58</sup> It will be seen below that as far as regards content restrictions and the imposition of bans and conditions, the liberties to assemble come off rather badly as against more concrete interests; as J. Murdoch, *op. cit.*, 180 notes;

'The rhetoric of fundamental rights competes at a disadvantage with more concrete and more valued considerations such as preventing violence, minimising the cost of policing and containing disruption in the community.'

(c.f. Smith, *op. cit.*, 1 and Wallington, *op. cit.*, 94).

Judicial attempts to grant the liberties of assembly a greater weight in the balancing process have been made but it is too early to assess their effect. Thus, for example Otton J in Hirst and Agu v Chief Constable of West Yorkshire (1986) 85 Cr.App.Rep. 143, (1986) 151 J.P. felt that the requirement that the issue of the reasonableness of the obstruction should be looked at under a charge of statutory obstruction would lead to a proper balance being struck '...and that the "freedom of protest on issues of public concern" would be given the recognition it deserves.'

<sup>59</sup> Note the absence of such requirements in Brighton Corpn v Packham, *op. cit.*

The conclusion must be that in England the crucial decision of where a meeting or procession can be held is subject to the wide discretion of the police and state authorities. The actual practice might be a liberal one but there is no guarantee that this is or will remain so.

As regards the public highway, France and England compare rather poorly with the USA, where because of the public forum doctrine, processions and meetings are envisaged as activities that are integral to the purposes of the public highway. Thus, *prima facie* there does not seem to be any privileging as between the liberties to meet and process. Neither has to justify itself against other interests from a weak position of being viewed as being beyond the normal and reasonable user of the public highway. The US regulatory framework can be seen as according the liberties to assemble an opportunity to express their political import as against other values.

This analysis of restrictions as to location concludes by restating the relatively inferior position of the two aspects of the liberty to assemble in England. This has been seen to have been in large part due to the prevalence of the private property view. France, however, presents a better regulatory framework and compares well with that of the US. Along with the preferred institutional structure and status of civil liberties, France also therefore presents a comparative reference point of considerable interest and value to English reformers.

## SECTION II BANS BEFORE ASSEMBLIES

Bans are another example of restrictions on the liberty to assemble that take effect before the assembly has got under way. They have also, like location restrictions, been the subject of much analysis in England,<sup>60</sup> where different rules apply as to meetings and processions. In this section, the provisions as regards bans in England and France will be compared, using the USA and the ECHR as examples of high standards of protection in this area.

---

<sup>60</sup> For example, Bailey, *et. al.*, *op. cit.*, 177-185, Supperstone, *op. cit.*, 50-62, Marston, *op. cit.*, 122-136, Card, *op. cit.*, 68-91, Smith, *op. cit.*, 130-2 & 134-41 and for a more historical perspective, see Kidd, *op. cit.*, 68-74 and Williams, (1967), *op. cit.*, 54-63.

## THE POSITION IN ENGLAND

### *The liberty to meet*

As far as the liberty to meet is concerned, there are no powers either at common law or statute to ban them in advance. Although, this may not always have been the position,<sup>61</sup> the current situation would seem to be confirmed by the Government's decision to reject the inclusion of a power to ban static assemblies (which can be taken to include meetings) in the POA 1986.<sup>62</sup>

As this chapter will show, the often heard claim that powers to ban before a meeting are not needed because of the existence of other restrictions may have much to say for itself and it should be recalled that meetings already suffer from a more restrictive framework on the public highway compared with processions. Thus, it may be contended that the absence of banning powers here is because they would be superfluous.<sup>63</sup>

### *The liberty to process*

The situation is somewhat different as regards the liberty to process: here banning powers exist by virtue of S.13 of the POA 1986. The existence and the extension of these powers since their first appearance in S.3(2) of the POA 1936 has caused much concern.<sup>64</sup> This concern may be seen to cover four areas: firstly, on what grounds may a ban be made? By a virtual repetition of the 1936 provision, S.13(1) of the 1986 Act provides that bans can be made on the grounds of 'serious public disorder', however the factual circumstances must be reasonably believed to be such that the powers to impose conditions

---

<sup>61</sup> Williams (1967), *op. cit.*, 51 *et. seq.*, notes a belief at the end of the nineteenth century that magistrates had the power to issue 'proclamations' to ban assemblies. There, however, seemed to be no basis in either common law or statute for such a power.

<sup>62</sup> The Government's reasoning was based on human rights considerations and interestingly a view of the relative importance of meetings and processions, as Card, *op. cit.*, 82 notes; 'The Government...rejected a power to ban static demonstrations on the ground that this would be a substantial limitation on the right of assembly and the right to demonstrate which would go further than strictly necessary; particularly as meetings and assemblies were a more important means of exercising freedom of speech than are marches.', and see the Government White Paper, Review of Public Order Law (Cmnd. 9510, 1985), 31-2. This reveals that the Government sees the primary function of assemblies as vehicles for exercising the freedom of expression.

<sup>63</sup> As Williams (1967), *op. cit.*, 63 observes;

'There is no general power allowed by statute in this country to interfere with the holding of stationary public meetings in public places....One reason for this is that the police find it easier in practice to utilise the ordinary criminal law to control public meetings...'

<sup>64</sup> See for example, Thornton, *op. cit.*, 144-5, Bonner & Stone, *op. cit.*, and Williams, (1967), *op. cit.*, 175.

on processions (S.12, *infra.*) are insufficient to prevent public disorder. Once again it should be noted that the Government rejected the inclusion of grounds other than public order in this provision.<sup>65</sup>

Secondly, what kind of ban may be imposed? As far as its duration is concerned, a ban cannot be declared for longer than three months and it may be applied to any *public* procession or a procession of any other class that may be specified.<sup>66</sup> A choice between specific and general bans therefore presents itself and it has been noted that the latter are the more common. The average duration of a ban would appear to be around thirty days, and longer than this is claimed to be exceptional.<sup>67</sup> Despite calls to employ bans in a 'bolder' fashion - more precisely, to make greater use of specific bans - the police have resisted such calls because they claim that specific bans would expose them to accusations of political bias.<sup>68</sup> As a consequence, the criticism is often made that general bans catch 'innocent' marches<sup>69</sup> and this has led to an application to the European Commission in Christians Against Racism and Fascism v UK. The claim was however found to be manifestly ill-founded and inadmissible.<sup>70</sup> More importantly, the use of general bans was upheld, as long as they were used as a last resort;

A general ban of demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent means.<sup>71</sup>

---

<sup>65</sup> See White Paper, *op. cit.*, chap.4.

<sup>66</sup> S.13(1).

<sup>67</sup> See Marston, *op. cit.*, 133-4.

<sup>68</sup> The Government made such a proposal in its White Paper, *op. cit.*, para.4.14 and Sir Leslie Scarman (as he then was) in his report on the Red Lion Square Disorders of 15th June 1974 *op. cit.*, urged a 'bolder use' of specific bans.

(He repeated this call in 'The Brixton Disorders 10-12 April 1981' (Cmnd. 8427), (1981), paras.7.41-7.49).

The police grounds for rejecting these calls were not accepted by Card, *op. cit.*, 79;

'...this is not very convincing, because if a blanket or class ban is imposed it will generally be known that this is to prevent a particular organisation holding a procession, and equally lay the police open to such accusations and disputes.'

<sup>69</sup> For example, Robertson, *op. cit.*, 73-4 and at 73, referring to the use of general (or blanket) bans in the 1980s;

'Most of these recent blanket bans have been imposed to stop just one march with a racist message. But a banning order is a scatter-gun which hits and hurts all sorts of innocent targets.'

<sup>70</sup> Application No. 8440/78 of 16th July 1980, 21 D & R March 1981, 138. Earlier the ban had been unsuccessfully challenged in the domestic courts in Kent v MPC, *op. cit.*, For the background to these cases, see Robertson, *op. cit.*, 73 and Bailey *et. al.*, 182.

<sup>71</sup> *op. cit.*, 150.

The Commission further recognised that general bans existed because of a desire

to ensure an even application of the law...that...aims at the exclusion of any possibility for the taking of arbitrary measures against a particular demonstration.<sup>72</sup>

A closely related point that may be mentioned here, although it has received little attention in England, is that banning powers are stated to only be applicable to '*public*' processions. It follows that a distinction between public and private is important here but the definition of a public procession that is given in S.16 is of little help. This is because it is circular: a public procession is one that is held in a public place.

Thirdly, who decides whether to ban? Outside London, the decision is a three-stage process involving the chief officer of police, the local police authority (LPA) and the Secretary of State. S.13(2) provides that a police application for a ban shall be made to the LPA, who upon receiving it

may with the consent of the Secretary of State make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State.

Thornton notes that LPAs have been known to refuse police applications but that the Home Secretary has never refused his consent once the LPA has consented.<sup>73</sup> In the absence of an LPA in London, the decision to ban becomes a two-stage process, whereby the police (the Commissioner of Police for the City of London or the Commissioner of Police for the Metropolis) applies directly to the Secretary of State.<sup>74</sup>

Fourthly, when and under what conditions may a decision to ban be reviewed?<sup>75</sup> The simple answer is that bans *may* be reviewed but the chances of a successful challenge seem slight. Although the terms of S.12 in the POA 1986 are more susceptible to judicial review than its 1936 predecessor, the already noted dominance of *procedural* review and the reluctance of the courts to enter into the domain of operational considerations, combines to

---

<sup>72</sup> *op. cit.*, 150.

<sup>73</sup> (1987), *op. cit.*, 146.

<sup>74</sup> S.13(4).

<sup>75</sup> Notwithstanding the fact that often the time which such legal processes take proves fatal to the exercise of the liberties (see chap.II. ? & V, ?), they still may be of considerable use in protecting them.



confirm the general view that the chances of a successful challenge are small.<sup>76</sup>

The decision in Kent v MPC<sup>77</sup> provides a clear example of the limitations of judicial review. Here, the Campaign for Nuclear Disarmament sought to challenge a general ban on processions in London. They claimed that the Commissioner of Police had not properly considered the effect that a London-wide ban would have on certain marches, including theirs. This argument was rejected by the Court of Appeal, holding that even though the police reasoning was 'meagre', the Court would not substitute its judgement for that of the police unless it could be proved that an irrelevant factor had been taken into consideration.<sup>78</sup> Thus, even though it was admitted that the reasons given by the police lacked substance, the court insisted on a procedural approach that looked at the decision as a process: since none of the considerations in this process had been proved to be irrelevant and/or irrational, the process was deemed unimpeachable.<sup>79</sup> The judicial avowal of the insubstantial nature of reasons in this case highlights how little English

---

<sup>76</sup> S.12 makes bans more susceptible to judicial review, as is noted, *inter alia*, by Smith, *op. cit.*, 137;

'The new position differs from the old in one significant way, by altering the terminology in which the Act is couched from the senior police officer's "opinion" that he is unable to prevent the serious public disorder to "reasonably believes" that the imposition of conditions will not enable him to preserve order. Because of the more objective terminology in which this is couched, it invites the readier use of the powers of judicial review.'

Despite this improvement, Smith is less than sanguine as to the chances of a successful review of a banning decision, *op. cit.*, 137;

'Whether this will in practice make a great difference may be doubted, since it seems unlikely that a court will come to the conclusion that a chief constable of police has come to a decision that he could not reasonably arrive at, which is the critical test for the exercise of the powers of judicial review.'

and see also Thornton, (1987), *op. cit.*, 148.

Card, *op. cit.*, 89 points out that the chances of success are even slimmer as regards challenges as to the *nature* of a ban (and the same point is made as far as conditions);

'...if it cannot be proved that there was not a reasonable belief in a ground for imposing a condition or a ban, but objection is taken to the nature of the condition or ban, an application for judicial review of it is most unlikely to succeed. The reason is that there is no requirement for a reasonable belief in the necessity for a particular condition or ban.'

<sup>77</sup> *op. cit.*

<sup>78</sup> This decision was eventually challenged before the European Commission of Human Rights, in Christians Against Racism and Fascism v UK, *supra*.

<sup>79</sup> For the general grounds of judicial review, see, Cane, *op. cit.*, 105-229 and a good summary of judicial review for present purposes is provided by Smith, *op. cit.*, 139-40;

'...a decision is open to review where it has been arrived at as a result of a mistaken view of the law, or where the decision is one that could not reasonably have been arrived at, in the sense that the person deciding must have taken into account irrelevant considerations, or failed to take into account relevant ones, or where he failed to observe the dictates of natural justice which require him to give the parties a hearing before arriving at his decision.'

courts are prepared to go in reviewing the merits of police decisions. To have investigated whether the police reasons held water would have required going beyond procedural judicial review and would have meant encroaching on police *operational* competence.<sup>80</sup>

## FRANCE AND ENGLAND COMPARED

How, if at all, are these issues regulated in France? Is the situation there helped by constitutional enactments or by other legal mechanisms? It will be seen that in France, the existence of a constitutional enactment has proven to be less important than the operation of judicial review and statute as means to protect the liberties.

Unlike England, both meetings and processions may be banned in France. It was seen that by virtue of art.9 of the 1881 Act, the general public order powers of the police were made applicable to the liberty to meet and that the Conseil in Benjamin<sup>81</sup> interpreted this as authorising the police to ban meetings. Furthermore, processions can be banned using these same general powers by virtue of art.3 of the 1935 decree-law.<sup>82</sup> At the outset, the French framework therefore seems the more restrictive but the picture changes if the regulation of meetings and processions is analysed and compared according to the four areas just outlined above as regards England.

### *On what grounds may a ban be made?*

As regards meetings, according to Benjamin and the cases that have followed it, meetings may only be banned by reason of serious public disorder and/or administrative and managerial considerations.<sup>83</sup> This public order reason is the same as in England and the similarity continues because of the requirement that the exercise of banning powers must be a last resort when other measures are not available to the police in order to maintain public order.<sup>84</sup> The last resort requirement in France is, however, a case-law creation and is used to limit the application of the general public order police powers. The French courts have proved that they will review police decisions in order to verify that they have been used as a last resort, as in the case of Naud,

---

<sup>80</sup> See Lustgarten *op. cit.*, 20-2 & 78, who notes that though this oft-cited the term does not appear in a legislative text;

'Yet the power of this conventional understanding is immense.'  
(pg.78).

<sup>81</sup> Chap.IV, section III.

<sup>82</sup> Chap.V, section III.

where it will be recalled that the Conseil struck down a ban because other police measures could have been taken.<sup>85</sup> This degree of review gives teeth to the last resort requirement and it is made possible by a willingness to investigate what in England would be considered an *operational* domain that is the exclusive province and competence of the police.<sup>86</sup>

Furthermore, it is important to note that the ban of a procession in England is only a last resort in a partial sense; in that by virtue of S.13(1) it only has to be shown that conditions would not have been sufficient to maintain public order.<sup>87</sup> Therefore, regard does not have to be had to other police measures, such as using police reinforcements, as was the case in Naud.

Despite all the advantages of French law, English law still remains without any powers to ban meetings, does this fact not make the English position more libertarian? Although it may seem that way at first sight, it will be remembered that the absence of banning powers in England was seen as being due to the ample restrictive powers available at other stages of a meeting. It has been seen that this is certainly the case as regards restrictions on locations. Once this global view is taken into account, it is French law that is preferred.

As regards processions in France, the situation differs from that in England. The police enjoy a discretion as to whether to ban either under the general public order powers or to use those powers as they are laid down in the in the 1935 decree-law.<sup>88</sup>

In France the police general public order powers have been seen to be wider than merely public order in the English sense of the term. Hence, in Legastelois it was seen that the Conseil upheld a ban on a march because of

---

<sup>83</sup> See chap.IV, section III.

<sup>84</sup> For example in Bujadoux, *op. cit.*, and see chap.IV, section III. The decision to ban a Monarchist banquet was struck down because the Mayor had failed to show that he did not have other means at his disposal by which to maintain public order.

<sup>85</sup> Chap.IV, section III. In this case the court reviewed the factual circumstances around the time of the proposed meeting and the decision in Bujadoux (*op. cit.*) shows that the burden of proving that a ban was a last resort lies on the police.

<sup>86</sup> Lustgarten, *op. cit.*, 20-2.

<sup>87</sup> According to this provision, it must be believed that the power to impose conditions; '...will not be sufficient to prevent the holding of public processions...resulting in serious public disorder...'

<sup>88</sup> Chap.V, section III.

the problems caused to traffic.<sup>89</sup> Therefore, unlike the liberty to meet, the courts have permitted bans to be employed on the basis of a wider conception of public order but at the same time they have strictly reviewed the reasons for the exercise of these powers.<sup>90</sup> However, this time, the position is worse than that in England, where the sole ground upon which a procession may be banned remains serious public order. Therefore, processions are subject to less restriction and can thus more readily perform the valued functions that have been identified in this study. This remains the case even if attention is turned to the greater number of restrictions that exist as regards locations in England because it will be recalled that processions enjoy a privileged position as regards the public highway.

The other source of banning powers as regards processions is art.3 of the decree-law and it has been seen that its terms result in a lower justificatory burden than that required in order to ban meetings.<sup>91</sup> Nevertheless, even in this area of lower justification, the courts have introduced the doctrine of proportionality.<sup>92</sup> Furthermore, despite the restrictive interpretations of this banning power by successive administrative circulars,<sup>93</sup> the formulation of the general police powers in art.3 has an advantage over the general powers as laid out in the Code des Communes because it would appear to lay down a *narrow* conception of public order as the sole justification for a ban. Thus bans can only be issued on the basis of apprehended violence. This conclusion is based both on its drafting history, which was a response to the serious public disorder of the 1930s<sup>94</sup> and the recent case from the Administrative Tribunal of Nantes, where it will be remembered that a ban based on the fact that organisers of a procession were 'outsiders' was struck down.<sup>95</sup> This contrasts with the general public order powers in the Code, which were originally enacted in the aftermath of the Revolution in order to accord *wide* powers to the police in order to maintain public order during this turbulent period. By way of summary, it can be seen that as far as the liberty to process, French

---

<sup>89</sup> Chap.V, section III.

<sup>90</sup> See Belmas et Brégeon and Association des Combattants de la Paix et de la Liberté et autres, (chap.V, section III).

<sup>91</sup> Chap.IV, section III.

<sup>92</sup> As seen in Anciens Combattants de Gondrecourt (chap.V, section III).

<sup>93</sup> Chap.V, section III.

<sup>94</sup> Chap.V, section II.

<sup>95</sup> Chap.V, section III.

regulation would appear to offer the police wider grounds upon which to ban than exist in England.

*What kind of ban may be imposed?*

It was noted that in England, as far as processions, the police may use general or specific bans. In France, a similar situation exists, with the difference that the courts have shown themselves to be hostile towards general bans.<sup>96</sup>

By reason of the above noted discretion as to which banning power to use, the police in France can decide to issue specific or general bans.<sup>97</sup> Thus, under the decree-law, a *specific* power is indicated, whereas the width of the general police powers would appear to provide ample basis for general bans. Even more discretion might be enjoyed because cases such as Abbé Marzy, Belmas et Brégeon and Dupont et autres have shown that the courts have not clearly limited the police to specific bans even under the decree-law.<sup>98</sup>

An interesting difference between France and England presents itself here. As was just stated, in France the courts have traditionally been hostile towards general bans, to the extent that in the 1920s and 1930s they almost became non-existent.<sup>99</sup> On the other hand, in England, general or blanket bans have been the norm, as the police have tended to eschew specific bans for fear of being seen to be overly political. Why such a difference?

The answer is suggested to be to a large degree linked to the nature of judicial review in France, where the courts have proved willing and able to strike down specific bans that are discriminatory. The police may then exercise banning powers of a specific nature with less fear of appearing overtly political because decisions can be validated by an exacting judicial review, in which any such allegations can be investigated. Contrast this with the position in England, where the police do not have recourse to judicial review in order to validate the exercise of their powers. Therefore, the police enjoy a type of 'bare' discretion which the English courts refuse to investigate and the consequence is a strong tendency to seek to minimise discrimination in the exercise of discretion, hence general bans. However, given the price that must

---

<sup>96</sup> Chap.V, section II.

<sup>97</sup> Chap.V, section III.

<sup>98</sup> Chap.V, section III.

<sup>99</sup> Chap.V, section II.

be paid by those who wish to exercise their rights it might be felt that the police should exercise their discretion more flexibly.<sup>100</sup>

The mere enactment of a constitutional provision enshrining assembly rights without more would probably leave this situation unresolved. Instead, what is required is a detailed legal measure setting out what types of bans can be made and, of equal importance, a degree of judicial review that can investigate the political issues that the police must inevitably become involved in.

As far as the *type* of meetings and marches that may be banned in France, it will be noted that the width of the general police powers means that both public and private assemblies can be banned. This would appear to be the foundation for the assertion of such powers over marches held on private land in the Paganon circular.<sup>101</sup> The distinction between public and private assemblies is therefore unimportant as far as bans are concerned. This can be contrasted with the position in England where only public marches may be banned.<sup>102</sup>

Paradoxically, it is in France, where the distinction is of little relevance (at least as far as bans are concerned) that greater attention has been paid to the formulation of a definition of public and private meetings, whereas in England, where the distinction is of more importance, little attention has been paid to this issue.<sup>103</sup>

In this area, French regulation appears to allow for a greater restriction of liberty by extending banning powers to private meetings. It might be argued that the State should be doubly reluctant to restrict activities that are in the 'private' sphere of the lives of citizens. Given this view, the non-existence of bans over private assemblies in England is to be commended. However, as stated above, the English position should be looked at in the light of the totality of restrictions. It is submitted that from the point of view of the conception of human rights adopted in this study, the possible restriction of private meetings, where the political motivation behind bans can be publicly

---

<sup>100</sup> As was urged by some commentators, see note 68, *supra*.

<sup>101</sup> Chap.V, section III.

<sup>102</sup> POA 1986, SS.13 & 16.

<sup>103</sup> Chap.V, section I.

and fully reviewed, is less objectionable than a system in which no such restrictions of this nature exist but in which restrictions of other kinds can not be closely checked and analysed. The former scenario is that of France, the latter that of England.

Finally, a serious deficiency in France is the lack of a time limit on bans. In neither of the two formulations of banning powers are such limits found, unlike the clear three month limitation in England. Even if the existence of judicial review means that it is likely that French bans will be reviewed in order to see if their duration is not more than necessary and proportional, this seems a dangerous lacuna that is in need of remedy. This is especially so since there is no guarantee that excessively long bans will be challenged and because of the normal long delay in deciding challenges to bans.

*Who decides whether to ban?*

Although in both England and France the decision to ban involves more than one person, the differences between the two may be claimed to be of such a nature that to compare them would be akin to 'comparing apples with pears'. This is the sort of argument that has been used to justify the relative lack of work on comparative public law and civil liberties in particular.<sup>104</sup> Whilst it may be true that the police structure differs markedly in the two jurisdictions, it will be seen that each jurisdiction can learn valuable lessons from the other.

As has been seen, police powers in France traditionally involve a dual control exercised by prefect and mayor. This tradition remains today despite the reforms carried out in the early 1980s.<sup>105</sup> Formally, police powers were vested in the mayor, with a 'tutelle' power in the prefect. Thus, now when a ban is made by the mayor, s/he exercises these powers subject to the 'administrative tutelle' of the prefect. The mayor is then obliged to send a copy of the decision to the prefect,<sup>106</sup> who can request an interim injunction to suspend the ban<sup>107</sup>. On other occasions, as when public order affects more than one commune or where the mayor refuses to use his/her police powers or in those areas served

---

<sup>104</sup> Chap.II, section I.

<sup>105</sup> Chap.IV, section III.

<sup>106</sup> Chap.II, section II.

<sup>107</sup> Chap.V, section, III, especially Commr. de la République du Département de l'Essonne c. Commune de Montgeron *op. cit.*, and the 1985 decision of the Administrative Tribunal of Nantes, *op. cit.*

by the Police nationale, the prefect can ban assemblies.<sup>108</sup> Thus the traditional system of dual control has been preserved as regards bans using the police general public order powers in the Code des communes and under the decree-law (art.3).

Despite their different police systems, both France and England have sought to involve local and central government elements in banning decisions. There are however exceptions: in London (where it was seen that central authority is dominant because of the non-existence of a local public authority), in areas with a national police force in France (where the prefect exclusively exercises police powers) and Paris (where the Prefect of Police is the sole police authority). Nevertheless, both systems have, from their different perspectives, generated similar balancing structures in which the interests of central and local government can be given weight.

An important difference is that this structure of balancing the often countervailing interests at the central and local level is not put into effect in England. Instead, it is in France where disputes over the exercise of banning powers between prefect and mayor are seen (i.e. between central and local government). Despite some above noted claims that some local authorities have in the past refused to consent to banning applications,<sup>109</sup> there have been no cases on this point in England. Furthermore, it may be doubted after the decision in R v Sec. of State for the Home Dept. ex. p. Northumbria Police Authority<sup>110</sup> whether the courts would uphold an LPA's refusal to consent to a ban in the face of opposition from the Chief Constable and the Home Secretary. If a look is taken beyond the centralised administration of France, it can be seen that the mayor constitutes an important counterweight to central power: s/he is a locally elected representative with extensive police powers.

If one searches for an analogous body in England one would have to choose the LPA. However, this is not a fully elected body of persons and its powers -

---

<sup>108</sup> Chap.IV, section III.

<sup>109</sup> Thornton, (1987), *op. cit.*, 146.

<sup>110</sup> [1988] 2 W.L.R. 590. In this case the Court of Appeal upheld a circular issued by the Home Secretary that authorised the stocking of plastic bullets and CS gas by local police forces, despite the opposition of the LPA. What should be noted is the extent the court went to in order to support the position of the Home Secretary and the Chief Constable, even resorting to a claim that the former enjoyed 'a prerogative power to keep the peace.' (c.f. Ewing & Gearty, *op. cit.*, 106-8).



being limited to *maintaining* a police force - are of a considerably reduced scope compared to those enjoyed by the French mayor.<sup>111</sup>

It can be concluded by seeing France as an attempt to create a structure in which the political considerations involved in the use of banning powers can be brought to the fore. In England a similar structure is available but by a combination of an unwillingness to put it into effect and the weakness of the police powers enjoyed by local bodies, is not as strong as that in France. However, France may see in England's multi-person, semi-elected, local LPA a model for improving its current arrangements whereby the mayor at the level of the commune is the *only* elected person who exercises police powers.<sup>112</sup> Since a ban involves the interests of a variety of citizens and groups: the police, local business, residents, organisers, participants etc., it would make sense to allow these actors to play a part, or at least be heard, in the decision-making process. The LPA could be expanded for this purpose but this is more difficult in France where the sole local decision-maker is the mayor. Such an improvement would once again strongly accord with the jurisprudential conception of human rights; in that the liberties to assemble would be regulated in a *political* forum via the participation of *political* actors, who represent the community and are accountable to it. Such a body would be in a position to take account of the particular circumstances at the local level. Moreover, a reform of this nature highlights that the protection of these liberties requires more than the mere enactment of constitutional rights. Clearly other more detailed issues need to be addressed.

---

<sup>111</sup> The LPA is the descendant of the directly elected Watch Committee of the Victorian era. Today it consists of two-thirds elected local councillors and one third nominated local magistrates, hence it is not an entirely elected body. By virtue of s.4 of the Police Act 1964 the LPA must, *inter alia*, maintain an adequate and effective police force and may provide equipment. However, the extent of LPA control is considerably weakened by the provision in s.5(1) that the police force is under the 'direction and control' of the Chief Constable. Lustgarten, *op. cit.*, chap.3 details the gradual marginalisation of LPAs in the tripartite governing structure of the police at the expense of greater powers being enjoyed by the Chief Constable.

<sup>112</sup> The Minister of the Interior also exercises police powers and is elected but these powers are rarely used and in any case do not usually affect the liberties to assemble. At departmental level it was noted that the prefect shares some police powers and duties with an elected General Council (see Chap.IV, section III) but the department is not as clearly local as the commune and here the prefect still plays a dominant role as far as the maintenance of public order.

### *Reviewing decisions*

The greater scope and possibility for bans to be challenged in France has already been noted and so little more needs to be added here except a summary of these preferred qualities: the existence of a review of the merits of police decisions, the review of operational matters that involve police expertise, a value accorded to human rights in balancing them against other interests and the firm application of the principles of proportionality and necessity. These qualities have been favourably compared with the English application for judicial review and that of the US as far as regulation of the location meetings and processions. Therefore, bans may be successfully challenged in France, whereas in England, as in the decision in Kent v MPC, the courts have refused to review police decisions to ban, other than on procedural grounds.

A factor that has not as yet been mentioned is that of time. In discussing the possibilities afforded in each jurisdiction to challenge bans, it has been assumed that the relevant review body is able to render judgement sufficiently quickly for the assembly to go ahead as planned should the ban be struck down. However, the average time in which these decisions are handed down in both the jurisdictions shows that in the vast majority of cases, a judgement will come too late. Therefore a finding that a ban was illegal some two to three months after the date intended for an assembly presents a hollow victory and more importantly a successful restriction of the liberties. It is worth repeating, therefore, that the liberties to assemble are of a temporally delicate nature.

Given this nature, decisions must be able to be challenged with sufficient speed. As far as human rights are concerned, it was seen that the 'déféré préfectoral' in France provides that a challenged police decision that 'compromises' a civil liberty must be suspended via an interim injunction within 48 hours of the administrative tribunal being seized by an application to review the decision.<sup>113</sup> The advantages of this emergency procedure for the liberties to assemble were, for example, seen, in Commr. de la République de l'Essonne c. Commune de Montgeron.<sup>114</sup> In England no such procedure exists for the rapid protection of human rights, despite the clear evidence that such

---

<sup>113</sup>Chap.II, section II.

<sup>114</sup>Chap.V, section III.

a procedure is needed in order to protect the liberties to assemble. The combination of a lack of an expedited review procedure and inadequate judicial review lends strong support to the criticism that bans are for all practical purposes beyond effective challenge.

### SECTION III CONDITIONS BEFORE ASSEMBLIES

A final group of restrictions that can be applied prior to meetings and processions is constituted by the power to impose conditions. These might be of various kinds (e.g. concerning the size or duration of an assembly) but they all have the effect of limiting liberty. Specifying locations may be seen as a particular kind of condition but because it has a more extensive regulatory framework than the conditions that will be considered here this justifies the special attention that has been given to them in section I.

The following analysis of conditions follows the same structure as that used for bans, except the comparison with the US and the ECHR will be made at the end of the section for both bans and conditions. This reflects the fact that a distinction is not generally made between these two kinds of restriction in these legal systems.

#### THE POSITION IN ENGLAND

*On what grounds may conditions be imposed?*

The main source of police powers to impose conditions on meetings and processions before they take place is the POA 1986. By virtue of SS.12(1) and 14(1), conditions may be imposed on the basis of four grounds: (1) serious public disorder, (2) serious damage to property, (3) serious disruption to the life of the community and (4) where the purpose of the organiser(s) is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

Previously the 1936 provision as to conditions merely provided that conditions could be imposed on the ground of serious public disorder<sup>115</sup> and the current extension beyond public order reasons has been strongly

---

<sup>115</sup> S.3(1).

criticised. Essentially, these criticisms have been focused on ground (3), which has been seen as posing a serious threat to the liberties of assembly because of a vagueness as to the degree of disruption that would justify the imposition of conditions.<sup>116</sup> These fears of greater discretion have not been assuaged by the rarity of the use of these powers and the probability that the previous practice of negotiations between police and organisers will continue.<sup>117</sup>

Although the POA 1986 is the main source of conditions, Supperstone has pointed to the possibility of imposing conditions under the Metropolitan Police Act and the Town Police Clauses Act, as well as certain local bylaws.<sup>118</sup> However, these are invariably conditions that relate to location and consequently attention will be focused here on powers located in the POA 1986.

The extension of the power to impose conditions on meetings has been described as the most controversial measure in the 1986 Act.<sup>119</sup> In its defence it was claimed that firstly, this extension removed the favourable treatment of meetings vis à vis processions, which was considered to be anomalous, given that they were just as often the cause of disorder<sup>120</sup> and secondly, that such powers would lead to negotiations between organisers and police.<sup>121</sup> However, despite these claims, it will be seen below that meetings still enjoy a favoured position as regards the conditions imposed upon them.

Finally, it should be noted that like bans, conditions can only be imposed on *public* meetings and marches.

---

<sup>116</sup> For example, Williams, (1987), *op. cit.*, 72-3, Robertson, *op. cit.*, 71-2, Thornton, (1987), *op. cit.*, 142, Card, *op. cit.*, 71-2, Smith, *op. cit.*, 134-6 and Ewing & Gearty, *op. cit.*, 118-121. Both Smith, *op. cit.*, 135 and Card, *op. cit.*, 71 also note that the grounds in the provisions provide for the imposition of conditions by reason of the apprehended reaction of others to the meeting or march (the so-called 'heckler's veto', *infra.*).

<sup>117</sup> Card, *op. cit.*, 68 and Smith, *op. cit.*, 134-6, n.26. Even if informal negotiations continue, police powers to impose conditions may be seen as constituting a powerful bargaining position. As a consequence, the police may ultimately dictate terms, instead of negotiating them. This would be contrary to one of the avowed aims of the condition power which was to provide a framework for negotiations, *not* police coercion (see the Fifth Report from the Home Affairs Committee, Session 1979-80, 'The Law Relating to Public Order' (1979-80 HC 756), vol. 1, para.35).

<sup>118</sup> *op. cit.*, 59-62.

<sup>119</sup> Robertson, *op. cit.*, 74.

<sup>120</sup> See White Paper, 'Review of Public Order Law', *op. cit.*, para. 5.1.

<sup>121</sup> note 117, *supra*.

*What kinds of conditions can be imposed?*

Here the position differs as between processions and meetings. Nevertheless, for both kinds of assembly the condition that is imposed must 'appear...to prevent' the disorder, damage, disruption or intimidation which were mentioned above as being the grounds upon which conditions are based.<sup>122</sup>

However, meetings may only have conditions as to place, maximum duration or maximum number of participants imposed upon them, whereas for processions 'such conditions as appear...necessary' to prevent the four situations laid out in SS.12 & 14 may be imposed.<sup>123</sup> The result is a wider discretion as regards conditions that may be imposed upon the liberty to process.

No explanation has been given for this difference but it may be surmised that the conditions for meetings correspond to the police view of what is necessary to avoid the four evils, whereas a wider and more flexible approach was preferred as regards processions.

*Who decides whether to impose conditions?*

Whereas this power was exercised by the Chief Constable in the 1936 Act, the 1986 provisions provide that as regards processions the 'senior police officer' may impose conditions where 'persons are assembling with a view to taking part in it...'. Where the march is in the actual process of assembling, the 'senior police officer' is defined as the 'most senior in rank of the police officers present at the scene.'<sup>124</sup> On the other hand, when a procession is intended to take place but with less immediacy, 'senior police officer' means Chief Constable.<sup>125</sup> Thus, apart from processions that are in the process of assembling, prior conditions on assemblies remain the decision of the Chief Constable. The probable reason why the former decision can be taken by a police officer of less than the rank of Chief Constable without consulting either the LPA or the Home Secretary is that conditions in such circumstances are seen as more clearly involving the operational expertise of the police on the spot, which as was noted with regard to judicial review, is generally felt to be beyond the competence of the courts. Nevertheless, given the width of the

---

<sup>122</sup> S.12(1)(b) and S.14(1)(b).

<sup>123</sup> Marston, *op. cit.*, 130.

<sup>124</sup> S.12(2)(a).

<sup>125</sup> S.12(2)(b) and S.14(2)(b).

conditions that may be imposed, especially as far as processions are concerned, it may be justifiably claimed that such decisions should be open to scrutiny and involve other and more locally accountable parties.

### *Reviewing decisions*

Much the same comments as were made about the possibilities of challenging bans are applicable as regards conditions. However, three factors would seem to further reduce the chances of a successful challenge: firstly, conditions are imposed as 'appear necessary' not as 'reasonably' appear necessary. This omission allows for a wide degree of subjectivity that may not easily be open to judicial review. This wide discretion in turn means that conditions may be imposed which may be unduly (i.e. disproportionately) restrictive of the liberties but because they *appear* to be necessary are unimpeachable.<sup>126</sup> This possibility is especially heightened as regards processions, where the wider discretion excludes any meaningful requirement of proportionality or necessity as far as conditions are concerned. Instead all the police must prove is the weakest of links between the reason and condition in order to have shifted a monumental burden of proof on those who seek to challenge the condition.

Secondly, there is no requirement that the imposition of conditions be a measure of last resort, indeed nothing in the relevant provisions would prevent them being imposed as a first resort. Hence, conditions used too readily would seem to be beyond challenge.<sup>127</sup>

Thirdly, as was noted above, judicial review-proof subjective opinions seem to be laid down in order to impose conditions on the grounds of serious disruption and intimidation.<sup>128</sup>

---

<sup>126</sup> It is worth repeating the remarks by Card, *op. cit.*, 89;

'...if...objection is taken to the nature of the condition or a ban, an application for judicial review of it is most unlikely to succeed. The reason is that there is no requirement for a reasonable belief in the necessity for a particular condition or ban. In fact, in relation to a condition it is expressly stated that such conditions may be imposed "as appear necessary" to the officer imposing them. This means that a condition or ban can only be impugned on the grounds of ultra vires, breach of duty to act fairly, or abuse or misuse of power.'

<sup>127</sup> This is unlike bans, which were at least required to be a partial last resort; see section II, *supra*..

<sup>128</sup> The intimidation ground was the subject of review in Police v Reid [1987] Crim.L.R. 702, where it was held that 'discomfort' was not to be equated with intimidation.

## COMPARING FRANCE AND ENGLAND

No specific powers to impose conditions on the liberties to meet and to process exist in French law, however such powers would seem to be implicitly part of the wider public order powers belonging to the police. This would indeed seem to be the case if Abbé Olivier is recalled, where a mayor attempted to impose a condition on a funeral procession, using these powers.<sup>129</sup> This case confirms that conditions may only be imposed for public order reasons, although it will be recalled that this is a wider notion than in England. Given that conditions are probably within the competence of the general public order powers, the same comments that were previously made in section II as regards banning powers in France are applicable here.

Essentially, this means firstly, that conditions will be subject to a more exacting judicial review (including the expedited emergency procedure), secondly, must be a last resort and thirdly, must be necessary and proportional.

Consequently, the wide subjective terms in the POA 1986 would in France be subject to a detailed investigation of the factual circumstances surrounding a belief that disruption to the community or intimidation would occur. The police would have to show that no other choice was available. This would give teeth to the requirement of necessity. Furthermore, a link or a proportional relation would be required between the condition and the ground upon which it is based. Finally, unlike England, the decision as to conditions would, as part of the police general public order powers, be generally subject to a dual police authority control rather than being a decision within the discretion of one person. While, as was shown above, there is room for some improvement in the French system in order to provide greater access to other interested and affected parties, it provides better protection of the liberties than the English framework, which leaves decision-making solely in the Chief Constable or senior officer's hands.

Furthermore, despite the fact that conditions can be as damaging to the liberty to assemble as bans, this is not reflected in the legal framework in England,<sup>130</sup> where they are left to the wide discretion of the police. This is a

---

<sup>129</sup> Chap.V, section III.

<sup>130</sup> As is forcefully put by Ewing & Gearty, *op. cit.*, 119;  
(Footnote continues on next page)

danger that ought to be remedied but that once again calls for wider action than simply calling for the constitutional enactment of rights, that has traditionally been the focus of attention of the Bill of Rights campaign. Instead, detailed regulation could be set out in an Act of Parliament, thus achieving protection but via a means that is more readily subject to alteration in the face of political and social forces.

### HIGHER STANDARDS: USA and ECHR

How do French and English regulations of bans and conditions before meetings and marches measure up against the supposed higher standards of the US and the ECHR? The answer requires some extrapolation from US and Convention law because of the lack of case law in this area. This means that such questions as the grounds upon which conditions and bans may be made, the kinds of bans and conditions and judicial review have to be compared with principles drawn from other, but related, areas. Nevertheless, it will be contended, that as with restrictions as to location in section I, French law protects the liberties to assemble *at least* as well as US law and the Convention.

#### *US law*

Given that in the US the liberties of assembly are constructed as a single liberty, which is guaranteed as one of the rights within the First Amendment, the liberties are seen as part of the freedom of speech and consequently, little or no distinction is made between the liberty to meet and the liberty to process. Furthermore, bans and conditions are analysed according to whether they are aimed at the *communicative impact* or *non-communicative impact* of an assembly.<sup>131</sup>

Non-communicative impact would be characterised by bans or conditions that are imposed because of prior knowledge of the message of the assembly, for example. Normally, such a restriction of meetings and marches in a public forum (for example the public highway or a local authority meeting hall) would be invalid because restrictions in these areas must normally be

---

'It is quite clear that the imposition of conditions may be as effective as an outright ban. A CND march around an empty common is less effective, if causing less inconvenience, than one down a High Street. A meeting about South Africa [House] is less meaningful at Waterloo Bridge than in front of the country's embassy in Trafalgar Square, especially if the number is cut to 20 after 2,000 turn up.'

<sup>131</sup> Tribe, *op. cit.*, 789-90 and see section I, *supra*.



content-neutral.<sup>132</sup> An exception is however made as regards a certain category of unprotected speech. Therefore, if in a procession or meeting it is reasonably believed that words will be spoken in order to directly incite or produce imminent lawless action and that this advocacy is also 'likely to incite or produce such action' bans or conditions may be upheld.<sup>133</sup> This means that bans and conditions may be imposed where the content of assemblies is likely to involve the advocacy of illegal conduct.

However, there are further limits which are imposed even on restrictions of this kind of speech. These consist of the doctrines of *prior restraint*, *vagueness* and *overbreadth*. Common to all is that restrictions on speech will be held to be invalid if they use *impermissible means*, even though the speech could legitimately have been restricted using other means. Essentially, these doctrines regulate the *ways* in which speech may be limited. For example, bans and conditions carry a presumption of illegality because US courts assert that restrictions should normally only be applied *ex post facto* to the speech, for example, a criminal prosecution. This is the known as the doctrine of prior restraint.<sup>134</sup> These restrictions must also not be so vague that 'persons of common intelligence must necessarily guess at its meaning and differ as to its application' (vagueness)<sup>135</sup> and a restriction (or legal measure that provides for it) may not have *potential* applications that would unduly and

---

<sup>132</sup> See, for example, Grayned v Rockford, *supra*.

<sup>133</sup> This is the two part test laid down in Brandenburg v Ohio, 395 U.S. 444 (1969). The test is somewhat of a synthesis of the previously dominant 'clear and present danger test' (as per Holmes J in Schenck v U.S. 249 U.S. 47 (1919)) and Learned Hand J's test focusing solely on the words spoken and not on the surrounding circumstances (laid down in Masses Publishing Co. v Patten, 244 F. 535 (S.D.N.Y. 1917)).

<sup>134</sup> Prior restraint is a doctrine that has mainly developed as regards press and publishing (see Tribe, *op. cit.*, 1039-55 and W.B. Lockhart, Y. Kamisar, J.H. Choper and S.H. Shiffrin, 'Constitutional Rights and Liberties, cases-comments-questions', (1991), (598-605). However, the impositions of bans and conditions prior to an assembly have also been seen to be examples of prior restraints (see V. Blasi, 'Prior Restraints on Demonstrations' Mich.L.Rev. 68 (1969-70), 1482) and restrictions as to location have also been seen as a particular form of prior restraint (see for example, the cases on permit requirements: Carroll v Princess Anne, 339 U.S. 175 (1968), Kunz v New York, 340 U.S. 290 (1951) and Shuttlesworth v Birmingham, 394 U.S. 147 (1969). Prior restraints therefore carry a burden of showing that *ex ante* punishment would not be suitable and thus the Court stated in Bantam Books, Inc. v Sullivan, 372 U.S. 58, 70 (1963) that any  
'...system of prior restraints comes to this Court bearing a heavy presumption against constitutional validity.'

<sup>135</sup> This was the test laid down in Connolly v General Construction Co., 269 U.S. 385 (1926). The doctrine can be seen to stem from the requirement of the Due Process Clause that citizens should have fair notice of illegal conduct and that uncertainty of the law may discourage citizens from exercising their liberties. Another aim is to reduce the discretion enjoyed by state officials.

substantially restrict other forms of protected speech (unconstitutional on its face for reasons of overbreadth).<sup>136</sup>

Where bans and conditions are imposed on the grounds of content-neutral reasons, the same comments as were made above as regards restrictions on locations would appear to apply. Consequently, bans and conditions must be *narrowly tailored, serve a significant government interest and not close adequate alternative channels for communication*.<sup>137</sup>

Apart from this general rule, the courts have been active as regards two other areas of content-neutral restrictions. The first is the so-called 'hecklers' veto'. This refers to the restriction of assemblies (in the present context, via bans and conditions) based upon an apprehension of the violent reaction of others, be they the audience or those engaged in a counter-assembly. However, the cases have actually concerned hostile reactions *during* assemblies.<sup>138</sup> The second area concerns the 'sensitive audience'. In this case the question concerns whether speech may be restricted because listeners will find it offensive and then react violently.<sup>139</sup> Although the cases have concerned restrictions during assemblies, the principles may be extended to the prior situation but given the fact that the cases therefore concern restrictions *during* assemblies they will be returned to in greater detail in the next section. Here it will be noted that the principles concerning the hecklers' veto and the sensitive audience were laid down in Chaplinsky v New Hampshire, in which it was stated that;

---

<sup>136</sup> The overbreadth doctrine (see Thornhill v Alabama, 310 U.S. 88 (1940)) allows the court to go beyond the application of a statute or measure 'as applied' (the normal method) and to look at *potential* applications in order to see its effects ('on its face review'). Thus, as another exception to the general rule, an individual can litigate the rights of third parties not before the court by showing that a measure if applied according to its terms would violate the First Amendment rights of others (see Tribe, *op. cit.*, 1022-29).

<sup>137</sup> See Grayned v Rockford, *supra*.

<sup>138</sup> A crucial distinction must be made here between the 'hecklers' veto' as a ground for a ban or condition and this same reason employed as a justification for interference with an assembly when it has already got under way. It will be noted that English law has been far more concerned with the latter, whereas U.S. law has primarily focused on the former (see for example, Feiner v New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295). Therefore in the next section the principles of U.S. law (involving restrictions prior to assemblies) will also be applied as higher standards as far as restrictions in England (*during* assemblies).

The term 'heckler's veto' was first used by H. Kalven, 'The Negro and the First Amendment' (1965) 140-5.

<sup>139</sup> See for example, Terminiello v Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) and Street v New York, 394 U.S. 576 (1969).

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>140</sup>

Following on from this case it may therefore be claimed that bans and conditions may be imposed where fighting words or speech that will inflict injury or incite an immediate breach of the peace are apprehended. However, on the authority of Cox v Louisiana,<sup>141</sup> it would seem that restrictions must be a last resort in the sense that the police must have been unable to 'handle the crowd' by other means except via bans and conditions.<sup>142</sup>

### *ECHR law*

As far as the ECHR is concerned a series of grounds are set out in art.11 for the imposition of restrictions on the liberties, where they are constructed as a single, unified liberty to assemble, but there has been little case law as to the application of these grounds.<sup>143</sup> However, it has been held by the Commission that while restrictions may be imposed on the grounds of 'public safety' and the 'prevention of disorder', such measures must be *necessary* and *proportional*.<sup>144</sup>

---

<sup>140</sup> 315 U.S. 568, 572.

<sup>141</sup> *op. cit.*, 550.

<sup>142</sup> See also Feiner v New York, *op. cit.*, 326-7, Black J dissenting:

'If in the name of preserving order [the police] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him.'

(c.f. Edwards v South Carolina, 372 U.S. 229, 232-3 (1963) and Gregory v Chicago 394 U.S. 111 (1969)).

These cases have sought to limit and prevent the discretion the police enjoy as to whether to 'silence a provocative speaker or instead...control the hostile audience' (Tribe, *op. cit.*, 852). Much depends on the *context* (Cohen v Carolina, 403 U.S. 15 (1971)) and so no hard and fast rule can be found. Therefore, there is no rule that a speaker's interests will always prevail (see Niemotko v Maryland, 340 U.S. 268, 289 (1951), per Frankfurter J; 'It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker.'), nor that the audience's interest will always be prioritised (see Cantwell v Connecticut, 310 U.S. 296, 311 (1940)).

Thus, the imposition of bans and conditions very much depends on the context; the purpose and message of the proposed assembly, as well as that of the hecklers will be very important and if the willingness of the Supreme Court to strictly examine police accounts of the facts *during* assemblies (as in Hess v Indiana, 414 U.S. 105 (1973)) is extended to the prior situation, exacting judicial review can be expected to be extended to apprehended circumstances.

<sup>143</sup> P. van Dijk & G.J.H. van Hoof, Theory and Practice of the European convention of Human Rights (1990), 429 note;

'...freedom of assembly still has not played an important part in the Strasbourg case-law.'

<sup>144</sup> Appl. No. 8191/78 Rassemblement jurassien et Unité jurassienne v Switzerland, 17 (1980) D & R, 93, 120.

The hecklers' veto situation has also been pronounced upon; in Christians Against Racism and Fascism v UK,<sup>145</sup> where the Commission asserted that the prospect of violent reactions or counter-demonstrations did not remove the obligation to protect the freedom of assembly. The Commission strongly underlined this view in Platform 'Ärtze für das Leben' v Austria by stating that the right to assemble included the right to protection against counter-demonstrators;

because it is only in this way that its effective exercise can be secured to social groups wishing to demonstrate for certain principles on highly controversial issues.<sup>146</sup>

After this brief summary of the US and Convention positions as regards conditions and bans, French and English practice can now be compared with these standards.

### *Comparison*

*on what grounds may bans and conditions be imposed?*

It will be recalled that in France bans and conditions may only be imposed as a last resort for reasons of public disorder and administrative and managerial considerations. This is also the case in England. In both the USA and under the Convention public disorder has been seen to be a legitimate ground. However, it was noted that public order had quite a wide meaning under the general police powers in France, that goes beyond violence. At the same time, it should be noted that in the US, as regards non-communicative impact restrictions, 'significant government interests' have been held to include interests such as the 'well-being, tranquillity, and privacy of the home'.<sup>147</sup> Therefore, providing that bans and conditions are narrowly tailored to effect these government interests, it would appear that restrictions may also be imposed for non-public order reasons in the US (i.e. reasons that go beyond violence).<sup>148</sup> The review of facts and circumstances which the US courts undertake is remarkably similar to the review carried out in the French administrative courts, using the principles of proportionality and necessity

---

<sup>145</sup> *op. cit.*, at 148.

<sup>146</sup> Appl. No. 10126/82, (1985), 44 D & R, 65, 72-4.

<sup>147</sup> See Carey v Brown, 447 U.S. 455, 471 (1980), most recently affirmed in Frisby v Schultz, 101 L.Ed. 2d. 420, 431 (1988), per O'Connor J.

<sup>148</sup> For example, in Cox v New Hampshire (*op. cit.*, 572), the Supreme Court upheld a statute that required marchers to pay the costs of policing. Having secured constitutional validity, a refusal to pay would presumably have been a justified and hence a non-public order ground for a ban or condition (c.f. Blasi, *op. cit.*, 1527-32).

and examining the merits of police decisions. On the other hand, in England it has been seen that the courts have declared themselves incompetent to review what they consider to be matters of operational policy. From a theoretical perspective, French arrangements are not only preferred but once again compare well with higher standards.

Similarly, the ECHR provides a range of grounds which probably include non-public order considerations (e.g. the 'protection of health or morals' or the 'protection of the rights and freedoms of others'). It follows that both France and England accept grounds for bans and conditions that would be acceptable under US law and the ECHR. However, the need for reform as far as its less exacting review seems imperative in England, now that bans and conditions may be imposed for non-public order reasons in the POA 1986. It is precisely because of the existence of exacting judicial review in France that it is claimed that it affords greater protection even though its notion of public disorder is wider than that in England. Thus, although both the US and the ECHR have shown that bans and conditions may be imposed for reasons that go beyond public disorder in the English sense, it is contended that the decision to go beyond this relatively narrow justification must be accompanied with tighter and tougher review mechanisms - this has not been the case in England.

France would also seem to be in a somewhat stronger position than England and the ECHR as far as the last resort requirement. It has been shown why this is so vis à vis England but in comparison to the Convention it is contended that despite the avowed requirements of proportionality and necessity, the fact that the Convention permits the Contracting States a 'margin of appreciation' as regards what is a necessary reaction, provides a weaker degree of protection than in France. This is because of the acceptance by both the Court and Commission of factual judgements at the national level, especially when 'on the spot' decisions have to be made.<sup>149</sup> Thus in the Christians Against Racism case, the UK Government was able to invoke a margin of appreciation in order to have its view of the necessity of the general

---

<sup>149</sup> See van Dijk & van Hoof, *op. cit.*, 583-606 and the cases cited therein. The authors conclude (*op. cit.*, 605), as regards the margin of appreciation left to States, that: 'The Commission and the Court appear to follow in many cases what might be called a *raison d'état* interpretation: when they weigh the full enjoyment of the rights and freedoms on the one hand and the interests advanced by the State for their restriction on the other hand. They appear to be inclined to pay more weight to the latter.'

ban accepted, despite the Commission's admission that the parties were 'in fundamental disagreement as to the justification of the measure complained of.'<sup>150</sup>

In France, on the other hand, state authorities do not enjoy this presumption of truth, instead they must show that they have exhausted all other police measures before restricting the liberties. In addition, the previous behaviour of those wishing to assemble is not so readily admitted as it was in the instant case,<sup>151</sup> as is seen by Naud.<sup>152</sup>

Furthermore, France compares well with the US by reason of the same insistence that restrictions be a last resort when all else has failed or shown to be ineffective.<sup>153</sup>

*what kind of bans and conditions may be imposed?*

The English tendency to use general bans has been upheld by the Commission in the Christians Against Racism case, which accepted the UK Government's contention that;

this legal situation is based on considerations designed to ensure an even application of the law in that it aims at the exclusion of any possibility for the taking of arbitrary measures against a particular demonstration.<sup>154</sup>

However, it was stated that general bans of processions would only be permitted where disorder could not be prevented by *less stringent* measures (i.e. as a last resort) and the authorities had to show that the disadvantages caused to other processions must be 'clearly outweighed by the security considerations justifying the issue of the ban.'<sup>155</sup> US standards would seem to be tougher as regards communicative impact restrictions, in that the doctrine of overbreadth indicates the need for strong justificatory grounds before

---

<sup>150</sup> *op. cit.*, 149.

<sup>151</sup> *op. cit.*, 151;

'The Commission considers that in these circumstances it was not unreasonable for the competent authorities to prohibit all public processions other than customary ones during the relevant two months period i.e. extending three days after the by-election in Lambeth. *Having regard to the previous experience in Manchester* where the National Front had circumvented a local ban by marching in another district it was not unreasonable to extend the ban to the whole of the London police area.' (emphasis added).

<sup>152</sup> Chap.IV, section III.

<sup>153</sup> See *supra.*, and Cox v Louisiana, *op. cit.*

<sup>154</sup> *op. cit.*, 150.

<sup>155</sup> *op. cit.*, 150.

general bans can be used.<sup>156</sup> As a consequence, the English policy of general bans would probably be struck down under US standards. Although in France such general bans are possible under the general police powers, it has been seen that on the rare occasions they have been employed they have been struck down. However, general bans would seem to carry a heavy burden of justification as in the US, at least when they are based on the communicative content of an assembly.

Strong arguments have been presented to justify specific, as opposed to general bans and vice-versa.<sup>157</sup> Which of these is to be preferred from the jurisprudential perspective that was formulated in Part I of this study? The answer is that specific bans are preferred because they are more likely to take account of the specific circumstances of a particular meeting or march; in other words, an emphasis on the specific. It would thus seem that none of the legal systems meets the standards set by the theory but at least France comes closer than England to doing so.

This is because of the legal context of a specific or general ban. In cases such as Kent v MPC where an innocent march is caught by a general ban, liberty would seem to be better protected by the existence of a review body that could engage in an in-depth investigation of the factual circumstances and reasons at issue. Moreover, since controversial and political issues may need to be dealt with, it would make sense if such a body was composed of persons who are representatives of interested political groups. Such a body has been seen in the shape of the Cc in France, although this is a national, as opposed to a preferred local body. Thus the English use of general bans is less open to criticism, given its use in other legal systems but its use in a context in which adequate review is not provided is certainly a source of concern that can be criticised. In comparison, France's system of judicial review more closely approximates to the ideal. In addition, future legislative changes to the framework are likely to undergo the highly political and exacting review that is carried out by the Cc, as was seen in chapter II. Both these factors ensure, to a greater degree than in England, that the use of general (and for that matter,

---

<sup>156</sup> However, the generality of the ban would have to be such that overbreadth was *substantial*, in that the number of potentially restricted assemblies was large in comparison to those legitimately restricted by the measure (c.f. Broadrick v Oklahoma, 413 U.S. 601 (1973)).

<sup>157</sup> In favour of specific bans, see note 68, *supra.*, and against, see G. Shaw MP, Home Office Minister of State House of Commons, Second Reading, col. 861 (expressing the reservations of Chief Constables) and see the Christians Against Racism case, *supra.*

specific) bans will be closely scrutinised as to their political contexts and consequences.

However, it must be added that England seems to stand its own in providing for time limits on bans. Although it may be assumed that France, the US and the ECHR would subject this question to the requirements of necessity, proportionality, narrow tailoring etc., it would seem better to make an express legal enactment to this effect. This is furthermore submitted to be a serious deficiency in the ECHR which purports to set European-wide minimum standards.

*who decides whether to impose bans?*

US law has not pronounced on this issue and so seems to be of no help in providing a higher standard as far as who should impose conditions and bans. Although it should be noted that here the interaction between central and local power is also found (i.e. between the Federal and State governments). In a similar fashion, the requirement in art.11 of the Convention that any restrictions on the freedom of assembly must be proscribed by law has not been expanded upon and, as it stands, appears to be of little guidance in comparing France and England.<sup>158</sup>

*reviewing decisions*

Both the US and the ECHR provide review bodies that, as has been seen in the cases, can go some way beyond the limited procedural review in England. Hence in the US, the Supreme Court will engage in a fresh review of the finding of fact of the lower court and the lower courts themselves are able to investigate the factual circumstances at the time a decision was made to restrict the liberties in question. As far as the ECHR, the Commission and the Court, although allowing a margin of appreciation to the domestic authorities, will also investigate the merits of the case. This is the type of review that was noted in France and is the exacting degree of review that is supported by theory. Therefore, it can again be claimed that the theory and France stand up to comparison with higher standards. Indeed, France may even provide better protection by reason of the emergency administrative review procedure as regards human rights, which can be said to reflect the

---

<sup>158</sup> van Dijk & van Hoof, *op. cit.*, 578-83.



social importance and value of human rights by according them special protection.

On the other hand, the lack of such exacting review in England isolates it and means that meetings and processions are more likely to be subject to the unchecked discretion of the police and other government officials. It suffices to repeat here that reforms as regards judicial review are therefore required to bring England up to, not only the French standard, but also those of the US and the ECHR. It is worth repeating that this is more likely to be accomplished via an approach that is based on theory and which looks at the detailed legal reforms that are necessary to improve the legal protection of the liberties, as opposed to a broad and general constitutional enactment.

## CHAPTER VIII

### COMPARING REGULATION OF THE LIBERTIES: DURING MEETINGS AND PROCESSIONS

#### INTRODUCTION

Having looked at the framework of laws that may be applied to meetings and processions *before* they commence, attention will now turn to the regulation of these two aspects of the liberty to assemble *during* their exercise. Firstly, the position in England will be briefly set out. Since there is little difference as between meetings and processions as far as this type of regulation is concerned, they will be treated together. Secondly, a comparison will be made with France, using the theoretical conception of civil liberties. Thirdly, the resultant evaluations will be compared with the standards provided by the USA and the ECHR.

Finally, for the sake of simplicity, the term 'conduct regulations' will be employed henceforth in order to refer to legal regulations during assemblies. This term also focuses attention on the reasons normally given for such regulation; namely the conduct (in the widest sense and therefore including what is said or done) of those assembling or those not taking part.

#### SECTION I

##### THE POSITION IN ENGLAND

Conduct regulations in England either provided by the common law or statutory enactments.

#### COMMON LAW

At common law, the liberties to meet and process are most likely to be regulated on the basis of the breach of the peace power. Essentially, this refers to a duty at common law on all the subjects of Her Majesty to prevent breaches of the peace.<sup>1</sup> It is essentially a preventative power, in that it is

---

<sup>1</sup> The authoritative decision on the nature of the breach of the peace power is R v Howell (Erroll) [1982] Q.B. 416, in which Watkins LJ, at 427 stated;

(Footnote continues on next page)

doubtful if a *substantive* offence of breaching the peace exists in England.<sup>2</sup> The aim of the doctrine is to *prevent* reasonably apprehended breaches of the public peace. In practical terms it is the police constable who most commonly carries out this duty.<sup>3</sup> What is the genus of conduct that constitutes a breach of the peace? Williams has claimed that a core element is conduct involving danger to the person as well as the apprehension of a *threat* or *use of force*.<sup>4</sup>

At this point it may be objected that the common law duty to prevent a breach of the peace is part of the legal framework applicable *before* meetings and processions, as opposed to during their exercise. This would seem to be clear given that the police are justified in acting upon a reasonable apprehension and this in turn indicates *a priori* application. In a sense this point must be conceded but the breach of the peace duty has been limited to an *immediate* apprehension of a breach. The consequence of this is that it is the police constable on the spot who carries out the duty; it is his/her reasonable

---

'We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant.'

In this case it was stated that the activity which causes a breach of the peace must be linked to harm (either to the person or to property); at 426;

'...we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done.'

(c.f. A.T.H. Smith, 'Breaching the Peace and Disturbing the Quiet' [1982] P.L. 12-8).

Doubt has been thrown on this link by reason of the more recent comments in R v Chief Constable of Devon and Cornwall, ex. p. Central Electricity Generating Board [1982] Q.B. 458, in which Lord Denning claimed that a criminal obstruction was a breach of the peace without making any reference to the likelihood of harm. However, these remarks have not been taken up and it is suggested that R v Howell (Erroll) is still good law.

<sup>2</sup> Supperstone, *op. cit.*, 1, points to the fact that breaching the peace is probably not a substantive crime in England, although it is in Scotland (c.f. Thornton, (1987), *op. cit.*, 75 and Sherr, *op. cit.*, 111-2).

<sup>3</sup> The police have been noted to have

'...a common law duty *to take such steps as are reasonably required* to quell a breach of the peace and to prevent a reasonably apprehended breach of the peace.'

(Supperstone, *op. cit.*, 328, emphasis added).

However, it is a duty that is shared by ordinary citizens (see Albert v Lavin [1982] AC 546, 565).

<sup>4</sup> G. Williams 'Arrest for Breach of the Peace' [1954] Crim.LR 578 at 579. This would accord with the views expressed in R v Howell (note 1, *supra*).

apprehension that justifies restrictions.<sup>5</sup> If this were not the case, the Chief Constable could ban an assembly on the basis of an apprehended breach of the peace but it has been held that at common law no such powers exist and that their attempted use was discredited in Beatty v Gilbanks.<sup>6</sup> Given the requirement of close temporal proximity, the breach of the peace power has therefore been applied on the basis of conduct *during* meetings and processions. The common situation has been acts or words during an assembly that a police constable then present has believed would lead to an imminent breach of the peace. The power is also preserved in the POA 1986.<sup>7</sup> Therefore, as presently formulated, the power is part of the legal regulation of conduct during assemblies.

Having disposed of this possible objection, it should be noted that the police enjoy a wide discretion as to what action should be taken to prevent a breach of the peace. In fact, it has been held that all reasonable steps must be taken. This might mean the arrest of those believed to be about to cause a breach, the dispersal of the assembly, the attendance of police, re-routing and moving the location of the assembly, in short, the police constable *must* do all that is *reasonably* necessary.<sup>8</sup>

Finally, it should be noted that as far as the 'heckler's veto', the police constable may restrict a meeting or procession on the basis that the apprehended reaction of others would constitute a breach of the peace.

---

<sup>5</sup> See generally Marston, (1985) J.P.N. 403 and 423, R v Chief Constable of Devon and Cornwall, ex. p. CEGB, *op. cit.*, at 476 and G. Williams, 'Dealing with Breaches of the Peace' (1982) 146 J.P.N. 199-200, 217-219 at 200.

<sup>6</sup> (1882) 9 Q.B. 308 and see Williams (1967), *op. cit.*, 49-54.

<sup>7</sup> S.40(4);

'Nothing in this Act affects the common law powers in England and Wales to deal with or prevent a breach of the peace.'

For an example of the application of the breach of the peace power to the liberty to meet, see Thomas v Sawkins [1935] 2 K.B., 249 and for the liberty to process, R v Londonderry Justices (1891) 28 L.R.Ir. 440.

<sup>8</sup> See Thornton (1987), *op. cit.*, 75, Sherr, *op. cit.*, 112-3 and Humphries v O'Connor (1864) 17 I.C.L.R. 1, where a police officer's removal of an orange lily which 'was calculated and tended to provoke animosity between different classes of Her Majesty's subjects' was upheld, Hayes J stating:

'A constable, by his very appointment, is by law charged with the solemn duty of seeing that the peace is preserved. The law has not ventured to lay down what precise measures shall be adopted by him in every state of facts which calls for interference. But it has done far better; it has announced to him, and to the public over whom he is placed, that he is not only at liberty, but is bound, to see that the peace is preserved, and that he is to do everything that is necessary for the purpose, neither more nor less.'

Although it was held in Beatty v Gilbanks that those engaged in otherwise lawful activities could not have those activities restricted because of the apprehended violent reaction of others,<sup>9</sup> later cases have created exceptions to this principle. For example, restrictions may be justified if there is conduct that *deliberately* provokes a violent reaction and where the *natural consequences* of conduct in an assembly would be a breach of the peace by others.<sup>10</sup>

## STATUTES

Three statutes are of relevance here (1) the Public Meeting Act 1908, (2) the Police Act 1964 and (3) the Public Order Act 1986. Each will be looked at in turn but it should be underlined that they can operate in conjunction with each other and can consequently reinforce each other.

### *The Public Meeting Act*

The Public Meeting Act 1908 was originally passed in order to prevent the disruption of public meetings by the suffragettes.<sup>11</sup> By virtue of S.1

---

<sup>9</sup> *op. cit.*, Field J stating:

'The appellants were guilty of no offence in their passing through the streets, and why should other persons interfere with or molest them? What right had they to do so? If they were doing anything unlawful it was for the magistrates and the police, the appointed guardians of law and order, to interpose. The law...affords no support to the view of the matter which the learned counsel for the respondent was obliged to contend, viz., that persons acting lawfully are to be held responsible and punished merely because other persons are thereby induced to act unlawfully and create a disturbance.'

<sup>10</sup> This 'chipping away' at the Beatty v Gilbanks principle has been noted by W. Birtles, 'The Common Law Power of the Police to Control Public Meetings' (1937) 34 M.L.R. 587, at 591 and Williams, (1978), *op. cit.*, 31-2 and (1967), *op. cit.*, 106-7. In Wise v Dunning [1902] 1 K.B. 167, Wise was bound over to keep the peace (see chap.IX, *infra.*) after addressing a meeting using words and gestures that were insulting to Roman Catholics. The order was upheld on appeal because the breaches of the peace were the 'natural consequence' of his provocative conduct. The case distinguished Beatty v Gilbanks because of the presence of deliberately provocative conduct that had the clearly foreseeable consequences of causing a breach of the peace. This distinguishing, based on a causal view, can paradoxically be seen to have been drawn from statements in Beatty v Gilbanks itself where Field J stated;

'Now, without a doubt, as a general rule it must be taken that every person intends what are the natural and necessary consequences of his own acts, and if in the present case it had been their [the Salvation Army's] intention, or if it had been the natural and necessary consequence of their acts, to produce the disturbance of the peace which occurred, then the appellants would have been responsible for it, and the magistrates would have been right in binding them over to keep the peace.'

Thus, it may be claimed that Beatty v Gilbanks 'contains the seeds of its own destruction', independently from the later glosses and critical comments like that in O'Kelly v Harvey (1883) 15 Cox CC 435 per Law LC;

'I frankly own that I cannot understand that decision...'

<sup>11</sup> Williams (1967), *op. cit.*, 138.

Any person who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together shall be guilty of an offence

An offence is also committed by 'any person who incites others to commit an offence' under S.1. In addition, S.3 provides that if a police constable 'reasonably suspects' someone of committing a S.1 offence s/he may, if requested by the chair of the meeting, require that person's name and address. If that person then refuses or fails give this information or gives a false name and address, this also constitutes an offence.<sup>12</sup>

This statute is important in the heckler's veto situation, in that even if the breach of peace power permits the unrequested presence of the police in an assembly, at least as far as meetings are concerned,<sup>13</sup> the police by virtue of this Act should first take steps against those disrupting a meeting rather than those acting lawfully.<sup>14</sup> Having said this, the statute does not appear to have been widely used in modern times. This is probably due to a lack of a power of arrest in s.1 and because the police feel they should not interfere except on the grounds of a breach of the peace.<sup>15</sup>

#### *The Police Act*

The Police Act 1964 creates two offences of relevance here, both by virtue of S.51. The first is by virtue of S.51(1) which creates the offence of *assaulting a constable in the execution of his duty* and the second, to be found in S.51(3), is that of *obstructing a constable in the execution of his duty*. In relation to the former, in order to be applied to peaceful assemblies (i.e. those by which the liberty to meet or to process is exercised) a finding of conduct that intentionally or recklessly causes another (i.e. the police constable) to apprehend immediate and lawful personal violence is required.<sup>16</sup> Given this necessary element of violence, this offence is of less relevance to the liberty to assemble than is the second, obstruction offence. This is an offence that has been widened by the judiciary to extend to non-physical obstruction of the

---

<sup>12</sup> See Burden v Rigler and Another 1 K.B. [1911] 337 for the application of this statute.

<sup>13</sup> Thomas v Sawkins [1935] 2 K.B. 249, see *infra*.

<sup>14</sup> As is stated by Bailey *et. al.*, *op. cit.*, 214 when discussing this statute;

'It is arguable that the police should act first against persons who disrupt or threaten to disrupt a lawful meeting, and disperse the meeting itself if necessary in the last resort.'

<sup>15</sup> See Card, *op. cit.*, 92.

<sup>16</sup> See Supperstone, *op. cit.*, 109 *et. seq.*, and Smith (1987), *op. cit.*, 183-190.

police.<sup>17</sup> It has been held that the *duty* that the police constable must be exercising when obstructed does not have to be derived from a specific rule of law. Therefore, the duty to prevent breaches of the peace would seem to be covered by this statutory offence.<sup>18</sup>

The obstruction offence is one of the most common means by which assemblies are restricted. As is instanced by Duncan v Jones,<sup>19</sup> it usually operates in tandem with other powers. In this case a police constable, apprehending a breach of the peace asked Duncan not to address a meeting outside a labour exchange where there had been some disorder connected with a public meeting on a previous occasion. Duncan was instead asked to hold the meeting in another location. She was arrested for obstructing a policeman in the execution of his duty when she nevertheless attempted to address the crowd.<sup>20</sup> The duty that the policeman was found to be executing was that of preventing a reasonably apprehended breach of the peace. Thus, in this case the statutory obstruction offence is seen as working together with the common law breach of the peace power. The case appears to be authority for the proposition that a refusal by those exercising the liberties to assemble to obey police commands issued in the execution of their duty is an obstruction offence.<sup>21</sup> An assembly may also be restricted where there is a

---

<sup>17</sup> See Bastable v Little [1907] 1 K.B. 59, Hinchcliffe v Sheldon [1955] 1 W.L.R. 1207 and generally Smith, *op. cit.*, 190-5.

<sup>18</sup> The view that the duty of a police constable does not have to derive from a specific rule of law was laid down in Coffin v Smith (1980) 71 Cr.App.Rep. 221.

<sup>19</sup> *op. cit.*

<sup>20</sup> At the time of the case, the obstruction offence was found in Prevention of Crimes Act 1871, S.12 (as amended by the Prevention Crimes Amendment Act 1885, S.2).

<sup>21</sup> Supperstone, *op. cit.*, 113 sums this up;

'Arguably the decision in Duncan v Jones gives the police officer the power to prevent the holding of a lawful meeting if he suspects, not that the meeting itself may be disorderly, but that breaches of the peace may occur a result of the meeting. This is so whether those breaches are by supporters or opponents of a speaker at the meeting.'

The case has been criticised on several grounds: the way the court upheld the apprehension of public disorder by making a causal connection between events of some fourteen months previous and the meeting in the instant case (Williams (1967), *op. cit.*, 121); the fact that the criminal offence was not based on some *independent* illegality but on a refusal to obey the orders of a police constable which were based on an apprehended breach of the peace (Smith, *op. cit.*, 175 and Sherr, *op. cit.*, 127); that the breach of the peace that was apprehended was going to be caused by others (Wade, *op. cit.*, 179); that non-physical; obstruction was accepted as founding the offence (Birtles, *op. cit.*, 598) and that the police common law preventative powers were found to be self-legislating, in that lawful acts in themselves (the holding of a meeting) became unlawful upon a police constable's say-so (Supperstone, *op. cit.*, 112). For further criticism, see T. Daintith, 'Obeying a Policeman: A Fresh Look at Duncan v Jones' [1966] P.L. 248, Williams, (1967), *op. cit.*, 119-23 and Kidd, *op. cit.*, 22-4.

refusal to obey an order to move on when an obstruction of the highway is being caused.<sup>22</sup> Thus, the 1964 Act provides yet another source of wide powers to regulate the conduct of assemblies.

### *The Public Order Act 1986*

Sections 4 & 5 of the POA 1986 respectively create two distinct offences of firstly, causing fear or provoking violence and secondly, causing harassment, alarm or distress. Both offences can be committed in public and private assemblies and are made out by a wide variety of conduct: using (but only towards another person for the S.4 offence) threatening, abusive or insulting words or behaviour or displaying any writing, sign or other visible representation which is threatening, abusive or insulting. S.4 is a modification of the old S.5 POA 1936 offence of threatening, abusive or insulting behaviour that is likely to cause a breach of the peace. The new provision replaces the breach of the peace requirement with that of the *provocation of violence*. A more fundamental change is brought about by the reversal of cases such as Marsh v Arscott, Parkin v Norman and Nicholson v Cage,<sup>23</sup> in which the courts refused to uphold prosecutions for the offence where the only persons present were police officers because since their duty was to keep the peace, it was held that they could not be expected to be threatened or insulted as easily as ordinary members of the public. However, the new provision requires only that there is a *likelihood* of a victim fearing violence, thus, as Thornton has noted;

the offence will be committed even if there is no possibility that the victim will react with violence, for example, if the victim is old and frail, or the victim is a police officer who is not expected to resort to violence, or any other law-abiding citizen likely to ignore the threat or insult.<sup>24</sup>

As a consequence, the new offence could be applied to conduct during an assembly when the police constable who is present is the only person likely to be insulted etc.

---

<sup>22</sup> Supperstone, *op. cit.*, 109;

'Even where no breach of the peace is anticipated, a police officer may be under a duty to give instructions to members of the public. He may, for example require pickets to move on when they are obstructing the highway. A deliberate refusal to obey such an instruction may amount to an obstruction for the purposes of S.51(3).'

<sup>23</sup> Respectively, (1982) 75 Cr.App.Rep. 211; [1983] Q.B. 92; (1985) 80 Cr.App.Rep. 40.

<sup>24</sup> (1987), *op. cit.*, 37.



As far as the meanings of 'threatening', 'abusive' and 'insulting' under these sections, the cases under the 1936 Act would still appear to be instructive. Therefore, the words are to be given their ordinary meaning<sup>25</sup> and as far as the heckler's veto, a kind of public law 'thin-skull' rule applies;<sup>26</sup> namely if an audience or onlookers feels threatened etc. by the speaker's conduct due to some special characteristic that makes them more sensitive than an ordinary audience, for example, belonging to a particular race vis à vis racist speech, this does not constitute a defence to a charge under the provision - the rule is that one must take one's audience as one finds it.<sup>27</sup>

The new S.5 offence is an extension of the law to cover acts that were formerly not criminalised.<sup>28</sup> Once again there is only a requirement that a person is *likely* to be caused harassment, alarm and distress. It has been held that the provision does not apply the previous case law<sup>29</sup> and that therefore it remains a possibility that a police constable could be caused the harassment, alarm or distress under this section.<sup>30</sup> The major importance of this offence is that it shifts the focus away from the physical reaction of the victim to their mental reaction.<sup>31</sup> Both these offences require a specific intention and an awareness that the words or behaviour are threatening etc. The main area of concern has been over the breadth and the subjectivity involved in interpreting the terms threatening, abusive and insulting.<sup>32</sup> As a result, conduct in meetings and

---

<sup>25</sup> Brutus v Cozens [1973] A.C. 854.

<sup>26</sup> This rule comes originally from the law of tort, see Dulieu v White [1901] 2 K.B. 669, 679 per Kennedy J.

<sup>27</sup> R v Jordan and Tyndall [1963] Crim.L.R. 124.

<sup>28</sup> See Thornton, (1987), *op. cit.*, 40.

<sup>29</sup> As was set out in note 23, *supra*.

<sup>30</sup> DPP v Orum [1988] 3 All E.R. 449, 451 per Glidewell LJ;

'I find nothing in the context of the 1986 Act to persuade me that a police officer may not be a person who is caused harassment, alarm or distress by the various kinds of words and conduct which S.5(1) applies.'

<sup>31</sup> Bailey et. al., *op. cit.*, 205 and per McCullough J in DPP v Orum, *op. cit.*, at 453;

'In enacting S.5 of the Public Order Act 1986 in place of S.5 of the Public Order Act 1936, Parliament advisedly deleted the requirement that a breach of the peace was either intended by the defendant or was likely to result from his conduct. In its place was put the requirement that someone within sight or sound of the defendant at the material time would be likely to be caused harassment, alarm or distressed by his conduct. Thus, what matters is not the likely physical reaction to the conduct complained of, but the likely mental reaction to it.'

<sup>32</sup> See Masterson v Holden [1986] 3 All E.R. 39 whereby the conduct of two homosexuals kissing in public was found to be 'insulting' under S.54(13) of the Metropolitan Police Act 1839, which repeated the old S.5 POA 1936 offence; as per Glidewell J, at 44;

(Footnote continues on next page)

processions may be criminalised due to the opinions and possible reactions of the police and the audience.

It will be recalled that the POA 1986 is also the source of the power to impose conditions on the liberty to meet and the liberty to process<sup>33</sup> but in yet another novel departure, conditions may now be imposed *during* a public procession.<sup>34</sup> Such action must be based upon the view that because of the time or place or circumstances in which a procession is being held and its route it is reasonably believed that serious disorder, serious damage to property or serious disruption to the life of the community may result. The comments made above on the use of conditions as part of the body of laws applicable before an assembly can be generally applied here but it must be added that the decision as to the imposition of a condition is here granted to the most senior ranking police officer present at the scene.<sup>35</sup>

Finally, mention should be made of the miscellany of offences that may be committed during an assembly. Many of these, such as criminal damage,<sup>36</sup> riot, violent disorder and affray<sup>37</sup> are not generally used against the liberties because of their peaceful nature. On the relatively rare occasions that prosecutions for these offences are brought, there has to have been serious public disorder and this kind of behaviour can be seen to have moved beyond the realm of peaceful assembly that has been explained to be the focus of attention. Offences such as incitement to disaffection,<sup>38</sup> incitement to racial

---

'Overt homosexual conduct in a public street, indeed overt heterosexual conduct in a public street, may well be considered by many persons to be objectionable, to be conduct which ought to be confined to a private place. The fact it is objectionable does not constitute an offence. But the display of such objectionable conduct in a public street may well be regarded by another person, particularly by a young woman, as conduct which insults her by suggesting that she is somebody who would find such conduct in public acceptable herself.' (c.f. Lodge v DPP (1988) Times 26th Oct., where jaywalking was caught by S.5). For further criticisms of the offence, see Bailey *et. al.*, *op. cit.*, 206-7, C. Douzinas, S. Homewood & R. Warrington, 'The Shrinking Scope for Public Protest' in Index on Censorship (1988), 12 and Ewing & Gearty, *op. cit.*, 122-3 for the attempted prosecution of demonstrators for carrying an effigy of Margaret Thatcher as a dominatrix carrying a whip).

<sup>33</sup> SS.12 & 14, *supra.*, chap.VII, section III.

<sup>34</sup> S.12(1).

<sup>35</sup> S.12(2)(a).

<sup>36</sup> See the Criminal Damage Act 1971, S.1(1).

<sup>37</sup> See POA 1986, SS.1, 2, & 3.

<sup>38</sup> See the Incitement to Disaffection Act 1934.

hatred<sup>39</sup> and defamation<sup>40</sup> which however do not necessarily include an element of violence are also rarely used. This study has therefore concentrated on the more common restrictions of the liberties to assemble. It follows that since the focus is on the *peaceful* exercise of the liberties under study, much of what is known as 'public order' law in England is not of relevance. One criticism that was made earlier should be recalled: that is a tendency by commentators to equate the liberties to assemble and public order law.<sup>41</sup> While it may be true that *some parts* of this body of law apply to peaceful assemblies (e.g. the breach of the peace and SS.4 & 5 of the POA 1986), it must be underlined that the liberties to meet and to march concern peaceful activities. With this in mind, it should be asked on what grounds and who decides that an assembly is no longer peaceful and that public order measures are then applicable. It has been seen that the police constable on the spot plays an important role in this area.<sup>42</sup> This role is crucial because public disorder justifies a whole battery of restrictions, that is why review mechanisms are essential and that laws granting these powers should be narrowly drawn in order to limit discretion and abuse. If restrictions can be too readily applied to assemblies, the status of the liberties will be considerably weakened and, in any case, subject to the discretion of the state and its officials.

## SECTION II FRANCE AND ENGLAND COMPARED

A miscellany of possible offences exist in France by which to restrict conduct during the exercise of the liberties to assemble: insulting a police officer in the exercise of his/her duties and press offences, among others.<sup>43</sup> This has also been seen to be the case in England and similarly these offences are rarely, if

---

<sup>39</sup> See s.18 POA 1986.

<sup>40</sup> See Williams (1967), *op. cit.*, 229 and W.V.H. Rodgers, 'Winfield & Jolowicz on Tort' (1989), 294 *et. seq.*

<sup>41</sup> Chaps.I & VI.

<sup>42</sup> Williams (1967), *op. cit.*, 114 states in this connection;

'A vitally important role in the prevention of disorder is played by the police officer on the spot. His is the final responsibility. Whatever prior action may have been taken it is he alone who can assess the situation at first hand and, in the light of that assessment, take appropriate preventative measures.'

<sup>43</sup> As briefly noted in Chaps.IV, section III and V, section III.

ever, applied to assemblies. In fact, with the exception of the *attroupelement* offence and the new offence of interfering with the liberties to meet and to process, French law does not appear to have specifically dealt with conduct. Instead, it would seem that the laws applicable *prior* to assemblies can be extended to conduct during assemblies. However, no cases have actually applied this body of law to conduct during assemblies.

Nevertheless, a comparison will be made with the *attroupelement* offence, by viewing it as playing an analogous role to public disorder in England. This is because it triggers restrictions on otherwise peaceful activities by reason of actual or apprehended violence. A decision must then be taken that such violence is actually present or is likely to occur. Secondly, attention will also be focused on the police general public order powers and judicial review, thirdly, the English obstruction offences will be compared and finally art.431-1 of the new penal code which introduces the offence of interference with the liberties to meet and to process will be compared with the Public Meeting Act 1908.

#### **ATTROUPEMENTS AND PUBLIC ORDER**

Dealing first with the *attroupelement* offence, it has already been noted that it was in the past defined in such wide terms that it could justify the restriction of processions.<sup>44</sup> The police were then able to interpret peaceful processions as actually or threatening to become violent, in order to disperse them by force. However, eventually the offence was defined according to the formulation in Gras,<sup>45</sup> such that an *attroupelement* was not made out simply by reason of a banned procession taking place on the public highway and this was seen to have been taken up in the current formulation of the offence in art.431-3 of the penal code.<sup>46</sup> Essentially it was noted that the offence required an element of public disorder.

This is similar to the English breach of the peace powers and S.4 of the POA (as well as the serious public order offences such as riot, affray etc.), where an element of public disorder or violence is an essential element. In France a procession or a meeting must be shown to be likely to cause public disorder

---

<sup>44</sup> Chap.V, section II.

<sup>45</sup> Chap.V, section III.

<sup>46</sup> Chap.V, section III.

before it can be interfered with. This likely or actual public disorder has been seen to be a finding of fact for the court to decide upon and failure to address the question will be fatal to a prosecution, as seen in Puauux.<sup>47</sup> This case showed how the French courts will analyse and investigate the reasons given by the police. Once again the nature of judicial review in France would appear to prevent police accounts from simply being accepted without more and as a result the possible abuse of discretion is minimised.

Therefore, although English law and French law appear very similar, French law is to be preferred because of the existence of exacting judicial review. This better ensures the separation is maintained between public disorder offences and the liberties to assemble. In turn, this accords a greater degree of protection and reflects the social importance of the liberties. In short, French law is claimed to minimise the on the spot discretion enjoyed by the police in both countries by subjecting their decisions to stricter scrutiny in recognition that civil liberties are in play.

#### **GENERAL PUBLIC ORDER POWERS AND THE BREACH OF THE PEACE POWER**

The role of judicial review in France can also be seen if attention is now turned to general public order police powers. Here, these are extended from restrictions prior to assemblies that were dealt with in the previous chapter to conduct during them. These powers could easily be applied in order to restrict assemblies where conduct is apprehended to cause public disorder. In this sense, the width of these powers presents a striking similarity with the breach of the peace power in England. In addition, both are akin to original powers, since they date back to the creation of the first police forces in the respective countries. However, here the similarity ends, it is difficult to see, for example, how the discretion left to the police in Moss v McLachlan,<sup>48</sup> would have been permitted in France. In this case, police roadblocks preventing striking miners from attending picket lines in another part of the country, based upon an apprehension of public disorder upon their arrival, were upheld. The police were found to be taking reasonable steps to prevent

---

<sup>47</sup> Chap.V, section III.

<sup>48</sup> [1985] I.R.L.R. 76.

a breach of the peace.<sup>49</sup> This case may be compared with Naud,<sup>50</sup> where it will be recalled that a limiting principle was laid down on the use of general police powers, in that there had to be some degree of *immediacy* as far as the disorder was concerned. The same requirement seems to exist in England<sup>51</sup> but as this case indicates, the courts prefer to accept the police view of immediacy without further investigation, unlike in Naud, where it was subject to close scrutiny.<sup>52</sup> Therefore, French law provides greater protection because it requires the police to prove the immediacy of the apprehended order, whereas in England police accounts of the facts enjoy a heavy presumption of truth.

English law in theory limits the breach of the peace power, but without adequate judicial review, these limits are claimed to be ineffectual. Thus, the 'reasonable steps' that may be taken to prevent a breach of the peace may have provided a ground for considering whether the presence of the police in a meeting in Thomas v Sawkins<sup>53</sup> or the command to move elsewhere in

---

<sup>49</sup> Thornton, (1987), *op. cit.*, 97 observes that the police action taken in Moss v McLachlan was widely used in the Miners' strike and was referred to as the 'intercept policy'. He points to the more extreme example in the unreported decision in Foy v Chief Constable of Kent (20th March 1984) in which

'...the same policy was applied to stop Kent miners at the Dartford Tunnel some 200 miles from their destination.'

A similar wide use of the breach of the peace power is instanced by R v Secretary of State for Northern Ireland, ex. p. Atkinson [1987] 8 N.I.J.B. 6, in which a Catholic band in Northern Ireland was prevented from travelling to Keady (a predominantly Nationalist area) in order to take part in a parade. Hutton J accepted, *inter alia*, that the police honestly believed that their actions were necessary to prevent a breach of the peace.

<sup>50</sup> Chap.IV, section III.

<sup>51</sup> Thornton, (1987), *op. cit.*, 74.

<sup>52</sup> In Moss v McLachlan, Skinner J stated at 78;

'The situation has to be assessed by the senior police officer present. Provided they honestly and reasonably form the opinion that there is a real risk of a breach of the peace in the sense that it is in close proximity both in place and time, then the conditions exist for reasonable preventative act[ion] including, if necessary, the measures taken in this case.'

Ewing & Gearty, *op. cit.*, 111 have criticised the readiness of the court to accept the police account of the circumstances;

'...according to the law report the police officers did not know to which specific pits the pickets were travelling and...some of the evidence of violence on which the police officers relied was that which they had gathered from press and television reports.'

<sup>53</sup> [1935] 2 K.B. 249. In this case a public meeting had been called in a private hall to protest against the Incitement to Disaffection Bill. In previous meetings, the speaker (Thomas) had made complaints concerning the police refusal to leave. At a subsequent meeting the police were refused admittance but nevertheless managed to enter and sit down. Thomas threatened them with being ejected, he then attempted to eject them and was physically restrained by Sergeant Sawkins, against whom he brought an action for assault. The court

(Footnote continues on next page)

Duncan v Jones was in fact reasonable, but these points were never taken up. In France, reasonableness is sought to be guaranteed by the requirements of proportionality and necessity. Therefore, in the latter case, it could be claimed, using these principles, that the police could have fielded extra police and allowed Duncan to speak. The result would have been that the court would not have conceded to the hecklers' veto and the decision would have constituted an effective limit on an otherwise large degree of police discretion. Such a possibility exists in France by virtue of the last resort requirement as noted, for example in Bujadoux.<sup>54</sup>

The same principles, if applied to threatening, abusive or insulting conduct (under SS.4 & 5) would again restrict police discretion. Furthermore, the requirement under the police general public order powers in France that the conduct must be likely to cause public disorder keeps the focus on physical reactions and not the more subjectively ascertained mental states that were noted as regards S.5 of the POA 1986. This requirement also makes it most unlikely that restrictions can be justified on the basis of the reactions of the police as victims, which was now seen to be the case by virtue of sections 4 & 5 of the POA 1986.

It was also seen that the principle in English law of not conceding to the hecklers' veto when lawful activities are being exercised was upheld in Beatty v Gilbanks but that this has been eroded by subsequent cases such as Humphries v O'Connor and O'Kelly v Harvey.<sup>55</sup> The result of this erosion can thus be seen in Wise v Dunning,<sup>56</sup> where the court held that the defendant had deliberately used insulting words and gestures to provoke others to react in a violent way. In contrast to Beatty v Gilbanks, the court in Wise v Dunning examined the content of the defendant's message in order to discover that there were limits to the amount of provocation others could endure. What is unclear is why the courts did not do this in Beatty v Gilbanks, where it might also have been claimed that the marching of the

---

accepted that the police presence was justifiable in order to, *inter alia*, prevent a reasonably anticipated and imminent breach of the peace.

It should be recalled that in France, under art.9 of the 1881 Act the police may be present at public meetings (see chap.IV, section II), however this case is referred to here in order to highlight the inadequacies of English judicial review.

<sup>54</sup> Chap.IV, section III.

<sup>55</sup> (1864) 17 I.C.L.R. and (1883) 15 Cox CC 435.

<sup>56</sup> [1902] 1 K.B. 167.

Salvation Army was deliberately provocative. Wise v Dunning, along with the other cases mentioned above, therefore signals a move away from the principle in Beatty v Gilbanks. Another reason for this erosion has been because of the application of a causality test, formulated in Wise v Dunning, as to whether it could be reasonably foreseen that conduct would provoke violence; in other words, whether violence was the natural and foreseeable consequence of conduct.<sup>57</sup>

Although there are no specific cases on the hecklers' veto issue, the application of the French principles that have been recognised above would seem to provide a stronger degree of protection to the liberties to meet and to process in this situation. Therefore, restrictions on the liberties to assemble would once again have to be a 'last resort'; this requires that other measures were either not available or were insufficient to maintain order.<sup>58</sup> This last resort requirement is not addressed in the English cases (i.e. Wise v Dunning, O'Kelly v Harvey and Humphries v O'Connor), thus the question is not put as to whether extra police could have been deployed, for example, or whether the existing police presence was sufficient. Similarly, whereas French law applies doctrines of proportionality and necessity to this area, the English cases at best only appear to stress the former, thus in Humphries v O'Connor, per Hayes J;

A constable, by his very appointment, is by law charged with the solemn duty of seeing that the peace is preserved. The law has not ventured to lay down what precise measures shall be adopted by him in every state of facts which calls for interference. But it has done far better; it has announced to him, and to the public over whom he is placed, that he is not only at liberty, but is bound to see the peace be preserved, and that *he is to do everything that is necessary for that purpose, neither more nor less.* (emphasis added).

---

<sup>57</sup> per Darling J, at 178;

'In my view, the natural consequences of those people's conduct has been to create the disturbances and riots which have so often given rise to this sort of case.'

and per Channell J, at 179-80;

'I agree with the proposition...that the law does not as a rule regard an illegal act as being the natural consequence of a temptation which may be held out to commit it. For instance, a person who exposes his goods outside his shop is often said to tempt people to steal them, but it cannot be said that it is the natural consequence of what he does...The proposition is correct and really familiar; but I think the cases with respect to apprehended breaches of the peace shew (sic.) that the law does regard the infirmity of human temper to the extent of considering a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct.'

<sup>58</sup> See for example, Naud and Demazieres et autres; chap.IV, section III.



To insist on the necessity of a restriction without the requirement of proportionality is to require that it merely be effective as to purpose. Therefore, the requirement of 'neither more nor less' than is necessary in this context, simply counsels sufficiency. It then follows that a measure can be unduly restrictive, as perhaps in Duncan v Jones, where the measure was the moving of a meeting to another location or Thomas v Sawkins, where it was the unwanted presence of the police in a public meeting, without any inquiry as to whether it was proportional, as in having a reasonable relationship to the disorder expected, bearing in mind the value of the restricted activity (i.e. the liberties to assemble).

Following on from this last point, the hecklers' veto would seem difficult to uphold in France where the liberties in question have been accorded a higher value than in England. Thus, liberty is the rule and restriction the exception.<sup>59</sup> It is therefore possible for the liberties to meet and to process to be protected in the face of violent reactions from onlookers. This is more likely in the case of the liberty to meet because its statutory status makes it a 'pedigree' civil liberty. However, the liberty to process has also been recognised by the courts and upheld against other values on many occasions,<sup>60</sup> which shows that it enjoys a value that gives it weight in order to prevail in the heckler's veto situation. This must be contrasted with the refusal (sometimes hostile) to accord value to the liberties to assemble in English law.<sup>61</sup> This lack of value results in the prioritising of what are viewed as the more valuable and concrete public order values.<sup>62</sup> Accordingly, French law better meets the criteria of according importance to human rights in this aspect of regulation.

---

<sup>59</sup> See Berthenet et Baldy, *op. cit.* chap.IV, section III.

<sup>60</sup> For example, see Abbé Chapalain, Abbé Marzy, the decision of the Administrative Tribunal of Nantes, 10th Oct. 1985 and that of the Administrative Tribunal of Versailles, 5th July 1985 (chap.V, section III).

<sup>61</sup> The caustic remarks of Lord Hewart CJ in Duncan v Jones, may be taken as an example; 'There have been moments during the argument in this case when it appeared to be suggested that the court had to do with a grave case involving what is called the right of public meeting. I say "called," because English law does not recognise any special right of public meeting for political or other purposes.'

<sup>62</sup> Smith, (1987), *op. cit.*, 1, claims that in comparison with 'clearly visible social needs' such as 'personal safety and physical integrity, and rights in property', the 'interests protected by public order law are much more diffuse and indeterminate.' This would seem to be more so for the liberties to meet and process vis à vis public order interests, even if these latter values are relatively indeterminate.

Murdoch, *op. cit.*, 180 also observes that the rhetoric of rights in England is in a disadvantageous position vis à vis more concrete rights.

Finally, the liberties to meet and process would also be better protected in France because of the exactitude of judicial and not just because of the doctrines of proportionality and necessity that have just been mentioned. Therefore, it should be underlined again that French review looks at the merits of a decision, as opposed to the English emphasis on procedural review. It has been noted on several occasions that in France police accounts of the facts are subject to stricter scrutiny and this contrasts with the widely accepted belief that English judges too readily accept police evidence,<sup>63</sup> even when it is admitted to be meagre.<sup>64</sup>

### OBSTRUCTION

What of the obstruction offences, how do they compare? Comparable offences such as these do not exist in French law. However, French law can be seen from what has been said above to require that the police exercise their duties by according importance to the liberties to assemble and this has been reinforced by exacting judicial review and principles. Thus, the restrictive effects in English law of the combination of wide discretionary powers and the statutory obstruction offence would be considerably eased if French law principles were applied. The wide discretionary powers would be limited by principles of necessity, proportionality, last resort and the requirement of the immediacy of disorder. This claim can be illustrated by briefly applying these to Duncan v Jones. Applying principles derived from French law, the police would have had to have shown that the command to move the meeting elsewhere was the only way to prevent public disorder (the last resort requirement), was necessary, proportional and that the previous disorder that had occurred was sufficiently proximate to be a relevant consideration in supporting an imminent apprehension of public disorder.

---

<sup>63</sup> For example, Williams (1987), *op. cit.*, 178;

'There is...some measure of scepticism about the efficacy of judicial review. In the first place, there are those who would argue that judges traditionally lean towards the police and exercise too much self-restraint. Reference is sometimes made to *Kent v Metropolitan Police Commissioner*. The decision itself by no means involves a full scale acceptance of police evidence, though along with other (less directly relevant) cases it undoubtedly reflects a policy of judicial restraint.'

<sup>64</sup> As in Kent v MPC, *supra*.

This section on conduct regulations will conclude by looking at how assemblies are protected from the conduct of those who deliberately seek to disrupt them.

### **THE PUBLIC MEETING ACT AND ART.431-1**

It was noted above that the Public Meeting Act 1908 provides some protection against those who seek to disrupt public meetings by 'disorderly' conduct. This statute can be compared with Art.431-1 of the new French penal code. However, the latter is somewhat wider in that it makes it an offence to interfere with the exercise of the freedoms of expression, work, association, the liberties to meet and to process. On the other hand, the measure would seem to be of a narrower application in that interference must be in conjunction with others and be accompanied by either threats, assault, destruction of property or other forms of violence, whereas in England the 1908 Act covers a wider range of acts that may not necessarily be violent or carried out in a group. Consequently, the two measures seek to protect assemblies from different types of interference but what they do have in common is a recognition of the need to protect assemblies.

Having isolated this common aim, it is suggested that the French provision is better for two reasons. Firstly, Art.431-1 makes clear reference to *liberties*; therefore fundamental rights are recognised in the criminal law and the nature of the particular offence is seen in a new light because of this civil libertarian context. Contrast this with the 1908 Act, where no mention is made of the liberty to meet. As a result, it is easy to see the measure as merely one more public order provision and there is no recognition of a *valued* activity that is sought to be protected.

Secondly, the French provision reflects modern considerations. Its terms suggest the need to protect the liberties to assemble from deliberate and violent attempts to disrupt its exercise. It is also comprehensive in that it also makes reference to processions. In comparison, the English statute reflects particular historical circumstances that are no longer relevant. Therefore, although processions are also in need of similar protection, the concern of the 1908 Act is with the protection of public meetings, a legacy of its suffragette origins. Another consequence that is linked to the out-datedness of the English provision is that the reference to 'disorderly' conduct might, for example, catch mere heckling, even though it might be argued that today this

is legitimate activity in a public meeting. This danger is however reduced by the requirement in the French provision that the disruption should be violent and reflects a contemporary tolerance for a level of non-violent, if disruptive, behaviour in public meetings - today the danger to assemblies comes more from violence, actual or threatened and the English provision does not reflect this.

It might be claimed that English law supports and supplements the 1908 statutory protection of meetings with the more expansive breach of the peace powers that were illustrated in Thomas v Sawkins. This point may be conceded, so that it can be claimed that the police may also be present to protect processions should disorder arise. The problem is that the breach of the peace power has been clearly seen to have been applied with considerable uncertainty as far as the liberties in question are concerned. For example, in Beatty v Gilbanks it protected the liberty to process but in Thomas v Sawkins and other cases<sup>65</sup> it restricted liberty in the face of disorder on the part of onlookers.

The breach of the peace powers are at their most certain when they support the presence of the police in an assembly but they do not indicate how the police should act once present; should they uphold liberty or curtail it? Art.431 provides a powerful direction to the police as to how to exercise what are in abstract extremely wide general powers and counterbalances the legal right police have to attend public meetings under the 1881 statute. Moreover, if one looks instead at the legal context that the French provision inhabits (i.e. exacting judicial review and legally valued civil liberties) one sees this direction reinforced: a direction to protect liberty and to restrict it only in exceptional circumstances.

### SECTION III HIGHER STANDARDS: THE USA AND THE ECHR

How does English and French conduct regulation compare with US and ECHR standards? More particularly, French law which is generally seen to

---

<sup>65</sup> To take Duncan v Jones and Wise v Dunning as but two examples.

accord better protection according to the theoretically derived evaluative criteria? A comparison with the US will be undertaken first, followed by the ECHR.

## COMPARISON WITH US LAW

In looking at US law it should be once more recalled that a distinction is made between restrictions aimed at communicative impact and those aimed at noncommunicative impact.

### *Communicative impact*

As far as communicative impact is concerned, a regulation must be struck down as unconstitutional

unless it falls within one of several exceptions to the principle that government may not prescribe the form or content of individual expression.<sup>66</sup>

If content based regulations are applied to circumstances that fall outside one of these pre-existing categories, there is a strong presumption of unconstitutionality. Here, the court will strictly scrutinise the regulation and consequently the government bears the burden of showing that it is narrowly drawn and serves a compelling government interest.<sup>67</sup> Even where restriction is legitimate it must not be a prior restraint, vague or overbroad. However, returning to the narrow categories that normally fall outside constitutional protection, these are based upon the view that

expression has special value only in the context of 'dialogue': communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs.<sup>68</sup>

Two categories would seem to be of relevance here, firstly the one currently formulated in Brandenburg v Ohio,<sup>69</sup> which provides under the 'clear and present danger' test for the restriction of speech that advocates illegal action.

---

<sup>66</sup>Tribe, *op. cit.*, 832. These categories traditionally include obscenity, fraudulent misrepresentation, advocacy of imminent lawless behaviour, defamation and fighting words (c.f. Lockhart, *et. al.*, *op. cit.*, 374-522 and G.R. Stone, L.M. Seidman, C.R. Sunstein & M.V. Tushnet 'Constitutional Law' (1986), 938-1169).

<sup>67</sup> See Widmar v Vincent, (1981) 454 U.S. 530.

<sup>68</sup> Stone, *et. al.*, *op. cit.*, 1006.

<sup>69</sup> 395 U.S. 444 (1969).

The second is the 'fighting words' doctrine that was seen to have been first laid down in Chaplinsky v New Hampshire.<sup>70</sup>

In neither England nor France has the reason for conduct restrictions of the liberties to assemble been generally stated to be based upon what is said. Instead, problems have been identified because of the *reactions* to what is said. If such is the case, it is the second of the US categories that is in fact of relevance here. It will be recalled that according to this test, the speech must by its 'very utterance *inflict injury* or tend to *incite an immediate breach of the peace*' (emphasis added). The test has been contextualised so that the words must be looked at in the context of the factual circumstances in which they were uttered. Therefore, according to Houston v Hill they must

have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.<sup>71</sup>

If this test is compared with the offences set out in sections 4 & 5 of the POA 1986 an insistence on an element of violence is found in the US cases before speech may be restricted<sup>72</sup> and not merely harassment, alarm or distress as in S.5. At the same time, given the violent reaction that must be likely to ensue, it is most unlikely that the police could be victims of such speech as was seen to be the case in Parkin v Norman.<sup>73</sup> As far as France is concerned, it should be noted that the American insistence on physical violence is also generally at the base of the French police general public order powers, in the sense that mental states are not normally seen to be of relevance and so they favourably compare. However, the possibility of the police being provoked has not as yet been raised in France.

---

<sup>70</sup> *op. cit.*

<sup>71</sup> (1987) 107 S. Ct. 2502, 2510.

<sup>72</sup> See for example, Gooding v Wilson, (1972) 405 U.S. 518, Rosenfield v New Jersey, (1972) 408 U.S. 901, Brown v Oklahoma, (1972) 408 U.S. 914 and Lewis v New Orleans II, (1974) 415 U.S. 130.

<sup>73</sup> This point is underlined by the comments in Lewis v City of New Orleans (Lewis I), (1972) 408 U.S. 913. The issue here was whether 'fighting words' were used where a police officer, in the performance of his duty, was called 'G\_D\_M\_F\_police'. The case was remanded to the Supreme Court of Louisiana for reconsideration but Powell J stated;

'If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words." *But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen.*' (emphasis added).

Even if speech presents a clear and present danger or advocates or provokes violence/illegal conduct it was noted that further limits on restrictions, such as the doctrines of overbreadth, prior restriction and vagueness, still apply. Thus, in Terminiello v Chicago a statute that made speech that 'stirs up the public to anger, [or] invites dispute,' an offence was struck down as being overbroad.<sup>74</sup> These doctrines can be favourably compared with the French doctrines of proportionality and necessity but this is not the case as regards England where the cases do not show that the judiciary have adverted to the need to tailor means to ends.<sup>75</sup>

Similarly, it has been seen that England lacks a notion that restrictions should only be used in the 'last resort', unlike France.<sup>76</sup> US law can be seen to have laid down such a requirement in Edwards v South Carolina.<sup>77</sup> In this case a demonstration attracted some 200 to 300 onlookers but the police had been informed well in advance and had stationed 30 officers at the scene, with adequate reinforcements which could be called upon at short notice. These measures were found to be sufficient to maintain public order and hence the order to disperse because of an apprehended violent reaction from the onlookers was not a last resort. At the same time, the US courts will strictly review the factual circumstances in order to see whether the measures were a

---

<sup>74</sup> *op. cit.*

<sup>75</sup> For example, Wise v Dunning and O'Kelly v Harvey, *supra*. In fact, it was claimed that English law in this area shows elements of necessity but not proportionality; for example, per Hayes J in Humphries v O'Connor, *op. cit.*;

'But whether the act which he [the police constable] did [removing a political emblem] was or was not, under all the circumstances, *necessary* to preserve the peace, is for the jury to decide.'

<sup>76</sup> It should be added that the principle has at best been treated in passing by the English judiciary, for example, per Law LC in O'Kelly v Harvey, *supra*;

'The question then seems to be reduced to this: assuming the plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the defendant believing as he did that there would be a breach of the peace if they continued so assembled, and that *there was no other way* in which the breach of the peace could be avoided but by stopping and dispersing the plaintiff's meeting - was the defendant justified in taking the necessary steps to stop and disperse it?' (emphasis added).

In addition, the commentators assert a last resort principle, for example, Bailey *et. al. op. cit.*, 223 and Smith, (1987), *op. cit.*, 181. The latter also points to R v Londonderry Justices, *op. cit.*, per O'Brien J to support his claim. However, it was noted that the last resort principle was not adverted to in Moss v McLachlan or Duncan v Jones for example. This would indicate that it is a principle of considerable uncertainty as compared to France.

<sup>77</sup> (1963) 372 U.S. 229 and see also Cox v Louisiana, *op. cit.*, and Gregory v Chicago (1969) 394 U.S. 111.

last resort, as in Hess v Indiana.<sup>78</sup> Contrary to the English position, the French principles of last resort and exacting review of the facts accorded with the higher standards of the US.

*Non-communicative impact*

If attention is now turned to noncommunicative impact restrictions, it will be recalled that restrictive regulations must bear a less heavy burden but a burden nevertheless. This is the combined result of the doctrines of the public forum, the prohibition against excessive administrative discretion, as well as the requirement that regulations are narrowly tailored, with the purpose of serving a significant government interests and leave open ample channels of alternate communication.<sup>79</sup>

US law insists that only conduct which threatens to break out into public disorder may be restricted, thus in Cohen v California where the appellant wore a jacket bearing the words 'Fuck the Draft' in a court-house corridor, there was found to be no evidence that there was an intention to provoke violence or that this was likely on the facts.<sup>80</sup>

This insistence on a link between conduct and violence has been noted in France but is not always the case in England where by reason of S.5 of the POA it is mental states that are of greater relevance. This can be contrasted with the judgment in Collin v Smith, concerning a proposed march by a group of neo-Nazis through the Village of Skokie, which adopted the language of Terminiello v Chicago in stating that;

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.<sup>81</sup>

---

<sup>78</sup> (1963) 414 U.S. 229. This factual review can be contrasted with the English tendency to accept police accounts of the facts if based upon an *honest* and *reasonable* belief, see per Skinner J in Moss v McLachlan, note 52, *supra*.

<sup>79</sup> For example, Clark v Community For Creative Non-Violence, *op. cit.*, and Ward v Rock Against Racism, *op. cit.*

<sup>80</sup> (1971) 403 U.S. 15. See also Collin v Smith, *op. cit.*, where a 'Racial Slur Ordinance' in the Village of Skokie was struck down because, *inter alia*, the local authority did not rely on a fear of a violent response to justify the ordinance and Edwards v Carolina, *supra.*, where the Court found that the onlookers did not in fact threaten violence.

<sup>81</sup> *op. cit.*, 1206.



Thus, in Collin v Smith, despite a finding that a procession by the neo-Nazis would 'seriously disturb, emotionally and mentally, at least some, and probably many of the Village's residents', this was deemed to be an insufficient reason for restricting conduct. Therefore, US law clearly limits interference to where there is a proven and high probability of violence. English law is alone in emphasising mental states (by virtue of S.5 of the POA 1986) and given its already relatively limited judicial review, it would appear to grant even more discretion to the police authorities as far as their being able to assert without more that conduct is likely to lead to the mental states of either fear, harassment or distress.

As regards S.4 of the POA 1986, which links threatening, abusive and insulting conduct to violence, it is submitted that an improvement has been made vis à vis the former breach of the peace requirement in the POA 1936. The motivation behind this change was the uncertainty as to the meaning of a breach of the peace.<sup>82</sup> Thus, it now has to be proved that the relevant conduct induced a fear of violence or that it was likely that such fear would have been provoked. This is submitted to be closer to the US test of 'fighting words', as seen in Chaplinsky v New Hampshire, which states that conduct must be more than merely making others angry: there must be an *incitement* to violence, as was stated in Terminiello v Chicago. However, further improvement would seem to necessitate a last resort and proportionality requirement along French and US lines which seems absent under S.4. French principles would seem to indicate similar standards to the US because of the link that is insisted upon between disorder and the use of the police general public order powers in response. Even though public order has been noted to have a wider ambit in France, the existence of judicial review and concomitant principles provides strong protection to the liberties to assemble, as was suggested earlier.

It is clear that if violence is the trigger to the restriction of the liberties to assemble in England, France and the US, then the decision as to when violence is apprehended is crucial. It has been noted how France places more exacting limitations on this discretion than England. In contrast to England, the French position appears to meet the high standards of the US. Therefore,

---

<sup>82</sup> See Bevan, *op. cit.*, 182.

it was noted that as far as restrictions on location, the US courts have shown a hostile attitude towards wide discretionary powers given to the police. As a consequence, in Kunz v New York,<sup>83</sup> the Court insisted on clear standards in order to guide officials in exercising discretion. Although it may be argued that clear standards are lacking in France as regards general public order powers, at least in this jurisdiction there are limits placed on police discretion over the liberties to assemble, by virtue once again of exacting judicial review. This is not the case in England, as cases such as Arrowsmith v Jenkins and Duncan v Jones (among many possible examples) have shown. It must be underlined that without the legal limitation and control of discretion the suggestion of limiting conduct restrictions to conduct that incites violence will be largely ineffective as a way of protecting the liberties in question.

The hostility towards granting wide discretion to the police in US law is further illustrated in Houston v Hill,<sup>84</sup> which also touches on the question of the obstruction of the police in the exercise of their duty. In the instant case a Houston ordinance forbidding 'speech that in any manner interrupts a police officer in the performance of his/her duties' was struck down as being overbroad. It was shown that the ordinance was broken daily on scores of occasions but that only some people, singled out by the police using an *unguided discretion*, were arrested. It would seem doubtful in the light of this case and other prohibitions against wide discretion and unclear standards in US law,<sup>85</sup> that S.51(1) of the Police Act (that lays down the offence of obstruction in England) could be seen as placing sufficient limits on official discretion. The combination of an extremely wide breach of the peace power and the on the spot discretion granted by the statute would not seem to meet the US standard. Again, this does not appear to be the case in France, where a similar wide discretion is strictly construed by the courts, especially the administrative tribunals.<sup>86</sup> French law, as preferred by the theoretical criteria of this study, thus once more acquits itself well as against an evaluation with US law.

---

<sup>83</sup> (1951) 340 U.S. 290 and see Gooding v Wilson, *op. cit.*

<sup>84</sup> *op. cit.*

<sup>85</sup> See for example, Lovell v Griffin, (1938) 303 U.S. 444.

<sup>86</sup> This view can be supported if regard is had to the principles derived from the cases on discriminatory access to local authority premises, for example Communes de Tourrettes-sur-loup, *op. cit.*, chap.IV, section III.

Another aspect of noncommunicative regulation in which US law has been very active is the concern as regards the hecklers' veto situation. It was noted above, in chapter VII, when discussing regulations prior to assemblies that the courts displayed a presumption against the restriction of the liberties to meet and process where this was based upon the apprehended hostile reaction of either onlookers or counter groups. This doctrine was seen to be the 'other side' of the Chaplinsky judgment. Therefore, the police must show that conduct is likely to incite an immediate breach of the peace. This would seem to be very similar to the English breach of the peace standard which was used in cases such as Thomas v Sawkins, Duncan v Jones and O'Kelly v Harvey. However, the crucial difference is that in US law, as instanced by Cox v Louisiana and Edwards v South Carolina, breach of the peace convictions were overturned by the Supreme Court upon a finding that the police presence was sufficient to have contained a hostile reaction from the crowd. The US position is therefore again seen to require that restriction be a last resort, when all other measures are impossible or inadequate for the maintenance of public order. It has been claimed that there is little trace of a similar doctrine in the English cases.<sup>87</sup> On the other hand, French law has on several occasions been seen to have developed a doctrine of last resort. For example this has been seen as far as the liberty to meet in the case of Bujadoux.<sup>88</sup> It would appear that this is a general principle that is applicable to all civil liberties, including therefore the liberty to process.<sup>89</sup>

The efficacy of the last resort principle depends on the degree to which accounts of the factual circumstances of meetings and processions can be reviewed. Consequently, attention should be drawn to the judgments in both Edwards v South Carolina and Cox v Louisiana, in which the Court stated that when constitutional rights are at stake

we cannot avoid our responsibilities by permitting ourselves to be completely bound by state court determination of any [essential] issue, [else] federal law could be frustrated by distorted fact-finding.<sup>90</sup>

---

<sup>87</sup> See for example, cases at note 76, *supra*.

<sup>88</sup> Chap.IV, section III.

<sup>89</sup> See Aubry & Drago, op. cit., 527-8 and Ktistaki, op. cit., 128-38.

<sup>90</sup> *op. cit.*.

The Court therefore engaged in an 'independent review' of the facts. This means it reviewed the facts that had been presented before the lower court and more importantly made a detailed assessment of the factual circumstances that was independent of police accounts.<sup>91</sup> Again this can be contrasted with the tendency by the judiciary in England to accept police accounts and favourably compares with the French system in which both the merits and procedures of restrictions on the liberties of assembly are reviewed.

Finally, no cases seem to have directly dealt with the protection of the liberties to meet and to process from those who seek to disrupt them via disorderly conduct. As a consequence, in this area France on its own would appear to provide clear standards for England by which to further secure the protection of the liberties and thus accord them a legal importance that reflects their social value.

#### COMPARISON WITH THE ECHR

How do French and English law compare with the standards derived from the Convention? This question can be answered briefly given the above-noted lack of elaboration of the Convention via case law.<sup>92</sup> As far as relevant aspects, it was seen above that the Convention had only been elaborated as far as the 'heckler's veto' situation. However, this was as regards regulation prior to assemblies.<sup>93</sup> Nevertheless, if these principles are applied to conduct regulations *during* assemblies it will be seen that French law matches these

---

<sup>91</sup> The extent to which American judges are prepared to undertake an independent review may be instanced by Black J's dissent in Feiner v New York, *op. cit.* In this case the Supreme Court upheld a disorderly conduct conviction against a speaker who refused to obey a police command to cease addressing a racially-mixed crowd. It was found that the speaker had given

'...the impression that he was endeavouring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights...'

and that at least one of the eighty or so crowd of people had threatened violence if the police did not act to silence the speaker. Black J fundamentally disagreed with these findings of fact - in other words he engaged in an independent review of the pertinent circumstances;

'As to the existence of a dangerous situation on the street corner, it seems far-fetched to suggest that the "facts" show any imminent threat of riot or uncontrollable disorder...According to the officers' testimony, the crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault petitioner but the officers did nothing to discourage this when even a word might have sufficed.'

<sup>92</sup> Chap. VII, section III.

<sup>93</sup> Chap. VII, section III.

standards. Thus, in Plattform 'Ärzte für das Leben' v Austria it was stated that disorder on the part of others could not, without more justify a ban on a procession. In this case, the Court and the Commission found that the police had a duty to provide protection to those who wished to exercise their rights to meet and march. In effect, the Court laid down a *positive* obligation on states, in detailing the action they should take. The case can be read as stating that authorities should take all possible steps to secure the liberty.<sup>94</sup>

Thus, the Court went on to state that;

In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.

Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11...Article 11 sometimes requires positive measures to be taken<sup>95</sup>

Such a doctrine is consonant with the French principle that restriction should only be as a last resort and further highlights the higher standards in France in comparison to England. However, the Court and the Commission seem to have gone further in laying down a type of 'affirmative action' principle. Such a principle would certainly accord more importance to the liberties by requiring a greater degree of protection. The social value that would be reflected by an obligation on the state to take certain positive steps is therefore supported by theory, even if it has not been previously articulated. However, if such a measure is taken as a higher standard, neither France nor England can be said to have met this standard of protection since neither seems to have made provision or formulated such principles. Perhaps France has come closer by virtue of Art.431-1 (*supra.*) but it should be recalled that this article merely punishes conduct that interferes with the liberties to meet and to process and fails to include any measures which the police are obliged to take in order to protect these liberties. At the same time, it could be argued

---

<sup>94</sup> 21st June, A.139 (1988), 12. This is a decision from the Court, whereas it was that of the Commission was cited earlier. Both however agree on this heckler's veto point.

<sup>95</sup> *op. cit.*, 12. See also Christians Against Racism And Fascism v UK, *op cit.*, which expresses the previous view of the Commission concerning the heckler's veto;

'...the possibility of violent counter-demonstrations, or the possibility of extremists with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right..'

It can be seen that the previous view lacked a *positive action* element which was added by the Plattform case.

that the provision lays down a clear message that interference is unacceptable and regarded as criminal, this therefore can be seen as a positive step in securing the necessary conditions for the liberties to be exercised.

### **A SUMMARY**

French regulation in this area, as supported by theory has been argued to provide greater protection than England. Moreover, this degree of protection and the criteria used to compare France and England seem to be mirrored in the standards derived from the US and often provide more comprehensive regulation than the ECHR. Elements favoured by the jurisprudential theory adopted in this study have been continually pointed to as being the reason for the higher standards in France. They are also elements that highlight the detail and specific needs that legal regulation must meet. Moreover, this has been argued to be better achieved by statute.

## CHAPTER IX

### COMPARING REGULATION OF THE LIBERTIES: AFTER ASSEMBLIES

#### INTRODUCTION

The legal regulation of the liberties to meet and to process has been analysed from the point of view of restrictions that may be imposed before and during their exercise. It follows that in order to complete the comparison, this chapter focuses on restrictions *after* an assembly. Hence, attention is here turned to sanctions because of the possibility that their potential and actual application that may dissuade people from exercising the liberties in question and that such an effect would then restrict the liberties.

The method that will be followed here will be to set out those sanctions which have been of particular concern in England. Next, French law will be compared and evaluated to see whether it better protects the liberties in question. It is claimed that US and ECHR are of little use in this area. US law does not seem to have dealt with the issue of sanctions as regards the liberties and because of the Convention's instance that sanctions should be prescribed by law<sup>1</sup> there is no scope for its application to France and England, where restrictions are always prescribed by law. This is thus an example of an area of regulation where the ECHR provides a minimum standard that has been met by both France and England.

#### SECTION I

##### THE POSITION IN ENGLAND

Two types of sanctions have caused concern in England. The first are those resulting from the POA 1986 which concern the failure to fulfil requirements as to notice and failing to follow conditions and bans imposed before and during meetings and processions. The second is the use by the judiciary of a wide discretion to bind over persons to keep the peace. These two sanctions will be briefly set out here, before an analysis of French law is undertaken.

---

<sup>1</sup> Art.11(2).

## SANCTIONS IN THE POA 1986

The POA 1986 creates three broad categories of offences. Firstly, by virtue of S.11(7) those that *organise* a public procession (as defined by S.16) without fulfilling the requirements as to giving written notice are guilty of a criminal offence punishable by a fine (S.11(10)).

Secondly, by virtue of S.12(4),(5) & (6) those who *organise, participate* in or *incite* others to take part in a public procession whilst knowingly failing to comply with a condition imposed under S.12 are guilty of an offence. However, the punishments differ according to the specific criminal activity. Therefore, organisers and inciters are liable to heavier fines and imprisonment (S.12(8) & (10)) compared to participants who are liable to a smaller fine (S.12(4)). In addition, a police constable, unlike the notice offence above, is given the power to arrest those he/she reasonably suspects to be committing this offence. Exactly the same offence is provided for as regards conditions imposed on meetings (S.14(4), (5) & (6)), as well as the same power of arrest without warrant (S.14(7)) and the gradation of penalties (S.14(8), (9) & (10)).

Thirdly, by virtue of S.13(7), (8) & (9), those who *organise, participate in* or *incite* others to take part in a public procession that has been banned, are guilty of an offence. Once again a power of arrest is provided (S.13(10)), as well as the same distribution of punishments as in second set of offences above (S.13(11), (12) & (13)). In summary, the 1986 Act penalises organisers that breach the notice requirement and organisers, participants and inciters who breach conditions and bans.<sup>2</sup>

It will be noted that organisers are liable to criminal sanctions under all of the offences. It follows that a finding that a person or group of persons were organisers is very important. Consequently, uncertainty as to the legal meaning of 'organiser' may dissuade some from exercising their liberties to assemble because of fears of being found liable under one of the offences. As a disincentive to the exercise of the liberty to assemble, it would therefore be a restriction.

---

<sup>2</sup> See generally, Marston, *op. cit.*, 120 *et. seq.*



Given the importance of the term, it is surprising that it is left undefined in the Act. The only case that has dealt with its meaning is that of Flockhart v Robinson,<sup>3</sup> which was decided under the 1936 Act and concerned the liberty to process. Most attention has been paid to the remarks of Finmore J who stated that mere stewarding of a march did not constitute organisation and that;

The mere fact that a person takes part in a procession would not of itself be enough. I do not think that the fact that the appellant was the leading person in the procession would by itself be enough, although it might be some evidence to be considered...I think organising a procession means something in the nature of arranging or planning a procession. It is not necessary...for the plans to be made long in advance or perhaps in advance at all...The procession could be organised on the spot in the street...<sup>4</sup>

Furthermore, Goddard CJ stated;

'organised' is not a term of art. When a procession is organised what happens? A procession is not a mere body of person; it is a body of persons who are moving along a route. Therefore the person who organises the route is the person who organises the procession...by indicating or planning the route a person is in my opinion organising a procession.<sup>5</sup>

This case only lays down advice as regards the organisation of *processions* and so therefore there is no authoritative advice as regards what constitutes the organisation of a meeting, not to mention the meaning of participation and incitement which are also of fundamental importance to the question of liability and consequently, the exercise of the liberties.

Aside from these definitional problems, there has also been criticism of the arrest without warrant power as far as the condition offences are concerned. Card has indeed questioned the need for such a power.<sup>6</sup> It has also been observed that the offences as regards bans in S.13, provide, by reason of S.13(7), that a person can be found liable for organising a banned procession

---

<sup>3</sup> [1950] 2 K.B. 498.

<sup>4</sup> *op. cit.*, at 504-5.

<sup>5</sup> *op. cit.*, at 502-3.

<sup>6</sup> *op. cit.*, 87;

The necessity for it is open to question. Quite apart from the common law power to arrest for an actual or apprehended breach of the peace, in many instances one of the general arrest conditions in S.25 of the Police and Criminal Evidence Act 1984 will be satisfied and where none of them is satisfied it is questionable why there should be a power of arrest for these summary offences.'

even where that procession does not take place.<sup>7</sup> This omission of a reference to a procession actually having been held appears strange since all the other offences require that the assembly is actually held. In any case, it is clear that as the provision currently stands it could be used to punish those who merely take preparatory steps in the organisation of a procession in an attempt to breach a ban. On the other hand, the liability of organisers does not stretch to responsibility 'for any default that might have occurred in the conduct of the meeting or procession.'<sup>8</sup>

Lastly, a defence to the notice offence is found in S.11(1) & (6). Here a person who organises a procession without advance notice can claim that it was 'not reasonably practicable' to do so. Similarly, if notice is not delivered in the required six days before the date when the procession is intended to be held, delivery may be made as soon as is 'reasonably practicable'. The burden of proof falls on the organiser but the intention behind the provision was to protect spontaneous processions. However, Smith points out a possible problem

where a group claims that it was unaware of an intention to hold a march by a group to which it holds opposing views until some time within the notification period. In such circumstances, it would still be under an obligation to give notification of its intention to march, and the courts should perhaps hold no offence is committed under section 11(7) if notice has been given, however shortly before the proposed 'counter march,' where this would still permit the imposition of conditions by the police, if necessary, under section 12. This would mean that the courts could take into account, as in other contexts where the expression is encountered, the purpose for which the notification is required.<sup>9</sup>

## THE BINDING OVER POWER

The second sanction that is of relevance is that of the power to bind over and is more contentious. Most commonly, judges may bind a person over to keep the peace under the Justice of the Peace Act 1361.<sup>10</sup> The order can be made in lieu of or in addition to another sentence and it has been noted that a person may be bound over even where he/she has not been convicted of an offence. The order functions by requiring the person to enter into a surety to keep the

---

<sup>7</sup> Marston, *op. cit.*, 135.

<sup>8</sup> Smith, (1987), *op. cit.*, 141;

'The offences are subject to defences that may be summarised as being "no-negligence" defences, that is, that the organiser was not responsible for any default that may have occurred in the conduct of the meeting or procession.'

<sup>9</sup> Smith, (1987), *op. cit.*, 143.

<sup>10</sup> For an historical analysis, see D. Feldman, 'The King's Peace, The Royal Prerogative and Public Order: The Roots and Development of Binding Over Powers' [1988] C.L.J. 101.

peace and in the case of a refusal to provide a satisfactory surety, a prison sentence can be imposed. The judges enjoy an extremely wide discretion as to the amount of the surety and the length of time during which a person is bound over, although this is normally twelve months.<sup>11</sup>

The power has been observed to have been applied in the context of the liberties to meet and to process as a preventative power.<sup>12</sup> In this sense it is applied by the judges against those they apprehend will commit future breaches of the peace in forthcoming meetings and processions. For example, Williams has noted that it has in the past been used against meetings to deprive them of their leaders.<sup>13</sup> The major concern as regards this power has been that it can be imposed at the discretion of the judge upon people who have not committed an offence. The effect is to make attendance at meetings and processions by persons who have been bound over perilous, since if they are found to have breached the peace (which, as has been seen, is not exclusively a result of violent assemblies), the surety can be forfeited, thus constituting a type of fine. The binding over power can therefore be seen as a sanction that restricts the liberties to assemble.

Having set out the two general types of sanctions that have caused concern and may restrict the liberties to meet and process, comparison will now be made with the French law on sanctions.

## SECTION II FRANCE AND ENGLAND COMPARED

### COMPARING THE PUBLIC ORDER OFFENCES

Similar offences to those found in the POA 1986 are found in Art.431-9 of the new French penal code, where it will be recalled that (a) organising a procession on the public highway without making a prior declaration, (b) making an incomplete or inaccurate declaration with the aim of evading the conditions laid down for organising a procession and (c) organising a

---

<sup>11</sup> See generally, Supperstone, *op. cit.*, 312-15, Williams (1967), *op. cit.*, 87-101 and Smith, (1987), *op. cit.*, 36-7.

<sup>12</sup> Williams (1967), *op. cit.*, 94.

<sup>13</sup> (1967), *op. cit.*, 97

procession on the public highway which had been banned, are punished by either a term of imprisonment or a fine.<sup>14</sup>

It should be noted that these offences place liability solely on organisers and unlike England there is no sanctioning of participants or inciters.<sup>15</sup> It could be claimed, given the overall approach to regulating the liberties in France, that the difference here is because in France it is generally recognised that a civil liberty and not public order is in issue. It follows that the scope of liability is kept to a minimum, so that it is the organisers who are sanctioned. It may be objected in response that the requirement in England that the participants must knowingly commit the offences (and that the same requirement might well be extended to inciters) means that it must be proved that they are responsible. Nevertheless, it is contended that the offence in England will be so difficult to prove and risks creating martyrs, that it is actually virtually useless in practice.<sup>16</sup> Bereft of this function, the offences against participants and inciters appear as empty warnings that may however have a dissuasive effect on the exercise of the liberties. Furthermore, the French provisions, in imposing sanctions only on organisers, seek to limit the possible restrictive consequences on the liberty to assemble. This is compared to the English

---

<sup>14</sup> Chap.V, section III.

<sup>15</sup> Art.431-10 is an exception but this concerns the carrying of weapons in a public procession. Since, the concern in this study is with the liberties to assemble - peaceful activities - this article is of no relevance here.

A more relevant exception to this position is art.R.26(15) of the penal code which provides for an offence of violating a legally made administrative regulation (this would include a police constable's command, for example to disperse). Despite the obvious scope for its application, as has been the case in England regarding similar laws, it has not been used in the cases (see generally J-H. Robert 'Contraventions et peines (première classe)' J.-Cl. (Pénal) 460 à R-D, Art.R.26(15), (1984), Fasc.1, 2.

<sup>16</sup> For example, Card, *op. cit.*, 75 claims that the condition offence is unlikely to be often brought against participants;

'It is hard to believe that there will be mass prosecutions for the offence under S.12(5), if thousands of marchers knowingly break a condition, and in relation to this offence in particular there is the risk of creating martyrs and of bringing the law into contempt whether it is enforced or whether it is not.'

He feels that the offences will only function to

'...strengthen the framework within which negotiations take place between the police and organisers.'

( at pg.75).

However, it will be recalled that in the discussion on the imposition of conditions before assemblies (chap.VII, section III, *supra.*), it was suggested that a detailed statute should explicitly address negotiations instead of approaching the issue obliquely and enacting provisions that strengthen the hand of the police. If Card's point is accepted, this offence would seem to be a typical example of the practice that was criticised.

offences which are clearly have public order as their origin,<sup>17</sup> since there is no similar attempt to limit liability. The consequence of the wider scope of potential liability is a greater risk of dissuading participants and others from exercising their rights. This, in turn cannot be said to be according value to the liberties.

It follows from the French focus on organisers that the meaning of this term is of fundamental importance. As in English law, the French courts have also been seen to have grappled with the question of what is an organiser. Therefore, a comparison can be made between Flockhart v Robinson and the French case law. Firstly, it would seem that on the strength of Merabet Bourogaa et autres,<sup>18</sup> that in the case of processions the courts will require more than merely physically leading. Instead, they will require some kind of *de facto* organisation. This would seem to concur with the above-noted dictum of Finmore J, except that he clearly accepted the possibility of considering physically leading a march as a relevant consideration. However, a greater difference may arise if closer attention is paid to the opinion of Lord Goddard CJ, where he mentions that organisation may, *inter alia*, be constituted by those who indicate or point out the route by which other persons are to go. There may consequently be difficulties in distinguishing physical leadership from this, since it might be said that being at the head of the procession is a way of pointing out the route to others.<sup>19</sup>

Secondly, the case of Calas,<sup>20</sup> which concerns a demonstration but which may be used to shed some light on the difference between organisation and participation as regards processions. It will be recalled in this case that it was held that mere participation, in the form of addressing a demonstration, is insufficient to constitute organisation. This position may well be contained in the Flockhart decision but since this case concerned processions, the court's attention was occupied with laying down a rule that participation in a

---

<sup>17</sup> For yet another example of the dominant public order approach, see Wade, *op. cit.*, 177, who claims that the 'law of public meetings' functions 'primarily to prevent and to punish outbreaks of disorder'; significantly he does not assert that it should function to *uphold* liberty.

<sup>18</sup> Chap.V, section III.

<sup>19</sup> See also Marston, *op. cit.*, 122 who quotes Lord Goddard CJ as stating:

'If a person indicates the route, plans the route, or points out the route by which other persons are to go, I think he is organising a procession.'

<sup>20</sup>*op. cit.*, and see chap.V, section III.

procession did not necessarily constitute organisation. In comparison, French law has the benefit of a clear statement that can be applied to meetings and it is submitted that the Flockhart view on processions should be similarly extended to the liberty to meet, in order to reduce the ambiguity between organisation and participation.

Thirdly, both jurisdictions have developed fairly loose tests that turn on the particular fact situations.<sup>21</sup> It is submitted that as a guide the courts should recall the context of their decisions; that of civil liberty, as well as public order. Thus, they should be aware that an overly broad view of what constitutes organisation may dissuade people from exercising their rights. In France it has been seen that the sanctions reflect civil liberty concerns and this gives human rights a weight when balanced against public order considerations. The same is doubtful in England where both the location of the sanctions - in the '*Public Order*' Act - and their wider incidence of liability can be seen to again clearly indicate a public order emphasis.

#### COMPARING THE BINDING OVER POWER

As regards comparison with the English binding over power, briefer comments can be made. The simple fact is that what has been referred to as the constitutionally objectionable power to bind over<sup>22</sup> knows no counterpart in France. Certainly there are various provisions in the penal code to suspend the execution of sentences on condition of future good behaviour but these are all only applicable when a person has been found guilty of an offence. Then, the application of one of the forms of suspended sentence clearly does and must constitute a criminal sanction.<sup>23</sup> From a comparative perspective, English law provides for the restriction of the future actions of persons without their first being proved guilty of having committed a criminal offence. Since it is normally the element of guilt that acts as a trigger for the application of restrictions on liberty, the binding over power appears aberrant to the principles of criminal law.

Reform of the binding over power has, however, been suggested;

---

<sup>21</sup> For France, see M.P. c Texereau et autres, *op. cit.*

<sup>22</sup> Smith, (1987), *op. cit.*, 38.

<sup>23</sup> See for example, arts.132-29-39 and arts.132-40-53 and generally R. Merle & A. Vitu, 'Traité de droit criminel' (1981), 938-60.

There is much to be said for a return to the view that some specific offence...should be shown to exist as in an ordinary prosecution. Furthermore, the court should be satisfied that there are good reasons for using the processes of preventative justice as opposed to bringing a prosecution. The magistrates perhaps should themselves be required to explain their decisions in full, thus allowing a reasonable opportunity to the defendants to challenge their discretion on appeal.<sup>24</sup>

These comments are strongly endorsed here but in the light of French law it would seem that they could be best effected by integrating the binding over power into the criminal law proper. This would mean that a person would have to have been found guilty of a specific offence before the power could be used. The defendant would have the rights of challenge that are called for above and the judge would be under the normal obligation to give reasons for his/her decision, as well as having these open to appellate review. More importantly, the personal liberty of innocent persons could no longer be restricted in this way and the scope for using the power in order to prevent people exercising their liberties to meet and process would be considerably limited.

#### A SUMMARY

Analysis of restrictions after assemblies once again reveals that the adequate protection of the liberties under study requires more substantial reform than is likely to be provided by the constitutional entrenchment of the liberty to assembly. In fact, here it has been shown that at least as far as the binding over powers are concerned, a reform of the criminal law is a necessity. This would be best affected by detailed statutory enactments. As far as the POA offences are concerned, a valued conception of civil liberties has been shown to be lacking. Thus offences in England are inspired by public order considerations without the counterbalance of civil libertarian considerations and this is clearly instanced by the wider range of persons (participants and inciters) who may be found criminally liable.

Lastly, it is worth underlining that the binding over power deprives people of liberty but it does so according to terms prescribed by law (i.e. the Justice of the Peace Act). The inadequacy of the Convention on this issue adds further weight to the arguments in favour of the enactment of detailed statute, that has been major theme of this study.

---

<sup>24</sup> Williams (1967), *op. cit.*, 101.

## CHAPTER X

# CONCLUSIONS: A RE-EXAMINATION OF TWO PRACTICAL CONCERNS

### INTRODUCTION

The conclusions that this study draws as to the application of theory to practice can be best illustrated in the context of the two practical concerns that were mentioned in Part I: the Bill of Rights debate in the UK and the protection of human rights in the EU. In applying human rights and comparative theory to civil liberties it will be seen that new light can be shed on these issues and more importantly new possibilities for resolution reveal themselves.

The two issues will be dealt with in turn, beginning with the Bill of Rights debate in the UK and then attention will be focused on the protection of human rights in the EU. Before commencing, the conclusions will be explicitly stated in order to be able to recognise them and their relevance to the two practical concerns more clearly. In this connection, six broad conclusions can be made.

### SECTION I

#### SIX CONCLUSIONS

##### *The relevance of France*

The French system of protecting human rights is of great relevance to England because of the highly political character of that protection. It follows that the tendency to make comparisons between jurisdictions that belong to the same legal family is shown to be unduly limiting. In short, valuable comparisons can be made between common-law and civil law systems which share the same basic constitutional traditions. Membership of a particular legal family should not be allowed to obscure basic problems that are shared between these jurisdictions. As a consequence, the orthodox view of comparative law that tends to limit comparison to that between members of the same legal family should be treated with caution.



### *The benefits of statutory protection*

The French system of utilising statutes to protect civil liberties reveals an alternative to constitutional enactments. This method has the advantage of being more open to political change and is better able to accommodate a detailed concentration on specific liberties. Therefore, this form of protection sits well with the conception of human rights that was formulated in this thesis on the basis of a possible consensus between liberal and critical theorists. It was claimed that both groups would agree that human rights are political and social values and as a consequence statutes were the best way of giving effect to this conception while at the same time protecting them. Unlike the judicial model in, for example, North America, political choices are made more transparent in the French political and statutory model and human rights can consequently be more clearly seen to be the product of political processes. This is not to suggest that mechanisms like that in the United States are of no worth. On the contrary, it is accepted that they could be justified by an alternative theory of human rights. However, according to the view formulated here, a political conception is to be preferred.

### *Constitutional protection*

The focus, hitherto, on a constitutional protection of human rights which dominates the debate as to the improvement and reform of human rights law in England, neglects the need to reform other areas of law. Energy is largely devoted to a method of protection that while undoubtedly having the benefit of indicating a general statement of principle, does not provide the detailed mechanisms that would in practice be needed to protect human rights in England. The current preference for broad constitutional enactments is claimed to be based upon an impoverished view of the theoretical nature of civil liberties and furthermore, it tends to obscure the work that must be done to reform judicial review, emergency remedies, police powers and accountability and binding over powers, to take but a few examples that have been raised in the previous chapters.

### *A common constitutional tradition*

A strong tradition of the liberties to meet and to process in France and England has been identified, even though different values are given to the different liberties in the two jurisdictions. This tradition should form a major component of any common constitutional tradition from which the protection of human rights is derived. The comparative method is therefore proven to be

essential to such an enterprise, if it is to be taken seriously. Moreover, although comparative theory will need to be employed to other civil liberties in order to discover their common constitutional traditions, where these traditions reveal practices or methods of protection that are lower than desired there must a theory of human rights by which to then construct the desired standards. In consequence, the protection of civil liberties in the EU is not a purely descriptive exercise, instead normative decisions and choices will need to be made on the basis of jurisprudential theory.

#### *Emphasis on the specific*

It has been shown via the liberties to assemble that specific liberties have different needs and problems and so may often need to be specifically analysed. Hitherto this has not been the dominant tendency in England. To treat civil liberties as a homogenous, undifferentiated category risks obscuring crucial differences. The consequence may also be that there is no one answer, such as the enactment of a Bill of Rights, that will solve the problems of all the different human rights. This would lend further support to the use of statutes to remedy the specific problems encountered by a specific liberty. It also suggests that in formulating protective measures in the EU, regard should be had to the specific and particular context of each right, as well as their tradition in each member state. There are however common features to human rights, for example, they have been claimed to be social and political values. Given this commonalty, general measures, such as an unentrenched list of fundamental rights may be of value in laying down the spirit and general manner in which civil liberties are to regulated and treated. A Bill of Rights reformulated in this way, may therefore have a role to play.

#### *Theory and practice*

Finally, reform of the law on civil liberties in England and the search for a common tradition of human rights protection in Europe benefit in theoretical and practical terms from a theoretical underpinning. Thus, the comparative method and jurisprudential theories of human rights have been utilised and applied to a particular area of civil liberties law. The results are claimed to have been the opening up of new vistas of possible legal protection and a better understanding of the nature of human rights. In short theory can be applied to practice.

## SECTION II

### THE BILL OF RIGHTS DEBATE: A COMPROMISE

The Bill of Rights debate in the UK was examined earlier in chapter I. It was seen that the debate was very much a struggle between political and jurisprudential viewpoints and choices, for example the sovereignty of parliament versus the recognition and protection of human rights: how could the possibility of changes in social values be accommodated by a need to develop measures to secure these values against such change? The debate was therefore revealed to be the locus of political struggle and a compromise was claimed to be needed. This compromise would need to be able accommodate change at the same time as the recognition that certain socially constructed values, namely human rights, are felt to be of higher value than others, such that they are deserving of extra respect in the face of change.<sup>1</sup>

In England debate has become polarised between those calling for the enactment of a Bill of Rights or the incorporation of the ECHR and those who favour the status quo; the sovereignty of Parliament. This study has revealed, as part of the French legal machinery for protecting human rights, the existence of a political organ which could constitute a compromise in the debate. This is the Conseil constitutionnel (Cc). It will be recalled that such an organ permits the French Parliament to continue its claim to being sovereign, whilst at the same time recognising the special status of civil liberties. Therefore, Parliamentary bills can only be struck down *before* they become law and they are reviewed by a political, as opposed to a judicial, body. The Cc can change its view to reflect changes in human rights, so they are not fixed categories and are more open to political and social forces. However, when a bill contradicts an existing civil liberty that still enjoys the support of the political community, it can be struck down. In such a way human rights are accorded weight and value - in other words they are both respected and protected. The Cc's decisions are controversial and involve political choices and this is made transparent by reason of its personnel and the political space it occupies.<sup>2</sup>

---

<sup>1</sup> Chap.I.

<sup>2</sup> Chap.II.

Enacting a Bill of Rights along US lines (i.e. a constitutionally entrenched list of rights) would mean to a large degree fixing human rights against changes in the values of the community. Moreover, when change would be permissible under such arrangements, decisions to this effect are not to be taken by the political community or its representatives but rather by the judiciary, which in England is unelected. Handing over this highly political and controversial function to the judiciary risks masking the political character of human rights behind the claimed objectivity of the law. A political organ does not need to hide behind such language, on the contrary, it can, and by definition, does act politically.

However, why should this political conception be preferred? The response is because this accords with the jurisprudential view of the nature of human rights, which sees them as social constructs that are intimately linked to the politics of the community. They embody socio-political values and as a result can be changed, but such change should be administered as far as possible by the body politic.<sup>3</sup> Such change should be seen for what it is and not dressed up as a question of declaring a pre-existing and immanent legal truth that merely requires judicial expertise to bring it to the surface. This conception reflects the 'political' constitution in England, in which traditionally parliamentary sovereignty and human rights questions have not been left to the judiciary.<sup>4</sup> It must be underlined that notwithstanding the way this conception 'fits' English arrangements, it is preferred because of jurisprudential reasons. In addition, even if it points towards a conception of human rights that is found in England, it has been seen that English law has been found wanting as regards several of the reforms that it has generated.

As for comparative theory, it has presented an alternative to the focus on the enactment of a Bill of Rights. By looking at France it has been seen that beneath the label 'civil law', it shares a tradition of parliamentary sovereignty

---

<sup>3</sup> Waldron (1993), *op. cit.*

<sup>4</sup> Griffiths (1979), *op. cit.*, and at 16;

'The fundamental political objection is this: the law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth. For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.'

with England, much more so than the 'common law' system of the US with which comparisons are overwhelmingly made. Given the theoretical interest in a political conception of civil liberties, a focus on French law has been proven to be of great interest to England. One method of protecting human rights has been shown to be via a political organ along the lines of the Cc. Much work would however need to be done in order to translate a similar organ into the English legal system but it is suggested that most importantly its political nature should be retained in any such process. Another method of protection that has been revealed is that of statute but that can be better explained in relation to the other major suggestion in the Bill of Rights debate, namely the incorporation of the ECHR into English law.

Comparative evaluation has consistently revealed the benefits of specific provisions dealing with the specific context and problems of the liberties to meet and process.<sup>5</sup> France has been seen to have adopted precisely this form of regulation. In contrast, the Convention speaks merely of a 'freedom of assembly', with no detailed provisions as to bans, conditions or sanctions. Furthermore, there is no elaboration of the activities that are covered by this right and the interests that may justify its restriction are vague. To incorporate such a right into English law may be politically attractive but its benefits are outweighed by its disadvantages; these chiefly being insufficiency. In these circumstances there is no guarantee that judicial interpretation will not be restrictive. There is no provision that would prevent the introduction of a system of prior authorisation, for example and nothing is said as to the need for emergency procedures for review of restrictions, the involvement of local elements or the provision of public fora. These are but a few examples of the detailed provisions that are lacking in the Convention. Others have been pointed to in chapters VI-IX.

In comparison, France has employed statutes to protect meetings and to a lesser extent processions. In the case of meetings, which enjoy a higher status, a statute provides detailed provisions as regards bans and sanctions.<sup>6</sup>

---

<sup>5</sup> Chaps.VI-IX. Some English commentators have on occasion called for the use of statutes to protect these liberties but without providing any supporting justifications for such demands, for example, Card, *op. cit.*, 6 and Bevan, *op. cit.*, 174-5 & 184.

<sup>6</sup> See the 1881 Act, chap.IV.

Although more detail would be welcome as regards certain aspects of protection,<sup>7</sup> the French approach is a step in the right direction.

It might be objected that a Bill of Rights could be enacted in which detailed provisions could be contained. In theory there is indeed nothing to prevent this but in practice it is doubtful if this legal form would be used in such a way. To do so would radically alter the traditional utilisation of constitutional provisions, by which they tend to indicate broad principles.

A second possible objection is linked to the last point, in that constitutional enactments contain statements of principle, which are usually lacking in statutes, which are on the contrary predominately concerned with technical matters. Thus the argument might run that detail might be acceptable in such areas as taxation and construction but surely human rights are such important values that they need to be seen as such? In other words, something more, beyond the merely technical is required in order to signal and underline the importance of rights. Such an objection would seem to be given further weight given the lack of value accorded to the liberties to meet and to process in England.<sup>8</sup> It could then be claimed that the police and the judiciary are in need of precisely the kind of statements of principle that constitutional enactments contain.

These are powerful arguments but are rebuttable because they are based upon the fallacy that statutes cannot contain statements of principle. This might be an accurate description of the current practice in England<sup>9</sup> but even if this controversial claim is conceded, French practice has shown that this need not be the case; that is statutes can be used to contain principles. This has been seen in the 1881 Act and Art.431-1. More importantly, such an objection misconstrues the claims made here. Therefore, it is argued that

---

<sup>7</sup> For example, time limits on bans and the lack of a public forum doctrine; see chaps.VIII & VI, respectively.

<sup>8</sup> A point consistently made in the preceding chapters and see for example, Dworkin, (1990), *op. cit.*, 1-12 and 'Devaluing Liberty' in *Index on Censorship* 17 (1988), 7.

<sup>9</sup> Even so, S.43(1) of the Education (No.2) Act 1986 can be pointed to as an example of a statement of principle contained in a statute;

'Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that *freedom of speech* within the law is secured for members, students and employees of the establishment and for visiting speakers.' (emphasis added).

statutory and detailed protection should play a central role in the protection of human rights but this does not mean that Bills of Rights (with the appropriate flexibility) should not be enacted in order to lay down a general statement of intent. Only a reorientation toward statute is asserted and not the complete rejection of a Bills of Rights.

Another advantage of statute over constitutional enactment is that English judges are accustomed to interpreting the former as opposed to the latter. A traditional objection to enacting a Bill of Rights or incorporating the Convention was seen to be the claim that the English judiciary would interpret such a text in a narrow, technical manner, as if it were a tax statute.<sup>10</sup> If this point is accepted, it may be countered by giving the judiciary statutes to interpret, which contain the type of detailed provisions to which they are claimed to be accustomed. A statement of principle could be made therein in order to guide their interpretation. This could be made in the Preamble to the statutes or the main body of the text itself. Moreover, it is contended that the judiciary may be more likely to uphold the will of Parliament since it accords more closely with their own view of their constitutional role,<sup>11</sup> rather than requiring them to make sorties into the uncharted waters of a Bill of Rights or the Convention, that may often require them to oppose the will of Parliament. Therefore, the statutory protection of human rights actually seeks to draw advantage from the much criticised mode of English judicial interpretation.

Detailed statutory texts may also provide clear directions to the police and other state authorities. These bodies are also accustomed to following statutes and once again added weight may be derived from the fact that they can be seen as embodying the will of the legislature. This view was seen as a central explanation of the supremacy of *loi* in France and why human rights are ideally protected by *loi*.<sup>12</sup> Both there and in England a deference is shown towards statute and it is argued that this could be harnessed to the service of civil liberties.

Consequently, both the enactment of a Bill of Rights and the incorporation of the Convention have been shown to be problematic on jurisprudential

---

<sup>10</sup> See for example, Zander, *op. cit.*, 57-64 and Lester (1969), *op. cit.*, 15.

<sup>11</sup> See Jacconelli, *op. cit.*, 178-186.

<sup>12</sup> Chap.II, section II.

grounds. The comparative method has pointed to possible alternatives: political review and statute that should be a part of the current debate as to the reform of the law.

Comparison with France has also shown that the debate has rather narrowly focused on one issue; a Bill of Rights, whereas the liberties to meet and to process are in need of other forms of protection. It has been seen that police discretion, especially that exercised on the spot is an important factor in the exercise of these liberties.<sup>13</sup> A question that an advocate of a Bill of Rights and/or the incorporation of the Convention must respond to, is how these measures would prevent and punish abuses of this discretion.

Taking as an example, the simple enactment of a Bill of Rights in which either a liberty to assemble or the liberties to meet and process were included, it may be doubted whether this provision would be of any aid as regards police discretion. More precisely, how would such an enactment ensure that breach of the peace powers are exercised as last resort, are necessary and proportional? The response to these problems in France has been to develop principles of judicial review that submit such discretion to exacting review and as a consequence, the principles of last resort, proportionality and necessity have been developed. Admittedly, this has been a development that was felt to be necessary to protect the already valued category of human rights but for the reasons stated above, it would seem preferable to use statutes to give weight to human rights as opposed to constitutional enactments. Furthermore, statutes could easily make reference to these principles of judicial review and thus a connection between human rights and judicial review could more easily be made than between constitutional enactments and judicial review. Therefore, the first problem with a constitutional provision to protect the liberties to assemble is that it would not focus attention on the need for exacting review, let alone the need to examine the merits of a restriction.

A second problem is that of time. Above, it was stated that the liberties in question require methods of protection that can be exercised rapidly.<sup>14</sup> There is little value in a finding that an assembly was banned illegally some four to

---

<sup>13</sup> See chaps. VII & VIII.

<sup>14</sup> See chap. V, section III, as regards the French *déféré préfectoral*.



six months after its intended date. The exercise of the liberty to assemble is not about pyrrhic victories of this kind. An enacted constitutional provision, without more, would not provide for the kind of emergency procedure that is required to protect the liberties under study. Once again, statutes laying down detailed provisions to protect the liberties to meet and process could also lay down an emergency procedure. As the French example has shown, such an emergency procedure could be set out in its own statute and it would also appear possible to make such provision within the statute protecting the liberties, but all that is claimed here is that statutory enactments can embody the rapid protective procedures that are claimed to be necessary.

Turning now to the incorporation of the Convention, it can be seen that problems as to emergency procedures still persist. Admittedly, art.11 and the case law on that provision contain the last resort principle<sup>15</sup> and English judges would be able to apply this in order to review discretion. It follows that at least this could provide a means of developing more exacting judicial review in England. However, there is a lack of emergency procedures in the Convention, which is most tellingly manifested by the paucity of case law on these liberties. Given the lengthy period that is required before a judgement is laid down from either the Court or the Commission, the Convention is, at best, only of use as far as declaring illegality and perhaps dissuading a repetition of such behaviour in the future. This function should not be too readily dismissed but it should not be over-estimated. The protection of the liberties to assemble also requires legal mechanisms that aim at ensuring their immediate exercise. Constitutional enactments and the Convention seem generally better suited to securing a moral vindication of the liberties but not to securing practical benefits.

Applying comparative theory and jurisprudence to human rights shifts the focus of debate to the *practical* needs and problems of specific liberties, as well as re-introducing the political element into the regulation and adjudication of civil liberties. Paradoxically, theory brings the debate down from the abstract level and seeks to give practical effect to the principled values that a community has created. The result aimed for is a legal and political framework in which citizens can exercise the liberties for the diverse purposes

---

<sup>15</sup> See chap.VII.

revealed, and ultimately as means of effecting social and political change and challenging the status quo.<sup>16</sup> Recourse to theory changes the nature of debate and proves the value of theory.

This study has shown that creating the kind of legal framework desired requires more than superficially attractive measures such as enacting a Bill of Rights. These reforms may historically have proven invaluable as a rallying point for the extension of liberty where it had not previously existed or had been curtailed but as far as specific liberties in modern society are concerned, more widespread reforms are also called for. This is instanced by the importance of police structures in France and England. This thesis has called for greater political participation in decisions that regulate the liberties under study. Such participation has been argued to accord with a conception of human rights as politically and socially contingent constructions. Therefore, those in the community who are affected by the exercise of these liberties should have a say in their regulation. The resultant decisions may be controversial and uncertain but this merely reflects the uncertainty and acute controversy that often attends police decisions today.<sup>17</sup> The improvement that would result would be that at least the decisions would have involved the people whose lives are touched by it. The values and interests would clash in a more politically transparent manner. If liberty prevailed or was restricted it would be seen to be the result of clear but contested political choices. However, the local view would be constrained by a statutory framework that accorded priority to the liberties to assemble but the local community, along with representatives of the national interest, should ideally have a say in the particular decisions within this general framework.

Concentration on the specific liberties to assemble consequently leads to a wider outlook that even raises the issue of structures of police governance. However, the question that then follows is how can this structure be changed in order to meet the demands outlined above? It has been argued that this may be done by expanding the role of the local police authority (especially as regards its representation of the local interest) in England and further decentralising the relatively centralised police forces in France. These are

---

<sup>16</sup> Chap.I.

<sup>17</sup> For example, the London-wide ban that caught the procession arranged by CARAF and led to the cases of Kent v MPC and Christians Against Racism And Fascism v UK, *supra*.

broad measures but are claimed to be essential. However, despite their importance, they are not adverted to in the Bill of Rights debate in the UK. This should not be surprising, given the failure to analyse specific liberties and the insistence on a very broad and general method of protecting human rights. Turning the focus of attention to the French system with its similar tradition of parliamentary sovereignty leads to these questions being adverted to.

Despite these criticisms, it has been underlined that there is a role for a Bill of Rights. After all, the Cc in France, despite being a political organ, has drawn inspiration from such a text; the 1789 Declaration.<sup>18</sup> From where would the similar body that has been argued for in England draw its catalogue of rights? Similarly, is there not a need to re-inculcate a culture of liberty in both citizens and officials in England? Is this not best achieved by a Bill of Rights - containing a provision or provisions covering the liberties to meet and to process? Once again, a Bill of Rights may indeed have a role to play here.

Despite the dominance of the constitutional view in the Bill of Rights debate, there is also a fundamental role to be played by statute and politics. However, caution has been counselled in interpreting this as denying any role for a Bill of Rights. Nevertheless, it does follow from the conception of human rights adopted here that a Bill of Rights should be employed with extreme caution because as traditionally conceived it would put a brake on change and it would lack the degree of precision required to protect the liberties under study. The same may not be true for all liberties and it may be possible to enact constitutional provisions for certain human rights.<sup>19</sup> Even so the problem of change remains.

Consequently, it is suggested that if a Bill of Rights is used it should be open to change and not be shielded from it as has traditionally been the case.<sup>20</sup> Procedures to ensure ready change would then be imperative. In addition, such provisions must not claim to enshrine values that are over and above the

---

<sup>18</sup> Chap.II, section II and see generally B. Nicholas, 'Fundamental Rights and Judicial Review in France' P.L. [1978] 82 & 155.

<sup>19</sup> This might, for example, be the case for the freedom of expression. This term has been suggested to actually cover a wide variety of human rights (chap.VI, section III) and a constitutional enactment could serve as a statement of intent and principle.

<sup>20</sup> Waldron, (1993), *op. cit.*

body politic. It should always be clear that human rights are constructed and this would be made easier by leaving rights open to change. This study therefore leaves the door open for the employment of a Bill of Rights but subject to the correction of certain problematic elements as regards change. Once these have been remedied, a Bill of Rights may be of use in re-establishing a culture of liberty but as has been argued above, statutes should provide the mainstay of protection by laying down detailed and specific regulation.

In response to the question as to where a political organ along the lines of the Cc would derive the rights it is to protect, it is contended that this should not be from a *de novo* Bill of Rights but based on the Convention. However, this should be achieved on a statutory basis, in order to facilitate and ensure the possibility of change.<sup>21</sup> Therefore, a review organ could be set up which would review Parliamentary Bills upon request from a prescribed number of politicians from either House. The same statute that sets up this body could also provide that such bills were to be reviewed to see if they were contrary to the provisions derived from the Convention.<sup>22</sup> This would not necessarily mean incorporating the Convention because its provisions could be simply copied into the establishing statute. By reason of the statutory basis of these measures, they could be repealed or amended by a future parliament. Parliamentary sovereignty would therefore remain intact but be limited by a concern for human rights. This concern would be political because the review

---

<sup>21</sup> This method of incorporating the Convention is not novel, and in any case no international treaty can be made a part of English law without a statute being passed to this effect; see, Jaconelli, *op. cit.*, 261-70 and A.Z. Drzemczewski, 'European Human Rights Convention in Domestic Law: A Comparative Study' (1983), 177-87 and for a recent explanation of this rule, see Sir J. Laws, 'Is The High Court The Guardian of Fundamental Constitutional Rights?' P.L. [1993] 59 at 61;

'The true basis for the rule is surely this: since a treaty is made by the Executive, generally as an act of prerogative power, it cannot have the force of law for the very good reason that the Crown is not a source of law: the only sources of law under our constitution are the other two arms of government, the Judiciary and the Legislature.'

The benefit of the Convention is that it is already drawn on by the judiciary as providing guidance for the protection of human rights; for recent cases to this effect, see Rantzen v Mirror Group Newspapers [1993] 1 All E.R. 42, R. v Chief Metropolitan Stipendiary Magistrate ex. p. Choudhury [1991] 1 All E.R. 306 and Derbyshire County Council v Times Newspapers Ltd. [1991] 4 All E.R. 795 (and c.f. Lord Browne-Wilkinson, 'The Infiltration of A Bill of Rights' P.L. [1992] 397).

<sup>22</sup> This proposal may seem less novel than it appears when it is recalled that a Human Rights Commission and a Human Rights Council to advise Parliament on statutory bills have been proposed in the past, see Zander, *op. cit.*, 87 and chap.I, section I.

body would be composed of political nominees. In such a way it would occupy political space and constitute a compromise between respect for human rights and politico and social change.

Of course, there is nothing to stop the review body drawing the rights from a series of statutes, in which each one laid down the detailed regulation of a specific right and directed the body to review proposed statutes against such rights. However, given the political will that would be required, the large degree of disagreement as to liberties and the tight legislative calendar, it might be more realistic to turn to a ready made text, so to speak, that enjoys wide support. In any case, statutes would still be needed to direct judges and officials as far as the regulation of liberties beyond the review of proposed legislation. This detail has been shown to be lacking in the Convention as far as certain aspects of the regulation of the liberties to assemble, for example, as regards sanctions.<sup>23</sup> What is therefore proposed here is a minimal role for the Convention and one that must be supported by statute. The establishing statute or statutes could also include rights that are not in the Convention and similarly, leave out those that it is felt are not relevant according to current values.

Laying down detailed provisions as regards the review of Parliamentary bills is not intended to be carried out here and so only what are considered to be the essential features have been considered. The precise content and rules of political review must be the product of political procedures and choices. The essential features that should however be retained are change, the political conception of civil liberties and a means of according value to human rights. Thus, as with a Bill of Rights, there remain possible limited uses for the Convention. However, these are strongly conditioned by the need to keep open avenues for affecting social and political change in order to reflect changes in socio-political values and the need to focus on a range of issues that affect the protection of human rights.

Finally, in criticising the Bill of Rights debate the intention has also been to provide a compromise that both sides could find acceptable or at least use as a basis for further negotiation. Therefore, by insisting on statutory enactments

---

<sup>23</sup> Chap.IX.

an attempt has been made to leave parliamentary sovereignty intact. On the other hand, the calls for the political review of laws, better judicial review, the improvement of structures of police governance and other reforms have been motivated by a need to create a framework to better protect and respect human rights. These reforms are based upon the study of two liberties and the same method can and should be used to reveal the specific needs and contexts of each civil liberty. The Bill of Rights debate should be replaced by a debate as to how best to protect human rights and it should be informed by a theoretical perspective which states *why* these rights are so special as to merit special protection.

### SECTION III

#### HUMAN RIGHTS IN THE EU: TOWARDS COMMON TRADITIONS

The practical problem of how to ensure that Union institutions respect human rights was seen above to have been responded to in Nold v Commission. In this case it was stated that civil liberties would be protected by the ECJ according, *inter alia*, to the constitutional traditions common to the Member States. It was then argued in this essay that this formulation raised the need for a method by which to discern what was a common tradition, in short, a method derived from comparative theory.<sup>24</sup> This conclusion was based upon the assumption that the judges of the ECJ were taken to be serious in their intention of deriving protection from a European tradition as opposed to simply imposing their own value judgements.

Therefore, assuming the Nold formulation can be taken at face value, this study has attempted to show the type of analysis that judges must engage in and a way of assessing their judgements, or more precisely, the common traditions that they arrive at. What this method of comparative civil liberties entails will firstly be set out before looking at the results of employing that methodology; in other words what is the common tradition of the liberties of assembly as between France and England. Finally, suggestions as to how this tradition should be improved are then made.

---

<sup>24</sup> Chap.II, section III.

Comparative civil liberties in the context of the EU firstly require that specific civil liberties are analysed. Thus, in this study the liberties to assemble were looked at. The specific problems and tensions concerning these liberties were brought to the surface.<sup>25</sup> As a result, it is suggested that in order to identify common traditions, judges will have to analyse specific human rights.

Secondly, analysis has used history, in the sense of looking at the histories of the liberties concerned in order to illustrate its importance for understanding current regulation. Consequently, history has been seen to have left a large imprint on the way the liberties are regulated today. For example, the public order crises in the 1930s still to a great extent (more so in England than in France<sup>26</sup>) colours the present framework in which the liberties are regulated. Moreover, traditions are formed over time. This may seem trite but the study has shown that it would be inaccurate merely to look at current regulation without its preceding history. The ECJ must therefore avoid this kind of snapshot view. In order to discern tradition it must engage in historical investigation and comparison.

Thirdly, a comparative study should minimise the risks of imposing particular cultural value-judgements on the practices of others. It follows that conceptions such as human rights and the specific liberties under study, must be formulated in such a way as to be capable of encompassing the different perspectives of the jurisdictions to be compared. As a consequence, much time was spent in seeking a definition of the rights to assemble that would neither prioritise French nor English conceptions.<sup>27</sup> Such a conception was derived from theory and this leads to the fourth point; the relevance of theory to practical questions.

The judges of the ECJ must be clear as to the nature of the rights they seek to protect. More particularly, what are these rights and why should they be protected? The jurisprudential view in this study provides a response and what is more a response that does not seem to prioritise the view of one Member State over another. This is achieved by claiming that human rights

---

<sup>25</sup> Chaps.VI-IX.

<sup>26</sup> Consider, for example the 1881 Act and art.431-1 of the new penal code in France, which are not a product of this turbulent period.

<sup>27</sup> Chap.III, section II.

represent social values, this provides room for different constructions, according to different traditions. The one insistence of the theory was that human rights were valued because of their potential to effect social and political change. Nevertheless, it was conceded that other theories might construct liberties in other ways.

At the same time, comparative theory was again shown to be important. Without it there was a temptation not to carry out comparison between France and England on the grounds that they belonged to different legal families that were diametrically opposed to one another.<sup>28</sup> Using the comparative method to its full potential means looking at substance as opposed to being content with surface form. From this standpoint, it was revealed that France and England shared a similar scepticism towards higher law, a belief in the sovereignty of Parliament and proceeding from this basis, a tradition of meeting and processing.<sup>29</sup> By reason of the fact that Member States of the EU belonging to different legal families,<sup>30</sup> a theoretical perspective that looks beyond form to substance seems essential if common constitutional traditions are really to be identified.

The final point is the most controversial because it is explicitly normative and activist. Comparing the common constitutional traditions of the Member States might reveal traditions of systematic restriction of a liberty. Does this mean that the ECJ should view such traditions as a source of inspiration as to how civil liberties are to be treated? Firstly, it should be recalled that the ECJ has laid down other sources from which it will derive inspiration: international treaties to which Member States are signatories and the objectives of the EU.<sup>31</sup> Nevertheless, an important source remains the common constitutional traditions of the Member states and furthermore it may be that it will be given more weight than the other sources. In any case, the question remains, what are the judges to do in the face of a discovery of an illiberal tradition?

---

<sup>28</sup> Chap.II, section I.

<sup>29</sup> Chap.III, section I

<sup>30</sup> Using the legal families identified by Zweigert & Kötz, *op. cit.*, 75, the EU consists of legal systems from the Romanistic, Germanic, Nordic and Common Law families.

<sup>31</sup> For example, Nold, *op. cit.*, Hauer v Land Rheinland - Pfalz, *op. cit.*, and National Panasonic v Commission, *op. cit.*; see chap.II, section III.



In this thesis it has been suggested that there is a normative element to comparison, thus comparative evaluation adopted, *inter alia*, comparative criteria derived from the jurisprudential perspectives set out in Part I.<sup>32</sup> These were employed in order to evaluate the degree to which civil liberty, as formulated by the jurisprudential theory, was respected by the law in France and England. It is not suggested that these exact same criteria and the same background theory of rights should be applied by the ECJ but rather that they should be prepared to make normative decisions in very much the following manner: 'yes, the tradition between the Member States reveals an illiberal practice but nevertheless it *ought* to be as follows..'. A purely *reflexive* comparative method may not necessarily protect liberties, whereas protection is more likely to be secured where this approach is combined with a normative theory. It is in this second sense that it is strongly contended that judges should act.

To act in this way is no longer to solely derive standards from traditions. What is urged is to leave the path that tradition indicates, no matter how strongly, where not to do so would be restrictive of liberty. Perhaps this might not prove necessary where traditions reveal practices that uphold liberties but in the event of a worst case scenario it is argued that a mechanical application of a restrictive tradition turns the ultimate aim of protecting human rights in the EU on its head. Normative theory can also be used to assess the protection that is accorded by the ECJ in its judgements because it provides a yardstick of what ought to be. Such an evaluative criteria is important if there is to be some means to check if liberties are being sufficiently protected.

So much for the method of comparative civil liberties. The next area of interest is the results that employing this method has yielded; in other words, what is the common constitutional tradition between France and England as regards the liberty to assemble? The response can be set out as follows:

(a) It has been shown that the two jurisdictions recognise (although to different degrees) two distinct but related liberties - the liberty to meet and

---

<sup>32</sup> Chap.VI, section I.

the liberty to process. Thus, these two socially valued activities are subject to different legal regimes, which reflect different and specific problems.

(b) The liberties may be restricted on the grounds of violence or because they infringe the interests or rights of others or society at large, such as the circulation of traffic or the rights of passage. Therefore, the liberties are not absolute and are given differing values in each system, but what is common to both is that the liberties must be weighed up against other interests and rights and they may not always prevail.

(c) The liberties are seen as performing a variety of functions; democratic, safety-valve, self-fulfilment and protest. There is no agreement as to one particular and exclusive function, apart from expression, but even if this view is accepted, there are different views as to the value of expression. In consequence, the liberties can be claimed to be multi-functional.

(d) Heavy reliance, despite the presence of quite detailed regulation, is placed on a kind of catch-all, original power in the hands of the police. This is the main source of the police discretion that is so often applied to the liberties. The precise contours of these powers is uncertain because they are extremely reflexive and flexible in the face of unforeseen and ever-changing circumstances. By reason of their antiquity, their fundamental nature and existence are to all intents and purposes beyond challenge. However, they are generally limited to the function of preventing public disorder, even though this is defined differently in the two jurisdictions.

(e) The liberty to meet enjoys a privileged position in both systems in terms of banning powers, in that a greater justification is required to ban meetings than for processions. This is claimed to reflect a view that there is less chance of public disorder resulting from the exercise of the liberty to meet and it is a more important medium for the freedom of expression function of the liberties to assemble. Interestingly, religious and traditional marches are for similar reasons treated more liberally than ordinary marches, since they are commonly exempted from an obligation that is imposed on ordinary marches of having to provide written notice.

(f) The authorities in both systems commonly subject assemblies to restrictive regulation as regards locations. This seems to be based upon excluding

assemblies from areas where they may infringe upon other rights and interests, be they of other persons or the community as a whole. This is especially the case as regards the liberty to meet and the public highway.

(g) Both jurisdictions share a history of exercising the liberties to assemble and they have often been used as a means for calling for change or expressing protest. In response, they have sometimes met with forceful and violent repression at the hands of the authorities and restrictive measures, often under the guise of preventing violence have often curtailed peaceful assemblies. By reason of this history they are claimed to be closely linked to the political and social culture of the two Member States.

(h) The historical background of the liberties also reveals that they have often been regulated via texts that have had public disorder as their first concern. This has generally not made for a regulatory framework that sets out the conditions by which those who wish to peacefully assemble may do so and also be protected from attempts to curtail this exercise. When regulation has occurred with liberty in mind, this has been accompanied by a view that the particular activity does not generally present a public order problem.

(i) In neither of the systems is there a tradition of positive action on the part of the authorities in order to secure the liberty. Thus there is no tradition of setting aside specific locations in which assemblies are a priority activity. Instead, the focus of regulation has been on preventing interference from the authorities. This has meant that there has generally been felt to be little need to take 'affirmative action' to protect the liberties from restriction from other members of society.

(j) In both systems an attempt is made to accommodate central and local interests in the regulation of the liberties. Police structures therefore reflect the involvement of central and local viewpoints.

These are the results of the comparison between France and England. They are the result of a synthesis that is concerned to identify common aspects of regulation. However, there are some areas which *ought* to be included in the tradition but which are not shared between the jurisdictions or are not found in either of them. These will set out here.

Neither jurisdiction has a statutory framework for negotiations between police and assembly organisers over bans and conditions, despite evidence that this is a regular practice and that certain provisions have been enacted with the aim of encouraging such steps. It is suggested that statutes should formulate negotiatory procedures so that, where reasonable, the police, organisers and other interested parties should consult and negotiate. Such a framework could also embody wider participation in the negotiations and consultation so as to include, for example, local businesses, residents and community groups; in this way a wider degree of political participation in decisions than merely that of local and central government could be achieved. This would better capture the extent of political controversy that is sometimes involved in regulating the liberties.

It follows that the common tradition should provide the means by which those affected by the exercise of the liberty can be heard and participate in its regulation. This point essentially calls for local interests and not merely the local police, to be heard. The result would be that local differences and interests could conflict and be resolved openly and clearly. The political choices and compromises involved would also be more apparent and be seen as integral to the exercise and regulation of the liberties.

A common tradition should also insist that public forums are set aside. The state should be obliged to provide locations whose primary use would be the exercise of assembly rights. This should not however mean that such activities are then to be restricted to these locations but it does ensure that those who wish to exercise their rights are accorded a priority.

Similarly, the common tradition should contain emergency procedures by which restrictions on the liberties can be reviewed quickly. That such a system can work has been shown by the French example. The inclusion of such a mechanism in the protection of the liberties in the EU would reflect the delicate nature of the liberties in terms of time and this in turn would reflect their social importance.

The previous legal measure and the last one below that ought to be included within the tradition are of a more general nature and were also present in France but not in England. Hence, the tradition should contain an emphasis on specific statutes regulating the liberties, perhaps containing a statement of

principle and exacting judicial review which could, if necessary, extend to the merits of the decision. The arguments in favour of these points have been made at several points above and do not need to be repeated here, suffice it to say that they accord greater protection to the liberties, given the theoretical view of human rights that underpins this study.

Lastly, it should be underlined that this resulting tradition of the liberties to assemble in France and England is but one step in the formulation of a European-wide tradition; the laws of other Member States must be investigated and what is more, this needs to be done for each liberty. Nevertheless, England and France represent important elements in this tradition, especially as regards the liberties under study, as history shows. Perhaps an alternative method may be chosen by which to effect this task but it is submitted that any alternative must by the very nature of the enterprise make use of theory (both comparative and jurisprudential) and in some way introduce and apply theoretical perspectives to human rights law, as has been attempted in this study.

## BIBLIOGRAPHY

### BOOKS IN ENGLISH

ABERNATHY, M.G. (1977) Civil Liberties Under The Constitution, (New York: Harper & Row)

ALTHUSSER, L. (1972) Lenin and Philosophy, (London: New Left Books)

AQUINAS, T. (1267-1273) Summa Theologicae, (Trans. J.G. Dawson) (1970) (Oxford: Basil Blackwell)

ARBLASTER, A. (1984) The Rise and Decline of Western Liberalism, (Oxford: Basil Blackwell)

AUSTIN, J. (1832) The Province of Jurisprudence Determined, (1954) (London: Weidenfeld & Nicholson)

AUSTIN, J.L. (1970) Philosophical Papers, (Oxford: Oxford University Press)

AUSTIN, J.L. (1975) How To Do Things with Words, (Oxford: Clarendon Press)

AYER, A.J. (1936) Language, Truth and Logic, (London: Penguin Books)

BAKER, C.E. (1989) Human Liberty and Freedom of Speech, (New York: Oxford University Press)

BAILEY, S.H., HARRIS, D.J. & JONES, B.L. (1991) Civil Liberties: Cases and Materials, (London: Butterworths)

BARENDT, E. (1987) Freedom of Speech, (Oxford: Clarendon Press)

BEDAU, H.A. (ed.) (1969) Civil Disobedience: Theory and Practice, (New York: Pegasus)

BELL, J. (1992) French Constitutional Law, (Oxford: Clarendon Press)

BENYON, J. & SOLOMOS, J. (eds.) (1987) The Roots of Urban Unrest, (Oxford: Pergamon)

BERLIN, I. (1969) Four Essays on Liberty, (Oxford: Oxford University Press)

BERLIN, I (1980) Concepts and Categories: Philosophical Essays, (Oxford: Oxford University Press)

BERMAN, H.J. (1983) Law and Revolution: The Formation of the Western Legal Tradition, (Cambridge: Harvard University Press)

BERNARD, P. & DUBRIEF, H. (1985) The Decline of The Third Republic: 1914-1938, (Cambridge: Cambridge University Press)

BLACKBURN, R. (ed.) (1993) Rights of Citizenship, (London: Mansell)

BONNER, D. (1985) Emergency Powers in Peacetime, (London: Sweet & Maxwell)

BOWERING, J. (ed.) (1843) The Works of Jeremy Bentham, (Edinburgh: Edinburgh University Press)

BOYNE, R. (1990) Foucault and Derrida: The Other Side of Reason, (London: Routledge, Chapman & Hall)

BRIDGE, J.W., LASOK, D., PERROTT, D.L. & PLENDER, R.O. (eds.) (1973) Fundamental Rights, (London: Sweet & Maxwell)

BROGAN, D.W. (1940) France Under The Republic: The Development of Modern France, (Westport: Greenwood Press)

BURNS J.H. & HART, H.L.A. (eds.) (1970) The Collected Works of Jeremy Bentham, (London: Athlone Press)

CAENEGUM, R.C. (1987) Judges, Legislators and Professors: Chapters in European Legal History, (Cambridge: Cambridge University Press)

CAMPBELL, C. (ed.) (1980) Do We Need A Bill of Rights?, (London: Temple Smith)

CAMPBELL, T., GOLDBERG, D., McLEAN, S. & MULLEN, T. (eds.) (1986) Human Rights: From Rhetoric to Reality, (Oxford: Basil Blackwell)

CAPPELLETTI, M. (1989) The Judicial Process in Comparative Perspective, (Oxford: Clarendon Press)

CARD, R. (1987) Public Order: The New Law, (London: Butterworths)

- CARTY, A. (ed.) (1990) Post-Modern Law: Enlightenment, Revolution and the Death of Man, (Edinburgh: Edinburgh University Press)
- CASESSE, A. (1986) International Law in A Divided World, (Oxford: Clarendon Press)
- CASESSE, A. (1990) Human Rights in A Changing World, (Cambridge: Polity Press)
- COBB, R. (1972) The Police and The People: French Popular Protest 1789-1820, (London: Oxford University Press)
- COBBAN, A. (1978) A History of Modern France, vol.III (London: Cape)
- COLLINS, H. (1982) Marxism and Law, (Oxford: Oxford University Press)
- CONKLIN, W.E. (1979) In Defence of Fundamental Human Rights, (Alphen aan Rijn: Sijthoff and Noordhoff)
- CRAIG, P.P. (1990) Public Law and Democracy in the United Kingdom and the United States of America, (Oxford: Clarendon Press)
- CRANSTON, M. (1973) What Are Human Rights?, (Oxford: Bodley Head)
- CROSS, C. (1961) The Fascists in Britain, (London: Barrie & Rockcliff)
- DADOMO, C. & FARRAN, S. (1993) The French Legal System, (London: Sweet & Maxwell)
- DANIELS, N. (ed.) (1975) Reading Rawls: Critical Legal Studies on Rawl's A Theory of Justice, (Oxford: Basil Blackwell)
- DAVID, R. & BRIERLEY, J.E.C. (1985) Major Legal Systems in the World Today, (London: Stevens & Sons)
- DAVIDSON, S. (1993) Human Rights, (Oxford: Oxford University Press)
- D'ENTRÈVES, A.P. (1970) Natural Law: An Introduction to Legal Philosophy, (London: Hutchinson)
- DICEY, A.V. (1885) Introduction to the Study of the Law of the Constitution, (1959) (London: Macmillan Press)



- DÍEZ-PICAZO, L.M<sup>a</sup>. & PONTTHOREAU, M.C. (1991) The Constitutional Protection of Human Rights: Some Comparative Remarks, (Florence, European University Institute)
- DONNELLY, J. (1989) Universal Human Rights Theory and Practice, (Ithaca: Cornell University Press)
- DOUZINAS, C., WARRINGTON, R. & MCVEIGH, S. (1991) Postmodern Jurisprudence: The Law of Text in the Texts of Law, (London: Routledge)
- DRZEMCZEWSKI, A.Z. (1983) European Human Rights Convention in Domestic Law: A Comparative Study, (Oxford: Clarendon Press)
- DURKHEIM, E. (1912) The Elementary Forms of Religious Life, (1982) (London: George Allen & Unwin)
- DWORKIN, R. (1978) Taking Rights Seriously, (London: Duckworth)
- DWORKIN, R. (1986) Law's Empire, (London: Fontana Press)
- DWORKIN, R. (1990) A Bill of Rights for Britain, (London: Chatto & Windus)
- EDWARDS, S. (1971) The Paris Commune, 1871, (London: Eyre & Spottiswoode)
- ERHMANN, H.W. (1976) Comparative Legal Cultures, (Englewood Cliffs: Prentice-Hall)
- EWING, K.D. & GEARTY, C. (1990) Freedom Under Thatcher: Civil Liberties in Modern Britain, (Oxford: Clarendon Press)
- FELDMAN, D. (1993) Civil Liberties and Human Rights in England and Wales, (Oxford: Clarendon Press)
- FINNIS, J. (1980) Natural Law and Natural Rights, (Oxford: Clarendon Press)
- FITZPATRICK, P. & HUNT, A. (eds.) (1987) Critical Legal Studies, (Oxford: Basil Blackwell)
- FITZPATRICK, P. (ed.) (1991) Dangerous Supplements: Resistance and Renewal in Jurisprudence, (London: Pluto Press)
- FITZPATRICK, P. (1992) The Mythology of Modern Law, (London: Routledge)

GASKELL, G. & BENEWICK, R. (eds.) (1987) The Crowd in Contemporary Britain, (London: Sage)

GAUTHIER, D. (1986) Morals By Agreement, (Oxford: Clarendon Press)

GEWIRTH, A. (1982) Human Rights: Essays on Justifications and Applications, (Chicago: University of Chicago Press)

GLENDON, M.A., GORDON, M.W. & OSAKE, C. (1985) Comparative Legal Traditions: Text, Material and Cases on Civil Law, Common Law and Socialist Traditions, with special reference to French, West German, English and Soviet Law, (St Paul: West Publishing)

GOSTIN, L. (ed.) (1988) Civil Liberties in Conflict, (London: Routledge)

GRAHAM, C. & PROSSER, T. (1988) Waiving the Rules: The Constitution Under Thatcherism, (Milton Keynes: Open University Press)

GRIGG-SPALL, I. & IRELAND, P. (eds.) The Critical Lawyer's Handbook, (London: Pluto Press)

GROSSFELD, B. (1990) The Strength and Weakness of Comparative Law, (Trans. T. WEIR) (Oxford: Clarendon Press)

GUTTERIDGE, H. (1971) Comparative Law: An Introduction to the Comparative Method of Legal Study and Research, (London: Wildy)

HÄGERSTRÖM, A. (1953) Inquiries into the Nature of Law and Morals, (Trans. C. BROAD) (Stockholm: Almqvist and Wiksell)

HALL, P., HAYWARD, J. & MACHIN, H. (eds.) (1990) Developments in French Politics, (London: Macmillan)

HAMPSON, N. (1983) Will and Circumstance: Montesquieu, Rousseau and The French Revolution, (London: Duckworth)

HARDEN, I. & LEWIS, N. (1986) The Noble Lie: The British Constitution and The Rule of Law, (London: Hutchinson)

HARLOW, C. (ed.) (1986) Public Law and Politics, (London: Sweet & Maxwell)

HART, H.L.A. (1961) The Concept of Law, (Oxford: Clarendon Press)

HART, H.L.A. (1982) Essays on Bentham: Jurisprudence and Political Theory, (Oxford: Clarendon Press)

HART, H.L.A. (1983) Essays in Jurisprudence and Philosophy, (Oxford: Clarendon Press)

HARTLEY, T.C. (1981) The Foundations of European Economic Community Law: An Introduction to the Constitutional and Administrative Law of the European Community, (Oxford: Clarendon Press)

HAYWARD, J.E.S. (1983) Governing France: The One and Indivisible Republic, (London: Weidenfeld & Nicholson)

HENKIN, L. (1979) The Rights of Man Today, (London: Stevens & Sons)

HOBBSAWM, E. (1959) Primitive Rebels, (Manchester: Manchester University Press)

HOGGART, R. (ed.) (1989) Liberty and Legislation, (London: Chatto & Windus)

HOHFELD, W.N. (1919) Fundamental Legal Conceptions As Applied In Judicial Reasoning, (New Haven, Connecticut: Yale University Press)

HUME, D. (1740) A Treatise of Human Nature (1985) L.A. Selby-Bigge (ed.) (Oxford: Clarendon Press)

HUTCHINSON, A.C. (1988) Dwelling on the Threshold: Critical Essays in Modern Legal Thought, (Toronto: Carswell)

INSTITUTE FOR PUBLIC POLICY RESEARCH (1991) The Constitution of the United Kingdom, (London: IPPR)

JACONELLI, J. (1980) Enacting a Bill of Rights, (Oxford: Clarendon Press)

JARDIN, A. & TUDESQ, A-J. (1983) Restoration and Reaction, 1815-1848, (Trans. E. FORSTER) (Cambridge: Cambridge University Press)

JEFFREY, K. & HENNESSY P. (1983) States of Emergency, (London: Routledge, Kegan Paul)

JOSEPH, Sir Keith (1975) Freedom Under the Law, (London: Conservative Political Centre)

- JOWELL, J. & OLIVER, D. (eds.) (1988) New Directions in Judicial Review, (London: Stevens & Sons)
- JOWELL, J. & OLIVER, D. (eds.) (1989) The Changing Constitution, (Oxford: Clarendon Press)
- KAIRYS, D. (ed.) (1982) The Politics of Law, (New York: Pantheon Books)
- KALVEN, H. (1965) The Negro and The First Amendment, (Columbus: Ohio State University Press)
- KELLY, D.R. (1990) The Human Measure: Social Thought in the Western Legal Tradition, (Cambridge: Harvard University Press)
- KHAN-FREUND, O., LÉVY, C. & RUDDEN, B. (1991) A Source-Book on French Law: Public Law: Constitutional and Administrative Law: Private Law: Structure, Contract, (Oxford: Clarendon Press)
- KIDD, R. (1940) British Liberty in Danger: An Introduction to the Study of Civil Rights, (London: Lawrence & Wishart)
- KRAMER, M. H. (1991) Legal Theory, Political Theory and Deconstruction: Against Rhadamanthus, (Indiana: Indiana University Press)
- LACEY, M.J. & HAAKONSSSEN, K. (eds.) (1991) A Culture of Rights: The Bill of Rights in philosophy, politics and law, (Cambridge: Cambridge University Press)
- LEFEBVRE G. (1967) The French Revolution: from 1793-1799, (London: Routledge & Kegan Paul)
- LILLY, M. (1984) The NCCL: The First Fifty Years, (UK: NCCL)
- LLOYD, Lord & FREEMAN, M.D.A. (1985) Introduction to Jurisprudence, (London: Stevens & Sons/English Language Book Society)
- LOCKE, J. (1689), Two Treatises of Government', (1960) P. Laslett (ed.) (Cambridge: Cambridge University Press)
- LOCKHART, W.B., KAMISAR, Y., CHOPER, J.H. & SHIFFRIN, S.H. (1991) Constitutional Rights and Liberties: Cases - Comments - Questions, (St. Paul: West Publishing)
- LOUGHLIN, M. (1992) Public Law and Political Theory, (Oxford: Clarendon Press)

- LUNDSTEDT, A.V. (1956) Legal Thinking Revised, (Stockholm: Almqvist & Wiskell)
- LUSTGARTEN, L. (1986) The Governance of the Police, (London: Sweet & Maxwell)
- MacCORMICK, N. (1982) Legal Right and Social Democracy: Essays in Legal and Political Philosophy, (Oxford: Clarendon Press)
- MACKIE, J.L. (1977) Ethics: Inventing Right and Wrong, (London: Harmondsworth)
- MARSHALL, G. (1984) Constitutional Conventions: The Rules and Forms of Political Accountability, (Oxford: Oxford University Press)
- MARSTON, J. (1987) Public Order: A Guide to the 1986 Public Order Act, (London: Fourmat Publishing)
- MAWBY, R.I. (1990) Comparative Policing Issues: The British and American System in International Perspective, (London: Unwin Hyman)
- McCLELLAND, J.S. (1988) The Crowd and the Mob: From Plato to Canetti, (London: Unwin Hyman)
- McCLUSKEY, Lord (1987) Law, Justice and Democracy, (London: Sweet & Maxwell/BBC Publications)
- McCRUDDEN, C. & CHAMBERS, G. (eds.) (1994) Individual Rights and the Law in Britain, (Oxford: Clarendon Press)
- McFARLANE, L.J. (1985) The Theory and Practice of Human Rights, (London: Temple Smith)
- McLELLAND, D. (ed.) (1977) K. Marx: Selected Writings, (Oxford: Oxford University Press)
- McMILLAN, J.F. (1985) Dreyfus to de Gaulle: Politics and Society in France 1898-1969, (London: Arnold)
- McPHAIL, C. (1991) The Myth of the Madding Crowd, (New York: Aldine de Gruyter)
- MEIKLEJOHN, A. (1965), Political Freedom: The Political Powers of the People, (New York: Harper)

MERON, T. (ed.) (1984) Human Rights in International Law, (Oxford: Clarendon Press)

MERRYMAN, J.H. (1985) The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, (Stanford: Stanford University Press)

MILL, J.S. (1849) On Liberty, (1988) (London: Penguin Books)

MOORE, M. (1993) Foundations of Liberalism, (Oxford: Clarendon Press)

MORRIS, C. (1946) Signs, Language and Behaviour, (New York: George Brazillier)

MUNROE, C. (1987) Studies in Constitutional Law, (London: Butterworths)

NEVILLE BROWN, L. & BELL, J.S. (1993) French Administrative Law, (Oxford: Clarendon Press)

NEWMAN, R.A. (ed.) (1962) Essays in Honour of Pound, (Connecticut: Greenwood Press)

NORTON, P. (1982) The Constitution in Flux, (Oxford: Martin Robertson)

NOZICK, R. (1971) Anarchy, State and Utopia, (Oxford: Basil Blackwell)

OLIVECRONA, K. (1939) Law as Fact, (Stockholm: Ejnar Munksgaard)

PALLEY, C. (1991) The United Kingdom and Human Rights, (London: Stevens & Sons/Sweet & Maxwell)

PENNOCK, J.R. & CHAPMAN, J.W. (eds.) (1981) Human Rights, (New York: New York University Press)

PENNOCK, J.R. & CHAPMAN, J.W. (eds.) (1982) Ethics, Economics and the Law, (New York: New York University Press)

RAPHAEL, D.D. (1967) Political Theory and The Rights of Man, (London: Macmillan Press)

RAWLS, J. (1972) A Theory of Justice, (Oxford: Oxford University Press)

- RAZ, J. (1986) The Morality of Freedom, (Oxford: Clarendon Press)
- ROBERTSON, G. (1989) Freedom, The Individual and the Law, (London: Penguin Books)
- RODGERS, W.V.H. (1989) Winfield & Jolowicz on Tort, (London: Sweet & Maxwell)
- ROSS, A. (1956) On Law and Justice, (London: Stevens & Sons)
- ROSS, A. (1968) Directives and Norms, (London: Routledge & Kegan Paul)
- ROUSSEAU, J. (1762) The Social Contract, (Trans. M. CRANSTON) (London: Penguin Books)
- RUDE, G. (1970) Paris and London in the Eighteenth Century: Studies in Popular Protest, (London: Collins)
- SCHAUER, F. (1982) Free Speech: A Philosophical Enquiry, (Cambridge: Cambridge University Press)
- SHERR, A. (1989) Freedom of Protest, Public Order and The Law, (Oxford: Basil Blackwell)
- SHIRER, W.L. (1970) The Collapse of The Third Republic: An Inquiry into the Fall of France in 1940, (New York: Pocket Books)
- SIEGART, P. (ed.) (1988) Human Rights in the United Kingdom, (London: Pinter Publishers)
- SMART, B. (1985) Michel Foucault, (London: Routledge, Chapman, Hall)
- SMART, J.J.C. & WILLIAMS, B. (1973) Utilitarianism: For and Against (Cambridge: Cambridge University Press)
- SMELSER, N. (1962) Theory of Collective Behaviour, (New York: Free Press)
- SMITH, A.T.H. (1987) Offences Against Public Order Including the Public Order Act 1986, (London: Sweet & Maxwell)
- SOUCY, R. (1986) French Fascism: The First Wave, 1924-1933, (New Haven: Yale University Press)
- STEAD, P.J. (1983) The Police of France, (London; Macmillan)

STEVENS, I.N. & YARDLEY, D.C.M (1982) The Protection of Liberty, (Oxford: Basil Blackwell)

STONE, A. (1992) The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective, (Oxford: Oxford University Press)

STONE, G.R., SEIDMAN, L.M., SUNSTEIN, C.R. & TUSHNET, M.V. (1986) Constitutional Law, (Boston: Little, Brown & Co.)

SUPPERSTONE, M. (1981) Brownlie's Law on Public Order and National Security, (London: Butterworths)

THOMPSON, E.P. (1963) The Making of the English Working Class, (1980) (London: Penguin Books)

THORNBERRY, C. (1976) A Charter of Human Rights, (London: Labour Party)

THORNTON, P. (1987) Public Order Law, (London: Financial Training)

THORTON, P. (1989) Decade of Decline: Civil Liberties in the Thatcher Years, (London: National Council for Civil Liberties)

TRIBE, L.H. (1985) Constitutional Choices, (Cambridge: Harvard University Press)

TRIBE, L.H. (1988) American Constitutional Law, (New York: The Foundation Press, Inc.)

TUCK, R. (1979) Natural Rights Theories: Their Origins and Development, (Cambridge: Cambridge University Press)

TUSHNET, M.V. (ed.) (1992) Constitutional Law, (Aldershot: Dartmouth)

UGLOW, S. (1985) Policing Liberal Society, (Oxford: Oxford University Press)

UNGER, R.M. (1986) The Critical Legal Studies Movement, (Cambridge: Harvard University Press)

VAN DIJK, P. & VAN HOOFF, G.J.H. (1990) Theory and Practice of the European Convention of Human Rights, (Deventer: Kluwer Law & Taxation Publishers)



- VON MEHREN, A.T. & GORDLEY, J.R. (1977) The Civil Law System: An Introduction to the Comparative Study of Law, (Boston: Little Brown)
- WADDINGTON, D., JONES, K. & CRITCHER, C. (eds.) (1989) Flashpoints: Studies in Public Disorder, (London: Routledge)
- WALDRON, J. (ed.) (1984) Theories of Rights, (Oxford: Oxford University Press)
- WALDRON, J. (ed.) (1987) Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man, (London: Methuen Press)
- WALLINGTON, P. & McBRIDE, J. (1976) Civil Liberties and a Bill of Rights, (London: Cobden Trust)
- WATSON, A. (1974) Legal Transplants: An Approach to Comparative Law, (Edinburgh: Scottish Academic Publishers)
- WATSON, A. (1981) The Making of the Civil Law, (Harvard: Harvard University Press)
- WEBER, E. (1962) Action Française: Royalism and Reaction in Twentieth Century France, (Stanford: Stanford University Press)
- WERTH, A. (1942) The Twilight of France: 1933-1940, (New York: Harper & Bros.)
- WHITE, M. (1978) The Philosophy of the American Revolution, (Oxford: Oxford University Press)
- WILLIAMS, D.G.T. (1967) Keeping the Peace: The Police and Public Order, (London: Hutchinson)
- WILLIAMS, R. (1969) The French Revolution of 1870-1871, (London: Weidenfeld & Nicholson)
- WITTGENSTEIN, L. (1953) Philosophical Investigations, (Trans. G.E.M. ANSCOMBE) (Oxford: Oxford University Press)
- WRIGHT, V. (1990) The Government and Politics of France, (London: Unwin Hyman)
- ZANDER, M. (1985) A Bill of Rights, (London: Sweet & Maxwell)

ZWEIGERT, K. & KÖTZ, H. (1987) An Introduction to Comparative Law, (Trans. T. WEIR) (Oxford: Clarendon Press)

## ARTICLES AND REPORTS IN ENGLISH

ALDERSON, J. (1989) 'The Right to Protest', in R. HOGGART (ed.)

ALLAN, T.R.S. (1991) 'Constitutional Rights and Common Law', *Ox.J.L.S.* 453

ALTHUSSER, L. (1972) 'Ideological State Apparatuses', in L. ALTHUSSER

AN, M. (1991) 'Free Speech, Post Office Sidewalks and the Public Forum Doctrine - *United States v Kokinda* 110 S.Ct. 3115 (1990)', *Harv.Civ.Lib.Rev.* 633

BALKIN, J.M. (1987) 'Deconstructive Practice and Theory', *Yale L.J.* 743

BALKIN, J.M. (1987) 'Taking Ideology Seriously: Ronald Dworkin and the CLS Critique', *U.Missouri at K.C.L.Rev.* 492

BARENDT, E. (1985) 'Dicey and Liberties', *P.L.* 596

BARNUM, D.G. (1977) 'The Constitutional Status of Public Protest Activity in Britain and the United States', *P.L.* 310

BELL, J. (1986) 'The Expansion of Judicial Review Over Discretionary Powers in France', *P.L.* 99

BENTHAM, J. (1789) 'An Introduction to the Principles and Morals of Legislation', in J.H. BURNS & H.L.A. HART (eds.)

BENTHAM, J. (1843) 'Anarchical Fallacies: Being An Examination of the Declaration of Rights Issued During the French Revolution', in J. BOWERING (ed.)

BENYON, J. (1987) 'Interpretations of Civil Disorder', in J. BENYON & J. SOLOMOS (eds.)

BERLIN, I. (1969) 'Two Concepts of Liberty', in I. BERLIN (1969), 118

BEVAN, V.T. (1979) 'Protest and Public Order', *P.L.* 163

BIRTLES, W. (1937) 'The Common Law Power of the Police to Control Public Meetings', *M.L.R.* 587

- BLASI, V. (1970) 'Prior Restraints on Demonstrations', *Mich.L.Rev.* 1482
- BONNER, D. & STONE, R. (1987) 'The Public Order Act 1986: Steps in the Wrong Direction?', *P.L.* 202
- BOSTON, Lord (1980) 'Arguments Against A Bill of Rights', in C. CAMPBELL (ed.)
- CAMPBELL, T. (1986) 'Realising Human Rights', in T. CAMPBELL et. al. (1986)
- CARTY, A. (1990) 'Post-Modernism in the Theory and Sociology of Law, or Rousseau and Durkheim as read by Baudrillard', in A. CARTY (ed.)
- CUMMINS, R.J. (1986) 'The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France', *I.C.L.Q.* 594
- DAINTITH, T. (1966) 'Obeying a Policeman: A Fresh Look at Duncan v Jones', *P.L.* 248
- DAUSES, M.A. (1985) 'The Protection of Human Rights in the Community Legal Order', *E.L.R.* 398
- DOUZINAS, C., HOMEWOOD, S. & WARRINGTON, R. (1988) 'The Shrinking Scope of Public Protest', *Index on Censorship* 12
- DOUZINAS C. & WARRINGTON R. (1992) 'The (Im)possible Pedagogical Politics of (the Law of) Postmodernism', in I. GRIGG-SPALL & P. IRELAND (eds.)
- DUNNING, E., MURPHY, P., NEWBURN, T. & WADDINGTON, I. (1987) 'Violent Disorders in Twentieth-Century Britain', in G. GASKELL & R. BENEWICK (eds.)
- DWORKIN, R. (1988) 'Devaluing Liberty', *Index on Censorship* 7
- EUROPEAN COMMISSION (1979) 'Commission Memorandum on Ascension to the European Human Rights Convention', *E.C.Bull.Suppl.* 2/79
- FELDMAN, D. (1988) 'The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers', *C.L.J.* 101
- FINNIS, J. (1985) 'A Bill of Rights for Britain?: The Moral of Contemporary Jurisprudence', *Proceedings of the British Academy* vol.71, 303

- FITZPATRICK, P. (1992) 'Law as Resistance', in I. GRIGG-SPALL & P. IRELAND (eds.)
- FRANK, J. (1948) 'Cardozo and The Upper Court Myth', *Law Cont.Probl.* 369
- FREEMAN, A.D. (1982) 'Anti-Discrimination Law: A Critical Review', in KAIRYS, D. (ed.)
- FULLER, L. (1959) 'Positivism and Fidelity to Law', *Harv.L.Rev.* 630
- GAETE, R. (1991) 'Postmodernism and Human Rights: Some Insidious Questions', *Law & Critique* 149
- GALLIGAN, D. (1988) 'Preserving Public Protest: The Legal Approach', in L. GOSTIN (ed.)
- GASKELL, G. & BENEWICK, R. (1987) 'The Crowd in Context', in G. GASKELL & R. BENEWICK (eds.)
- GEARTY, C. (1994) 'Freedom of Assembly and Public Order', in C. McCRUDDEN & G. CHAMBERS (eds.)
- GOODHART, A.L. (1937) 'Public Meetings and Processions', *C.L.J.* 161
- GOODRICH, P. (1988) 'Law and Modernity', *M.L.R.* 545
- GOODRICH, P. (1990) 'Contractarians: Rousseau in the Year Two Thousand', in A. CARTY (ed.)
- GRIFFITHS, J.A.G. (1979) 'The Political Constitution', *M.L.R.* 1
- GRIGG-SPALL, I. & IRELAND, P. (1992) 'Afterword: Law's (Un)spoken (Pre)sumptuous (Pre)suppositions', in I. GRIGG-SPALL & P. IRELAND (eds.)
- HALL, J.S. (1973) 'The Right of Passage', in J.W. BRIDGE et. al. (eds.)
- HALL, S. (1987) 'Urban Unrest in Britain', in J. BENYON & J. SOLOMOS (ed.)
- HARLOW, C. (1980) "'Public" and "Private" Law: Definition Without Distinction', *M.L.R.* 241

- HART, H.L.A. (1954) 'Definition and Theory in Jurisprudence', *L.Q.R.* 37
- HART, H.L.A. (1958) 'Positivism and the Separation of Morals', *Harv.L.Rev.* 593
- HART, H.L.A. (1975) 'Rawls on Liberty and Its Priority', in N. DANIELS (ed.)
- HEGINBOTHAM, C. (1988) 'Mental Health and Civil Rights', in SIEGART, P. (ed.)
- HOME AFFAIRS COMMITTEE (1980) 'The Law Relating to Public Order', 1979-80 HC 756
- HOME OFFICE (1976) 'Legislation on Human Rights. With Particular Reference to the European Convention. A Discussion Document', (London: H.M.S.O.)
- HOME OFFICE (1985) 'Review of Public Order Law', (Cmnd.9510) (London: H.M.S.O.)
- HORWITZ, M.J. 'The Rule of Law: An Unqualified Good', in D. KAIRYS (ed.)
- HUNT, A. (1987) 'The Critique of Law: What is "Critical" About Critical Legal Theory', in P. FITZPATICK & A. HUNT (eds.)
- HUNT, A. (1990) 'Rights and Social Movements: Counter-Hegemonic Strategies', in *J.L. & Soc.*
- IVAMY, E.R.H. (1949) 'The Right of Public Meeting', *C.L.P.* 183
- JOWELL, J. & LESTER, A. (1988) 'Proportionality: Neither Novel or Dangerous', in J. JOWELL & D. OLIVER (eds.) (1988)
- KELMAN, M. (1981) 'Interpretative Construction in the Substantive Criminal Law', *Stan.L.R.* 591
- KHAN-FREUND, O. (1966) 'Comparative Law as an Academic Subject', *L.Q.R.* 40
- KLARE, K.E. (1982) 'Critical Theory in Labor Relations Law', in D. KAIRYS (ed.)
- KRAMER, M.H. (1988) 'The Rule of Misrecognition in the Hart of Jurisprudence', *Ox.J.L.S.* 401

LABOUR PARTY (1990) 'The Charter of Rights: Guaranteeing Individual Liberty in a Free Society', *Labour Party Document*

LAWS, J. (1993) 'Is The High Court The Guardian of Fundamental Constitutional Rights?', *P.L.* 59

LESTER, A. (1968) 'Democracy and Individual Rights', Fabian Tract No.390

LESTER, A. (1989) 'The Constitution: Decline and Renewal', in J. JOWELL & D. OLIVER (eds.)

LIBERTY (formerly the N.C.C.L.) (1989) 'A Bill of Rights for Britain', *Briefing no.13*

LLEWELLYN, K. (1931) 'Some Realism About Realism', *Harv.L.Rev.* 122

LLOYD, Lord (1976) 'Do We Need A Bill of Rights?', *M.L.R.* 121

LOBBAN, M. (1990) 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820', *Ox.J.L.S.* 307

LYONS, D. (1982) 'Utility and Rights', in J.R. PENNOCK & J.W. CHAPMAN (eds.) (1982)

MacCORMICK, N. (1981) 'Natural Law Reconsidered', *Ox.J.L.S.* 9

MacDONALD, M. (1984) 'Natural Rights', in J. WALDRON (ed.)

MARSHALL, G. (1992) 'Press Freedom and Free Speech Theory', *P.L.* 40

MARX, K. (1844) 'On The Jewish Question', in D. McLELLAND (ed.)

MAZEY, S. (199) 'Paris Outside Paris', in P. HALL et. al. (eds.)

MILNE, A.J.M. (1977) 'Should We Have A Bill of Rights?', *M.L.R.* 389

MINOGUE, K. (1986) 'What is Wrong With Rights', in C. HARLOW (ed.)

MITCHELL, J.B.D. (1960) 'The Flexible Constitution', *P.L.* 332

- MITCHELL, J.B.D. (1965) 'The Causes and Consequences of the Absence of a System of Public Law in the United Kingdom', *P.L.* 95
- MULLEN, T. (1986) 'Constitutional Protection of Human Rights', in T. CAMPBELL et. al. (eds.)
- MURDOCH, J. (1986) 'The Rights of Public Assembly and Procession', in T. CAMPBELL et. al (eds.)
- NEVILLE BROWN, L. & LAVIROTTE, P. (1974) 'The Mediator - A French Ombudsman?', *L.Q.R.* 211
- NICHOLAS, B. (1978) 'Fundamental Rights and Judicial Review', *P.L.* 82 & 155
- NICKEL, J.W. (1982) 'Are Human Rights Utopian?', *Philosophy & Public Affairs* 247
- OLIVECRONA, K. (1962) 'Legal Language and Reality', in NEWMAN (ed.)
- O'NEILL, A. & COPPEL, J. (1992) 'The European Court of Justice Taking Rights Seriously', *C.M.L.Rev.* 669
- PENNOCK, J.R. (1981) 'Rights, Natural Rights and Human Rights - A General View', in J.R. PENNOCK & J.W. CHAPMAN (eds.) (1981)
- RAZ, J. (1984) 'Rights-Based Moralities', in J. WALDRON (ed.) (1984)
- ROSENBAUM, M. (1988) 'Children's Rights', in P. SIEGART, (ed.)
- ROSS, A. (1958) 'Tû-tû', *Harv.L.Rev.* 821
- RUTHERGLEN, G. (1987) 'Theories of Free Speech', *Ox.J.L.S.* 115
- RYAN, A. (1991) 'The British, the Americans, and Rights', in M.J. LACEY & K. HAAKONSSON (eds.)
- SCANLON, T. (1972) 'A Theory of Freedom of Expression', *Philosophy & Public Affairs* 204
- SCARMAN Lord (1975) 'The Red Lion Square Disorders of 15 June 1974', (Cmnd.5919) (London: H.M.S.O.)

- SCARMAN, Lord (1981) 'The Brixton Disorders 10-12 April 1981' (Cmnd.8427) (London: H.M.S.O.)
- SCARMAN, Lord (1980) 'Human Rights: The Current Situation', in C. CAMPBELL (ed.), 2
- SHAW, S. (1988) 'Prisoners' Rights', in P. SIEGART, (ed.)
- SHESTACK, J.J. (1984) 'The Jurisprudence of Human Rights', in T. MERON (ed.)
- SILKIN, S. (1977) 'The Rights of Man and The Rule of Law', *N.I.L.Q.* 3
- SMITH, A.T.H. (1982) 'Breaching the Peace and Disturbing the Quiet', *P.L.* 212
- THOMSON, A. (1992) 'Foreword: Critical Approaches to Law: Who Needs Legal Theory?', in I. GRIGG-SPALL & P. IRELAND (eds.)
- TILLY, C. (1983) 'Speaking Your Mind Without Elections, Surveys, or Social Movements', *Public Opinion Quarterly* 461
- TURKEL, G. (1990) 'Michel Foucault: Law, Power and Knowledge', *J.L. & Soc.*
- TURPIN, C. (1989) 'Ministerial Responsibility: Myth or Reality?', in J. JOWELL & D. OLIVER (eds.)
- WADE, E.C.S. (1938) 'The Law of Public Meeting', *M.L.R.* 177
- WALDRON, J. (1993) 'A Right-Based Critique of Constitutional Rights', *Ox.J.L.S.* 18
- WALLINGTON, P. (1976) 'Injunctions and the Right to Demonstrate', *C.L.J.* 82
- WALLINGTON, P. (1980) 'What Does A Bill of Rights Mean In Practice?', in C. CAMPBELL (ed.), 38
- WEILER, J.H.H. (1987) 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities', *Wash.L.Rev.* 1103
- WILLIAMS, D.G.T. (1978) 'The Law and Public Protest', in *The Cambridge-Tilburg Law Lectures* (Deventer: Kluwer)



WILLIAMS, D.G.T. (1981) 'Civil Liberties and the Protection of Statute', in *C.L.P.* 25

WILLIAMS, D.G.T. (1987) 'Processions, Assemblies and the Freedom of the Individual', *Crim.L.R.* 167

WILLIAMS, G. (1954) 'Arrest For Breach of the Peace', *Crim.L.R.* 578

WILLIAMS, G. (1982) 'Dealing with Breaches of the Peace', *J.P.N.* 199 & 217

WILLIAMS, P.J. (1987) 'Alchemical Notes: Restructuring Ideals From Deconstructed Rights', in M.V. TUSHNET (ed.)

WRIGHT, J.S. (1981) 'The Bill of Rights in Britain and America: A Not Quite Full Circle', *Tul.L.Rev.* 291

#### BOOKS IN FRENCH

AUBY, J.M. & DUCOS-ADER, R. (1984) Droit public, droit constitutionnel, libertés publiques, droit administratif, (Paris: Sirey)

AUBY, J.M. & DRAGO, R. (1992) Traité des recours en matière administrative, (Paris: Litec)

AZÉMA, J.P. & WINOCK, M. (1976) Naissance et mort: la Troisième République, (Paris: Calmann-Lévy)

BAFFREY, M. (1937) Le droit de réunion en Angleterre et en France, (Paris: thesis)

BÉDIER, J. (1938) Les principes de la législation sur le maintien de l'ordre public, (Paris: thesis)

BERNSTEIN, S. (1975) Le 6 Février 1934, (Paris: Gallimard/Julliard)

BERTHON, R. (1938) Le régime des cortèges et des manifestations en France, (Paris: thesis)

BONNEFOUS, E. (1973) Histoire politique de la Troisième République, vol.V (Paris: P.U.F.)

BUISSON, J. (1988) L'Acte de police, (Lyon: thesis)

- BRAUD, P. (1967) La notion de liberté publique en droit Français et ses implications en droit Français, (Rennes: thesis)
- BURDEAU, G. (1972), Les Libertés Publiques, (Paris: L.G.D.J.)
- BURDEAU, G., HAMAN, F. & TROPER, M. (1991) Droit constitutionnel, (Paris: L.G.D.J.)
- CARRÉ DE MALBERG, R. (1920-22) Contribution à la théorie générale de l'état, (1962) (Paris: CNRS)
- CARRÉ DE MALBERG, R. (1931) La loi, expression de la volonté générale, (1984) (Paris: CNRS)
- CARROT, G. (1984) Le maintien de l'ordre en France: depuis la fin de l'Ancien Régime jusqu'à 1968, (Toulouse: Institut d'études politiques de Toulouse)
- CHAPUS, R. (1992) Droit contentieux administratif, (Paris: Montchrestien)
- CHARVARDÈS, M. Le 6 Février 1934: la République en danger, (Paris: Calmann-Lévy)
- CHASTENET, J. (1962) Histoire politique de la Troisième République: vol 6: déclin de la Troisième, 1931-1938, (Paris: Hachette)
- COLLIARD, C-A. (1989), Libertés Publiques, (Paris, Dalloz)
- COLLIARD, C-A., CONAC, G., BEER-GABEL, J. & FROGÉ, S. (eds.) (1990) La Déclaration des Droits de l'Homme et du Citoyen de 1789, ses origines - sa pérennité, (Paris: Documentation Française)
- COSTA, J-P. (1986) Libertés publiques en France et dans le monde, (Paris: Sciences Techniques et Humaines)
- DEGRENE, M-L. (1938) Les réunions et les pouvoirs de police, (Caen; thesis)
- DESLANDRES, M. (1932) Histoire constitutionnelle de la France: de 1789 à 1870, vol.II (1979) (New York: Arno Press)
- DESLANDRES, M. (1937) Histoire constitutionnelle de la France: l'avènement de la Troisième République, (1979) (New York: Arno Press)

- DUGUIT, L. (1921-29) Traité de droit constitutionnel, vol.III (Paris: Fontemoing)
- DUHAMEL, O. (1991) Le pouvoir politique en France, droit constitutionnel, I, (Paris: P.U.F.)
- ERBÈS, J.M. (1992) Polices d'Europe, (Paris: Harmattan)
- FAVOREU, L. (ed.) Cours constitutionnelles européennes et droits fondamentaux, (Paris: Economica)
- FOSSIER, A. (1927) Les manifestations culturelles sur les voies publiques en France, (Paris: thesis)
- GICQUEL, J. (1991) Droit constitutionnel et institutions politiques, (Paris: Montchrestien)
- GODECHOT, J. (1979) Les constitutions de la France depuis 1789, (Paris: Garnier-Flammarion)
- HAURIOU, M. (1929) Précis de droit constitutionnel, (1975) (Paris: CNRS)
- JOUBREL, A. (1904) Du droit de réunion, (Rennes; thesis)
- KTISTAKI, S. (1991) L'Évolution du contrôle juridictionnel des motifs de l'acte administratif, (Paris: L.G.D.J.)
- LE CLÈRE, M. (1945) Les réunions, manifestations et attroupements en droit français et comparé, (Paris: thesis)
- LE CLÈRE, M. (1967) Le 6 Février, (Paris: Hachette)
- LECLERCQ, C. (1991) Libertés Publiques, (Paris: Litec)
- LEFEBVRE E. (1903) Le droit de réunion, (Paris: thesis)
- LEMIRE, P. (1975) La protection constitutionnelle des libertés en droit public Français, (Paris: thesis)
- LEPOINTE, G. (1953) Histoire des institutions du droit public français, (Paris: Montchrestien)

LONG, M., WEIL, P., BRAIBANT, G., DELVOLVÉ, P. & GENEVOIS, B. (1993) Les grands arrêts de la jurisprudence administrative

MARTIN-PANNETIER, A. (1981) Institutions et vie politique françaises de 1789 à nos jours, (Paris: L.G.D.J.)

MENANTEAU, M. (1937) Les nouveaux aspects de la liberté de réunion, (Paris: thesis)

MERLE, R. & VITU, A. (1984) Traité de droit criminel, (Paris: Cujas)

MORANGE, J. (1977) La liberté d'association en droit public français, (Paris: P.U.F.)

MORANGE, J. (1989) Droits de l'Homme et Libertés Publiques, (Paris: P.U.F.)

MOUSSET, P. (1931) Les meetings: essai sur les caractères politiques et juridiques de la liberté de réunion en Angleterre, (Nancy: thesis)

RIVERO, J. (1977) Les libertés publiques, vol.II (Paris: P.U.F.)

RIVERO, J. (1984) Le Conseil constitutionnel et les libertés, (Paris: Economica)

RIVERO, J. (1990) Droit administratif, (Paris: Dalloz)

ROBERT, J. & DUFFAR, J. (1988) Les libertés publiques et droits de l'homme, (Paris: Montchrestien)

ROUSSEAU, D. (1990) Droit de contentieux constitutionnel, (Paris: Montchrestien)

ROUSSEAU, D. & SUDRE, F. (eds.) (1990) Conseil constitutionnel et Cour européenne des Droits de L'Homme: droits et libertés en Europe, (Paris: Sciences et Techniques Humaines)

RUSU, V.D. (1942) Les décrets-lois dans le régime constitutionnel de 1875, (Bordeaux; thesis)

SOBOUL, A. (1989) Dictionnaire historique de la Révolution Française, (Paris: P.U.F.)

TIMBAL, P-C. & CASTALDO, A. (1990) Histoire des institutions publiques et des faits sociaux, (Paris: Dalloz)

TEITGEN, P.-H. (1934) La police municipale: étude de l'interprétation jurisprudentielle des articles 91, 94 et 97 de la loi du 5 avril 1884, (Nancy: thesis)

## ARTICLES AND REPORTS IN FRENCH

BÉNOIT, F. (1982) 'La police municipale', *J.-Cl. (Collectivités locales)*, vol.III, 2201-1

BERLIOZ, J.M. (1987) 'Les manifestations', *Rev. de police national*, 4

BERNHARDT, R. (1976) 'Problèmes liés à l'établissement d'un catalogue des droits fondamentaux pour les Communautés européennes', *E.C.Bull.Suppl.* 5/76, 27.

CHABANOL, D. (1985) 'Un renouveau du sursis à exécution?', *Gaz.Pal.doctr.* 87

CHAPUS, R. (1960) 'De la soumission au droit des règlements autonomes', *D. chr.* 117

CHAPUS, R. (1966) 'De la valeur juridique des principes généraux du droit et des autres règles jurisprudentielles du droit administratif' *D. chr.* 99

COMITÉ CONSULTATIF POUR LA RÉVISION DE LA CONSTITUTION, présidé par le doyen G. Vedel (1993) 'Rapport au Président de la République: propositions pour une révision de la Constitution, 15 Février 1993'

COURTIN, M. (1990) 'Tribunaux administratifs: procédure d'urgence, demande de sursis à exécution', *J.-Cl. (Admin.)*, Fasc.635-2, 5, 14

DAUTAN, R. (1992) 'Police des réunions, manifestations et attroupements', *J.-Cl. (Admin.)* Fasc., 210, 2

DUBOURG-LAVROFF, S. (1993) 'Pour une constitutionnalisation des droits et libertés en Grande-Bretagne', *R.F.D.C.* 479

DUFFAU, J. (1992) 'Domaine Public', *J.-Cl. (Admin.)*, Fasc., 405-1, 5

du GRANET, B. (1990) 'Faut-il accorder aux citoyens le droit de saisir le Conseil constitutionnel?', *R.D.P.* 309

ETCHEGARAY, J.-R. (1985) 'Limites du sursis à exécution', *Gaz.Pal.doctr.* 87

- FAVOREU, L. (1989) 'Le retour des mythes', *Le Monde* 11th Aug., 6
- FAVOREU, L. (1990) 'L'élargissement de la saisine du Conseil constitutionnel aux juridictions administratives et judiciaires', *R.D.P.* 581
- FAVOREU, L. (1990) 'Les libertés protégées par le Conseil constitutionnel', in D. ROUSSEAU & F. SUDRE (eds.)
- FOHLEN, C. (1990) 'La filiation américaine de la Déclaration des Droits', in C-A. COLLIARD (ed.)
- GLEIZAL, J.J. (1975) 'Le sursis à exécution des décisions administratives - théorie et politique jurisprudentielle', *A.J.D.A.* 381
- GLEIZAL, J.J. (1992) 'La police en France', in J.M. ERBÈS (ed.)
- GRAZIER, F., GENTOT, M. & GENEVOIS, B. (1989) 'La marque des idées et des principes de 1789 dans la jurisprudence du Conseil d'État et du Conseil constitutionnel', in *E.D.C.E.* 151
- LANGLOIS, D. (1979) 'Le droit de manifester', *Après-Demain* 14
- LUCHAIRE, F. (1990) 'Le contrôle de la loi promulguée sur renvoi des juridictions: une réforme constitutionnelle différée', *R.D.P.* 125
- MARSHALL, T. (1990) 'Les droits de l'homme et l'art politique à l'époque révolutionnaire: la France et les États-Unis', in C-A. COLLIARD et. al. (eds.)
- MARTIN, P.M. (1975) 'La déclaration préalable à l'exercice des libertés publiques', *A.J.D.A.* 436
- MESTRE, M. (1934) note on Benjamin, *S.* 3.1
- MONTREUIL, J. (1990) 'Manifestations', *J.-Cl. (Pénal) Art. 104 à 108, Fasc.20*, 11
- MONTREUIL, J. (1990) 'Réunions publiques', *J.-Cl. (Pénal), Art. 104 à 108 Fasc.10*, 11
- PICARD, E. (1987) 'Forces civiles et militaires de police: organisation', *J.-Cl. (Admin.)*, Fasc.201-2, 5
- RIVERO, J. (1951) 'Le juge administratif: un juge qui gouverne?', *D. chr.* 21

RIVERO, J. (1980-81) 'Ordre public et état démocratique', *Revue de la police nationale* 16

ROBERT, J. (1990) 'La protection des droits fondamentaux et le juge constitutionnel français: bilan et réformes', *R.D.P.* 1255

ROBERT, J.-H. (1984) 'Contraventions et peines (première classe)', *J.-Cl. (Pénal)*, Art.R.26(15), Fasc.1, 2

ROUSSEAU, D. (1990) 'L'intégration de la Convention européenne des droits de l'homme au bloc de constitutionnalité', in D. ROUSSEAU & F. SUDRE (eds.)

SUR, S. (1979) 'Motivation ou non-motivation des actes administratifs', *A.J.D.A.* 3

TARATOWSKY, D. (1991) 'La politique et la rue', *Ethnologie Française* 317

TERCINET, M.-R. (1979) La liberté de manifestation en France, *R.D.P.* 1008

TILLY, C. (1984) 'Les Origines du Répertoire de l'Action collective Contemporaine en France et en Grande Bretagne', *Vingtième Siècle: Revue d'Histoire* 89

TURPIN, D. (1983) 'L'Autorité judiciaire, gardienne de la liberté individuelle', *A.J.D.A.* 653

VEDEL, G. (1990) 'L'égalité', in C.-A. COLLIARD (ed.)

VITU, A. & MONTREUIL, J. (1990) 'Attroupements', *J.-Cl. (Pénal)*, Fasc.30, 11

WALINE, M. (1937) 'Qu'est-ce qu'une réunion publique?', *D.* 73













