PARADES, PROTESTS AND POLICING

A HUMAN RIGHTS FRAMEWORK

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FOREWORD

The Northern Ireland Human Rights Commission commissioned this report because it wished to make a contribution to the information available to the general public on the relevant legal principles affecting the rights of individuals in relation to parades in Northern Ireland. This is in line with the Commission's Strategic Plan for 2000-2002.

With the coming into force of the Human Rights Act 1998 on 2 October 2000, all public authorities in Northern Ireland – including the Parades Commission, the police and the courts – must adhere to the standards laid down by the European Convention on Human Rights. This report therefore surveys what those standards are, in the light of opinions and judgments issued to date on the Convention by the European Commission and Court of Human Rights in Strasbourg.

The Human Rights Commission is very grateful to the authors of the report, Dominic Bryan, Michael Hamilton and Neil Jarman, for their careful work in compiling it. The authors would no doubt be the first to admit that the report provides few black and white answers to the many questions that can be raised about the right to freedom of peaceful assembly and the right to protest in Northern Ireland, but no-one could deny that the report nevertheless supplies valuable information for everyone who needs to know more about where they stand legally in relation to marching and demonstrating.

While the views expressed in the report are those of the authors alone (and are not necessarily those of the Human Rights Commission itself), the Commission is pleased to be able to put the report in the public domain. We hope it will be viewed as making a useful and thought-provoking contribution to what is an important debate.

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Chief Commissioner

27 March 2001

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SUMMARY

This report explores the relevance of international human rights standards, particularly European standards, to parades and protests and the policing of those events in Northern Ireland. If nothing else it reveals the complexity of the issue. There are few simple answers and on occasion case law generated by the European Convention on Human Rights (ECHR) appears contradictory. Human rights legislation will not provide easy solutions to political and community relations problems. However, human rights legislation should make a contribution to providing structures within which disputes can be justly resolved. We have tried to collate some provisional conclusions as to how these human rights standards impinge upon:

- Freedom of assembly and expression;
- Affected individuals and communities; and
- The policing of public events.

The right to freedom of assembly, and effectively the right to march, is viewed as one of the foundations of democratic society and one not to be interpreted restrictively. Article 11 of the European Convention on Human Rights holds that 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests'. No restrictions shall be placed on the exercise of these rights other than such are prescribed by law and are necessary in a democratic society:

- In the interests of national security or public safety;
- For the protection of disorder or crime;
- For the protection of health or morals;
- Or for the protection of the rights and freedoms of others.

This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

From international human rights standards, from legal cases referring to those standards (numbers in brackets refer to cases in appendix), and from international practice we can summarise the position as the following. It has to be remembered, however, that not all the cases are recent ones and not all were decided by the European Court of Human Rights.

Peaceful assembly includes the right to:

- Peaceful protest (27, 42, 49).
- Annoy or give offence to opponents (27, 42).
- Parade (14, 19, 42).
- Counter-demonstrate (42).
- A degree of protection from the state to exercise right to assembly (42).

- Peaceful protest even if a counter protest threatens disorder (19)
- Impede vehicular traffic and pedestrians (23)

Peaceful assembly does not include the right to:

- Assemble for an indefinite length of time (47).
- Assemble for purely social reasons (6).
- Pass and re-pass in a public place (6).
- Provoke others to violence (15, 49).
- Hold a parade or protest if 'hangers-on' threaten disorder (3).
- Offend religious sensibilities (39, 54).
- Offend public morality (36).

Assembly can reasonably be restricted if:

- There is a fear of public disorder, whether by those demonstrating or opponents (15,14, 44).
- There is a recent history of violence at the location (41).
- There is unreasonable disruption to traffic or pedestrians (23, 47).
- The state feels it could not control disorder (14, 42).
- A ban is imposed for a limited time (14, 41, 44).
- A ban covers a defined geographical area (14, 41, 44).
- The event could take place in an alternative location (43).
- The event could take place in an alternative manner (41).

It is clear from the above lists that decisions over the right of assembly can be very difficult. A parade or protest is allowed to impede vehicular traffic and pedestrians but not cause unreasonable disruption. A parade or protest is allowed to annoy or offend opponents but not to provoke violence. If there is a parade and a counter protest how does one decide on where the threat of violence is coming from? What level of disorder should be tolerated before the state intervenes to restrict peoples' rights? These issues can only be resolved in the context of each case. However, from the cases we have looked at we can draw some basic conclusions:

- **Decisions taken by the European Court have often given a wide 'margin of appreciation' to national governments over freedom of assembly.** In other words, the court has preferred to find in favour of the institutions of the state rather than the applicant who has complained of an infringement by the state. The Court has argued that the state is best placed to adjudicate over the local context. With the incorporation of the ECHR into domestic law under the Human Rights Act 1998 local courts could actively re-interpret decisions when a 'wide margin of appreciation' has been relied upon.

- **Freedom of assembly covers not only static meetings, but also public processions.** The state has a positive obligation to enable peaceful demonstrations to take place and should take reasonable and appropriate measures to facilitate this.

- **There is no absolute right to assemble or parade.** While central to the democratic process, the state can place restrictions upon the right so long as those restrictions are prescribed by law, are necessary in a democratic society, and are imposed for one of a number of legitimate purposes including securing public safety, preventing disorder, and protecting the rights and freedoms of others.

- **Route restrictions have been held to be an infringement of the right to peaceful assembly.** But infringements have been allowed if they are proportionate to the legitimate aim being pursued.

- **The likelihood of public disorder at an event has been a central issue for the European Court.** It has frequently made adjudications that accept the decision made by the local courts in restricting freedom of assembly, particularly if it can be shown that violence is possible, or there has been a history of violence, from any party involved.

- **A policy of communal consent, whereby marches through residential areas would be permitted only if the march organiser had obtained the consent of the residents, has no basis in international human rights law.** Nonetheless, it could be argued that there is a responsibility on event organisers to create conditions in which an assembly might take place peacefully, and this could include liaising with local communities.

- **The rights of individuals and communities affected by parades may include the right to respect for private and family life, the right to respect for one's freedom of thought, conscience and religion, and the right to peaceful enjoyment of one's possessions.** As with the right to freedom of assembly, however, these rights are not absolute and can be restricted in similar circumstances.

- **The police have a dual role to protect people's rights and to adjudicate between those rights.** They therefore have the responsibility to facilitate the exercise of human rights and the authority to restrict such practice. This is particularly pertinent with regard to issues related to freedom of assembly and maintaining public order.

- **The police have the authority to prevent or to disperse any assemblies that might create unreasonable disruption, that threatens to disturb public order or that have the potential to provoke violence from others because it interferes with their rights and freedoms.**

- **In dispersing assemblies the police should always attempt to use peaceful means in the first instance.** The police do have the right to use force to disperse assemblies but such force must always be both proportionate and necessary in the circumstances. Police should only use firearms to disperse violent demonstrations in so far as it is necessary for self-defence, to protect others from threat of death or serious injury, or to facilitate the arrest or prevent the escape of someone presenting such dangers.

- **The police also have a positive obligation to protect life and they have a responsibility to ensure that all operations are prepared and planned with this in**

mind. Preparation may extend to the training given and equipment supplied to police officers.

- **In relation to the procedure of making determinations on the right to peaceful assembly account should be taken of the right to a fair hearing.**

- **In relation to policing peaceful assembly account should be taken of the right not to be subjected to inhuman or degrading treatment or punishment**.

- **Issues over the protection of minority rights remain problematic in Northern Ireland.**

This report considers whether and how the following factors should influence decisions that involve restricting the right to freedom of assembly in Northern Ireland:

- The message of a parade;
- Whether there are likely to be any 'hangers-on';
- The intentions of the parade organiser;
- Whether there is to be a related protest;
- Any history of disorder connected with a particular parade or location;
- The potential for disorder in areas other than the immediate vicinity of a parade;
- The current political climate;
- Evidence of any steps taken towards a peaceful resolution of the dispute; and
- The likely impact of the parade on relationships within the community.

It reveals that, whilst the ECHR, and the cases that have been taken, offers some guidance to the problems around peaceful assembly in Northern Ireland, the lessons to be drawn are often inconclusive. As such, the Parades Commission is uniquely positioned to further develop thinking around freedom of peaceful assembly. Furthermore, since the ECHR became fully incorporated into UK law on 2 October 2000, the 'margin of appreciation' that existed in the cases we have examined will not be as significant. This opens the possibility of local jurisprudence developing around this issue which can give far greater guidance. The situation may thus become clearer when cases are brought before Northern Ireland's courts. However, the courts cannot solve all the problems. A long-term resolution of the parades issue will depend on a greater understanding of rights and responsibilities, improved community relations and political accommodation.

1. INTRODUCTION

1.1 The Context

People in Northern Ireland, like people all over the world, hold parades, festivals, demonstrations, commemorations, carnivals, and protests that reflect their communities, their identity, their politics, their culture, their traditions, their sense of fun, their communal memory, their creativity, their sense of place and their beliefs. Clearly, therefore, there is a substantial overlap between public assembly and public expression. Furthermore, both freedom of assembly and freedom of expression have been recognised as fundamental human rights. However, public events inevitably impinge upon the life of others. In Northern Ireland, and around the world, these public events take place within the context of rights held by those *not* taking part. This is most evident when the public expression of belief and identity occurs where there are sharp political differences, differences that are played out in historical and contemporary animosity and violence. In such cases the right to freedom of assembly must be balanced against other rights, and the need to maintain public order.

The politics of difference, territory and legitimacy in Ireland has left a history of violent confrontation over public events. This has been particularly true of the north. Since the middle of the eighteenth century local 'fleets', Volunteers, Masons, Defenders, Peep O'Day Boys, the Orange Order, the United Irishmen, the yeomanry and militia, Ribbonmen, O'Connolites, marching bands and drumming parties of all sorts, open-air preachers, the Tenant Right movement, the Blackmen, the Apprentice Boys, the Ancient Order of Hibernians, the Forresters, the Independent Orange Order, the Ulster Volunteer Force, the Gaelic Athletic Association, Republicans, the Unemployed Workers Committee, the Civil Rights Movement, the Ulster Defence Association, and the Ulster Workers Council, to mention just a selection, have held public events that have ended in violence. How many of these organisations either carry 'symbolic' weapons or pictures of weapons or battles or wear uniforms or play music remembering battles or fallen heroes? The state has enacted a variety of repressive legal measures including banning all parades from 1832 to 1845 and 1850 to 1872 and Public Order Acts (or Orders), the more significant of which were in 1951, 1971 and 1987. And magistrates and police have used both discretion and extreme violence in controlling or stopping events. In periods of unrest connected to such events hundreds, perhaps thousands have died, thousands, maybe hundreds of thousands have been made homeless and the cost must run into hundreds of millions of pounds.

For democracy to work people must be allowed to express their politics even if others do not agree with those politics. The right to free public political, cultural and religious expression must be at the heart of both governance and citizenship in Northern Ireland. Yet, an event that is central to one person's cultural or religious identity is often seen by another as a threat. How can Northern Ireland develop an environment in which freedom of assembly and expression can take place peacefully?

This document does not presume to answer that question outright. Rather, it reflects upon the possible contribution to be made by human rights law. It aims to explain why understanding human rights is important for Northern Ireland, and in particular, examines the interpretation

of international human rights standards, and the attendant responsibilities of the state, in relation to:

- Freedom of assembly and expression;
- Affected individuals and communities; and
- The policing of public events.

It is appropriate to begin with a brief guide to international human rights standards – how they have developed, what forms they take, and what obligations they give rise to.

1.2 International Human Rights – A Brief Guide

Human rights are an entitlement derived from the inherent dignity and worth of all human beings. They are universal, although, of-course, many countries have provided for the protection of particular human rights within their own constitution or bill or rights. In 1948, following the atrocities of the Second World War, the United Nations' Universal Declaration of Human Rights became the first widely held standard on human rights. Since then, a number of international and regional 'treaties' ('conventions' and 'covenants') and 'declarations' have been produced. These are sometimes described using the umbrella term, 'instruments'. For the most, these have been arrived at under the aegis of the United Nations or the Council of Europe.

The Council of Europe should not be confused with the institutions of the European Union – it is both older and larger than the latter, and entirely separate. Any references to the 'European Court' in this document are, therefore, to the European Court of Human Rights and not the European Court of Justice. Furthermore, the dual machinery of the European Commission on Human Rights and the European Court on Human Rights was replaced by a single Court in November 1998.

The 1948 UN Declaration was followed in 1966 by two international Covenants:
- The UN International Covenant on Civil and Political Rights; and
- The UN International Covenant on Economic, Social and Cultural Rights.

The rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) are sometimes known as first generation rights whilst those in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are there to promote social justice and are described as second generation rights. There are also third generation rights called 'collective rights' which are conferred upon individuals as members of communities or ethnic groups. Examples include:
- The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992);
- The European Framework Convention for the Protection of National Minorities (1995).

In addition, a range of more specific instruments have been developed including:

- The UN Convention on the Elimination of All forms of Racial Discrimination (1966);
- The UN Convention on the Elimination of Discrimination Against Women (1979);
- The European Convention on the Compensation of Victims of Violent Crime (1983);
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987); and
- The UN Convention on the Rights of the Child (1989).

There are also international standards which deal exclusively with law enforcement, and these are particularly relevant to our purposes here:
- The United Nations Code of Conduct for Law Enforcement Officers (1979);
- The Council of Europe Declaration on the Police (1979); and
- The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

The three most important regional instruments are:
- The European Convention on Human Rights (1950);
- The American Convention on Human Rights (1969); and
- The African Charter on Human and Peoples' Rights and Duties (1981).

All of these instruments have one thing in common: they confer rights upon individuals (or minority groups in the case of third generation rights). The next question to address is how those rights are enforced.

1.2.1 The Role of the State

It is the *government* of the country in which a violation of rights is alleged to have taken place which will be held accountable by the appropriate international tribunal, commission, court or committee. This can be clearly seen from the case names listed in the appendix. The appropriate court will be the one which oversees the operation of the instrument in question – for example, the UN Human Rights Committee will hear cases involving an alleged breach of the International Covenant on Civil and Political Rights, whereas the European Court on Human Rights will deal with cases concerning alleged violations of the European Convention.

What then are the duties of the state in regard to the array of international instruments named above? Three points should be made. First of all, normally the international court will grant a certain amount of leeway to domestic authorities when determining whether or not a government has failed to live up to its obligations. This leeway is known as the 'margin of appreciation' (see further **2.3.3**). Secondly, it is important to distinguish between declarations, which are not intended to be legally binding (exhortations rather than obligations), and treaties (*ie* conventions and covenants) which do impose legal obligations on the parties to them. This means, for example, that although the UN Universal Declaration of Human Rights paved the way for many subsequent conventions and covenants, it of itself contains no legal undertakings, and merely urges governments to promote its standards. States voted for it by resolution, but no country has signed or ratified it. And this leads to the third point – that the level of a state's obligations will depend on the manner in which it

agrees to any treaty. Essentially, there are three possibilities – (a) signature, (b) ratification or accession, and (c) incorporation.

(a) Signature
Signing an instrument, while not a legally binding step, creates an obligation of good faith that a state signatory will refrain from any action calculated to defeat or undermine the goals of the instrument. Signature is often followed by ratification at a later date, but this is not necessarily so.

(b) Ratification/Accession
Ratification by a government means that any individual, non-governmental organisation or group of individuals within its jurisdiction can petition the appropriate international court alleging a violation of a right (or rights) contained in that instrument. Accession is virtually the same as ratification, except that it is not preceded by any act of signature. The ICCPR, for example, was ratified by the UK in 1976, and both the British and Irish governments have recently ratified the European Framework Convention for the Protection of National Minorities.

Once an instrument has been ratified by a member state, that state is bound by its terms even though it is not incorporated into domestic law. Domestic statutes ought to comply with the instrument, and local courts may look to that instrument for guidance when construing any ambiguity in domestic law.[1]

That said, when ratifying a treaty, a contracting state may make a **reservation** in respect of any of its provisions if municipal laws in force at that time do not conform. The state, therefore, only accepts the obligation imposed by the treaty to a limited degree. In addition, in times of public emergency, a state may make a **derogation** from the terms of a treaty. This means that the State may take measures which would otherwise be in breach of the treaty so long as such measures are not inconsistent with the state's other obligations under international law. Any such derogation is susceptible to legal challenge, and some rights are regarded as non-derogable (see **1.2.2** below).

(c) Incorporation
The crucial distinction between ratification and incorporation is that ratification does not give rise to directly enforceable rights in local courts, whereas incorporation does. In general terms, unincorporated treaties have no legislative effect and do not form part of the law of the country. Incorporation, on the other hand, renders an instrument part of domestic law. The ECHR has now been incorporated into UK law by the Human Rights Act 1998, and this is discussed further in **1.3** below.

[1] See, for example, *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283G per Goff LJ, and *Derbyshire County Council v Times Newspapers Ltd.* [1992] QB 770, at 830B-C per Butler-Sloss LJ.

1.2.2 A Hierarchy of Rights

Some human rights are seen as 'absolute' or 'non-derogable'. These include freedom from inhuman and degrading treatment and punishment, and a state cannot opt out of an absolute right. Other rights *are* 'derogable', and these can be sub-divided into two further categories - 'limited' rights and 'qualified' rights. Limited rights are those in relation to which the government can enter a derogation but which are not to be balanced with any general public interest. An example is the right to a fair trial. Many other rights, however, fall into the 'qualified' category. These rights must be balanced with the general public interest given that their exercise and enjoyment will often bring them into conflict with other rights. Obvious examples, with particular relevance to the subject of this study, are the rights to freedom of expression, freedom of assembly, and respect for private and family life. The qualifying paragraphs in the Convention (for example Article 11(2)) therefore allow restrictions to be placed on these rights in pursuit of certain legitimate aims which include the interests of national security or public safety, the protection of health or morals, and the protection of the rights and freedoms of others. Restrictions must also be non-discriminatory, prescribed by law, and necessary in a democratic society (see further **2.3**).

1.3 The Human Rights Act 1998

In 1998, the British parliament enacted the Human Rights Act which came into force on 2 October 2000. This legislation incorporates the European Convention on Human Rights (ECHR) into UK law, and enables, for the first time, victims of human rights abuses to obtain remedies in local (domestic) courts rather than having to go to the European Court in Strasbourg. Domestic courts will be required to interpret legislation so as to uphold the Convention rights. The only qualification to this is where the High Court or Court of Appeal decides that the legislation itself (or a part of it) is incompatible with the Convention. In such instances, the court can make a 'declaration of incompatibility' but this does not affect the validity or continued operation and enforcement of the legislation.

The Act also imposes a duty on all public authorities (such as the Parades Commission) to act in a way which is compatible with the Convention. Thus, not only can individuals now rely on the ECHR as a defence in criminal or civil cases, but they may also rely on the Convention when applying for judicial review. The Human Rights Act effectively creates a new freestanding ground for review in addition to the three traditional grounds of illegality, irrationality and procedural irregularity. This new ground is whether or not a public body's decision is compatible with the Convention. Already, an application for judicial review of a decision of the Parades Commission has argued (albeit unsuccessfully) that the Commission overstepped the legitimate aims listed in Article 11(2) of the Convention (see **2.3.7.2 (i)**).[2]

This fourth ground will invariably extend the scope of the other three. In so far as illegality is concerned, a court might now be able to declare a decision of a public body to be illegal if it

[2] *In the matter of an Application by David Alexander Tweed for Leave to Apply for Judicial Review*. Heard by Kerr, J in the High Court on 25 October 2000, and by the Court of Appeal on 26 October 2000. Written judgment delivered by Carswell, LCJ.

fails to comply with the Convention. In relation to irrationality, an applicant may no longer need to satisfy the court that a disputed decision was so irrational that no rational authority could have taken it (a legal standard known as *Wednesbury unreasonableness*). Instead, the question may become whether or not a restriction placed upon a Convention right was *proportionate* (see further **2.3.6**). And in so far as procedural irregularity is concerned, the accepted rules of natural justice are now likely to be supplemented by the requirement that the procedures adopted by a public body must not compromise the individual's Convention rights (see, for example, **2.4** concerning the right to a fair hearing). Furthermore, for applicants relying on this fourth ground, the long established rule that individuals applying for judicial review must demonstrate a *sufficient interest* in relation to the unlawful act, will only be satisfied if he or she is, or would be, a *victim* of the act as defined by s7(7) of the Act.

1.4 Human Rights in Northern Ireland

The Belfast (Good Friday) Agreement 1998:

The participants endorse the commitment made by the British and Irish Government that…they will:

…affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social, and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities. (p2)

The Parties affirm their commitment to the mutual respect, the civil rights and the religious liberty of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- *the right of free political thought;*
- *the right to freedom of expression or religion;*
- *the right to pursue democratically national and political aspirations;*
- *the right to seek constitutional change by peaceful and legitimate means;*
- *the right to freely choose one's place of residence;*
- *the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender, or ethnicity;*
- *the right to freedom from sectarian harassment; and*
- *the right of women to full and equal political participation . (p16)*

Increased activity in the field of human rights, however, has not been confined to the international, or even national, arena. A key part of the future development of Northern Ireland will be the greater recourse to human rights legislation. The Belfast (Good Friday)

Agreement was explicit about this. Whether one supported the Belfast (Good Friday) Agreement or not, few would disagree with the sentiments expressed on human rights. Both British and Irish governments are committed to the maintenance of human rights within their jurisdiction. Indeed, the Northern Ireland Human Rights Commission itself was a product of the Belfast (Good Friday) Agreement. Under section 69 of the Northern Ireland Act 1998, the Commission is required to:

- Keep under review the adequacy and effectiveness in Northern Ireland of laws and practice relating to the protection of human rights;
- Advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights;
- Advise the Assembly whether a Bill is compatible with human rights;
- Promote understanding and awareness of the importance of human rights in Northern Ireland.

So how will this international, national and regional enthusiasm for human rights influence disputes over parades and marches? Certainly, human rights standards have the potential to set a benchmark against which the regulation of parades and related protests can be measured (including the premium properly attached to reaching local agreement). By establishing such principles, these standards may act as a catalyst in transforming the climate in which the public expression of one's culture, politics and/or religion takes place.

The remainder of this document looks at how some of these international instruments have been interpreted, and elicits the significance of those interpretations for disputes around parades. It concentrates primarily upon the European Convention on Human Rights and also, to a lesser degree, on the International Covenant on Civil and Political Rights. The reason for this bias is twofold. Firstly, it is only the European Convention which has been incorporated into UK law, and thus *it* is the instrument which will receive the greatest attention in local courts. While other instruments do include provisions relating to the right to freedom of assembly, and thus augment the Convention and Covenant jurisprudence, their utility is of a comparative nature rather than directly bearing on the legal protection of rights in Northern Ireland. Secondly, the volume of case law generated by the Convention is much greater than that generated by any other international human rights treaty. It therefore stands to offer the most comprehensive guidance.

This work does not purport to be an exhaustive inventory of international human rights provisions as they relate to issues around parades. Notwithstanding, other treaties will be cited where they illuminate discussion of the key issues, for a secondary objective of this work is to highlight the *different* ways in which rights have been both framed and interpreted. In the context of the Human Rights Commission's consultation on a Bill of Rights for Northern Ireland, this work should therefore further encourage reflection on what rights might be included in such a Bill.

2. PARADES AND RELATED PROTESTS: A RIGHTS FRAMEWORK

The Parades Commission, established under the Public Processions (NI) Act 1998, has declared itself to be born out of a failure to reach local accommodation over parade disputes in a number of areas. Such failure, as we emphasised above, is best understood against a historical backdrop of political uncertainty and agitation. It is the legacy of an embittered and sometimes violent past, often reduced to a zero-sum game in which the public expression of one's own identity is perceived by others to threaten theirs. The *Guidelines* published by the Parades Commission outline the principles that the Commission will consider when deciding whether or not to impose restrictions on a parade.

The Parades Commission Guidelines:

The Guidelines are based on the fundamental premise that the rights to peaceful assembly and freedom of expression as outlined in the European Convention on Human Rights are important rights to be enjoyed equally by all. The Commission will not therefore seek to raise obstacles to the exercise of these rights unless there are compelling arguments to do so.

In this chapter we examine the source and content of these rights as well as the arguments which have been made concerning their scope.

2.1 The Right to Freedom of Peaceful Assembly

In international human rights law, the right to freedom of peaceful assembly is guaranteed principally by Article 11 of the European Convention on Human Rights (ECHR) and Article 21 of the International Covenant on Civil and Political Rights (ICCPR).

The right to freedom of peaceful assembly has been recognised as one of the foundations of democratic society, and one not to be interpreted restrictively.[3] It can be exercised by both individuals and corporate bodies.[4] The introductory section highlighted the evanescent distinction between public assembly and public expression. Thus, in many cases, consideration of the right to freedom of assembly cannot logically be separated from that of the right to freedom of expression (Article 10, ECHR and Article 19(2) and (3), ICCPR) and also the right to freedom of religion (Article 9, ECHR and Article 18, ICCPR). Indeed, where issues under all three rights are raised, the United Nations Human Rights Committee and both the European Court and Commission have elected to explore the substantive issues under the Article *most* relevant to the facts, and to treat the others as subsidiary.

[3] *Rassemblement Jurassien & Unité Jurassien v Switzerland* (1979) at p.119; *Christians Against Racism and Facism v UK* (*CARAF*) (1980) at p.148; *G v The Federal Republic of Germany* (1989) at p.263; *Anderson et al v UK (1997).*

[4] *CARAF* at p.148. Similarly, Article 9 can be exercised by a church body, or an association with religious and philosophical objects, *ARM Chappell v UK* (1987) at p.246.

Article 11, European Convention on Human Rights:

(1) *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

(2) *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.*

Article 21, International Covenant on Civil and Political Rights:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

As far as parades are concerned, freedom of thought and freedom of expression are subsidiary to freedom of assembly and do not require separate consideration.[5] Furthermore, the European Court has explicitly stated that the Convention is to be read as a whole, and that therefore the application of any individual Article must be in harmony with the overall logic of the Convention.[6]

[5] *Ciraklar v Turkey* (1995), *Platform "Ärzte für das Leben" v Austria* (1988).
[6] *Otto-Preminger-Institut v Austria* (1994), para. 47.

Article 10, European Convention on Human Rights:

(1) *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent the State from requiring the licensing of broadcasting, television or cinema enterprises.*

(2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Article 19(2) and (3), International Covenant on Civil and Political Rights:

(2) *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

(3) *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For respect of the rights or reputations of others;*
(b) *For the protection of national security or of public order, of public health or morals.*

Before examining how these rights have been interpreted in the international courts – and thus, how they *might* be applied in cases involving parades in Northern Ireland – it is appropriate, briefly, to outline the principles developed in domestic courts regarding the right to peaceful assembly. The following section, therefore, sketches the common law position in the UK prior to incorporation of the European Convention.

2.1.1 Freedom of Assembly in Domestic Law

In the English case of *Director of Public Prosecutions v Jones (Margaret) and Another* (1999), Lord Irvine (in the majority) argued that UK law recognized the highway to be a public place on which all manner of activities may occur:

> Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the

> primary right of the general public to pass and repass, they should not constitute trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway…
> …Provided an assembly is reasonable and non-obstructive, taking into account its size, duration and the nature of the highway on which it takes place, it is irrelevant whether it is premeditated or spontaneous: what matters is its objective nature…These judgments are ever ones of fact and degree for the court of trial.[7]

Arguably, Lord Irvine's conclusions go beyond even the protection afforded to freedom of assembly by Article 11 of the European Convention (see, in particular, the *Anderson* case in **2.2.2** below regarding the right to pass and re-pass). Certainly, his "unreasonable user" test is broader than that relied upon in the Divisional Court and in the dissenting judgments of Lord Slynn and Lord Hope. In their minority submissions, they argue that the public right of assembly has been, and ought to be, restricted merely to activities incidental or ancillary to the right of passage. Any activity which exceeds these limits (even if peaceful and non-obstructive) amounts to trespass. They considered that this rule was not unduly restrictive if applied pragmatically, for in practice, other uses of the highway are frequently tolerated. Lord Irvine, though, asserts that "mere toleration does not secure a fundamental right":

> Unless the common law recognizes that assembly on the public highway may be lawful, the right contained in Article 11(1) of the Convention is denied.[8]

Lord Clyde, while also in the majority, advocates a slightly more cautious approach. Nevertheless, he notes the express limitations on the right of assembly laid down in Article 11 of the European Convention, and gives the following example of reasonable usage:

> …A road may properly be used for the purposes of a procession. It would still be a perfectly proper use of the road if the procession was intended to serve some particular purpose, such as commemorating some particular event or achievement. And if an individual may properly stop at a point on the road for any lawful purpose, so too should a group of people be entitled to do so. All such activities seem to me to be subsidiary to the use for passage…[9]

Thus, following the majority decision in *Jones*, it would certainly be tenable to suggest that the common law position in the UK relating to freedom of assembly has evolved so as to be entirely consonant with a rights based approach. The question of what constitutes an 'unreasonable use' of the highway will be similar to the questions posed in any given situation by Article 11 of the Convention – does that use threaten national security, public safety, public order, the rights and freedoms of others *etc.*? In the words of Lord Clyde,

> The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question.[10]

[7] [1999] 2 All ER 257 at 263A; 265F. Considered in *Birch v Director of Public Prosecutions* [2000] Crim LR 301.
[8] [1999] 2 All ER 257 at 267B-C.
[9] Ibid. at 286J.
[10] Ibid. at 287C-D.

Local courts must now look to the case law of the European Court of Human Rights for guidance when making this assessment, and the remainder of this chapter therefore focuses on these European cases. Just as Article 11 of the Convention is divided into two parts, analysis of the key issues here can be similarly arranged. The first section identifies the sorts of demonstration which fall within the definitional confines of "peaceful assembly". This is followed by an examination of the circumstances in which "peaceful assembly" can reasonably be restricted.

2.2 'Peaceful Assembly'

The right to freedom of assembly as secured by the ECHR and ICCPR extends only to '*peaceful* assembly'. Likewise, the American Convention on Human Rights only covers 'peaceful assembly without arms', as does section 17 of the Bill of Rights Chapter in the South African Constitution 1996. While the African Charter on Human and Peoples' Rights and Duties does not so limit what it terms 'the right to assemble freely with others', the preamble insists that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'.

Article 15, American Convention on Human Rights:

The right of peaceful assembly, without arms, is recognised.

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.

Section 17 of Chapter 2 (Bill of Rights), South African Constitution:

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Article 11, African Charter on Human and Peoples' Rights and Duties:

Every individual shall have the right to assemble freely with others.

The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

2.2.1 'Peaceful'

The European Court and Commission have attempted to delimit the boundaries of 'peaceful' behaviour. By and large, 'peaceful' has been held to include behaviour that may annoy or insult others, but to exclude behaviour which actually obstructs the activities of others, or which has the potential to incite others to violence (see further the English case of *Redmond-Bate* in **2.3.7.2(d)**). It is clearly a fine line to tread. Moreover, an illegal assembly (*eg* one that has not satisfied a statutory obligation to notify the relevant authorities) may be regarded as a 'peaceful' assembly, yet, as we shall see in the later part of this chapter, even legal peaceful assemblies can reasonably be restricted in certain circumstances.

In the case of *Plattform "Ärzte für das Leben" v Austria* (1988), which concerned a procession and open-air service organised by anti-abortion protesters, the European Court held that a peaceful demonstration "may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote."[11] In *G v The Federal Republic of Germany* (1989), however, the European Commission stated that 'peaceful assembly' does not cover a demonstration where the organisers and participants *have violent intentions which result in public disorder*.[12]

The latter case concerned an illegal demonstration (notice had not been given to the German authorities) in front of the US military barracks in support of nuclear disarmament. Demonstrators blocked the road for twelve minutes every hour, but the sit-in still fell within the accepted definition of a 'peaceful assembly'.[13]

Two 'freedom of expression' cases also shed light on what is likely to be considered 'peaceful' with regard to freedom of assembly. In the case of *Steel and others v UK* (1998), the first and second applicants, who were involved in protests against a Grouse Shoot and an extension to the M11 respectively, physically impeded the activities of which they disapproved. The European Court found that the police had been justified in fearing that this behaviour, if persisted in, might provoke others to violence.

In contrast, the actions of the remaining applicants in *Steel* (who handed out leaflets and displayed banners to protest against the sale of arms outside a conference on fighter helicopters) was held to be "entirely peaceful". The Court found no indication that these protesters "significantly obstructed or attempted to obstruct those attending the conference, or took any other action likely to provoke these others to violence"[14] – their arrest and subsequent detention *had* violated their right to peaceful assembly.

In another Article 10 case, *Hashman and Harrup v UK* (1999), two hunt saboteurs had tried to distract hounds by shouting and blowing a hunting horn. While the Crown Court had

[11] Para. 32.
[12] At p.263.
[13] As explained below, however, the Commission held that the blocking of a road caused more obstruction than would normally arise from the exercise of the right of peaceful assembly, and that therefore, the applicant's conviction did not constitute a violation of his right – an example of peaceful assembly being reasonably restricted (or an unreasonable exercise of the right).
[14] Para. 64.

previously ruled that such actions had not resulted in "violence or threats of violence", it is less clear whether the European Court would have described the saboteurs' protest as peaceful, for it openly acknowledged that the protest *had* impeded the activities of others. Judge Baka, although dissenting on the question of whether the *restriction* was 'prescribed by law', argued that the protesters were "avowed hunt saboteurs and as such they deliberately tried to seriously disturb other people's lawfully organised pleasure and leisure activity or even make it impossible."

2.2.2 'Assembly'

While an explicit definition of 'assembly' has not been forthcoming, its interpretation has been qualified in some important respects. The right to freedom of assembly can only be relied upon by those assembling for a specific purpose. In *Anderson and others v UK* (1997) – a case concerning the prohibition of nine individuals from entering a shopping mall – the European Commission concluded that there is no indication "that freedom of assembly is intended to guarantee a right to pass and re-pass in public places, or to assemble for purely social purposes anywhere one wishes." Article 11 was held not to apply to the circumstances of the case because the applicants had no history of using the shopping centre for "any form of organised assembly or association".

In a similar vein, the Commission's decision to deal with the issues in both *WG v Austria* (1992) and *GS v Austria* (1992) "under the more general guarantee of Article 10" (*ie* freedom of expression) suggests that an 'assembly' must be organised so as to enable the participation of a number of people for a particular purpose. The Commission thought it unnecessary to consider whether setting up tables from which to distribute information to passers-by, even with the intention of motivating persons present to take future common action, amounted to an 'assembly' within the meaning of Article 11.

Furthermore, even if purpose *is* established, an assembled group still may not conform to the notion of 'assembly' as protected by the international provisions on freedom of assembly. There is the secondary question of whether an 'assembly' must be organised and have a finite number of participants. This was partially addressed in the case of *Kivenmaa v Finland* (1994) which came before the United Nations' Human Rights Committee. It concerned twenty-five members of an organisation, summoned by Ms Kivenmaa for the purpose of distributing leaflets and displaying a banner to protest against the human rights record of a visiting foreign head of State. The twenty-five, however, merely formed part of a larger crowd of demonstrators, and the Human Rights Committee had to determine whether their gathering constituted a 'public meeting' which should have been notified to the authorities.

Ms Kivenmaa argued that it was not a public meeting but rather, simply, an exercise of her right to freedom of expression that did not require prior notification. The Committee agreed, concluding that a "gathering of several individuals at the site of the welcoming ceremonies for a foreign head of State on an official visit, publicly announced in advance by the State party authorities, cannot be regarded as a demonstration."[15] Therefore, Ms Kivennma's subsequent prosecution for holding a 'public meeting' without prior notification had been in

[15] Para 9.2.

violation of both articles 19 and 21 of the Covenant (even given that Finnish law requires only six hours notice compared, for example, with the 14 days required for parade related protests in Northern Ireland).

A dissenting member of the Committee pursued the issue further and cited the following commentary on Article 21:

> The term 'assembly' is not defined but rather presumed in the Covenant. Therefore, it must be interpreted in conformity with the customary, generally accepted meaning in national legal systems, taking into account the object and purpose of this traditional right. It is beyond doubt that not every assembly of individuals requires special protection. Rather, only *intentional*, temporary gatherings of several persons for a specific purpose are afforded the protection of freedom of assembly.[16]

2.2.3 A Right to March?

In *Christians Against Racism and Fascism (CARAF)* (1980), the European Commission accepted "that the freedom of peaceful assembly covers not only static meetings, but also public processions."[17] This understanding has been relied upon in a number of cases coming before the European Commission and Court, including *Plattform Ärzte* (1988) and *Ezelin v France* (1991). In the latter, the Commission stated that the right to freedom of assembly "is exercised in particular by persons taking part in public processions."[18]

2.2.4 A Right to Counter-demonstrate?

The Public Processions (NI) Act 1998 defines 'protest meeting' as a meeting held in the vicinity of, and at about the same time as, a procession "the purpose (or one of the purposes) of which is to demonstrate opposition to the holding of that procession on that route or proposed route."[19]

The right to take part in such a meeting is, *de facto*, no different from the right to participate in a parade. However, in *Plattform Ärzte* (1988), the European Court noted that the right to counter-demonstrate must not be allowed to inhibit the exercise of the right to demonstrate (see also *CARAF* (1980),[20] **2.3.7.2(d)** and **4.3** below). The State therefore has a duty to take reasonable and appropriate measures to enable lawful demonstrations to take place without participants fearing that they will be subjected to physical violence by their opponents. In this case, participants in the counter-demonstration (which had been prohibited) threw clumps of grass and shouted down a recitation of the rosary. The police, though, did not attempt to stop this behaviour, and argued that it had neither caused serious damage nor actually prevented the procession and religious service from taking place. The Court held that the police had acted reasonably in the circumstances.

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[16] Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCPR Commentary*, Engel Publisher, Kehl-Strasbourg-Arlington, 1993, p.373.
[17] At p148, para. 4.
[18] Commission, para. 32.
[19] Section 17.
[20] At p.148.

It could plausibly be argued that it was unnecessary for the Court in *Plattform Ärzte* to make such a statement. If a counter-demonstration becomes violent then the counter-demonstrators have themselves already overstepped the legitimate exercise of the right to freedom of *peaceful* assembly and should thus forfeit the protection offered by that right.

Furthermore, this is one area in which the margin of appreciation has previously allowed contracting States a wide discretion. The Court added that the State "cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used."[21] Just as the adjective 'peaceful' defies easy definition, the level of violence which ought to be tolerated (if any), and what should be regarded as 'inhibitive', has not been prescribed but rather left to police discretion.

Thus, the Austrian government in *Chorherr v Austria* (1993) successfully argued (*inter alia*) that the arrest and detention of a demonstrator who, at a military ceremony, had worn a large banner on his rucksack (apparently blocking the view of some spectators) and distributed leaflets calling for a referendum on the sale of fighter aircraft, was merely in satisfaction of this positive duty to enable legal demonstrations to take place without interference. Interestingly, in *Chorherr* the European Commission had previously ruled – and three dissenting judges in the Court followed the Commission's reasoning – that the interference was *dis*proportionate given that the impairment of the spectators' view could have been remedied by less stringent measures (see further **2.3.6**, **2.3.7.2** and chapter **4**).[22]

2.3 Restricting the right to freedom of peaceful assembly

Already, it is clear that neither the right to freedom of expression, nor that of assembly, are absolute rights. As can be seen, Articles 10(2) and 11(2) of the European Convention, Articles 19(3) and 21 of the International Covenant, Article 15 of the American Convention on Human Rights, and Article 11 of the African Charter on Human and Peoples' Rights and Duties all outline the conditions under which limitations may legitimately be imposed on the exercise of these rights. Section 36 of the South African Constitution similarly notes that the rights contained therein may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

a) The nature of the right;
b) The importance of the purpose of the limitation;
c) The nature and extent of the limitation;
d) The relation between the limitation and its purpose; and
e) Less restrictive means to achieve the purpose.

In Northern Ireland, conditions may be imposed on public processions by the Parades Commission, the Police, and the Secretary of State under the Public Processions (NI) Act 1998. Related protests which do not take the form of a parade may be restricted by the Police

[21] Para. 34.
[22] See particularly, Commission, para. 47.

or the Secretary of State under the Public Order (NI) Order 1987. Restrictions upon the exercise of the right to freedom of peaceful assembly do not, though, only include sanctions by way of prior restraint but also subsequent punitive measures such as fines and convictions (see further **2.3.7.2(d)**).[23]

2.3.1 The Requirement to Give Notice

The UN Human Rights Committee has held that a requirement to give notice is compatible with the permitted limitations laid down in Article 21, ICCPR.[24] Similarly, the European Commission in *Rassemblement Jurassien* (1979) stated that:

> subjection to an authorisation procedure does not normally encroach upon the essence of the right. Such a procedure is in keeping with the requirements of Article 11(1), if only in order that the authorities may be in a position to ensure the peaceful nature of the meeting, and accordingly does not as such constitute interference with the exercise of the right.[25]

The Commission's decisions in two more recent cases support this stance – *WG v Austria* (1992) and *GS v Austria* (1992). Each applicant had disseminated information from tables set up, respectively, on a public road (without obstructing traffic) and in a pedestrian area. While they *had* notified the police, they had not obtained prior authorisation from the local council as required by Road Traffic Regulations. The Commission held that the requirement of prior authorisation "could be regarded as justified" and that the fines for violation of the regulations were not disproportionate to the aim pursued.

2.3.2 Non-discrimination

Restrictions imposed on the exercise of rights must not be discriminatory in effect. This is itself guaranteed by Article 14 of the European Convention and Article 26 of the Covenant.

This right is always exercised in conjunction with one or more other substantive rights such as that to freedom of assembly, although Protocol 12 of the Convention (not yet ratified by the UK) will make the right into a freestanding one. Furthermore, while the Convention does not guarantee specific rights to minorities (see **3.5** below), Article 14 does secure the enjoyment of the Convention rights and freedoms without discrimination on any ground, including association with a national minority.[26]

In *Pendragon v UK* (1998), the prevention of a Druidic celebration of the summer solstice at Stonehenge was held not to discriminate against the Druids – despite the particular significance of both the time and place to their beliefs – on the basis that there was no

[23] See *eg Ezelin v France* (1991), Court, para. 39.
[24] *Kivenmaa v Finland* (1994).
[25] At p.119.
[26] *G and E v Norway* (1983), p.35.

Article 14, European Convention on Human Rights:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 26, International Covenant on Civil and Political Rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

evidence that Druids were treated in any way differently from any other groups of people wishing or attempting to observe the summer solstice in the vicinity of Stonehenge. This is precisely the same argument as was sucessfully advanced in the English case of *R v Tunbridge Wells Borough Council and another ex parte Gipsy Council for Education Culture Welfare & Civil Rights and another* (2000), albeit prior to the Human Rights Act 1998 coming into force:

> Whilst the Order may disproportionately impact on gypsies and travellers in respect of this event, it is not in itself discriminatory in that it applies equally to any person trespassing or intending to trespass within the area to which the Order applies…[27]

In *CARAF* (1980), the Commission held that the provision in the Public Order Act 1936 which enabled a ban to be placed on *all* processions or on any class of public processions in a certain area during a specified time was "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."[28] Furthermore, the Commission acceded to the judgment of the national authorities when addressing the question of whether the exemption from the ban of processions "customarily held within the Metropolitan Police District" was discriminatory. The Commission assumed that the competent national authorities must have been "able to foresee that none of the customary processions in London during the relevant time were likely to cause trouble…".[29]

[27] 7 September 2000, Judgment of David Pannick QC, para 11, citing para 9 of the submission made by Mr Stewart Baxter, senior officer of the public order section of the Home Office, LEXIS transcript.
[28] At p.150.
[29] At p.152.

There is no similar exemption clause for processions 'customarily held' in Northern Ireland. However, the powers under the 1936 Act *are* similar to the Secretary of State's powers contained in sections 11(2) and 11(3) of the Public Processions (NI) Act 1998.[30] If the criteria enumerated in those sections are satisfied, the Secretary of State may prohibit the holding of all public processions in any 'area'[31] for up to 28 days. Such a ban might be argued to be discriminatory given that in the financial year 1999-2000 the ratio of parades classified as loyalist to those classified as nationalist was 13:1.[32] Again, though, because of the present conjunctive nature of Article 14, the European Commission appears to have considered the *proportionality* of the restrictions when deciding whether or not they were discriminatory. Thus, if the restrictions can be shown to be proportionate to the aim being pursued by the Secretary of State (*eg* for the prevention of disorder), then they are less likely to be deemed discriminatory.[33]

Importantly, the United Nations Human Rights Committee has stated that Article 26 of the ICCPR does not provide a right to see another person prosecuted, nor does the absence of prosecution against one person render the prosecution of another person involved in the same offence necessarily discriminatory, in the absence of specific circumstances revealing a deliberate policy of unequal treatment before the law.[34]

2.3.3 The Margin of Appreciation

In determining the necessity of a restriction, the European Court and Commission have always accorded a certain margin of appreciation to the national authorities. The margin has been said to extend in particular to the choice of reasonable and appropriate means to be used by the authorities to ensure that lawful manifestations can take place peacefully.[35] In the vast majority of cases, the European Commission and Court have held that the restrictions imposed *did* fall within this margin, and therefore, did not breach the Convention. In other words, the European Court has been reluctant to override domestic courts which are viewed as better placed to understand the context in which decisions restricting particular rights have been made. Moreover, a wider margin has been conferred on the national authorities when dealing with politically sensitive matters,[36] as was the basis of the decision in *Rai, Allmond & Negotiate Now* (1995):

> In the circumstances of Northern Ireland, where sensitive and complex issues arise as to the causes of the conflict and any possible solutions, the Government can be considered in its general

[30] Although, the Secretary of State may also prohibit the holding of any individual procession under s11(1) of the Act.
[31] Defined under section 17 of Act as "The whole or any part of Northern Ireland".
[32] In the year 1st April 1999 – 31st March 2000, there were 2,644 loyalist and 203 nationalist parades; Report of the Chief Constable, 1999/2000, p.99.
[33] *Pendragon v UK* (1998); *G and E v Norway* (1983); *CARAF* (1980) p.152.
[34] L*eonardus Johannes Maria de Groot v The Netherlands*, Communication No 578/1994, UN Doc CCPR/C/54/D/578/1994 (1995) at para. 4.6.
[35] *Plattform Ärzte für das Leben v Austria* (1988), Court, para. 34; *Chorherr v Austria* (1993), Court, para. 32.
[36] See further Prebensen, Soren C, "The Margin of Appreciation and Articles 9,10 and 11 of the Convention" *19.1 Human Rights Law Journal [30 April 1998]* pp.13-17, at 17; Also, Schokkenbroek, Jeroen, "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", pp.30-36, at 34.

policy of banning demonstrations concerning the subject to be pursuing the aim of preventing disorder and protecting the rights and freedoms of others.

However, following incorporation of the ECHR into domestic law through the Human Rights Act 1998 (which came fully into force on 2 October 2000), the scope of the domestic courts' review of any restrictions imposed on Convention rights by, for example, the Parades Commission, may be significantly greater than that exercised by the European Court. The margin of appreciation is a fundamentally international doctrine,[37] and the Northern Ireland courts could, in theory, scrutinize the necessity of any impugned measure much more closely. Indeed, rather than blindly applying the European jurisprudence, the Courts here could actively re-interpret those cases in which the decision relied heavily upon the wide margin granted to national authorities (*eg Chorherr v Austria* (1993) and *Rai, Allmond and Negotiate Now* (1995)).

2.3.4 Prescribed by Law

Any restrictions must be "prescribed by law". The test here is whether the strictures have a basis in domestic law, and this itself must be formulated with sufficient precision to enable the individual – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[38] In *Hashman and Harrup v UK* (1999) the order by which the hunt saboteurs were bound over to keep the peace and not to behave *contra bonos mores* (*ie* in a way which is wrong rather than right in the judgment of the majority of fellow citizens) was held to violate Article 10, ECHR because it was not sufficiently precise so as to be 'prescribed by law'.

That said, in Northern Ireland the most frequently invoked basis for interfering with the rights of the individual under the common law is action taken to prevent a *breach of the peace*. While this does not constitute a criminal offence, the European Court has held it to be sufficiently defined so as to be 'prescribed by law' within the terms of the Convention.[39]

2.3.5 'Necessary in a Democratic Society'

Restrictions must also be 'necessary in a democratic society'. 'Necessary' means that any restrictions imposed upon the exercise of the right must correspond to a 'pressing social need', and, in particular, must be *proportionate* to the legitimate aim being pursued by the authorities (see **2.3.6** below). In assessing whether the need was pressing, the Court in *Ahmed and Others v UK* (2000) looked at the extent of the national debate about the issue. In this case, the regulation of the political activities of civil servants had been examined in detail by

[37] See Fenwick, Helen, "The Right to Protest, the Human Rights Act and the Margin of Appreciation" (1999) 62:4 *Modern Law Review* 491-514. Also *R. v DPP ex parte Kebilene* [1999] 3 WLR per Lord Hope: "This technique is not available to the national courts when they are considering Convention issues arising within their own countries", although "[i]n some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on *democratic* grounds, to the considered opinion of the *elected* body or person whose act or decision is said to be incompatible with the Convention" [emphasis added].
[38] See, for example, *Ezelin v France* (1991), Court, para.45.
[39] See *Steel and Others v UK* (1998); *Hashman and Harrup v UK* (1999).

the Widdecombe Committee which had concluded that regulation was necessary. It is likely that a court examining the need for the regulation of parades in Northern Ireland would take similar account of the North Report and any subsequent reviews of the Parades Commission.

One particularly relevant question raised in the assessment of whether a pressing social need exists is that of the weight to be accorded to *perceptions*. As the North Report noted, "in Northern Ireland perceptions are realities even though the basis of the perceptions may be false."[40] Notwithstanding, the European Commission in *Ezelin v France* (1991) stated that "a sanction based on the impression that the applicant's behaviour might have given is incompatible with the strict requirement of a 'pressing social need.'"[41] In apparent contrast, however, in the case of *CARAF* (1980) the history of disorder arising from National Front marches and related counter-demonstrations appears to have persuaded the European Commission that perceptions of the proposed anti-Fascist march (based on the publicly declared aims of the organiser) were such that disorder was likely, and the march ban was therefore upheld (see further **2.3.7.2(a), (c)** and **(d)** below).

2.3.6 Proportionality – Time, Place, Manner and Tradition

It is sometimes said that even though there may be a right to assemble – even a right to march – this in no way implies a right to assemble or march in a particular place, or along a particular route, at a particular time. Strictly speaking, this interpretation is incorrect. Route restrictions *have* been held to be an infringement of the right to peaceful assembly, for the right itself has not been interpreted restrictively (see **2.1** above).

Any restrictions upon the right to freedom of peaceful assembly must, however, be *proportionate* to the legitimate aim being pursued (see **2.3.7** below). Hadden and Donnelly argue that the authorities have to 'give proper consideration to competing rights and interests involved' and that the measures the authorities adopt should be 'reasonably proportional in relation to those rights and interests and the risks of public disorder.'[42] Thus, in *CARAF* (1980), when considering whether a two month ban on all parades within the London Police District was proportionate, the Commission considered that the applicant's right to freedom of assembly had *not* been violated as the organisation –

- Could have held its procession two days after the date applied for,
- Could have held it on the date applied for anywhere outside the district, or
- Could have held a meeting in another form other than a public procession on that date and within the London district.

Similarly, in *Rai, Allmond and 'Negotiate Now'* (1995), the Department of National Heritage's refusal to grant permission for a demonstration in Trafalgar Square *did* amount to an infringement of the organisation's right to freedom of peaceful assembly. This infringement, however, was held to be a proportionate one, and thus did not violate the organiser's Convention rights. The Commission noted that "the refusal of permission did not

[40] Para 1.1.
[41] Commission, at para. 56.
[42] Hadden, T and Donnelly, A. *The Legal Regulation of Marches in Northern Ireland*, Community Relations Council, (1997), p.50.

amount to a blanket prohibition on the holding of the applicants' rally but only prevented the use of a high profile location (other venues being available in central London)…".

The Parades Commission's *Guidelines* echo this proportionality test, stating in relation to disruption to the life of the community and to the impact on relationships within the community, respectively:

- *The question the Commission must therefore address is whether the level of disruption caused by the exercise of the right to assembly is disproportionate to the significance of the procession to those participating, or to the community they claim to represent (para. 3.1).*

- *Where residents and parade organisers are in conflict over proposals for parades to pass through individual areas, the Commission will take account [inter alia] of the … purpose of the parade and whether the route is necessary or proportional to that; the availability of alternative routes which are not controversial (para. 4.2).*

2.3.6.1 Traditional Parades

The significance and purpose of parades is often framed as being a function of their perceived traditionality. As required by section 8(6)(e) of the Public Processions (NI) Act 1998, the Parades Commission must have regard to the desirability of allowing a parade which has been customarily held on that route to continue to be allowed to do so. In the European case law, the importance attached by participants to the concept of tradition has been one of the factors taken into account when assessing the proportionality of any interference with the exercise of the rights to freedom of assembly and expression. It has not, though, been an overriding factor.

In both *ARM Chappell v UK* (1987) and *Pendragon v UK* (1998), the Druids claimed that their being prevented from celebrating the midsummer solstice at Stonehenge was a violation of their rights (under Articles 9 and 11, and articles 9, 10, 11, and 14 respectively) since they had performed a religious ceremony at Stonehenge at sunrise on the longest day of the year for many thousands of years. Moreover, Stonehenge was thought to have been built by the Druids some 4,500 years ago.

The European Commission held that the public order implications of large numbers of visitors arriving at Stonehenge outweighed the perceived significance of the summer solstice for Druids. Indeed, the fact that no alternative venue could be found, because of the unique historical and archaeological importance of Stonehenge, did not work in the Druids' favour, but rather led to the conclusion that closing the Stonehenge area over the immediate period of the solstice was the only and thus the least stringent means of preventing disorder, and was thus proportionate.

2.3.7 Legitimate Aims

The aims which may legitimately be pursued by the authorities in restricting the exercise of any right are listed in the particular Article securing that right. In terms of freedom of assembly, the Convention and Covenant are virtually identical. The exercise of the right can reasonably be restricted for the following purposes:

- The interests of national security or public safety,
- The prevention of disorder or crime,
- The protection of health or morals, or
- The protection of the rights and freedoms of others.

These are examined in greater detail below.

2.3.7.1 National Security or Public Safety

Clearly, in considering parades, public safety is a more pertinent consideration than national security. There is a significant overlap between public safety considerations and those concerning the maintenance of public order, and no cases have been decided by the European Court solely on the grounds of public safety. Conceivably, though, should the Secretary of State consider it "*necessary in the public interest*" to invoke his/her power to prohibit public processions as outlined by section 11 of the Public Processions Act, the aim of ensuring public safety may become more significant. Public safety arguments are also likely to be advanced where a large parade is notified to take place in a confined area.

The aim of protecting public safety may prove difficult to counter. In the English case of *R v Tunbridge Wells Borough Council and another ex parte Gipsy Council for Education Culture Welfare & Civil Rights and another* (2000) the Divisional Court readily accepted the 'official' assessment of the threat to public safety should the Horsmonden Horse Fair be allowed to take place, despite the serious implications for the rights of the Romany Gypsies as protected by Articles 8 and 11 of the Convention. David Pannick QC stated:

> It is quite plain, in my judgment, that the primary concern of the Borough Council (and indeed of the Secretary of State) is with safety implications…[43]
> …Articles 8 and 11 of the Convention recognise that a balance must be struck between the interests of the individual – in this case, the interests of the Romany community – and the interests of society generally. This Court sees no reason, in the circumstances of this case, to interfere on public law grounds with the judgment of the Borough Council and the Secretary of State in the light of the advice from the Chief Constable that the balance has to be struck by reference to the making of this order, and that is particularly so in the light of the express consideration given by Mr Baxter on behalf of the Secretary of State to whether such an order is necessary and proportionate.[44]

[43] 7 September 2000, para. 17. It is noteworthy that this case was heard *prior to* the full implementation of the Human Rights Act 1998.
[44] Para. 32.

2.3.7.2 The Prevention of Disorder or Crime

We have already sketched the boundaries of the right to *peaceful* assembly. Paradoxically though, peaceful assembly can be legitimately restricted on grounds of disorder. In *G v The Federal Republic of Germany* (1989), 'disorder' was synonymous with obstruction. The Commission upheld the applicant's conviction for participating in a sit-in protest on a public road.[45] In *G and E v Norway* (1983), the Commission stated that "a demonstration by setting up a tent for several days in an area open to public traffic must necessarily cause disorder."[46] The prevention of 'acoustic terror' – the use of megaphones, whistles, rattles and saucepan lids – in *S v Austria* (1990) was justified (*inter alia*) on grounds of disorder. And in *Chorherr v Austria* (1993), the European Court – whilst relying heavily on the doctrine of the margin of appreciation – concluded that the behaviour of a demonstrator who at a military ceremony blocked the view of some spectators with his banner was also disorderly.

What is considered to be 'disorderly' thus varies according to the situation, and is contingent upon a number of factors. As far as parades in Northern Ireland are concerned, the relevance of the following aspects falls to be determined:
(a) The message of a parade;
(b) Whether there are likely to be any 'hangers-on';
(c) The intentions of the parade organiser;
(d) Whether there is to be a related protest;
(e) Any history of disorder connected with a particular parade or location;
(f) The potential for disorder in areas other than the immediate vicinity of a parade;
(g) The current political climate;
(h) Evidence of any steps taken towards a peaceful resolution of the dispute; and
(i) The likely impact of the parade on relationships within the community.

(a) The message of a parade
Restrictions based entirely on the subject matter or message of a demonstration (both verbal and symbolic) risk confusing 'disorder' with 'controversy' (see also **2.3.5** above). Thus, while the right to freedom of expression as set down in section 17 of the Bill of Rights Chapter of the South African Constitution explicitly excludes:
(i) Propaganda for war,
(ii) Incitement of imminent violence, or
(iii) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm,

and Article 20(2), ICCPR states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law", the ECHR does not attempt such proscription. Article 10, ECHR stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities (as does Article 19, ICCPR), but the European Court has severally re-stated the principle that freedom of expression, subject to Article 10(2):

[45] At p.263.
[46] At p.37.

> …is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[47]

In *Incal v Turkey* (1998), the applicant's conviction for helping to prepare a political leaflet which urged the population of Kurdish origins to band together and "set up Neighbourhood Committees based on the people's own strength" was held by the European Court to have violated the applicant's freedom of expression under Article 10. Read in context, the leaflet could not be taken as incitement to the use of violence, hostility or hatred between citizens.[48] Moreover, the Court stated that the "limits of permissible criticism are wider with regard to the government than in relation to a private citizen."[49]

The First Amendment to the US Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

By way of comparison, in America, judicial interpretation of the First Amendment to the Constitution has given even greater protection to these fundamental rights. The First Amendment has been held to protect symbolic speech such as the burning of the national flag,[50] as well as the advocacy of racist theories as propagated by groups such as the Ku Klux Klan.[51] Time, place and manner restrictions must be justified, *inter alia*, *without* reference to the content or message of the activity in question. Other restrictions penalizing speakers or parade organisers for the *reaction* produced by a controversial message are subjected to even closer scrutiny (see further **(c)** and **(d)** below).

Of particular relevance to the parades issue is the *Skokie* case.[52] The National Socialist Party of America (NSPA) – a neo-Nazi organisation – planned a parade and demonstration in the village of Skokie which had a largely Jewish community. The local authority imposed a ban on the NSPA's demonstration but, on appeal, the Supreme Court held that the restrictions were unconstitutional and the march and rally should be allowed despite being deeply offensive to the residents of the village. While this case is often cited in support of an absolute right to freedom of assembly, less attention has focused on the fact that the NSPA's rally was eventually held at a non-contentious location.

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[47] *Handyside v The United Kingdom* (1976), para. 49. Applied in *Incal v Turkey* (1998), para. 46; *Otto-Preminger-Institut v Austria* (1994), para. 49, and joint dissenting judgment, para. 3; *Müller and Others v Switzerland* (1988), para. 33; *Observer and Guardian v United Kingdom* (1991), para. 59; *Chorherr v Austria* (1993), Commission, para. 39.
[48] Para. 50.
[49] Para. 54.
[50] *Texas v Johnson* 109 S Ct 2533 (1989); *Eichman v US* 110 S Ct 2404 (1990).
[51] *Brandenburg v Ohio*, 395 US 444 (1969).
[52] *Village of Skokie v National Socialist Party of America*, 363 NE 2d 347 (1977) and 373 NE 2d 21 (1978); Also *Collin v Smith* 447 F Supp. 676 (1978).

Even provocative speech and incitement to commit unlawful activity is given limited protection by the First Amendment. In the case of *Brandenberg v Ohio* (1969), the Supreme Court overturned the conviction of a Ku Klux Klan leader and declared unconstitutional the statute under which he was prosecuted because it punished the mere advocacy of using violence to achieve political change. The court held that restrictions upon the advocacy of force or crime could only be sustained if the provocation was both *intended* and *likely* to produce "imminent lawless action" (rather than a mere, abstract threat of violence). This test supercedes the "clear and present danger test" previously developed by the Supreme Court.[53]

In the UK, processions and demonstrations thought likely to inflame *political* passions appear to have been particularly susceptible to restriction, whereas those of a solely *religious* character have been offered special protection. The history of restrictions imposed on demonstrations in London is well documented in the facts of *CARAF* (1980)[54] which itself is an interesting case given the attempts by the organisers to have their proposed procession recognised as a religious demonstration as between two cathedrals and led by choirs in robes. In *Rai, Allmond and Negotiate Now* (1995), the Department of National Heritage's decision (upheld by the European Commission), not to allow the rally to take place in Trafalgar Square, was influenced by the fact that an Apprentice Boys' 'rally with hymns' ten years previously had been used 'as a *political* arena' despite prior assurances to the contrary (see further **(e)** below).

In international case law, any bias favouring religious assemblies is not so obvious. While the European Court has generally assessed politically sensitive events on public order grounds, events with religious overtones have instead largely been examined in light of their implications for *the rights and freedoms of others*. This is therefore examined in greater detail under that heading (**2.3.7.4**).

(b) Whether there are likely to be any 'hangers on'

The problem of non-participant hangers-on is frequently encountered in parade and protest situations. In *ARM Chappell v UK* (1987), the applicant argued that for eighty years up until 1985 the religious ceremony known as the midsummer solstice had taken place without interference by any public or private body. In recent years, however, the ceremony had attracted a large gathering of on-lookers, which developed over successive years into an event known as the Stonehenge free festival (attended in 1984 by an estimated 30,000 people). This event was not sanctioned or encouraged by the Druids and formed no part of the Druids' ritual or ceremony. More importantly, by 1983 and 1984 a group of people known as 'the peace convoy' introduced an unruly element into the festival, and were disruptive and disrespectful of the law. Yet despite the Druids' abdication of any responsibility for the actions of hangers-on, the restriction upon their solstice celebration was upheld.

[53] O'Neill, KF, "Disentangling the Law of Public Protest", *Loyola Law Review* 1999 Vol.45 (Fall) pp.411-526, at p.484, n.376.
[54] At p.143.

(c) The intentions of the parade organiser

The European Commission has often stated that the right to freedom of peaceful assembly is guaranteed to everyone who has the intention of organising a peaceful demonstration. Thus, in Northern Ireland, some enquiry as to, and assessment of, the intentions of the organisers can legitimately be made by the police and Parades Commission.

While noting that actual objectives or intentions may sometimes differ from those notified, unless there is evidence of any concrete action which might belie the sincerity of the aim declared by the organiser, the Court has previously been willing to accept the organiser's declared intention at face value.[55]

Peaceful intentions, though, have not necessarily led the European Commission and Court to conclude that restrictions placed on the right to freedom of assembly were unwarranted. In *Rai, Allmond & Negotiate Now* (1995), the applicants' peaceful intentions were not disputed – moreover, they had offered to use **stewards** and **co-operate with the police as to organisational details**. Notwithstanding, the restrictions placed on their proposed Trafalgar Square demonstration were deemed necessary in a democratic society.

In *Rassemblement Jurassien* (1979), the organisers stated that their planned demonstrations were to be peaceful. Again, the European Commission – noting the fairly broad margin of appreciation accorded to national authorities when confronted with foreseeable danger affecting public safety and public order[56] – held that as there was considerable tension and serious clashes could be foreseen, the banning order had been legitimate.

In *CARAF* (1980), the Commission noted that "whilst it was clear that the applicant association had wholly peaceful intentions it is nevertheless true that its statutory purposes were expressly directed against the National Front policies and it could therefore not be excluded that the proposed procession could also give rise to disorder."[57] Furthermore, the central issue was the likelihood of demonstrations to result in public disorder, irrespective of the source of such a risk, and thus "it was not unreasonable for the authorities to apply an objective criterion rather than a subjective test relating to the violent or peaceful intentions of the organisers of such demonstrations."[58]

This objective test, however, appears to contradict the tests used in both *Plattform Ärzte* (1988) and *Ezelin v France* (1991), which were heard by the European Court. In the latter, the European Commission (whose reasoning the Court followed) stated that:

> …generally speaking, an individual does not cease to enjoy the right to freedom of peaceful assembly simply because sporadic violence or other punishable acts take place in the course of the assembly, if he himself remains peaceful in his intentions and behaviour.[59]

[55] *Incal v Turkey*, para.51; *United Communist Party of Turkey and Others*, para.58;
[56] At p.120.
[57] At p.151.
[58] At p.152.
[59] Commission, para. 34.

It remains to be seen which test the European Court will rely upon in the case of *Boris Stankov v Bulgaria* (1998) and *United Macedonian Organisation 'ILINDEN' v Bulgaria* (1998). In the admissibility proceedings, the Bulgarian government submitted that there had been clashes between supporters of the applicant association and other persons in the past, whereas the applicants insisted that it had always been the police who had initiated the disorder. Furthermore, they stated that even if the authorities had reason to believe that their meetings and marches would meet opposition by other people, it was the duty of the police to protect their right to demonstrate.

(d) Whether there is to be a related protest

In **2.2.4** above, we noted that it was largely a question of police discretion as to what level of disorder caused by protest activity should be tolerated, that the European Court has often been sympathetic to the police prognosis, and that a wide margin has previously been granted to national authorities in deciding *how* to facilitate peaceful demonstrations. Thus, while making idealistic statements of principle such as that in the *Plattform Ärzte* case, evidence pointing to the possibility of a violent protest (see, for example, **(e) Any history of disorder** below), *could* serve to justify restrictions being placed on an entirely peaceful and legal demonstration. The following example extracted from the European Commission's report in *CARAF* reiterates the point. The Commission held that:

> …the right to freedom of peaceful assembly is secured to everyone who has the intention of organising a peaceful demonstration…[T]he 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. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it, such procession does not for this reason alone fall outside the scope of Article 11(1)…[60]

But the Commission then noted that restrictions could still be imposed on such an assembly so long as they are "in conformity with the terms of Article 11(2)" *ie* that the restrictions are proportionate to the legitimate aim sought to be achieved.

In contrast, the Court in *Ezelin* adopted a much stricter test:

> It is not 'necessary' in a democratic society to restrict those freedoms in any way unless the person in question has committed a reprehensible act when exercising his rights.[61]

Extending this principle, it would seem that if the organisers and participants of a parade have themselves remained peaceful, on no account may they be restricted because of disorder threatened or caused by a related protest. The person or group organising a parade or protest can only be restricted if they are shown to have acted 'reprehensibly' (although no definition of 'reprehensible' has been forthcoming).

The subjective *Ezelin* test is similar to that used in the English case, *Redmond-Bate v Director of Public Prosecutions* (1999). Three women, preaching on the steps of Wakefield

[60] At pp.148-9.
[61] [1991] 14 EHRR 362 at 363.

Cathedral, were arrested for a breach of the peace when some members of the gathered crowd became hostile towards them. The Court of Appeal held that:

> If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble … then it was they and not the preachers who should be asked to desist and arrested if they would not.[62]

Lord Justice Sedley noted that lawful conduct should not be restricted unless it is so provocative so as to give rise to a reasonable apprehension of violence. Moreover, the test for provocation is not whether the message is offensive, but rather whether the conduct in question interferes with the rights or liberties of others:

> …violence is not a natural consequence of what a person does *unless it clearly interferes with the rights of others* so as to make a violent reaction not wholly unreasonable.[63]

Unfortunately, the Court of Appeal did not elaborate any further on what might constitute clear interference with the rights of others. Guidance, therefore, may be obtained from the relevant European case law – see **2.3.7.4** below and chapter **3** generally.

It may, though, be significant that the 'restriction' in both *Ezelin* and *Redmond–Bate* was a retrospective sanction. In contrast, the restriction in *CARAF* was by way of prior restraint – a preventative measure based upon the objective threat of disorder. Arguably, therefore, distinguishing the source of disorder has been more important when assessing the rectitude of retrospective or reactive restrictions (eg an arrest for breach of the peace) than it has been when considering the necessity of pre-emptive restrictions (*eg* a ban or re-routing of a parade). Where preventative measures are concerned, an objective assessment of the potential for disorder would appear to suffice (see also **(c)** above).

In any case, in explaining how the Parades Commission will consider the factor, 'disruption to the life of the community', their *Guidelines* appear to adopt the more subjective test. They pledge that "the Commission will take care to distinguish between disruption caused by the procession itself and disruption caused by any associated protest activity or police action taken in response to that activity."[64] Furthermore, while it could be argued that Parades Commission determinations are themselves retrospective sanctions (based, as they often are, upon the previous conduct of the parade organiser and participants), and that therefore, the strict *Ezelin* test ought to be applied, in any determination where the Parades Commission relies upon breaches of the Code of Conduct, the *Ezelin* test will already have been satisfied (assuming that a breach of the Code would amount to 'reprehensible' behaviour in *Ezelin* terms).

In America, sanctions which punish a parade organiser for the actions of counter-demonstrators are more closely scrutinized than time, place or manner restrictions. The rationale here is that to restrict freedom of assembly because of a hostile audience would be to create a law-breaker's charter. In *Christian Knights of the Ku Klux Klan Invisible Empire,*

[62] Para.18.
[63] Para.16 [emphasis added].
[64] Para. 3.1.

Inc. v District of Columbia (1992),[65] the KKK was permitted to march in Washington DC even though previous rallies there had resulted in violence, injuries and multiple arrests. The DC Circuit court held that even where there was a substantial threat of violence, restrictions would be content-based and thus unconstitutional unless the violence was "beyond reasonable control." While the court rejected the police assessment of the gravity of the threat of disorder, it did recognize that the potential for violence because of a controversial message could legitimately give rise to time, place and manner restrictions:

> When the choice is between an abbreviated march or a bloodbath, government must have some leeway to make adjustments necessary for the protection of participants, innocent onlookers, and others in the vicinity.[66]

(e) Any history of disorder connected with a particular parade or location

The European Commission noted in both *ARM Chappell v UK* (1987) and *Pendragon v UK* (1998) that there had been serious disorder at Stonehenge in previous years. In this light, neither an absolute ban in the case of the former, nor a four-day ban for four miles around Stonehenge in the latter, were considered disproportionate. Similarly, in *S v Austria* (1990), a protest to criticize the courts was banned on the grounds of public order and the protection of the rights and freedoms of others. This was justified because of the disorder and disruption caused by previous similar demonstrations where shouting, megaphones, whistles, rattles and saucepan lids had been used.

In another case, *Rassemblement Jurassien* (1979), the Commission held that the Government's banning of all political demonstrations for two days in the town of Moutier – which had "always been a trouble spot, where latent tension was particularly high"[67] – was not disproportionate. It may be that what is proportionate in one town might be considered disproportionate in another.

Of particular relevance to Northern Ireland, *Rai, Allmond & 'Negotiate Now'* (1995) concerned the Government's refusal of an application by 'Negotiate Now' to hold a rally in Trafalgar Square, the purpose of which was to publicly ask the Government to enter into peace negotiations in Northern Ireland without a prior cease-fire. The Commission noted that in 1984 an Apprentice Boys rally had been allowed in Trafalgar Square, and despite assurances given by the parade organiser that the meeting would not be political, it *was* used as a political arena. The British Government argued that they were anxious to avoid a repetition of this, and the Commission did not question the fact that the Government's assessment of the history of rallies in Trafalgar Square were not confined to previous parades organised by the same organiser or even with the same participants. This would appear to support an argument that *any* history of disorder or derogation from conditions imposed on a rally or parade in a particular location, irrespective of the persons involved, may legitimately be taken into account when considering future parades and assemblies there (although see the comments pertaining to the margin of appreciation in **2.3.3** above).

[65] 972 F 2.d 365 (DC Cir. 1992). See also *Hurwitt v City of Oakland* 247 F. Supp. 995 (N.D. Cal. 1965).
[66] Ibid., at 374.
[67] At p.112.

(f) The potential for disorder in areas other than the immediate vicinity of a specific parade

In *CARAF* (1980) the Commission considered the 'proportionality' of the ban on all processions in London in light of "the situation existing in England at the time". This was "characterised by a tense atmosphere resulting from a series of riots and disturbances, having been occasioned by public processions of the National Front and counter-demonstrations in connection therewith."[68] This would suggest that disorder related to a parade dispute in one part of Northern Ireland may legitimately be considered in determining the conditions to be imposed on parades elsewhere in Northern Ireland.

(g) The current political climate

Likewise, in *Rassemblement Jurassien* (1979), a decision to ban all political meetings taken because of "the present tension which has arisen in a climate of provocation" (following, in particular, two referenda to revise the Canton constitution) in order to "avoid clashes whose consequences would be unforeseeable"[69] was held by the Commission to be proportional and not to violate Article 11. The prevailing political climate would also appear to be a legitimate consideration in determining the necessity of a restriction.

(h) Evidence of steps taken towards a peaceful resolution of the dispute

Again in *Rassemblement Jurassien*, the Government was allowed to ban all political demonstrations despite the fact that the local council had already imposed conditions on the proposed demonstration which, moreover, the organisers had accepted. However, a demonstration, organised in Moutier by the same group one month after the banned demonstration, *was* allowed to take place and did so peacefully. The applicants argued that the decision not to allow the earlier demonstration but to allow the later demonstration was irrational. The Commission did not dispute the government's justification for allowing the second demonstration – namely that it was taken in fundamentally different circumstances, including the fact that it followed a tripartite meeting and the establishment of a round-table conference to which the parties concerned had been invited to settle arrangements for the demonstrations.[70]

When balancing the right to freedom of assembly with the objective possibility of disorder, it therefore seems that the European Court has taken account of the commitment and resolve of the organisers to ensure that disorder will not result. In the context of Northern Ireland, any requirement imposed by the Parades Commission that organisers of a parade engage in dialogue with residents may conceivably be interpreted under Article 11(2) as a means of diffusing tension, and therefore as necessary in a democratic society for the prevention of disorder (see also **(i)** below).

Clear guidance as to what is expected of those organising parades and protests might be drawn from the joint dissenting opinion (which included the current Vice-President of the Court) in *Otto-Preminger-Institut* (1994). This case, though, relates to freedom of expression rather than freedom of assembly directly:

[68] At p.150.
[69] At p.109.
[70] At pp.113-4, para.16, and p.121, para.11.

> The duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others. Only if he fails to take necessary action, or if such action is shown to be insufficient, may the State step in.[71]

(i) The likely impact of the parade on relationships within the community

While this is one of the factors to which the Parades Commission is to have regard under the Public Processions Act 1998, none of the European cases have considered the relevance of this factor, and it is not one of the legitimate aims listed in Article 11(2) of the European Convention.[72] As such, it has already been the subject of a judicial review of a Parades Commission determination.[73]

The application for judicial review concerned the Commission's determination preventing the Dunloy LOL No.496 parade from entering the village of Dunloy on Sunday 29th October 2000. This determination relied upon two of the statutory criteria in the Public Processions Act – the potential for disorder and the likely impact on relationships within the community (both locally and wider afield)[74] should the parade proceed as notified.

Counsel for the applicant accepted that there would have been no case to answer had the Parades Commission relied exclusively on the potential for disorder, this being one of the legitimate aims in Article 11(2). He argued, however, that the Commission was not entitled to take into account factors other than those contained in Article 11(2), and that included both the impact of the parade on relationships within the community, and the fact that the Orange Order had not engaged with local residents.

Kerr J dismissed the application, stating first that the nexus between the potential for disorder and the absence of agreement was clear, and second, that the *principal* reason for the Commission's decision was the significant risk of the potential for disorder. The applicants appealed, and in the appeal judgment, Carswell LCJ similarly stated that:

> [The Commission] was bound to have regard to the other matters specified in section 8(6) of the 1998 Act, but they did not form the ground for its decision to impose the restrictions, which was placed firmly on the prevention of public disorder. The other considerations came into play in that part of the Commission's decision which was concerned with the issue whether those restrictions were necessary in a democratic society and proportionate.

Preventing a breakdown in relationships within the community, therefore, cannot be an *aim* of the Commission, but rather only a factor to be considered when gauging whether any restriction corresponds to a pressing social need and is proportionate (see **2.3.5** and **2.3.6** above). Carswell LCJ continued:

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[71] Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, para.7.
[72] Section 8(6)(c).
[73] *In the matter of an Application by David Alexander Tweed for Leave to Apply for Judicial Review*. Heard by Kerr J in the High Court on 25 October 2000, and by the Court of Appeal on 26 October 2000. Written judgment delivered by Carswell LCJ.
[74] See the definition of "community" approved by the High Court in **3.5** below.

> …even if it can be said that the Commission, in reaching its decision had regard to factors other than those specified in Article 11(2) of the Convention, that does not necessarily invalidate it. In domestic law the decision must be made by reference to the correct factors, and this requirement was satisfied in the present case…The issue is whether the restriction imposed on the parade can properly be said to be justified on one of the grounds specified in Article 11(2), whatever factors the Commission may have taken into account in reaching its decision. We are quite satisfied that the restrictions in the present case were necessary in a democratic society for the prevention of disorder, and that they were proportionate. We therefore consider that on this basis also the Commission's determination was a valid exercise of its powers and was not in breach of Article 11.

Like steps taken to reach a peaceful resolution, or the lack of them (see **(h)** above), it would appear that concerns about a parade having an adverse impact on community relations cannot, themselves, be used to justify the imposition of restrictions on freedom of assembly. Instead, they are relegated to being a litmus test of the potential for disorder. Ultimately, though, this remains to be decided by the courts. Indeed, no attempt was made in the proceedings to argue that this provision of the Public Processions Act is incompatible with the Convention.

2.3.7.3 The Protection of Health or Morals

The protection of morals are of limited relevance to parade disputes. In any case, *Hashman and Harrup v UK* (1999) serves as a reminder that any restrictions must have a basis in domestic law which is sufficiently clear and precise so as to satisfy the requirement of 'prescribed by law' (see **2.3.4** above). It is not enough for behaviour merely to offend morality, but it must be behaviour which is deemed *criminal* and has been defined by Parliament as such.

While entirely speculative, there is perhaps an argument to be made around the health implications of living in an area where parades are contentious and where the dispute has been sustained at a particularly high and consistent level. None of the freedom of expression or assembly cases have relied upon this proviso.

2.3.7.4 The Protection of the Rights and Freedoms of Others

No individual or group in society (majority or minority) ought to be able to deny others the freedom to exercise their right to peaceful assembly. A policy of communal consent, whereby marches through residential areas would be permitted only if the march organiser had obtained the consent of the residents, has no basis in international human rights law. It runs counter to the principles of tolerance and pluralism which can be adduced from the international jurisprudence.

Nonetheless, given the 'trickle-down' effect of public order considerations, efforts to solicit and take into account the views of local residents or even a requirement that parade organisers engage in dialogue with them *may* ultimately be related back to the aim of preventing disorder. Judge Pettiti, in *Wingrove v UK* (1996), argues that the same decision could have been reached on grounds such as the prevention of public disorder rather than blasphemy and the rights and freedoms of others.

As already mentioned, the aim of protecting the rights and freedoms of others tends to be relied upon to a greater extent where people's religious identities are offended. This was explained in the European Court's majority judgment in *Wingrove*:

> …there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest…a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions.[75]

Yet, despite granting such latitude to national authorities where the rights and freedoms of others are concerned, reliance on this aim has sometimes sparked disagreement within the European Court itself. Some judges appear to have relied on it as a means of giving extra protection to religious groupings, whereas other judges have argued that to give such special protection runs counter to the spirit of the Convention.

In *Wingrove*, the British Board of Film Classification rejected an application for a distribution certificate for the film, 'Visions of Ecstasy'. The film director argued that 'the rights of others' in Article 10(2) must mean an actual positive right not to be offended rather than a mere hypothetical right at the prospect of some people possibly being offended.[76] The European Court dismissed the director's argument, and held that the Board's aim, which was to protect against the treatment of a religious subject which was *bound to* (irrespective of how it was intended) outrage those who have an understanding of, sympathy towards and support for the Christian story *was* legitimate and entirely consonant with the protection of the rights of others within the meaning of Article 10(2).[77]

Translating this argument to a parades scenario, irrespective of the intention of either a parade or protest organiser, anything which is *bound* to offend the religious sensibilities of the other community may, on this understanding, be restricted to protect the rights and freedoms of others.

Similarly, in *Otto-Preminger-Institut* (1994), the majority of the Court stated that it could not disregard the fact that the proportion of Roman Catholic believers in the Tyrolean region of Austria (where the film, 'Council in Heaven', was advertised and scheduled to be shown) was as high as 87%. The Cinema Operator's right to freedom of expression had to be balanced with the community's right to proper respect for their freedom of thought, conscience and religion under Article 9 of the ECHR:

> Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which

[75] Para. 58. See also *Otto-Preminger-Institut v Austria* (1994), para. 50; *Müller and Others v Switzerland* (1988), paras. 30 and 35.
[76] Para. 45.
[77] Para. 48; also para. 57.

> religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.[78]

The Court – over-ruling the decision of the Commission by a majority of 6-3 – accepted the Government's submission that there was a pressing social need for the preservation of religious peace, and held that it had not overstepped its margin of appreciation in confiscating the film. This sits well with the Swiss Government's assertion in *Rassemblement Jurassien* (1979) that "the public interest in the freedom of peaceful assembly was bound temporarily to take second place to the equally legitimate public interest in harmonious community life among citizens in a democratic society."[79] The European Commission did not debate this argument.

However, in contrast, the minority dissenting opinion in *Otto-Preminger-Institut* argued that:

> The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.[80]

This dissenting opinion accords with the rationale in *Ezelin v France* (1991) where the Commission stated that a sanction based on *the impression* that the applicant's behaviour *might have given* is incompatible with the strict requirement of a 'pressing social need' and is, thus, insufficient to justify restricting the applicant's freedom.

Further consideration of the rights and freedoms of others is contained in the next chapter.

2.4 The Right to a Fair Hearing

The right to a fair hearing is guaranteed by Article 6(1), ECHR, and Article 14(1), ICCPR. It provides a safeguard not only in criminal trials but also in quasi-judicial or administrative hearings where a person's 'civil rights and obligations' are being determined. That said, the *applicability* of the right to the procedures by which the Parades Commission and the police take decisions about parades and demonstrations is problematic. It cannot be assumed that the determination of the right to freedom of peaceful assembly, as guaranteed by Article 11 of the Convention, attracts the protection afforded by Article 6.

[78] Paras. 52 and 55.
[79] At p.115,para. 20.
[80] Joint Dissenting Opinion, para.6.

Article 6(1), European Convention on Human Rights :

1) *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

Article 14(1), International Covenant on Civil and Political Rights :

1) *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

The first question raised is whether there is a dispute ('contestation') over a 'right' which, at least arguably, is recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the existence of a right but also to its scope and the manner of its exercise; and the outcome of the proceedings must be directly decisive for the right in question – mere tenuous connections or remote consequences are not sufficient to bring Article 6(1) into play.[81] The Parades Commission directly 'determines' the exercise of the right to freedom of peaceful assembly[82] and, arguably, the exercise of a number of other rights which are to be balanced against the latter (see further **2.3.7.4** and **3**). It therefore seems likely that a 'contestation' *would* be held to exist where disputes over contentious parades are concerned.

The second question to be addressed is whether the right to freedom of peaceful assembly, or the rights of affected individuals and communities, constitute '*civil* rights' – a phrase which has an autonomous Convention meaning. While bodies such as the Gaming Board,[83] Patent Office,[84] Board of Visitors[85] and Pensions Review Board[86] have previously been held to be

[81] *Zander v Sweden* 25/11/93, Series A no.279-B, p.38, para.22; *M.S. v Sweden* 17/8/97, para.47, *Fayed v United Kingdom* 25/8/94, 18 EHRR 393, para.56.
[82] Under section 2(2)(b) of the Public Processions (NI) Act 1998.
[83] *Kingsley v UK*, 7/11/2000.
[84] *British-American Tobacco Company Ltd v The Netherlands*, 20/11/95.
[85] *Campbell and Fell v UK*, 28/6/84, para.76.

bound by the requirements of Article 6(1), it is the *character of the right* being determined which is relevant, and not the nature of the body determining it.[87] Moreover, the European Court has declined to formulate a definition of 'civil' rights and obligations,[88] preferring instead an inductive approach according to the particular facts of individual cases (a substantial number of which have addressed this question).

The phrase '*civil* rights and obligations' has traditionally been interpreted as meaning '*private law* rights and obligations'. These rights cover disputes between individuals, and between individuals and the state, so long as the state is not acting in its sovereign capacity. In practice, the majority of cases in which the definition of 'civil rights' has been satisfied have involved rights of an exclusively pecuniary, economic or proprietary nature. The right to peacefully enjoy one's possessions as protected by Article 1 of Protocol 1 of the Convention (see **3.4** below) *may* therefore qualify as a 'civil right'. It is important to note, however, that "proceedings do not become 'civil' merely because they also raise an economic issue."[89]

While the determination of rights of a *public* nature has not generally been safeguarded by the fair trial provisions, the European Court in *König v FRG* (1978) stated that it did not have to decide "whether the concept of 'civil rights and obligations'…extends beyond those rights which have a private nature."[90] Indeed, Harris, O'Boyle and Warbrick note that Article 6 has been invoked in many more kinds of disputes between individual and state than the traditional understanding of 'civil rights' might suggest.[91] The jurisprudence might also be argued to indicate an incremental extension of 'civil rights' so as to include other Convention rights – most notably the right to private and family life under Article 8 of the Convention.[92]

None of the cases dealing with this 'characterisation of rights' issue have involved the right to freedom of peaceful assembly. However, in *Pierre-Bloch v France* (1997), the European Court explicitly distinguished between 'civil rights' and 'political rights'. This case concerned a politician who had exceeded the prescribed spending limit for election campaigns and was thus disqualified from standing for election by the Constitutional Council. The Court held that the right to stand for election was a political right and not a civil one, and that therefore, disputes concerning its determination lay outside the scope of Article 6(1).[93] Interestingly, the dissenting judgment of Judge De Meyer lamented the majority decision's nervous withdrawal "into the cocoon of a strict, fainthearted interpretation." On the definition of 'civil rights and obligations', he argued that

> Once again, [the Court] has missed the opportunity to acknowledge and assert the full extent of the meaning to be given to…those concepts…The distinction between civil rights and political

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[86] *Y.L. v Canada*, UN Human Rights Committee, 112/1981 – despite the fact that Article 14, ICCPR is ostensibly restricted to hearings involving a criminal charge or the determination of a person's rights and obligations *in a suit of law*.
[87] *König v FRG* (1978) A 27 para. 90.
[88] *Bentham v Netherlands* (1985) A97 para. 34.
[89] *Pierre-Bloch v France*, 21/10/97, para.51.
[90] A 27 para. 95.
[91] Harris, DJ, O'Boyle, M, and Warbrick, C. *Law of the European Convention on Human Rights*, Butterworths, (1995), p.184.
[92] For example, *MS v Sweden*, 17/8/97.
[93] Para.50.

> rights…– like the one between private law and public law, to which it is linked – has all too often served to remove from the scope of the ordinary law situations affecting the exercise of what is called public authority…and to reduce the scope of the protection of citizens in relation to such situations…In reality 'political' rights are a special category of 'civil' rights. Indeed, they are more 'civil' than others in that they are more directly inherent in citizenship…[94]

Certainly, if it were held that the Parades Commission does *directly* determine certain rights held by affected individuals and communities, it would be strange if the Commission was required to comply with Article 6 in the determination of those rights, but not required to do so in the determination of the right to freedom of peaceful assembly. In any case, should the Commission be deemed justiciable under Article 6, there are a number of different issues which might arise in relation to its compliance.

2.4.1 Are The Commission's Judgments Pronounced Publicly?

The Commission's determinations, which are first communicated to the parties involved and later posted on the internet, will likely satisfy the demand that they are publicly announced. In *The Axen Case* (1983), the European Court considered "that in each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6(1)."[95]

2.4.2 Is The Parades Commission 'Independent And Impartial'?

Given the power of the Secretary of State under section 9 of the Public Processions Act 1998 to review a determination issued by the Commission, it is not clear whether the Parades Commission of itself has the requisite degree of independence so as to satisfy the requirements of Article 6(1). In *Bryan v UK* (1995), the European Court held that a planning inspector whose powers could be revoked by the Secretary of State "notwithstanding the limited exercise of the power in practice", for that reason alone, was not sufficiently independent:

> In order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question of whether the body presents an appearance of independence.[96]

The Court, however, then stated that even where an adjudicatory body does not comply with Article 6(1) in this respect, "no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6.1."[97] The judicial body must be able to quash the impugned decision and to remit the case for a new decision.

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[94] See also the dissenting opinion of Messrs Melchior and Frowein in the *Benthem* case, B 80 para.10 (1983).
[95] *The Axen Case*, 25/10/83, para.31.
[96] *Bryan v UK* (1995), paras. 37-8. See also *Kingsley v UK* (2000), paras. 46-7.
[97] *Albert and Le Compte v Belgium* (1983), para.29; *Bryan v UK* (1995), para.40; *Kingsley v UK* (2000), para.51.

Following the Human Rights Act 1998, though, this 'composite' approach is problematic. Should the availability of Judicial Review effectively release a 'public authority' from its duty to act in a way which is compatible with the Convention, (see **1.3** above), or should the public authority of *itself* fulfill all the requirements of Article 6(1)? Because there *is* the fall-back of the Parades Commission's own review procedure (under rule 6.1 of its *Procedural Rules*), the question then arises as to whether the procedures involved at the Commission's *initial* decision making stage are in any way constrained by the demands of the right to a fair hearing.

2.4.3 'The Opportunity to have Knowledge of and Comment on the Observations Filed or Evidence Adduced by the Other Party'

In *Ruiz-Mateos v Spain* (1993), where the tribunal of first instance was a constitutional court (separate from and with different rules to the civil and criminal courts), these demands were held to include the right to an adversarial trial, whereupon the parties must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party.[98]

In *McMichael v UK* (1995), the refusal to disclose vital social documents, which was considered by the children's hearing, to a party in that hearing was held to be in breach of Article 6(1). The European Court did not consider it necessary to differentiate between the different stages of hearing and appeal, but rather considered the fairness of the care proceedings as a whole.[99]

Rule 3.3 of the Parades Commission's Procedural Rules:

3.3 ***All evidence*** *provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision.*

In this light, it might be argued that rule 3.3 of the Commission's Procedural Rules places parties to the dispute at a substantial disadvantage on three accounts:[100]

- In respect of influencing the outcome of the Commission's initial decision;
- In assessing their prospects of bringing an appeal; and
- In the subsequent presentation of any appeal.

The right to a fair hearing raises sensitive issues about anonymity and the non-disclosure of witnesses' identities. The interests of witnesses, however, must be seen as being protected by

[98] *Ruiz-Mateos v Spain*, 23/6/93, para.63.
[99] *McMichael v UK* (1995), para.78.
[100] See *McMichael*, paras.80 and 82.

other substantive provisions of the Convention, and so the interests of fair trial are to be balanced against those of witnesses.[101]

[101] *Doorson v The Netherlands*, 26/3/96, p.470, para.70.

3. AFFECTED INDIVIDUALS AND COMMUNITIES

Having established, as far as is possible, the parameters of the right to march and the right to counter-demonstrate, the question of what rights ought to be enjoyed by individuals in the communities through which parades pass must be addressed. Both Article 17 of the European Convention and Article 5 of the International Covenant (which are always exercised in conjunction with other substantive rights) make it clear that where freedoms collide they are to be balanced according to the particular facts of the case. This chapter, therefore, makes no attempt to balance the rights enumerated here with those discussed in the previous chapter.

Article 17, European Convention on Human Rights:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 5, International Covenant on Civil and Political Rights:

1) *Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*

2) *There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.*

3.1 A Right to Freedom from Sectarian Harassment?

One of the rights affirmed by the parties to the Belfast (Good Friday) Agreement was that to freedom from sectarian harassment. Building on the paragraphs in **2.3.7.4** above, and in particular the contrasting opinions in the case of *Otto-Preminger-Institut* (1994), it is clear that there is disagreement even within the European Court as to how much protection should be afforded to people's religious sensibilities. Certainly, there is no right not to be offended. But the concept of 'harassment' suggests something more than mere offence.

While the concept has little by way of international legal pedigree and discussion of its scope is therefore speculative, some guidance may be found in the *EU Code of Practice on Sexual*

Harassment.[102] In this document, "harassment" is defined as conduct which is "unwanted, unreasonable and offensive to the recipient". It may also create "an intimidating, hostile or humiliating…environment for the recipient." Such conduct affects the dignity of the recipient, and moreover, it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. Conduct becomes harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive.

The rest of this chapter is confined to examination of some of the rights and principles already enshrined in international human rights law. These are, namely, 'degrading treatment', the right to respect for private and family life, peaceful enjoyment of one's possessions, and the rights of minorities.

3.2 Degrading Treatment

Article 3, European Convention on Human Rights:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 7, International Covenant on Civil and Political Rights:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

There is a high threshold to be overcome in order for treatment to be deemed 'inhuman' or 'degrading'. In *ECW v The Netherlands* (1993), the UN's Human Rights Committee held that the applicant's conviction for violating the law, while protesting against the deployment of cruise missiles, did not raise an issue under Article 7, ICCPR.

More significantly, in *Smith and Grady v UK* (2000), the applicants were two homosexuals who were dismissed from the British army. They argued that the army's policy, the investigation procedure, and their subsequent discharge was discriminatory treatment, contrary to Article 3, ECHR, based on crude stereotyping and prejudice, which denied and caused affront to their individuality and dignity. The Court stated that:

> Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects…Treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and

[102] Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work (92/131/EEC).

> inferiority capable of humiliating and debasing them and *possibly breaking their physical or moral resistance*. Moreover, it is sufficient if the victim is humiliated in his or her own eyes.

The Court did not deny that treatment 'grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority' could, in principle, fall within the scope of Article 3, but the Court ruled in this case that the minimum level of severity had not been met, and there was no violation of Article 3 (see further **4.5**)

Given this minimum level, the application of this Article to the parades dispute in Northern Ireland is perhaps tenuous. In relation to **3.1** above, however, it would certainly seem that 'harassment' involves a lower threshold than 'degrading treatment'.

3.3 Private and Family Life

In addition to the potential for disorder, one of the factors which the Parades Commission must have regard to when deciding whether or not to impose conditions on a parade is the level of disruption likely to be caused to the life of the community. Such disruption might be argued to infringe upon the right of individuals to respect for their private and family life.

Article 8, European Convention on Human Rights:

1) *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2) *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 17, International Covenant on Civil and Political Rights:

1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.*
2) *Everyone has the right to protection of the law against such interference or attacks.*

'Private life' covers the physical and moral integrity of the person. Moreover, the right to private and family life has been held (in *X and Y v The Netherlands* (1985)) not merely to compel the State to abstain from arbitrary interference with the individual, but also to include a positive obligation to ensure *effective* respect for private or family life, which may extend even in the sphere of relations between individuals.

From a different angle, in *Friedl v Austria* (1995), the police had photographed a participant in a sit-in demonstration, confirmed his identity, and compiled a record of his details. They did so only after requesting that the demonstrators disperse, and the European Commission held there to be no violation of Article 8. While this fairly mild response by the police did not constitute an infringement of Article 8, there may well be arguments to be made under this provision concerning the proportionality of any policing operation which imposes a virtual curfew on a local community (see further chapter 4).

Furthermore, one of the purposes enumerated in Article 8 of the Convention for which it is permissible to interfere with the exercise of that right is for *the economic well being of the country.* In *G and E v Norway* (1983), the Commission made no attempt to ascertain the exact extent and nature of the interference with the applicants' rights under Article 8(1), but rather, considered only the necessity of the State's siting of the hydro-electric power station in the particular location. Finding that this necessity was borne out in the interests of the country's economic well being, the applicant's complaint under Article 8 was declared manifestly ill founded. In relation to parade disputes, this could, in theory be extended to mean that a court may dismiss any claimed violation of the right to respect for private and family life if the necessity of a policing operation to give effect to a determination by the Parades Commission, for example, is borne out in the interests of the country's economic well-being.

3.4 Peaceful Enjoyment of Possessions

Article 1 of Protocol 1, European Convention on Human Rights:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The right to peacefully enjoy one's possessions has been strictly construed by the European institutions so as to offer protection only to proprietary interests. In *G and E v Norway* (1983), a group of people from the minority Lapp community in Norway were protesting that their reindeer business would be damaged as a result of the building of a hydro-electric power plant. The European Commission found that the traditional use of vast territories for grazing, hunting and fishing, did not constitute a property right as protected by Article 1 of the First Protocol. In so far as parade disputes are concerned, individuals living in any local community are highly unlikely to be able to demonstrate a proprietary interest in the roads along which a parade might pass.

The proprietary issue was also at the core of *Chassagnou and Others v France* (1999), a case which involved the balancing of 'a right to hunt' with 'a right to property'. It concerned an attempt to compel small landowners to transfer the hunting rights over their land to a municipal hunting association. The European Court held that although the applicants had not been deprived of their right to use their property, to lease it or sell it, the compulsory transfer of hunting rights prevented them from making use of the right to hunt, which is directly linked to the right of property, as they saw fit. Any interference with the right to enjoy one's possessions must be proportionate and achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

One case in which the jurisprudence *could* have been further developed, with particular significance for business owners in the vicinity of contentious parade routes, was *Torgny Gustafsson v Sweden* (1995). An owner of a restaurant refused to join the Hotel and Restaurant Workers Union (HRF) because he objected, on principle, to collective bargaining. As a result, HRF placed his restaurant under a blockade and declared a boycott against it. This ultimately led to deliveries to the restaurant being stopped and the restaurant closing. The European Commission declared admissible the applicant's complaints that the lack of State protection against such industrial action had violated, *inter alia*, his right to the peaceful enjoyment of his possessions (Article 1 of Protocol 1). However, because the Commission concluded that there had been a violation of the applicant's negative freedom of association under Article 11 (given, in particular, the financial consequences of the boycott), it considered it unnecessary to examine the applicant's complaint regarding the peaceful enjoyment of his possessions.

3.5 The Rights of Minorities

In Northern Ireland, the question of whether there is a national minority is a vexed one. So too is the question of whether the protection afforded to minorities by international human rights standards also extends to self-defined minority groupings within a specific local community. The argument for such extension is perhaps strengthened by the loose definition of the term 'community' in section 8(6) (b) and (c) of the Public Processions (NI) Act 1998, which was approved by the Court of Appeal in *In the Matter of An Application By Patricia Pelan for Judicial Review*. Carswell LCJ stated that:

> We do not consider that it is necessary to confine the meaning of the word 'community' in such a rigid manner. If it is construed as meaning a group of people in society, then in any passage where it is used the breadth of that group is determined by the context. So in paragraph (b) of section 8(6) the disruption referred to appears to be primarily (though perhaps not exclusively) that which may occur in the life of those members of the community who live in the area through which the procession is to pass. When one turns to paragraph (c), however, it seems to us quite possible to interpret the word 'community' as referring to a wider group.[103]

Notwithstanding these questions about the relevance of minority protection to communities affected by parades in Northern Ireland, it should be noted that the ECHR is concerned

[103] 28 September 1998, p.18.

essentially with individual rights and "is not designed to deal with the issues which typically arise in societies which are deeply divided along communal lines or in which there are clearly identifiable majority and minority communities."[104] Article 1, ECHR obliges signatory States to secure to everyone within their jurisdiction the rights contained in Articles 1-18 of the Convention. In guaranteeing rights to "everyone", however, the Convention does not recognise specific rights for minorities[105]. In *G and E v Norway* (1983), the Commission concluded that:

> The Convention does not guarantee any specific rights to minorities, but disrespect of the particular life style of minorities may raise an issue under Article 8. There is no indication that the applicants have been treated in a manner which could be considered as discrimination, contrary to Article 14, nor have they been forced to abandon their lifestyle.[106]

Article 27 of the ICCPR, however, goes further than the protection afforded to minorities by the ECHR. Furthermore, while not enforceable in Northern Ireland courts, the European Framework Convention on the Protection of National Minorities (recently ratified by both the British and Irish Governments) may be cited in support of any action.

Article 27, International Covenant on Civil and Political Rights:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 6, Framework Convention for the Protection of National Minorities:

1) *The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.*
2) *The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.*

In the case of *Jouni E Länsman et al v Finland* (1996), the UN Human Rights Committee found that the Finnish Central Forestry Board's plans to approve logging and the construction of roads in an area covering 3,000 hectares which was used by reindeer breeders of Sami ethnic origin did not constitute a violation of Article 27. In their reasoning, the Committee held that "measures that have a certain limited impact on the way of life and the

[104] Northern Ireland Human Rights Commission – "*A Bill of Rights – your questions answered*".
[105] G. and E. v Norway.
[106] At p.38.

livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27",[107] although the cumulative impact of successive measures will be taken into account.[108]

3.6 A Right to be Consulted?

In their deliberations in the *Länsman* case, the Human Rights Committee gave serious consideration to the extent to which the minority community had effectively participated in the decision affecting them. This was important particularly where the consequences of any decision would create considerable, long-lasting or even permanent harm.[109] The fact that the consultation process was felt to be unsatisfactory by the applicants did not sway the Committee's decision. In terms of communities in Northern Ireland which are affected by parades, this would appear to be particularly relevant to the consultation process and evidence gathering procedure conducted by the Parades Commission. Because such a consultation process exists, mere dissatisfaction with it and any consequent decision cannot of itself constitute a violation of minority rights.

Indeed, the possibility of '**a right to be consulted**' has already been given limited consideration in three judicial review proceedings involving the Parades Commission.[110] One of the three grounds for judicial review is that of procedural irregularity.[111] This draws upon the principle of *audi alteram partem* which provides that a person should not be denied the opportunity to make representations, or to a fair hearing, where they might be deemed to have a 'legitimate expectation' of being heard.[112] It does not, however, require that the hearings be oral, as opportunity to make written representations might be sufficiently fair. The fact that a parade route has not been changed for a number of years, for example, may give rise to a legitimate expectation on the part of residents in the area that they be consulted before any changes are made.

The Druid applicant in *ARM Chappell v UK* (1987) contended that the Druids had had a reasonable expectation of consultation with the Commissioner of English Heritage before the making of any decision to ban the Druids and the festival from Stonehenge at the time of the midsummer solstice. The judge in the judicial review proceedings stated that he had dealt with the case on the basis of the fundamental rights of individuals including Article 9 of the Convention. In this light, he noted that the opportunity for consultation had been given more than once by the Commissioner and that the Commissioner could not be faulted for not

[107] Para. 10.3.
[108] Para. 10.7.
[109] Paras. 6.14 and 7.15.
[110] I*n the Matter of an Application by Kevin Farrell for Judicial Review* (regarding Parkmount Junior Orange Lodge No.150 parade on 29/5/99); *In the Matter of an Application by Joseph McConnell for Judicial Review* (regarding the section of 'The Long March' in Lurgan on 3/7/99); and *In the Matter of an Application by Rachel Campbell for Judicial Review* (regarding the AOH Pipe Band Glassdrumman & Holy Cross Accordian Band parade in Kilkeel on 17/3/00).
[111] per Lord Diplock in *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[112] per Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149; *Cinnamond v British Airports Authority* [1980] 1 WLR 582.

offering further opportunities for consultation. The European Commission did not question the judge's findings on this account.

4. POLICING PUBLIC ASSEMBLIES

The introduction of the Public Processions (Northern Ireland) Act in 1998 removed the power of the police to re-route or impose conditions on parades. Although the police retain the authority to constrain static protests under the 1987 Public Order (NI) Order the Parades Commission now has the authority to impose restrictions and conditions on contentious parades.

However the police still have a primary responsibility to ensure that people are able to exercise their basic human rights, that peaceful and legal parades are able to take place, that lawful protest is possible and that public order is maintained. To do so the police have to try to strike a balance between the sometimes competing and conflicting rights of individuals and communities and they have to exercise discretion in their dual responsibility to uphold the law and maintain order.

The police also have to balance their authority to use force to maintain public order with their responsibility to protect the right to life.

In this following section we begin by reviewing the general responsibilities of the police with regard to managing public order. We then discuss the case law of the European Court of Human Rights to consider how they have clarified the role and limitations of the police. Finally we address the issue of the right to life and the use of force.

4.1 Policing and Human Rights

The Patten Report on the future of policing in Northern Ireland stated clearly that 'the fundamental purpose of policing should be '…the protection and vindication of the human rights of all' (Patten 4.1). In saying this the report was reiterating the themes of two primary documents relating to police ethics and principles, the Council of Europe *Declaration on the Police* (1979) and the United Nations *Code of Conduct for Law Enforcement Officials* (1979). Although neither of these is a legally binding document, they nevertheless set down basic principles which establish the framework for policing and the boundaries of police behaviour and activities which are deemed to form the basis for law enforcement in all societies.

The *Declaration on the Police* does not refer directly to human rights but rather defines the duty of the police as being to protect their fellow citizens against violent, predatory and other harmful acts, and to act with integrity, impartiality and dignity. The UN *Code of Conduct* is more explicit, however, and in Article 2 states that law enforcement officials 'shall respect and protect human dignity and maintain and uphold the human rights of all persons'.

It is clear therefore that the Patten Report does no more that reflect international standards when it emphasise the importance of human rights for policing practice.

The fact that the *Code of Conduct* refers to both respecting and protecting human dignity implies a positive expectation on the police. It indicates that they not only have a responsibility to respect people's human rights, but also a duty to protect people's rights from infringement by others and to ensure that people are able to exercise their rights. Human rights are therefore fundamental both to practical notions of democratic policing and also to policing in a democratic society.

However, the range of duties and responsibilities that are central to police practice can create contradictory demands - between facilitating the exercise of people's rights and protecting others' rights from infringement. As we have discussed, human rights are rarely absolute; there is normally a need to find a balance between exercising one's rights without unduly infringing other people's rights. For basic political rights such as freedom of assembly or freedom of expression, which are often exercised in public, it falls on the police to impose a balance between competing rights. The complexity involved in trying to achieve a balance between competing rights is further complicated by the fact that the police also have a primary responsibility to maintain and protect public order.

4.2 Human Rights and Public Order

A key factor in the ability of people to exercise their rights is the establishment and maintenance of a degree of public order that provides the safety and security for people to express and demonstrate their opinions and ideas on a range of social and political issues. This is made explicit in Article 28 of the *Universal Declaration of Human Rights* (1948) which states that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised'.

The police therefore have the responsibility to protect the basic social conditions that enable people to exercise and enjoy their fundamental human rights. But the police are in a potentially contradictory position in so far as they also have the power and authority to restrict human rights to maintain public order. They have the power of arrest and the power to use force, both of which involve a restraint or an imposition on the rights of others. However police powers to restrict rights are not unlimited and they cannot be used indiscriminately. Article 29 of the UDHR states:

Article 29 UN Universal Declaration on Human Rights:

Everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Rights can be restricted to enable other people to exercise their rights. They can also be restricted to ensure other people's rights are not unduly curtailed and they can be restricted to

ensure that public order is maintained. But, as Article 29 clearly states, this must be in accordance with the law.

The European Convention similarly allows restrictions to be imposed on freedom of assembly as long as they are both prescribed by law and 'necessary in a democratic society'. However, the Convention provides a wider range of reasons for which the state, and in practice the police, can restrict the exercise of human rights. These are: the interests of national security and public safety, to prevent crime or disorder, for the protection of health and morals or to protect the rights and freedoms of others (see Chapter 2.3.8 above).

In practice police forces in a range of European countries have relied on fear of public disorder as their primary justification for imposing restrictions on assemblies or protests. In the majority of cases the European Court has accepted that the fears expressed by the police over the threat of public disorder have been reasonable and therefore form an acceptable basis for imposing restraints on assemblies and protests. But this is by no means unproblematic because public order is itself an ill-defined and variable concept. In normal circumstances blocking a main road with the attended disruption to traffic and public transport could constitute a breach of public order but on some occasions it is considered acceptable. Blocking a road to try to sell people things would generally not be regarded as acceptable behaviour, but blocking a road as part of a political protest or a cultural event is widely accepted as a legitimate part of democratic society.

International understanding and practice diverges quite considerably on the issue of blocking roads. In the United States and Canada the police regard it as reasonable to restrict parades and demonstrations in order to reduce disruption to traffic and businesses. In contrast the Israeli Supreme Court decided that people had as much right to use roads for demonstrations as they did for driving on. The acceptable limits of public order can and do vary and in practice will be dependent on the location, the time and the nature of the event or the behaviour.

Although the Parades Commission issue determinations on which rights and whose rights should have priority with regards to parades, in many cases it is still left to the police to determine what action and behaviour is reasonable in the circumstances. Police officers will be expected to use their discretion to decide between competing claims of human rights, of unreasonable restrictions and the needs of public order.

4.3 Policing Freedom of Assembly

We have already considered examples in which the European Court of Human Rights has addressed the issue of the limits to the right to freedom of assembly. In this section we review what the Court has said about the role of the police in the management of public assemblies and the right to protest. There has been only one case that has focused in any detail on the role of the police in facilitating these freedoms. The remainder of the cases to be considered have looked at the legitimacy of police intervention to prevent disorder.

In general the European Court has taken a position which has been sympathetic to the role of the state and its agents, the police, in managing public assemblies and protests. The Court has tended to accept claims made by the authorities about concerns for public order and the limits of their ability to restrain outbreaks of violence. It has therefore broadly accepted that restrictions should be imposed in advance of an event rather than expect the police to respond to unfolding and unpredictable situations. In the case of *Plattform Ärzte fűr das Leben v Austria* (1988), the European Court noted that the state has a responsibility to ensure that both the rights of demonstrators and counter-demonstrators should be met where possible. But it also noted that the right to counter-demonstrate does not extend to stopping a lawful assembly and the state has a 'positive obligation' to ensure peaceful demonstrations can take place. This means that the state has a responsibility to protect demonstrators from their opponents or from any counter-demonstrations.

However, at the same time the Court also noted that while the state should take 'reasonable and appropriate measures' to allow lawful assemblies to take place, it cannot guarantee this absolutely. Instead they stated that the police must strike a balance between intervention to protect a lawful assembly and intervention that will provoke some form of violence. In the *Plattform Ärzte* case the applicants complained that the police had not done enough to protect their procession and rally which had been disrupted by protesters who chanted and threw missiles. The Court noted that while there had been disturbances these had not stopped the events from being concluded and the action taken by the police had been reasonable in the circumstances.

4.4 Policing Protests

There have been a limited number of cases where the Court has sought to establish the limits to legitimate protest against the actions of others and has thus addressed the limits to police action in managing protests. In *Steel and others v UK* (1998) the Court distinguished between legitimate peaceful protest and protest which involved disrupting the lawful activities of others. It found that the police had not infringed the rights of protesters when they arrested them in order to stop them disrupting a grouse shoot or to prevent them from disrupting building work on a new motorway. However, the Court found that the police had infringed the rights of three protesters who were holding a banner and handing out leaflets objecting to the arms trade outside a centre hosting a conference on military helicopters.

In none of these instances did the protesters behave violently but the Court accepted the argument that the disruptive behaviour at the grouse shoot and road protest had the potential for provoking violence and it was therefore reasonable for the police to arrest the parties involved.

A similar line of reasoning was accepted in the case of *Chorrherr v Austria* (1993). In this case the police arrested the applicant who was wearing a placard and handing out leaflets opposing the arms trade at a military commemoration. The police claimed that he was causing annoyance to spectators and his behaviour was threatening to disturb public order. The applicant on the other hand claimed he was simply exercising his right to freedom of

expression. The Court again found for the State and agreed that it was 'reasonable and appropriate' for the police to arrest the man in these particular circumstances.

The Court has therefore established that while there is a right to peaceful protest this does not extend to the right to provoke others to violence. This implies that those engaging in protest should be mindful, not only that their own behaviour remains peaceful but also, that they have a responsibility to refrain from actions that might produce a violent reaction from others. Furthermore, the police have the authority to stop a protest that they believe may produce a violent response.

However, it is also clear that there are limits to the restrictions that the police can impose on protesters. This was revealed in the admission by the Metropolitan Police that they had acted unlawfully when they limited protests by the Free Tibet Campaign during the visit to England by the Chinese Premier in October 1999. During the visit the police removed flags and banners carried by peaceful protesters and used their vans to block the protesters from the view of the Chinese visitors. After an internal enquiry the police conceded that their actions had been unlawful.[113] This example resonates with the case of *Kivenmaa v Finland* (1994) before the UN Human Rights Committee, where the Committee found a violation of the applicant's freedom of expression after the police removed a banner she was waving in protest during a visit of the Kenyan President to Finland. In neither of these examples was the threat of disorder regarded as significant enough for the police to restrict the protest.

In another case, *G v Federal Republic of Germany* (1989), the European Commission agreed that the police were within their rights when they arrested the applicant for blocking a public road during a protest. Once again he was involved in a peaceful demonstration but the Commission decided that the protest was causing more disruption than was reasonable and would normally arise in the exercise of the right of freedom of assembly. A similar decision over limits of the right to disrupt traffic during a protest was taken in case of *F v Austria* (1989) and in the case of *H v Austria* (1989) the Commission decided that the police were acting reasonably in dispersing an assembly that was causing considerable obstruction to pedestrian traffic.

In each of these cases the decision of the Commission seems in part to have been determined by the length of the protests. In the case of *G* the report suggests the protesters had blocked the road a number of times during the day for a short period; in *F* the applicant had intended to hold a static protest for a full day; and in the *H* case the protest had continued for over a week and was growing in scale and level of disruption. In each of these cases the protest and the associated disruption had been permitted to continue for some time before the police intervened.

In all three cases the Commission effectively agreed that it was the responsibility of the local police to decide what was an acceptable level of disruption to other people and when it was 'necessary in a democratic society' to disperse the protest or if necessary to arrest the participants.

[113] *The Guardian* 4/5/2000

A further issue raised by the *Chorrherr* and *Steel* cases was that the Court also ruled that the police had not acted in a disproportionate manner in detaining the applicants for some considerable time after their arrest. In the case of *Steel* (who disrupted the grouse shot) the applicant was detained for forty-four hours because she refused to be bound over to keep the peace, while *Chorrherr* and the anti-roads protester, in the *Steel* case, were detained for three and a half hours and seventeen hours respectively. The State argued successfully that in each case the extended period of detention was necessary to prevent the applicants from resuming their protests and causing further breaches of the peace.

It is clear therefore that the police have a responsibility to facilitate peaceful protest but also some considerable latitude to determine both what is reasonable and how far they can impose restriction to prevent disorder.

4.5 Use of Force by Police Officers

The general principles governing the use of force by police officers are addressed in a range of relevant instruments. Article 3 of the UN *Code of Conduct* states that law enforcement officials may use force 'only when strictly necessary and to the extent required for the performance of their duty' and that this should be regarded as an exceptional measure and proportionate to the circumstances. The Council of Europe *Declaration on the Police* states in Article 12 that police officers are prohibited from using more force than is reasonable. This issue is dealt with in more detail in another United Nations instrument entitled *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990). This contains twenty-six articles relating to the use of force and firearms which elaborate on the provisions contained in the legally binding conventions. Principles 12-14 of this document relate to 'Policing Unlawful Assemblies' and these state:

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

12. As everyone is allowed to participate in lawful and peaceful assemblies .... Governments and law enforcement agencies and officials shall recognise that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases except under the conditions stipulated in principle 9.

We will consider the issue of the use of lethal force in the following section, here we will concentrate on issues related to the non-lethal use of force in the policing of assemblies. The

Principles distinguish between violent and non-violent assemblies and also between levels of policing such events that range from avoidance of the use of force through use of minimal force to the use of firearms and lethal force. While the texts are clear that use of force should be avoided wherever possible, force can be used in certain situations. However, it should always be an exceptional practice rather than a norm. But police officers have to assess the appropriateness, the proportionality and the necessity of the use of force within the context of the specific assembly or protest. This is particularly pertinent in situations where they are policing or attempting to disperse an illegal but non-violent protest and where there is a temptation to use some degree of force to move people who are engaged in passive disobedience.

The cases referred to in the previous section are all examples where the police used peaceful or non-violent means to constrain a protest or to arrest individuals. But in recent years there have been a number of occasions when the police have resorted to the use of force in situations that suggest that the *Principles* might be being contravened. Several major assemblies have provoked an aggressive or violent responses from the police including anti-capitalist protests in London in June 1999, the protests against the World Trade Organisation in Seattle in November 1999, in London in May 2000 and in Prague in October 2000, protests against the World Bank in Washington DC in April 2000, and in response to football hooliganism in Belgium during Euro 2000 in June 2000. In many of these situations there have been accusations that the violence of protesters or supporters was as much in response to police action to disperse peaceful protests as the police action was in response to violence by the protesters.

There have also been a number of occasions in relation to the recent disputes over parades when the RUC has resorted to the use of force to control or constrain crowd violence, to disperse protests or to enable lawful parades to take place. There have been other occasions when the police have used force to disperse unlawful but non-violent protest demonstrations during the same period, for example during the Tour of the North in June 1996, on the Garvaghy Road in July 1997 and on the Ormeau Road in August 1999. In each of these situations there have been accusations that the force used to remove non-violent protesters from blocking roads was disproportionate to the activities of the protesters. While concerns over the policing of such protests have been raised by a groups such as CAJ and Human Rights Watch, the various Courts of Human Rights have yet to be asked to respond to accusations of the disproportionate use of force by the police in controlling riots or violent assemblies. However, the European Court of Human Rights has been asked to address issues related to the use of force in the context of Article 3 which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

In both *Tomasi v France* (1992) and *Ribitsch v Austria* (1995) the Court found for the applicants after they had been subjected to physical abuse which amounted to inhuman and degrading treatment while in police custody. In the *Ribitsch* judgment the court stated that *'in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention'* (para 38). While in *A v United Kingdom* (1998) the Court found that physical abuse of a child by a step-parent

amounted to a breach of Article 3. The Court also noted that while ill-treatment must attain a minimum level of severity if it is to fall within the scope of this Article, that minimum level *'is relative: it all depends on the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim'* (para 20). Although these and other similar cases have been related to issues of ill treatment during detention or through the use of corporal punishment, there may equally be a relevance in relation to cases where the police use force to disperse peaceful assemblies or to arrest people engaged in some form of protest.

4.6 Right to Life and the Use of Force

The various texts and instruments set down clear limits to the use of force but they also make it clear that the policing of assemblies, and violent assemblies in particular, is one situation where force and firearms might well be used, albeit within prescribed circumstances. The implications are that the use of such force should be a last resort in policing crowds and that such force should be the minimum necessary to exert control and to assist the restoration of order.

Principle 9 of the UN *Basic Principles on the Use of Force and Firearms* limits the use of firearms to self-defence, defence of others against imminent threat of death or serious injury, to prevent a particularly serious crime involving threat to life and to facilitate the arrest or to prevent the escape of someone presenting such dangers. It also states that firearms may only be used when less extreme means are insufficient. Finally it states that intentional lethal force may only be used when strictly unavoidable in order to protect life.

Each of the major human rights treaties affirms that the right to life is a fundamental human right.

- The Universal Declaration (Article 3) states 'Everyone has the right to life, liberty and security of the person'.
- The United Nations International Covenant on Civil and Political Rights goes further by stating (in Article 6) that 'every human being has an inherent right to life. This right shall be protected by law. No one shall arbitrarily deprived of his life'.
- The European Convention expresses similar sentiments. Article 2 states that 'Everyone's right to life shall be protected by law.'

However, the European Convention also makes it clear that right to life is not unconditional. In a secondary clause it sets down a limited range of situations in which the deprivation of life will not be regarded as a breach of the right to life, provided that the use of force is 'no more than absolutely necessary'. The three situations are:

- In the defence of any person from unlawful violence;
- To effect a lawful arrest or to prevent the escape of a person who has been lawfully detained; and

- For the purpose of quelling a riot or insurrection.

This does not mean that it is legitimate for the authorities to intentionally kill someone in these circumstances but rather that the use of force, which results in death in these limited contexts, will not be regarded as a breach of the right to life. But it is also clear that the police may use lethal force providing it is 'absolutely necessary' and such force will only be determined as absolutely necessary if it is both proportionate and reasonable in the specific circumstances.

The parameters governing the use of force have been addressed in the small number of cases before the European Court relating to the killing of individuals by the State authorities, and which have direct relevance to the matter of managing public disorder. The most obviously connected case is *Stewart v UK* (1984). This was related to the death of a 13 year-old boy, Brian Stewart, who was killed by a plastic baton round fired by a soldier in Belfast in 1976. Local witnesses claimed the soldiers fired the plastic bullet in response to being stoned by a small group of young children. The soldiers claimed that they were being attacked by a crowd of about 150 rioters and fired a plastic bullet as a warning. When this had no effect a second bullet was fired but the soldier claimed he was hit by two missiles as he took aim and fired and the baton round hit Brian Stewart by accident.

In making its decision the Commission accepted the version of events given by the soldiers rather than the one given by local people. They also noted that the use of baton rounds was controversial and acknowledged that it was a dangerous weapon. However, they felt that in the circumstances prevailing in Northern Ireland at the time, in which the soldiers might well face the threat of a sniper attack, the use of plastic bullets was absolutely necessary to quell the riot.

In spite of this judgment both the UN Committee Against Torture and the Committee on the Rights of the Child have expressed their concern about the use of plastic baton rounds as an appropriate weapon for the control of public order. Although plastic bullets continue to be used in Northern Ireland the Patten Report recommended that *'an acceptable, effective and less potentially lethal alternative'* be sought and that a wider range of equipment be provided for police officers to reduce the current reliance on plastic baton rounds.

In the *Stewart* case, and in two other prominent 'right to life' cases *McCann and others v UK* (1995) (over the killing in Gibraltar of three members of the IRA by the SAS) and *Andronicou and Constantinou v Cyprus* (1997) (where police killed an armed man and his girlfriend whom he was holding hostage in the course of trying to free her), the Court has taken the side of the State and accepted the necessity of the use of lethal force where police officers or soldiers have claimed that they feared for their own lives. In a similar situation in the USA four New York Police Department officers were acquitted of murder over the killing of Amadou Diallo, whom they shot because they claimed they thought he was reaching for a gun. The Court has thus tended to prioritise the need to address the fears of operational law enforcement officials in many of the 'right to life' cases.

At the same time the Court has been critical of the planning that has gone on behind some of these operations and the failure of the police to take action that could have reduced or prevented the need to use force. In *McCann* it was accepted that the State could have neutralised the IRA operation earlier and reduced the likelihood of the need to use lethal force. In *Andronicou* there was criticism of the failure to achieve a mediated outcome in the hostage situation and in another recent case, *Ergi v Turkey* (1998) the Court was again critical of the planning of a security operation which left an innocent civilian dead.

It is therefore clear that the police do have the authority to use proportionate and reasonable force in specific circumstances, however a recent case has also re-affirmed that the state does have a positive obligation to protect life. In *Osman v United Kingdom* (1998) the Court stated that: *'Article 2:1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'*[114] the judgment went on to say that *'it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge'*[115]. This might well mean that the preparation and planning of policing operations is brought under further consideration in cases related to the use of lethal force. But at the same time it might well also raise issues about such matters as the quality of the training of police officers in non-confrontational conflict management techniques and in alternatives to the use of force.

Thus, although the European Convention permits the use of force by law enforcement officials, the Court has indicated a greater willingness to scrutinise the wider context of the planning and preparations of operations where lethal force is used. While the fears and judgments of operational officers may continue to be taken at face value in contentious situations involving the use of lethal force, these developments suggest that there will be an ever greater responsibility on police agencies to train their officers and to prepare and plan operations so as to reduce the possibility of the need to rely on force to resolve problematic situations.

4.7 Policing – Rights and Responsibilities

1. The police have a dual role to protect people's rights and to adjudicate between those rights. They therefore have the responsibility to facilitate the exercise of human rights and the authority to restrict such practice. This is particularly pertinent with regard to issues related to freedom of assembly and maintaining public order.
2. The European Court of Human Rights has confirmed that the state has a positive obligation to enable peaceful demonstrations to take place and should take reasonable and appropriate measures to facilitate this. They also have to balance between protecting a lawful assembly and provoking violence themselves in trying to maintain order.

[114] Para. 115.
[115] Para. 116.

3. The police have the authority to prevent or to disperse any assemblies that might create unreasonable disruption, that threatens to disturb public order or that have the potential to provoke violence from others because it interferes with their rights and freedoms.
4. In dispersing assemblies the police should always attempt to use peaceful means in the first instance. The police do have the right to use force to disperse assemblies but such force must always be both proportionate and necessary in the circumstances. Police should only use firearms to disperse violent demonstrations in so far as it is necessary for self-defence, to protect others from threat of death or serious injury, or to facilitate the arrest or prevent the escape of someone presenting such dangers.
5. The police also have a positive obligation to protect life and they have a responsibility to ensure that all operations are prepared and planned with this in mind. Preparation may extend to the training given and equipment supplied to police officers.

APPENDIX: LEGAL CASES

European Cases

1. A v UK (1998 App 100/1997/884/1096)
2. A. Association and H v Austria (1984, App 9905/82) 36 DR 187
3. ARM Chappell v UK (1987, App 12587/86) 53 DR 241
4. Ahmed and Others v UK (2000)
5. Albert and Le Compte v Belgium, (1983)
6. Anderson et al v UK (1997, App 33689/96) 25 EHRR CD 172
7. Andronicou and Constantinou v Cyprus (1997) 25 EHRR 491
8. Axen Case, 25/10/83
9. Boris Stankov v Bulgaria (1998, App 29221/95) and United Macedonian Organisation "ILINDEN" v Bulgaria (1998, App 29225/95)
10. British-American Tobacco Company Ltd v The Netherlands, 20/11/95
11. Bryan v UK, 23/5/95
12. Campbell and Fell v UK, 28/6/84
13. Chassagnou and others v France (1999, Apps 25088/94, 28331/95, 28443/95)
14. Christians Against Racism and Fascism v UK (1980, App 8440/78) 21 DR 138
15. Chorherr v Austria (1993, App 13308/87) 17 EHRR 358
16. Çiraklar v Turkey (1995, App 19601/92)
17. Doorson v The Netherlands, 26/3/96
18. Ergi v Turkey (1998, App 66/1997/850/1057)
19. Ezelin v France (1991, App 11800/85) 14 EHRR 362
20. *ECW v The Netherlands, UN Doc CCPR/C/49/D/524/1992 (1993)*
21. F v Austria (1989, App 14923/89)
22. Friedl v Austria (1995, App 15225/89)
23. G v The Federal Republic of Germany (1989, App 13079/87) 60 DR 256. Also, Schiefer; CS; W.M, and HO v The Federal Republic of Germany)
24. GS v Austria (1992, App 14923/89)
25. G and E v Norway (1983, App 9278/81 & 9415/81) 35 DR 30
26. H v Austria (1989, App 15225/89)

27. Hashman and Harrup v UK (1999, App 25594/94)
28. Handyside v UK (1976) 1 EHRR 737
29. Incal v Turkey (1998, App 22678/93)
30. *Jouni E Länsman et al. v Finland CCPR/C/58/O/671/1995. (1996)*
31. Kingsley v UK, 7/11/2000
32. *Kivenmaa v Finland, UN Doc. CCPR/C/50/D/412/1990 (1994)*
33. *Leonardus Johannes Maria de Groot v The Netherlands, UN Doc CCPR/C/54/D/578/1994 (1995)*
34. McCann and others v UK (1995) 21 EHRR 97
35. McMichael v UK (1995)
36. Müller and others v Switzerland (1988) 13 EHRR 212
37. Observer and Guardian v UK (A/216) (1991) 14 EHRR 153
38. Osman v UK (1998 App 87/1997/871/1083)
39. Otto-Preminger-Institut v Austria (1994, App 13470/87)
40. PH and HH v UK (1988, App 12175/86)
41. Pendragon v UK (1998, App 31416/96) 27 EHRR CD 179
42. Plattform "Ärzte für das Leben" v Austria (1988, App 10126/82) 13 EHRR 204
43. Rai, Allmond & "Negotiate Now" v UK (1995, App 25522/94) 19 EHRR CD 93
44. Rassemblement Jurassien & Unité Jurassienne v Switzerland (1979, App 8191/78) 7 DR 93
45. Ribitsch v Austria (1995) 21 EHRR 573
46. Ruiz-Mateos v Spain, 23/6/93
47. S v Austria (1990, App 13812/88)
48. Smith and Grady v UK (May 2000) 29 EHRR 493
49. Steel and others v UK (1998, App 24838/94)
50. Stewart v UK (1984) 38 DR 162
51. Tomasi v France (1992) 15 EHRR 1
52. Torgny Gustafsson v Sweden (1995, App 15573/89)
53. WG v Austria (1992, App 15509/89)
54. Wingrove v UK (1996, App 17419/90) 24 EHRR 1
55. X and Y v The Netherlands (1985)

56. YL v Canada, 112/1981 (ICCPR)
57. Zander v Sweden, 25/11/93

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58. DPP v Jones (Margaret) and another (1999) 2 All ER 257, (1999) 2 WLR 625
59. Redmond-Bate v DPP (1999)
60. R v Tunbridge Wells Borough Council and another ex.p. Gipsy Council for Education Culture Welfare and Civil Rights and another, QBD, 7/9/2000

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61. In the Matter of an Application by Rachel Campbell for Judicial Review (AOH Pipe Band Glassdrumman & Holy Cross Accordian Band parade in Kilkeel on 17/3/00)
62. In the Matter of an Application by Kevin Farrell for Judicial Review (Parkmount Junior Orange Lodge No.150 parade on 29/5/99)
63. In the Matter of an Application by Joseph McConnell for Judicial Review (section of 'The Long March' in Lurgan on 3/7/99)
64. In the Matter of an Application by Patricia Pelan for Judicial Review (Ormeau Road, 28/9/98)
65. In the matter of an Application by David Alexander Tweed for Leave to Apply for Judicial Review (Dunloy LOL No.496 parade on 29/10/2000)

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