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The Human Rights Act, Public Protest and Judicial Activism¹

1. Introduction

In the UK in the 21st century the legal response to protest is changing. The terrorist acts of 9/11, the rise of terrorism thereafter and of awareness of terrorism, and the Iraq war have all had an impact. The deployment of criminal sanctions in 2006 to seek to rid Parliament Square of a lone, peaceful anti-war protester is only the most obvious manifestation of this change. Since the main statutory framework governing protest was put in place in 1986 and extended in 1994 under the Conservative government, there has been, this Paper will argue, a continued creeping criminalization, and even terrorization, of many forms of dissent over the ten years of Labour rule since 1997. The over-broad provisions introduced in 1986 and 1994 have been extended incrementally in a range of statutes that on their face are not concerned mainly or specifically with public order, such as the Crime and Disorder Act 1998 and the Anti-Social Behaviour Act 2003. Accompanying incrementally increasing criminalisation of forms of dissent, there has recently been a more worrying trend – to use sanctions based on the civil standard of proof against protesters.

For most of those ten years the Human Rights Act (hereinafter HRA), which incorporates the European Convention on Human Rights into domestic law, has also been in force – an intriguing contradiction that forms one of the main themes of this paper. But in exploring the contradictions in recent UK civil rights statutory policy, it should be remembered that the common law doctrine of breach of the peace eclipses all the statutory changes over

¹ This paper draws in places upon H. Fenwick & G. Phillipson, *Public Protest, the Human Rights Act and Judicial Responses to Political Expression*, 2000 Public Law 627, and upon H. Fenwick, *Civil Liberties and Human Rights* (2007).

the last twenty years in terms of its impact on public protest. Breathtakingly broad, bewilderingly imprecise in scope, it provides the police with such wide powers to use against protesters as to render the statutory frameworks almost redundant. This paper has chosen to focus on that area in order to use it as an example of the discretion accorded to the judiciary in receiving the Convention into domestic law under the HRA. This paper focuses on two breach of the peace decisions under the HRA, *Laporte*² and *Austin and Saxby*,³ intended to illustrate the leeway created by the Convention jurisprudence, especially the concept of proportionality, and the HRA itself for the adoption of activist or minimalist approaches in the public protest context.

2. The Legal Response to Public Protest – The Nature of Public Order Law in the UK

Historically, the UK has had no formal constitutional or statutory provision providing rights to protest and assemble. Instead, it has seen a series of often ill-considered and needlessly broad statutory responses to disorder. A number of trends inimical to public protest are discernible, carried through from the Public Order Act 1986, to the Criminal Justice and Police Act 1994, the Protection from Harassment Act 1997, Sections 1 and 25 of the Crime and Disorder Act 1998, the Terrorism Act 2000 (TA), and the Criminal Justice and Police Act 2001, at present culminating in Sections 132-138 of the Serious and Organized Crime Act 2005, which apply to demonstrations in the vicinity of Parliament.

Certain features of these statutes exhibit the traditional hallmarks of UK public order law, but in the more recent legislation their illiberal tendency is more greatly marked. These statutes are littered with imprecise terms such as ‘disorderly’ or ‘insulting’ or ‘disruptive,’ all objectionable under rule of law notions since protesters cannot predict when a protest may lead to criminal liability. Reliance on the likelihood that police, magistrates or the CPS will under-enforce the law is unsatisfactory due to the likelihood that their decisions, in any particular instance, will not be subjected to independent scrutiny. Such reliance hardly provides the firm basis for the exercise of rights to assemble and to protest that one would expect to find in a mature democracy. The more recent statutory offences tend to have the ingredients of a minimal *actus reus* and an absent, minimal, or reversed *mens rea*.⁴ But the nature of the statutory

² [2006] UKHL 55, Para. 34. CA: R (on the application of *Laporte*) v. CC of Gloucester Constab [2004] EWCA Civ 1639.

³ [2005] HRLR 20; 2005 WL 699571 (QBD), (2005) 155 N.L.J. 515, 14 April 2005 Times 699, 571, [2005] EWHC 480; 23 March 2005, Queen’s Bench Division of the High Court.

⁴ See the Public Order Act 1986, Secs. 14A, 14C; the Criminal Justice and Public Order Act 1994, Sec. 69 and the Crime and Disorder Act 1998, Sec. 1.

provisions is only one factor contributing to the real extent of rights to protest and assemble. The common law power to prevent a breach of the peace outdoes such provisions in terms of exhibiting many of the features just criticised, and, as indicated, judicial influence in developing and interpreting public order law has been significant. The key factor continues to be the working practice of the police.⁵ The police may already have developed a practice that renders a statutory power irrelevant, or they may consider that the use of the power would exacerbate a public order situation, rather than defusing it. The police may therefore tend to pick and choose among the available powers, tending to prefer familiar or very broad ones, particularly the power to prevent a breach of the peace.

Judicial uncertainty in applying the Convention is arising in a number of contexts, but public protest cases present them with an especially stark choice, since the HRA provides that public authorities must not infringe Articles 10 and 11; on its face, this requirement demands a break not only with the traditional acceptance that there is no legal right to assemble or engage in public protest in the UK, but with the failure to prevent encroachment on the negative liberty. As indicated above, references to 'rights' were occasionally made, but they appeared to be, loosely, to negative liberties. The HRA requires more of public authorities than a mere voluntary tolerance of public protest or a recognition of freedom of assembly that can be readily abrogated.⁶ There were signs in the early post-HRA years that the judiciary, while paying lip-service to rights to freedom of protest, were maintaining something close to the previous balance between public order and freedom of assembly, thereby failing to give full effect to Articles 10 and 11. However, the *Laporte* case in the House of Lords signalled not only a change of stance and willingness to break with previous tradition, but also an acknowledgement that the previous common law protection for protest and assembly was deeply flawed and inadequate.

3. Rights to Assemble and Protest under the ECHR, Received Domestically under the Human Rights Act

Until the Convention was received into domestic law, domestic law continued to afford virtually no recognition to rights to meet or march.⁷ Now, under Section 6 HRA, those seeking to exercise rights of protest and assembly can rely on Articles 10 and 11 of the Convention, and any other relevant right,⁸ against

⁵ See P. Waddington, *Liberty and Order: Public Order Policing in a Capital City* (1994).

⁶ See *DPP v. Jones* [1999] 2 WLR 625.

⁷ See D. G. Barnum, *The Constitutional Status of Public Protest Activity in Britain and the US*, 1977 Public Law 310.

⁸ Art. 5 may have particular applicability.

public authorities, in particular the police. All the legislation already mentioned and discussed below must, where necessary, be interpreted compatibly with those rights, under Section 3, taking the Strasbourg jurisprudence into account under Section 2. But, in order to evaluate the actual and potential impact of the Convention, under the HRA, it is necessary to consider the scope and content of the Articles 10 and 11 rights of protest and assembly.

Existing Strasbourg jurisprudence on the right to protest is fairly scanty,⁹ and very few cases deal with direct action protest, which has been analysed under Article 11¹⁰ and, recently, Article 10.¹¹ In *Ziliberg v. Moldova*¹² the Court made the association between assembly and expression explicit: “the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society.” This stance is appropriate given the deliberate adoption of the wider term ‘expression’ rather than ‘speech’ in Article 10; it also avoids the problems experienced in the US in distinguishing between message-bearing conduct and conduct simpliciter. Article 11 leaves a great deal of discretion to the judiciary, since, in common with Articles 8-10, it contains a long list of exceptions in Paragraph 2. In interpreting it, the UK judiciary are obliged, under Section 2 of the HRA, to take the relevant Strasbourg jurisprudence into account. That jurisprudence is not, on the whole, of a radical nature, although the Court has found that the right to organise public meetings is ‘fundamental’¹³ and includes the right to organise marches, demonstrations and other forms of public protest. Article 11 may impose limited positive duties on the state to ensure that an assembly or a protest can occur even though it is likely to provoke others to violence; the responsibility for any harm caused appears to remain with the counter-demonstrators.¹⁴ The acceptance of further positive duties, including a duty to require owners of private land to allow some peaceful assemblies on their property, has not yet been accepted under the Convention but remains a possibility, especially, as Harris, O’Boyle and Warbrick point out,¹⁵ in view of the growth of quasi-public places such as large, enclosed shopping centres and the privatisation of previously public places.

⁹ There have been comparatively few decisions by the Court: *Plattform ‘Ärzte für das Leben’ v. Austria*, Decision of 21 June 1988, 1988 ECHR (Ser. A., No. 139); *Ezelin v. France*, Decision of 26 April 1991, 1991 ECHR (Ser. A., No. 202); *Steel, et al. v. UK*, Decision of 23 September 1998, 28 EHRR 603; *Chorherr v. Austria*, Decision of 25 August 1993, 1993 ECHR (Ser. A., No. 266); *Hashman and Harrup v. UK*, Decision of 25 November 1999, 30 EHRR 241; [2000] 8 BHRC 104. Most of the jurisprudence consists of admissibility decisions in the Commission, finding that the application was manifestly ill-founded.

¹⁰ *G v. Fed. Rep. of Germany*, App. No. 13079/87, 21 DR 138 (1980).

¹¹ See *Steel v. UK*, *supra* note 9; *Hashman v. UK*, *supra* note 9, at 342.

¹² App. No 61821/00 of 4 May 2004, unreported, Para 2.

¹³ *Rassemblement Jurassien & Unité Jurassienne v. Switzerland*, App. No. 8191/78, 17 DR 93 (1979), at 119.

¹⁴ *Plattform ‘Ärzte für das Leben’ v. Austria*, *supra* note 9, at 32.

¹⁵ M. O’Boyle *et al.*, *Law of the European Convention on Human Rights* 419 (1995).

It should be noted that the extensive jurisprudence on expression generally, especially political expression, is clearly applicable to public protest.¹⁶ The *content* of speech will rarely exclude it from Article 10 protection: thus, speech as part of a protest likely to cause such low level harm as alarm or distress may be protected according to the *dicta* of the Court in *Müller v. Switzerland*¹⁷ to the effect that the protection of free speech extends equally to ideas that “offend, shock or disturb.” The Court has repeatedly asserted that freedom of expression “constitutes one of the essential foundations of a democratic society,” that exceptions to it “must be narrowly interpreted and the necessity for any restrictions [...] convincingly established.”¹⁸ It is a well-known feature of the Strasbourg jurisprudence that political expression receives a high degree of protection. One of the leading works on the Convention concludes: “It is clear that the Court ascribes a hierarchy of value” to different classes of speech, attaching “the highest importance to the protection of political expression [...] widely understood.”¹⁹

Prima facie, all forms of protest that can be viewed as the expression of an opinion fall within Article 10 according to the findings of the Court in *Steel v. UK*.²⁰ Thus the direct action form of protest, such as symbolic or actual physical obstruction, does fall within the scope of Article 10,²¹ a finding that was reiterated in *Hashman v. UK*.²² In the *Steel* case, the Court drew no distinction between actual and symbolic obstruction, and has not therefore considered the means by which any such distinction might manifest itself in the assessment of the lawfulness of state interferences with these forms of obstruction. It is clear only that violent or threatening protest – which, according to the Commission, includes “demonstration[s] where the organisers and participants have violent intentions that result in public disorder” – falls outside Article 11 and, probably, Article 10.

3.1. Justifications for Interferences with the Primary Rights

Owing to the likelihood that, as indicated, most forms of protest will fall within Article 10, and probably also Article 11, the emphasis of Strasbourg findings is on the Paragraph 2 exceptions, which include “in the interests of national security [...] public safety [...] for the prevention of disorder or crime [...] for

¹⁶ *Steel v. UK*, *supra* note 9.

¹⁷ Decision of 24 May 1988, 13 EHRR 212.

¹⁸ *Observer and Guardian v. UK*, Decision of 26 November 1991, 14 EHRR 153, at 59.

¹⁹ *Supra* note 15, at 397 and 414.

²⁰ *Supra* note 9.

²¹ *See id.*, at 92: “It is true that the protests took the form of physically impeding the activities of which the applicants disapproved, but the Court considers nonetheless that they constituted expressions of opinion with the meaning of Art. 10.”

²² *Supra* note 9.

the protection of the [...] rights of others.” Under the familiar formula, in order to be justified, state interference with Articles 10 and 11 guarantees must be prescribed by law, have a legitimate aim, be necessary in a democratic society, and be applied in a non-discriminatory fashion (Article 14). In carrying out this assessment, the domestic courts are obliged to take the Strasbourg public protest jurisprudence into account although they are not bound by it.²³

In freedom of expression cases, Strasbourg’s main concern has been with the ‘necessary in a democratic society’ requirement; the notion of ‘prescribed by law’ has been focused upon to some extent but almost always with the result that it has been found to be satisfied. The ‘legitimate aim’ requirement will normally be readily satisfied. The requirements of precision and foreseeability connoted by the term ‘prescribed by law’²⁴ have also been flexibly applied in this context.²⁵ The Court tends to afford a wide margin of appreciation when reviewing the necessity of interferences with expression in the form of protest, viewing measures taken to prevent disorder or protect the rights of others as peculiarly within the purview of the domestic authorities, in contrast to its stance in respect of ‘pure’ speech. Therefore, expression as protest tends to be in a precarious position. The notion of a margin of appreciation conceded to states permeates the Articles 10(2) and 11(2) public protest jurisprudence, although it has not influenced the interpretation of the substantive rights.

In finding that applications are manifestly ill founded, the Commission has been readily satisfied that decisions of the national authorities to adopt quite far-reaching measures, including complete bans, in order to prevent disorder are within their margin of appreciation.²⁶ The Court has also found “the margin of appreciation extends in particular to the choice of the reasonable and appropriate means to be used by the authority to ensure that lawful manifestations can take place peacefully.”²⁷ Thus, states are typically *not* required to demonstrate that lesser measures than those actually taken would have been inadequate to deal with the threats posed by demonstrations – disorder, interferences with the rights of others, and so on.

The effect of this ‘light touch’ review may also be seen in the tendency to deal with crucial issues – typically proportionality, but also in some cases the scope of the primary right²⁸ – in such a brusque and abbreviated manner that explication for the findings is either non-existent or takes the form of

²³ HRA 1998, Sec. 2(1).

²⁴ *Sunday Times v. UK*, Decision of 26 April 1979, 2 EHRR 245, at 49.

²⁵ *See, e.g., Rai, Allmond and ‘Negotiate Now’ v. UK*, App. No. 25522/94, 19 EHRR CD 93 (1995).

²⁶ *See Christians against Racism and Fascism v. UK*, App. No. 8440/78, 21 DR 138 (1980); and *Friedl v. Austria*, No. 15225/89 (1992), unreported.

²⁷ *Chorherr v. Austria*, *supra* note 9, at 31.

²⁸ *See* the crucial findings in *Steel v. UK*, *supra* note 9; *Hashman and Harrup v. UK*, *supra* note 9; and *G v. FRG*, *supra* note 10, that direct action fell within the scope of Arts. 10 and 11.

mere assertion. Moreover, the jurisprudence is, in general, markedly under-theorised, in notable contrast to that concerning media expression.

It is fair to say that little recognition of the distinctive value of public protest as compared to other forms of political discussion is apparent from the case law; moreover [...] general principles have not played [a] great [...] part in cases involving public protest.²⁹

In the *Steel* case,³⁰ for example, which, as indicated, concerned interferences with the freedom of expression of five applicants, the proportionality of the arrest and seventeen-hour detention of the second applicant and her subsequent imprisonment for seven days on refusing to be bound over is airily determined, in a mere two sentences. The applicant was physically impeding digging equipment by sitting on the ground. The Court's finding was that her arrest and detention was justified as necessary to prevent disorder and protect the rights of others.³¹ But these grounds had scant substantiation: it was accepted that no violent incidents or damage to property had been caused by the road protesters (Paragraph 15) and the conduct of the applicant had been entirely peaceful: she had never resisted being removed from the area by security guards – so it is hard to see wherein lay the 'risk of disorder,'³² still less why it was sufficient to justify such comparatively drastic action. As for 'the rights of others,' the Court, rather extraordinarily, nowhere said what these 'rights' were, although presumably the judges had in mind the fact that the road builders were engaged in a lawful activity – building a road – which the protesters were disrupting. The issue of the gravity of the interference with these 'rights' was not touched upon: the road builders did have security guards, and were apparently able to carry on with their work, at the cost of some inconvenience. In neither case was the question of alternative means of protecting the road builders even adverted to, much less subjected to any analysis. In other words, one of the justificatory grounds for the interference with Article 10 rights was unsubstantiated by any real evidence; the other was subject to no analysis at all. Very similar tendencies may be seen in the Commission decisions in *Pendragon*³³ and *Chappell*,³⁴ in which blanket bans on assemblies at and around the ancient Stonehenge monument were found justifiable by the Commission, on the basis of virtually no evidence or reasoning.

²⁹ See H. Fenwick, *Public Protest*, *supra* note 1, at 629-630.

³⁰ *Supra* note 9.

³¹ *Id.*, at 109.

³² The first applicant, it found, "had created a danger of serious physical injury to herself and others and had formed part of a protest which risked culminating in disorder and violence" (*id.*, at 105). Neither of these factors was present in relation to the second applicant, so the reference was not only worthless, but positively misleading (though the Court did note that the risk of disorder was 'arguably less serious than that caused by the first applicant' (*id.*, at 109)).

³³ *Pendragon v. UK*, App. No. 31416/96, Decision of 19 October 1998, unreported.

³⁴ *Chappell v. UK*, App. No. 12587/86, 53 DR 241 (1987).

In contrast, in *Ezelin v. France*,³⁵ the Court took a ‘hard look’ at the issue of proportionality. The applicant, an advocate, took part in a demonstration against the judicial system generally and against particular judges, involving the daubing of slogans attacking the judiciary on court walls, and eventual violence. Ezelin did not himself take part in any illegal acts, but did not disassociate himself from the march, even when it became violent. He was disciplined by the Bar Association and eventually given a formal reprimand, which did not impair his ability to practice. No fine was imposed. The French Government’s argument was that, “By not disavowing the unruly incidents that had occurred during the demonstration, the applicant had ipso facto approved them [and that] it was essential for judicial institutions to react to behaviour which, on the part of an ‘officer of the court’ [...] seriously impaired the authority of the judiciary and respect or court decisions.”³⁶ The argument was rejected; Article 11 was found to have been violated. In an emphatic judgment, the Court found:

[...] the freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an advocate, so long as the person concerned does not himself commit any reprehensible act on such an occasion.³⁷

3.2. Conclusions

The broad phrasing of Articles 10 and 11³⁸ inevitably leave a great deal of interpretative discretion to the UK judiciary in considering their application to existing law. But certain conclusions can be drawn: the Court will not tolerate the arrest and detention of purely peaceful protesters, even if the protest degenerates into violence, so long as the protesters in question have not themselves committed ‘reprehensible acts.’ Thus, apart from violent or threatening protest, most forms of protest and assembly are within the scope of both Articles 10 and 11, although ceremonious processions and assemblies will probably be considered only within Article 11,³⁹ while the recent tendency is to consider forms of direct action within Article 10. All the forms of protest mentioned above, apart from the last two, appear to be covered. Thus, forms of protest including those far removed from the classic peaceful assembly holding up banners or handing out leaflets engage these Articles, but interference with direct action protest can be readily justified, even where the action is primarily of a symbolic nature.

³⁵ *Supra* note 9.

³⁶ *Id.*, at 49.

³⁷ *Id.*, at 53.

³⁸ Arts. 5 and 6 may also be relevant in some circumstances.

³⁹ See *Chorherr v. Austria*, *supra* note 9.

Nevertheless, it is evident that the application of the above case law without more might do little to structure the domestic judicial discretion, leaving the courts free to apply Articles 10 and 11 so that they constitute little or no check upon police discretion over assemblies and demonstrations on the ground. How far this is the case depends crucially upon two factors: first, the attitude of the domestic courts towards the margin of appreciation doctrine and any domestic equivalent; and secondly, how far they are prepared to make any use of the more fundamental principles underlying Convention jurisprudence on political expression generally. These factors were of special significance in the two decisions focused upon in this paper.

4. The Domestic Application of Articles 10 and 11

Two opposing judicial approaches to the application of the Convention can be identified, although it must be pointed out that judicial reasoning cannot always be neatly pigeonholed. It is suggested below that the two approaches are of special significance in this context, since the common law has failed to afford the protection to freedom of protest and assembly that has been evident at Strasbourg. This is clearly not a context in which the tendency of the common law has been to achieve high standards of human rights protection, as Lord Bingham acknowledged in *Laporte*. If the judges fail to abandon their traditional approach in favour of a more activist stance, under the impetus of the HRA, it will continue to be the case that the freedoms of protest and assembly receive less recognition in the UK than in other comparable democracies.

As commentators have agreed⁴⁰ and the House of Lords has stressed,⁴¹ the margin of appreciation doctrine, as such, should not be applied by domestic courts, since it is a distinctively international law doctrine. Applying the Convention without such reliance has two aspects. It means, first, refusing to import the doctrine into domestic decision-making on the Convention where no Strasbourg decision is in point, and, secondly, where such a decision is in point, seeking to apply it but to disentangle the margin of appreciation aspects from it. This might mean giving consideration to the likely outcome of the case at Strasbourg had the doctrine been disregarded.

⁴⁰ See Sir J. Laws, *The Limitations of Human Rights*, 1998 Public Law 254, at 258; D. Feldman, *The Human Rights Act and Constitutional Principles*, 19 Legal Studies 165, at 192 (1999); D. Pannick, *Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment*, 1998 Public Law 545; M. Hunt, R. Singh & M. Demetriou, *Is there a Role for the 'Margin of Appreciation' in National Law after the Human Rights Act?*, 1999 EHRLR 15, at 17.

⁴¹ *R. v. DPP ex parte Kebilene and Others* [1999] 3 WLR 972, at 1043, *per* Lord Hope: "[the doctrine] is not available to the national courts" See *dicta* to like effect in *R v. Stratford JJ ex parte Imbert*, [1999] 163 JP 693 *per* Buxton LJ.

However, as discussed above, the reasoning in much of the case law is quite sparse and tokenistic, the doctrine having had the effect, not of influencing a particular part of the judgment in a clear way, but simply of rendering the whole assessment quite rudimentary. Therefore, stripping away the effects of the doctrine might merely mean treating certain judgments as non-determinative of the points raised at the domestic level. Certainly, domestic courts minded to make an intensive inquiry into questions of proportionality will receive little aid from the cases described above in so doing. So far in the post-HRA domestic case law, there is little evidence that the judges appreciate the fact that they are in a sense importing the margin of appreciation aspects of Strasbourg decisions into domestic law by the back-door.

4.1. Minimalism

This is a context in which the possible stances that the domestic judiciary might adopt when confronted with public order cases raising Articles 10 and 11 issues are, it is argued, quite clearly opposed. A minimalist approach might be, in this context, almost indistinguishable from what might be termed a 'traditionalist' one and might yield similar results, since this is a field in which the judiciary have, since *Beatty v. Gillbanks*,⁴² almost invariably eschewed an activist approach. A minimalist approach could be justified on the basis that a balance has always been struck in UK law between freedom of assembly and public order by reference either to common law principle or parliamentary restraint; with only two exceptions,⁴³ that balance has been found to accord with Articles 10 and 11 at Strasbourg,⁴⁴ and therefore there is no reason to disturb it now. Under this approach, the courts, while pronouncing the margin of appreciation doctrine inapplicable, would not take the further step of recognising and making due allowance for its influence on the cases applied.

Thus, judges could rely simplistically and solely on the *outcomes* of decisions at Strasbourg – most of which are adverse to the applicants – without advertent to its influence on those outcomes. Thus, they could import its effects – 'light touch' review and therefore a 'soft-edged' proportionality standard likely to catch only grossly unreasonable decisions – into domestic decision making. The traditionalist judge would tend to take the view that common law principle has long recognised values that are coterminous with the factors taken into account at Strasbourg in evaluating the balance in question, and that,

⁴² [1882] 9 QBD 308.

⁴³ See the findings of the Court under Art. 10 regarding the third, fourth and fifth applicants in *Steel v. UK* and *Hashman and Harrup v. UK*, *supra* note 9.

⁴⁴ See, e.g., *Chappell v. UK*, (1989) 10 EHRR 510; *Christians Against Racism and Fascism v. UK*, *supra* note 26; the findings as regards *Steel and Lush in Steel v. UK*, *supra* note 9.

in most instances, the outcome of cases would not differ whether freedom of expression was viewed as a common law principle or as protected under the Convention.

Since, under the HRA, the courts have to take account of rights to protest as opposed to negative liberties, these approaches had to be modified in order to provide a little more protection for such rights than was provided previously. Under the HRA, the courts must apply a more rigorous proportionality doctrine. But where different views might be taken of the need for a particular interference, such as a ban imposed on a march under Section 13 of the Public Order Act 1986, a domestic court fully applying the Strasbourg jurisprudence, including its margin of appreciation aspects, under Section 2 HRA, would tend to defer to the judgment of the executive. This would entail the type of low-intensity inquiry into the existence of a 'pressing social need' to restrict rights to protest typified by the Strasbourg case law, albeit adopted for somewhat different reasons. The issue of whether less intrusive means could have been adopted would either be ignored or treated as an issue of police expertise, to which the courts should likewise defer. The decision in *Austin and Saxby* considered below is put forward as a significant and telling example of post-HRA minimalist judicial reasoning.

4.2. Activism

The approach under the HRA, which was adopted in 2006 by the House of Lords in *Laporte*, may be referred to as 'activist';⁴⁵ it starts from the premise that the reception of the Convention into UK law represents a decisive break with the past. Under this approach, judges regard themselves as required to go *beyond* the minimal standards applied in the Strasbourg jurisprudence,⁴⁶ given that Strasbourg's view of itself as a system of protection firmly subsidiary to that afforded by national courts has led it, particularly in public protest cases, to intervene only where clear and unequivocal transgressions have occurred. Such a stance recognises that, as a consequence, most of the cases on peaceful protest have not in fact required national authorities to demonstrate convincingly that the test of 'pressing social need' has been met. Furthermore, significantly, the courts can look for assistance to the general principles developed by Strasbourg.⁴⁷ A foundational Strasbourg principle, repeated in

⁴⁵ H. Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* 502-505 (2000).

⁴⁶ In the words of Judge Martens, "[the task of domestic courts] goes further than seeing that the minimum standards laid down in the ECHR are maintained [...] because the ECHR's injunction to further realise human rights and fundamental freedoms contained in the preamble is also addressed to domestic courts." (*Opinion: incorporating the Convention: the role of the judiciary*, 1998 EHRLR 3).

⁴⁷ See Fenwick, *supra* note 45, at 502-503. As the House of Lords recently stressed: "in the

a number of cases, is that “the right to freedom of peaceful assembly [...] is a fundamental right in a democratic society, and, like the right to freedom of expression, is one of the foundations of such a society [...]”⁴⁸

The HRA opened the way for the domestic courts to take to heart the principle – declared by Strasbourg, but not given practical effect by it – that peaceful protest has equal weight to freedom of expression generally, a freedom that is accorded ‘special importance’ within the Strasbourg jurisprudence,⁴⁹ and now, with the House of Lords judgment in *Laporte*, within the common law. That judgment clearly marked a turning point, not only in the UK public protest jurisprudence generally, but also in the post-HRA jurisprudence. It stands in marked contrast to the other relatively recent House of Lords’ decision in this context – in *DPP v. Jones*, taken immediately prior to the coming into force of the HRA, a much more cautious decision. Now that the freedom of expression dimension of public protest has been given domestic recognition in *Laporte*, following *Steel*, the principles developed in the Strasbourg and domestic media freedom jurisprudence can be utilised in protest cases, thus underpinning and guiding judicial activism.

5. The Common Law Doctrine of Breach of the Peace

The leading case on breach of the peace is *Howell*,⁵⁰ in which it was determined that a breach of the peace will arise if an act is done or threatened to be done which either: harms a person or his property *in his presence*, or is likely to cause such harm, or which puts a person in fear of such harm. Under this definition, threatening words might not in themselves amount to a breach of the peace, but they might lead a police officer to apprehend a breach. The *Howell* definition in itself is extremely wide, largely because it does not confine itself to violence or threats of violence. Nor does it require that the behaviour amounting to a breach of the peace, or giving rise to fear of a breach of the peace, should be unlawful under civil or criminal law. Further, it has been recognised for some time by the courts that a person may be bound over for conduct which is not itself a breach of the peace and which does not suggest that the individual concerned is about to breach the peace, but which may cause another to breach the peace.⁵¹ This third possibility is arguably implicit in the *Howell* definition itself and indeed is not sufficiently distinguished,

national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules” (R v. DPP ex parte Kebilene, *supra* note 41).

⁴⁸ *Rassemblement Jurassien v. Switzerland*, *supra* note 13, at 119.

⁴⁹ The Court referred to “the special importance of freedom of peaceful assembly and freedom of expression, which are closely linked in this instance” (*Ezelin v. France*, *supra* note 9, at 51).

⁵⁰ *R v. Howell*, [1981] 3 All ER 383.

⁵¹ *Wise v. Dunning*, [1902] 1 KB 167; *Lansbury v. Riley* [1914] 3 KB 229.

within that definition, from conduct which in itself amounts to a breach of the peace. This additional possibility is of great significance in the context of public protest since it means that in certain circumstances peaceful, lawful protest can lead to the arrest and binding over of the protesters.

A constable or citizen has the power and duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur. Three key issues arise in relation to the question of immediacy. First, it is necessary to determine the degree of imminence. In other words, does it indicate that the officer predicts that the breach will occur in the very near future? At what point could it be said that the point at which it was expected to arise was too distant to justify intervening action, including arrest? Secondly, assuming that a breach can be said to be imminent, who can be arrested or otherwise affected by police intervention? If – as may frequently occur in relation to protests – an innocent party is in the company of those who are, in the view of the police officers, about to commit the breach, can the police arrest or take other interventionary action against the innocent party? In the interests of maintaining public order, this might be argued for on the basis that it was difficult for the police to distinguish between those about to breach the peace and others.⁵² Or, it might be advocated on the basis that those remaining present while others, part of the same protest, become more confrontational, condoned or even encouraged the breach by their very presence or by their verbal support for the protest. This issue is a difficult one since police consider that some activist groups use protests as a cover for acts of violence and aggression.⁵³ Third, if a breach can *not* be said to be imminent, can the police take action short of arrest, such as directing protesters away from the protest, or detaining them without arresting them, on the basis that otherwise the breach will become imminent? In other words, is the degree of intervention linked to the degree of immediacy?

The leading authority on the question of what is an imminent breach of the peace (which was accepted in the House of Lords in *Laporte*, discussed below) is *Albert v. Lavin*.⁵⁴ That case reflected the trend of existing authority. In *Humphries v. Connor*,⁵⁵ Judge Fitzgerald said that “if a breach of the peace is imminent [a constable], may, if necessary, arrest those who are about to commit it, if it cannot otherwise be prevented.” Once it is accepted that an arrest may be made in respect of an apprehended breach of the peace, the question of the necessary degree of immediacy (the first issue identified) arises. A number of authorities establish that the duty to arrest for breach of the peace arises only

⁵² This was the case in both *Laporte* and *Austin and Saxby*, which are considered below.

⁵³ *Id.*

⁵⁴ [1982] AC 546.

⁵⁵ [1864] 17 ICLR 1, at 8-9.

when the police officer apprehends that a breach of the peace is “imminent”⁵⁶ or is “about to take place” or is “about to be committed” (*Albert v. Lavin*) or will take place “in the immediate future” (*R v. Howell*). His apprehension “must relate to the near future” (*McLeod v. Commissioner of Police of the Metropolis*).⁵⁷ If the officer reasonably apprehends that a breach of the peace is likely to occur in the near future, the officer’s duty is to take reasonable steps to prevent it. When this power, in conjunction with the offence of obstruction of an officer in the execution of his duty, was used extensively during the 1984 UK miners’ strike,⁵⁸ it was made clear that an arrest can occur well before the point is reached at which a breach of the peace is apprehended.

The most notorious instance of its use occurred in *Moss v. McLachlan*.⁵⁹ A group of striking miners in a convoy of cars were stopped by the police a few miles away from a number of collieries and prevented from travelling on to pits a few miles away where non-striking miners were working. The police officers had reason to believe that violent clashes would break out, not at the motorway exit where their cordon was positioned, but at the pits. The police told them that they feared a breach of the peace if the miners reached the pits and that they would arrest the miners for obstruction if they tried to continue. After some time, a group of miners tried to push past the police, were arrested and convicted of obstruction of a police officer in the course of his duty. Their appeal on the ground that the officers had not been acting in the course of their duty was dismissed. It was said that there was no need to show that individual miners would cause a breach of the peace, nor even to specify at which pit disorder was expected. A reasonable belief that there was a real risk that a breach would occur in close proximity to the point of arrest (the pits were between two and four miles away) was all that was necessary. (A case in Kent in which striking miners were held up over 200 miles away from their destination suggests that this requirement of close proximity may be becoming otiose.)⁶⁰

In assessing whether a real risk existed, news about disorder at previous pickets could be taken into account; in other words, there did not appear to be a requirement that there was anything about these particular miners to suggest they might cause a breach of the peace. Thus, a number of individuals were lawfully denied their freedom of both movement and assembly apparently on no more substantial grounds than that other striking miners had caused trouble

⁵⁶ *O’Kelly v. Harvey*, [1998] 3 All ER 705, 711b-c; *Foulkes v. Chief Constable of the Merseyside Police*, [1982] QB 416, 426.

⁵⁷ [1994] 4 All ER 553, 560F.

⁵⁸ March 1984 to March 1985.

⁵⁹ [1985] IRLR 76.

⁶⁰ *Foy v. Chief Constable of Kent*, 20 March 1984, unreported. It has also been noted by P. Thornton, Public Order Law 97-98 (1987), that the Attorney General, in a written answer to a parliamentary question tabled during the miners’ strike, omitted the requirement of an imminent threat to public order.

in the past, without having themselves provided grounds on which violence could be foreseen. Judge Skinner, giving the judgment of the Divisional Court, also introduced a significant modification to the doctrine. Dealing with the requirement of imminence, Judge Skinner said: “The imminence or immediacy of the threat to the peace determines what action is reasonable.”⁶¹ In *Minto v. Police*⁶² Judge Cooke said that “the degree of immediacy is plainly highly relevant to the reasonableness or otherwise of the action taken by the police officer.” On this approach, a police officer has the power – and duty – to take action short of arrest (such as stopping cars or directing protesters away from a protest) at an earlier stage than that at which he would have the power and duty to arrest persons on the grounds of breach of the peace.

5.1. The *Laporte* Case

The highly significant decision of the House of Lords in *Laporte* did not add much to the established understanding of the meaning of immediacy. However, it did address the question of action that can be taken when a breach is *not* imminent (the second issue identified above). The stance taken in *Moss* to the effect that action short of arrest can be taken if a breach of the peace is not imminent was decisively rejected by the House of Lords in *Laporte*.⁶³ The case arose in relation to the detention of protesters on a coach, which had been turned back by the police from an anti-war demonstration. The case arose since the claimant, a peace protester, wanted to protest against the policy and conduct of the United Kingdom and United States governments in relation to the Iraq war, and wished to join a protest at RAF Fairford in order to do so.

The claimant joined a group of about 120 passengers who boarded three coaches at Euston bound for Fairford. The three coaches were stopped by the police at Lechlade near Fairford. The police searched the coaches and found a few items that could possibly have been used in a non-peaceful protest, such as face masks and home-made shields. All these articles were seized. It appeared that all or some of the passengers were not questioned about their intentions or affiliations. After the search the coaches and passengers were directed by the officer in charge to be escorted by the police back to London. The officer took the view that had the coaches been permitted to continue to RAF Fairford, the protesters on the coaches would have been arrested upon arrival at RAF Fairford, since a breach of the peace would then have been ‘imminent.’ He stated that he had concluded that he had a choice of either allowing the coaches to proceed and managing a breach of the peace at RAF Fairford, arresting the occupants of the coaches in order to prevent a breach

⁶¹ *Moss v. McLachlan*, *supra* note 59, at 79, Para. 24.

⁶² [1987] 1 NZLR 374, at 377.

⁶³ [2006] UKHL 55, Para. 34. *Laporte* case, *supra* note 2.

of the peace, or turning the coaches around and escorting them away from the area in order to avert a breach of the peace. The passengers were not allowed to disembark from the coaches.

The claimant issued an application for judicial review, seeking to challenge the actions of the Chief Constable in (1) preventing her travelling to the demonstration in Fairford, and forcing her to leave the area, and (2) forcibly returning her to London, keeping her on the coach and preventing her from leaving it until she had reached London. Relying on *Sunday Times v. United Kingdom* (No. 2)⁶⁴ and *Hashman and Harrup v. United Kingdom*,⁶⁵ Lord Bingham in the House of Lords found that

[...] any prior restraint on freedom of expression calls for the most careful scrutiny [...]. The Strasbourg court will wish to be satisfied not merely that a state exercised its discretion reasonably, carefully and in good faith, but also that it applied standards in conformity with Convention standards and based its decisions on an acceptable assessment of the relevant facts.⁶⁶

He noted that the protection of the Articles may be denied “if the demonstration is unauthorised and unlawful (as in the case of *Ziliberberg*⁶⁷), or if conduct is such as actually to disturb public order (as in *Chorherr v. Austria*⁶⁸).” But he noted this finding in *Ziliberberg*:

[...] an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.⁶⁹

The key argument on behalf of Laporte was that subject to Articles 10(2) and 11(2) of the European Convention, the claimant had a right to attend the lawful assembly at RAF Fairford in order to express her strong opposition to the war against Iraq. The conduct of the police, in stopping the coach on which the claimant was travelling at Lechdale, and not allowing it to continue its intended journey to Fairford, was an interference by a public authority (Section 6 HRA) with the claimant’s exercise of her rights under Articles 10 and 11. The burden of justifying an interference with the exercise of a Convention right such as those protected by Articles 10 and 11 was on the public authority that has interfered with such exercise, in this case the Chief Constable. The interference by the Chief Constable in this case was for a legitimate purpose – the interests of national security, for the prevention of disorder or crime or for the protection of the rights of others – but (a) was not

⁶⁴ Decision of 26 November 1991, 14 EHRR 229, at 51.

⁶⁵ *Supra* note 9, at 32.

⁶⁶ Lord Bingham took this phrase from *Christian Democratic People’s Party v. Moldova*, App. No. 28793/02, Decision of 14 May 2006, unreported, at 70.

⁶⁷ App. No. 61821/00, Decision of 4 May 2004, unreported.

⁶⁸ *Supra* note 9.

⁶⁹ *Supra* note 67, at 2.

prescribed by law, because it was not warranted under domestic law, and (b) it was not necessary in a democratic society, because it was (i) premature and (ii) indiscriminate; accordingly it was disproportionate. As regards the argument that the Chief Constable's interference was not prescribed by law because it was not warranted by domestic legal authority, it was argued that there is a power and duty resting on constables to prevent a breach of the peace that reasonably appears to be about to be committed. The test is the same whether the intervention is by arrest or (as in *Humphries v. Connor*, *King v. Hodges* and *Albert v. Lavin* itself) by action short of arrest. But it was argued that there is nothing in domestic authority to support the proposition that action short of arrest may be taken when a breach of the peace is not as imminent as would be necessary to justify an arrest. Here, the officer in charge did not think that a breach of the peace was so imminent as to justify an arrest. Counsel for the police relied on *Moss v. McLachlan*,⁷⁰ which is discussed above, in support of an argument that it is not necessary to show that the breach of the peace was so imminent as to justify an arrest. But the House of Lords rejected this argument and accepted that there is nothing in domestic authority to support the proposition that action short of arrest may be taken when a breach of the peace is not as imminent as would be necessary to justify an arrest. Lord Bingham took this view partly on the basis that otherwise the common law doctrine would undermine the 1986 Act:

Parliament conferred carefully defined powers and imposed carefully defined duties on chief officers of police and the senior police officer. Offences were created and defences provided. Parliament plainly appreciated the need for appropriate police powers to control disorderly demonstrations but was also sensitive to the democratic values inherent in recognition of a right to demonstrate. It would, I think, be surprising if, alongside these closely defined powers and duties, there existed a common law power and duty, exercisable and imposed not only by and on any constable but by and on every member of the public, bounded only by an uncertain and undefined condition of reasonableness.⁷¹

He found that *Albert v. Lavin* had laid down a simple and workable test, readily applicable to constable and private citizen alike, which recognised the power and duty to act in an emergency to prevent a breach of the peace, and that there would in almost all circumstances be little doubt as to whom to take action against. He further found little support in the authorities for the proposition that action short of arrest may be taken to prevent a breach of the peace that is not sufficiently imminent to justify arrest. Since the police officer in charge did not consider that the claimant could properly be arrested when the coaches were stopped before reaching Fairford, it followed that action short of arrest could not be taken as an alternative. He also did not accept the finding of

⁷⁰ *Supra* note 59.

⁷¹ *Id.*, at 46.

the Court of Appeal that the present case is “very much on all fours with the decision in *Moss v. McLachlan*.”⁷² He found that *Moss* carried the notion of imminence to extreme limits, but that it was not unreasonable to view the apprehended breach as imminent. But he considered that the situation in *Moss* differed greatly from that in the instant case in which 120 passengers, by no means all of whom were or were thought to be Womble members, had been prevented from proceeding to an assembly point that was some distance away from the scene of a lawful demonstration. He concluded that the actions of the police in turning away the passengers on the coach and then detaining them on the coach were not prescribed by law.

Counsel for the claimant also contended that the police action at Lechlade failed the Convention test of proportionality because it was premature and indiscriminate. It was argued that the action was premature because there was no hint of disorder at Lechlade and no reason to apprehend an immediate outburst of disorder by the claimant and her fellow passengers when they left their coaches at the designated drop-off points in Fairford. Since the action was premature it was necessarily indiscriminate because the police could not at that stage identify those (if any) of the passengers who appeared to be about to commit a breach of the peace. Lord Bingham found that it was not reasonable to suppose that the passengers – apart from the Womble members – wanted a violent confrontation with the police. It was also unreasonable, he found, to anticipate that disorder would immediately occur on arrival of the passengers at the protest site. He noted that during that time the police would be in close attendance and able to identify and arrest those who showed a violent propensity or breached the conditions to which the assembly and procession were subject. He found therefore that it was wholly disproportionate to restrict the claimant’s exercise of her rights under Articles 10 and 11 because she was in the company of others, some of whom might, at some time in the future, breach the peace.

This decision is broadly in accordance with the stance taken in *McLeod v. UK*,⁷³ in which it was found that it is insufficient to find that a breach may occur at some future point, but is not immediately probable. As discussed above, much of the case law is in accordance with *McLeod* in establishing that (a) an arrest for breach of the peace can only occur when the breach is imminent, meaning – to occur in the near future – and (b) that if it is not imminent, action short of arrest cannot be taken. However, in *Laporte*,⁷⁴ the Divisional Court and the Court of Appeal both adopted the approach in *Moss*, which allowed for preventive action short of arrest in relation to apprehended breaches of the peace that were not imminent. The House of Lords has now rejected that possibility as representing an illegitimate broadening of the breach of the peace

⁷² *Id.*, at 45.

⁷³ Decision of 23 September 1998, 27 EHRR 493.

⁷⁴ [2004] EWCA Civ 1639; [2005] QB 678.

doctrine. In requiring a clear element of immediacy, this decision has created a strong inhibitory rule, not as to the powers that can be invoked under this doctrine, but as to the point at which it can be invoked. However, the Lords could have made a clearer pronouncement on the requirements of immediacy. They accepted that *Moss* took a somewhat lax view of what could be termed imminent, but did not reject that view. The Lords also accepted that preventive action short of arrest can be used under this doctrine where an arrest could be made for an imminent breach of the peace. Thus the police still retain wide powers under this doctrine to interfere with the actions of protesters so long as the element of immediacy is present. That element has to be judged by the officer on the ground, who may well take a very broad view of what constitutes an imminent breach of the peace. When such a view is taken, it is unlikely in practice that decisions to, for example, disperse protesters or impede them in travelling to the site of the protest will ever be challenged in court, and the impact of the protest will merely be diminished. Nevertheless, this decision is likely to have some impact in protest situations in which it would be very difficult to argue that a breach of the peace was imminent.

This judgment took the court's duties under the HRA seriously. The Strasbourg jurisprudence was quite closely analysed and the facts in question were subjected to close scrutiny under the doctrine of proportionality. The very real possibility that the common law could undermine a carefully crafted statutory scheme was recognized and, at least to an extent, avoided. Interestingly, the actions of the police were found not only to be disproportionate to the aim pursued, they were also found not to be prescribed by law. The starting point was the significance of upholding rights to protest. *Laporte* has offered a check to further development of the doctrine of breach of the peace and has recognized the 'constitutional shift' that the HRA has brought about in this context. Had the judgment gone the other way, it would have left intact a position whereby the police had carte blanche to order peaceful protesters away from the scene of a protest, stop cars proceeding to it, and detain persons, without arresting them, whenever a few of the protesters appeared likely to cause disorder or were causing it. That would have continued to render much of the Public Order Act 1986, as amended, effectively redundant, since it would continue to be unnecessary in most circumstances to rely on its powers to impose conditions on marches and assemblies.

But the impact of *Laporte* must not be over-stated. It curbed the use of common law powers only where a breach of the peace could not be said to be imminent. A range of interventions, including arrest or short of arrest, is still available to the police so long as it can be said that a breach of the peace is imminent. Thus, the statutory scheme is still highly likely to be marginalized. If a large group of protesters appears to the police to contain some unruly or aggressive, or potentially aggressive, elements, the police appear, post-*Laporte*, to retain very broad powers to intervene.

5.2. *Austin and Saxby v. Commissioner of Police of the Metropolis*⁷⁵

This point brings this discussion to the third issue identified above, which arose in the highly controversial case of *Austin and Saxby*. The decision concerned a political demonstration against capitalism and globalization that was organised in the heart of the West End of London on May Day 2001. Publicity material had given the police reason to believe that it would begin at 4 p.m., but in fact, it started two hours earlier. About 3,000 people had gathered in Oxford Circus and thousands more in the surrounding streets. The protest was made up of disparate groups, some of whom, according to police intelligence, had been involved in violent acts during protests in the past. The first claimant, Austin, took part in the demonstration and made political speeches using a megaphone. The second claimant, Saxby, had come to London on business and had inadvertently become caught up in the crowd. The police stated that they had been taken by surprise by the timing of the demonstration and, in order to prevent a breakdown of law and order, detained thousands of demonstrators for about seven hours in the street by forming a cordon around them. The cordon was absolute, in that persons were completely trapped in the area for the whole seven-hour period in cold and uncomfortable conditions and without recourse to any facilities. The police planned to release the crowd slowly but this was hindered, according to the police evidence, by some outbreaks of disorder or violence either from the trapped group or from persons outside the cordon. It was considered unsafe to release groups, but a few individuals were released because, for example, they were suffering panic attacks. The claimants asked to be released but were refused on the ground that some protesters were threatening a breach of the peace. The claimants had not created a threat, nor had they provoked others. They remained peaceable throughout the period.

The claimants brought a claim for damages, alleging false imprisonment and also deprivation of liberty, contrary to Article 5 ECHR, raising the claim under Section 7 HRA. Some 150 other persons trapped that day had given notice of, or commenced, legal proceedings for damages against the Commissioner. The two cases of the claimants, Austin and Saxby, were not strictly test cases, but the decisions on the issues arising in the two cases were considered by the judge to enable most, if not all, of the other claims to be settled by agreement. The issues under the tort action and under Article 5 were dealt with separately since the judge found that different factors were relevant in both claims. He found that in a claim for false imprisonment the burden of proof rested on the claimant to prove the imprisonment and on the defendant to prove the justification for it. If the detention fell within Article 5, the burden of proof, he found, lay on the defendant to bring the case within one of the

⁷⁵ *Supra* note 3.

exhaustive list of exceptions to Article 5(1), but if the question was whether the detention fell within Article 5(1), the burden was on the claimant.

The judge noted that in *HL v. United Kingdom*,⁷⁶ the Strasbourg Court had explained that the meaning of imprisonment in the tort is not the same as the meaning of deprivation of liberty in Article 5. It had held that the distinction for the purposes of Article 5 between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.⁷⁷ The House of Lords (in *R. v. Bournemouth Community and Mental Health NHS Trust Ex parte L*, the domestic case that was then considered at Strasbourg⁷⁸) had considered the question from the point of view of the tort of false imprisonment, and considerable emphasis had been placed by the domestic courts on the fact that the applicant was compliant and had never attempted, or expressed the wish, to leave. The Court found, however, that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention,⁷⁹ especially when it was not disputed that that person was legally incapable of consenting to, or disagreeing with, the proposed action. The Court went on to find that the applicant was of unsound mind within Article 5(1)(e), but that there had been a violation of Article 5(1)⁸⁰ due to the absence of procedural safeguards designed to protect against arbitrary deprivations of liberty on grounds of necessity. The case raised the question, if the detention of the claimants fell within Article 5(1), whether Article 5(1)(c) in particular was capable of authorising the detention of individuals whom the police neither suspected of criminality nor – it appeared – intended to bring before a court on reasonable suspicion of having committed an offence or to prevent them doing so. Once the cordon was lifted and dispersal occurred, it did not appear from the evidence of both sides that any consideration at all was given to arresting Austin or Saxby. When they asked to be allowed to leave earlier, they were not told by police that at some point they personally might be arrested.

The claimants argued that Article 5(1) was engaged by a deprivation of liberty short of arrest, especially one that was more than brief.⁸¹ It was found that Article 5(1) applied to the detentions: no one in the crowd was free to leave without permission; the detention was sufficient physically to amount to a deprivation of liberty. The measure was a close confinement, with minimal

⁷⁶ App. No. 45508/99, Decision of 5 October 2004.

⁷⁷ *Guzzardi v. Italy*, Decision of 6 November 1980, 3 EHRR 333, at 92 and *Ashingdane v. UK*, Decision of 28 May 1985, 7 EHRR 528, at 41.

⁷⁸ (1999) 1 A.C. 458.

⁷⁹ *De Wilde, Ooms and Versyp v. Belgium*, Decision of 18 June 1971, 1 EHRR 373, at 64-65.

⁸⁰ *Id.*, at 124.

⁸¹ *Guenat v. Switzerland*, App. No. 24722/94, (1995) 810A DR 130 and *Hojemeister v. Germany*, App. No. 9179/80, Decision of 6 July 1981, unreported, were relied upon. The domestic case of *DPP v. Meaden*, [2003] EWHC 3005 (Admin); [2004] 1 WLR 945 was also relied upon.

liberty in Oxford Circus; so the detention was a deprivation of liberty, rather than a restriction. If the only reason why police had detained the crowd had been to take temporary measures for the protection of members of the crowd themselves, this would not, it was found, amount to a deprivation of liberty. However, this was not found to be the case, and so there was a deprivation of liberty within Article 5(1).

The detention was imposed, the judge then found, with the conditional purpose of arresting those whom it would be lawful and practicable to arrest and bring before a judge, and to prevent such persons as might be so identified from committing offences of violence. This was found to be capable of falling within Article 5(1)(c). In order to fall within Article 5(1)(c) the police had to be exercising a lawful power. It was found that powers to prevent a breach of the peace do not depend upon the threat of violence and that there was a power of temporary detention for so long as was necessary to protect the rights of others and consistent with public safety.

The judgment is not entirely clear, but essentially it proceeded on the basis that the police actions could be justifiable under Article 5(1)(c) on the ground that the detention was effected partly in order to arrest some persons at some future point on grounds of breach of the peace. The claimants relied on the finding in *Lawless v. Ireland (No.3)*⁸² that persons detained must be brought before the court in all cases to which Article 5(1)(c) refers. Their counsel also relied on *Guzzardi v. Italy*,⁸³ *Fox, Campbell and Hartley v. UK*,⁸⁴ and *Berkday v. Turkey*⁸⁵ for the proposition that the suspicion has to relate to the person detained and to a concrete and specific offence. It was argued on behalf of the police that if the detainee is not taken before a court, but is released instead, then Article 5(1)(c) may be satisfied on the basis that the police had a “conditional” purpose to arrest.⁸⁶ The test for deciding whether a measure short of arrest could lawfully be taken against a given individual was, it was found, reasonable suspicion that that individual was presenting the relevant threat. It may be noted that the two claimants were trapped within the cordon for a total of seven hours and during that time, on the evidence, committed no act that could be interpreted as meaning that they themselves were about to breach the peace. Saxby was – in effect – not in the company of the protesters voluntarily.

In assessing the preventive action that can be taken against persons who do not threaten to breach the peace, the judge relied on the Court of Appeal decision in *Laporte*; it was held:

⁸² Decision of 1 July 1961, 1 EHRR 15, at 13-14.

⁸³ *Supra* note 77, at 102.

⁸⁴ Decision of 30 August 1990, 13 EHRR 157, at 34.

⁸⁵ App. No. 22493/93, Decision of 1 March 2001, at 199.

⁸⁶ The defence relied on *Brogan v. UK*, Decision of 29 November 1988, 11 EHRR 11, in which it was found at 52-53 that a “conditional” purpose can suffice to bring a case within Art. 5(1)(c).

The important feature to note about the ability to take preventive action is that its justification is not derived from the person against whom the action is taken having actually committed an offence, but based upon a need to prevent the apprehended breach of the peace. In some situations, preventing a breach of the peace will only be possible if action is taken which risks affecting a wholly innocent individual.⁸⁷

He said that none of the cases make it clear whether mere voluntary presence, which in fact encourages the principal, and which is intended to do so, is sufficient, but he found that this should be the case and that that conclusion was consistent with the leading case of *R. v. Coney* on the point.⁸⁸ He found that the voluntary presence of a defendant as part of a crowd engaged in threatening behaviour over a period of time and/or distance is sufficient to raise a *prima facie* case against him on a charge of threatening behaviour, notwithstanding the absence of evidence of any act done by himself.⁸⁹ The court commented that a high degree of respect should be shown towards a police officer's assessment of the risk of what a crowd might do were it not contained, whilst also bearing in mind individuals' human rights.

The judge further found that there was a public procession or assembly being held at Oxford Circus at 2 p.m., and the senior police officer reasonably believed that it might result in serious public disorder, serious damage to property, or serious disruption to the life of the community – these circumstances give rise to a statutory power to impose conditions under the Public Order Act 1986. The claimants argued that those powers could not provide a power to detain people, and could not be relied on after the event if not relied on at the time. But the judge found that directions pursuant to the Public Order Act 1986 Sections 12 and 14 were given, and the fact that none of the officers had the sections in mind was, the judge found, immaterial. The directions imposed conditions prohibiting the procession from entering any public place specified. Those directions, the judge found, were necessary to prevent disorder, damage, disruption or intimidation, and the police had reasonable grounds to take this view.

The judge noted that it appeared to the officers detaining each claimant that a breach of the peace was about to be committed. When each claimant came forward and asked to be released, it appeared to the police that all those present within the cordon, including each claimant, were demonstrators, and in the particular circumstances of this case, that meant that they also appeared to the police to be about to commit that breach of the peace. The judge found that whilst this inference could be properly drawn in the instant case, it was

⁸⁷ Laporte case, *supra* note 2, at Para. 48.

⁸⁸ (1882) 8 Q.B.D. 534, CCR (non-accidental presence at an unlawful prize-fight capable of being encouragement); he also found it consistent with *Wilcox v. Jeffrey* [1951] 1 All E.R. 464, DC (intentional encouragement in fact by voluntary attendance at a concert performance known to be unlawful).

⁸⁹ *Allan v. Ireland*, 79 Cr.App.R. 206, DC.

unlikely to be capable of being drawn in all crowd cases. It was found that the police also have a right, and perhaps a duty, to take measures short of arrest, sometimes called self-help, when there is unlawful conduct that does not amount to a breach of the peace. (In so far as this finding formed a part of the part of the judgment, it has now been overruled by the House of Lords' judgment in *Laporte*.) The limits on these common law powers, he noted in passing, are by no means clear.

The measures that the officers took – in containing the claimants in Oxford Street – were found to be reasonable steps to prevent each claimant from breaking or threatening to break the peace. In determining reasonableness, the judge took account of the fact that members of the assembly were in breach of the conditions imposed under Sections 12 or 14 of the 1986 Act, although there had been no advertence to the imposition of conditions under the Act by the police. The judge did not make this entirely clear, but appeared to indicate that the police detention of the assembly related to the breach of Sections 12 or 14. This would have to presuppose that one of the conditions that could be imposed under Sections 12 or 14 was to detain the assembly for a substantial period of time. Leaving aside the question whether the police can invoke conditions under either Sections 12 or 14 without advertent to those powers, or communicating their use to the protesters, this finding is doubtful, since once the march becomes a static assembly it is subject to Section 14, which does not on its face allow for detention of the assembly, and case law has established that the condition must be imposed under the right section.⁹⁰ However, as discussed above, the judge found that Section 14 could be interpreted to include a power to impose detention.

In assessing whether an arrest of the applicants, if undertaken, would have been reasonable, the judge noted that it is now recognised that “domestic courts must themselves form a judgment whether a Convention right has been breached” and that “the intensity of review is somewhat greater under the proportionality approach” [than under the *Wednesbury* approach].⁹¹ In relation to the intensity of scrutiny, the judge found that the Court should accord a high degree of respect for the police officers' appreciation of the risks of what the members of the crowd might have done if not contained. At the same time, he found that the court should subject to very close scrutiny the practical effect that derogating measures have on individual human rights, the importance of the rights affected, and the robustness of any safeguards intended to minimise the impact of the derogating measures on individual human rights. The judge found that when each claimant came forward and asked to be released, the police did suspect that all those present within the cordon, including each claimant, were demonstrators, and that in the particular circumstances of this

⁹⁰ See DPP case, *supra* note 6.

⁹¹ *R (Daly) v. Secretary of State for the Home Department*, [2001] UKHL 26, [2001] 2 AC 532 at 23, 27.

case, that meant that they also appeared to the police to be about to commit that breach of the peace.⁹² The judge accepted the police evidence that it was not possible to differentiate between violent and non-violent demonstrators in order to determine who could, in principle, be subject to arrest. The judge held that the burden of proof was on the claimants to show that the exercise of the discretion to detain was unreasonable, either to the Wednesbury threshold, or to a more intense level of scrutiny.

So, in summary, the detention of the claimants amounted to a breach of Article 5 but, it was found, it was justified because they appeared to the police to be protesters and, as such, might commit a breach of the peace. The detention was imposed with the conditional purpose of arresting those whom it would be lawful and practicable to arrest and bring before a judge, and to prevent such persons as might be so identified from committing offences of violence. It appeared to the officers detaining each claimant that each one, as members of the demonstration, was about to commit that breach of the peace and, the judge found, it so appeared on reasonable grounds. So the detention was found to be justified under Article 5(1)(c). On the basis of the use of the breach of the peace doctrine, taking account of the breach of Sections 12 or 14, the claims of breach of Article 5 were found to fail in respect of both claimants.

It was further found, in relation to the claim of false imprisonment, that the claimants had been imprisoned within the cordon, but that the police had a defence of necessity in so trapping them, which defeated the false imprisonment claim. In putting forward that defence, it was found that the police had to show that they reasonably suspected that the claimants presented a relevant threat and that it had been reasonable to use their discretion to detain them. The existence of the defence of necessity in tort had been affirmed by the House of Lords in *Esso Petroleum Co Ltd v. Southport Corp.*⁹³ The police, it was found, can take measures for the protection of everyone, and a reasonable measure taken in this instance, involving minimum use of force, was, it was found, to detain the crowd until dispersal could be arranged safely. The claimants argued that there were alternative and less restrictive measures open to the police and that therefore the police had acted negligently, defeating the defence of necessity. This was rejected by the judge on the basis that in the difficult circumstances the police had acted reasonably. The need to take the action of creating the cordon did not arise out of any negligence on the part of the police, it was found. The claimants, he found, as members of the crowd, would, if not subject to police control, have presented as much of an innocent threat to other members of the crowd as every other innocent member presented to them. He found that one of the reasons for which the police took the contested actions was to prevent serious injury, and possible death, to persons for whom they

⁹² *Id.*, at Para. 129.

⁹³ [1955] 3 All E.R. 864, [1956] A.C. 218.

were responsible, including police officers, members of the crowd and third parties, as well as to protect property.

The judge concluded by saying that no case was advanced at the trial to the effect that the police were adopting tactics designed to interfere with rights of assembly and freedom of speech. He ended by stating that the case was about the right to liberty, and public order, and not about freedom of speech or freedom of assembly.⁹⁴

This is a very significant and very worrying judgment for public protest. It means that the police can use this doctrine against protesters in order to: arrest them; detain them for several hours, without arresting them; stop an assembly or march; divert an assembly or march; or disperse most or all of it. The power to do all this arises if some members of the group have been involved in disorder in the past, or intelligence suggests that this is the case, or if some members are disorderly, or appear likely to become disorderly. The “conditional purpose” to arrest some persons is sufficient to allow the power of prolonged detention to be exercised even if in the event no attempt to arrest those detained is made or – it appears – even considered. These powers are so broad that the use of the statutory scheme under the 1986 or 1994 Acts becomes almost irrelevant. In most circumstances, all the Sections 12 or 14 powers can be exercised by way of the breach of the peace doctrine. The degree of deference accorded to the police in this judgment makes it very difficult to assess after the event the risk in fact posed at the time by protesters. The judgment came very close to suggesting that taking part in any protest during which a few protesters were disorderly, or showed a propensity to disorder, renders all members of the protest liable to all the powers listed – and a range of other ones as well. For example, as the protesters (and any bystanders, such as Saxby, trapped with them) were allowed to filter through the cordon, names and addresses were taken and they were filmed.

The key point, it is argued, at which this judgment fell into error was in finding that if protesters are in the company of other protesters who are disorderly or may become disorderly, even though they themselves have shown no propensity at all to disorder over a long period of time, they become liable to detention or arrest. It is argued that that finding is completely opposed to the spirit of Article 5 (and Articles 10 and 11), and that a notional, tokenistic “conditional purpose to arrest” on that basis is not sufficient to justify the detention under Article 5(1)(c), given the strong findings in *Guzzardi v. Italy*,⁹⁵ *Fox, Campbell and Hartley v. UK*,⁹⁶ and *Berktaş v. Turkey*⁹⁷ as to the need for suspicion of a specific offence relating to the person in question. The specific ‘offence’ would have to be breaching the peace, but it is greatly stretching

⁹⁴ *Id.*, at 607 and 608.

⁹⁵ *Supra* note 77, at 102.

⁹⁶ *Supra* note 84, at 34.

⁹⁷ *Supra* note 85, at 199.

the definition from Howell to find that protesters such as Austin who have behaved entirely peacefully throughout the whole period of time can be said to be liable for arrest for that 'offence.' *A fortiori* those remarks can be applied to bystanders such as Saxby who are only in the company of the protesters because they have been forced into it by the police! Saxby could not have been said to have encouraged those breaching the peace by his presence or intending to do so since he was not part of the protest. Clearly, he, in common with the others, was annoyed at being trapped by the police – although he remained peaceful – but that was a consequence of the actions of the police, not part of encouragement to others to engage in disorderly or violent protest. Austin's only 'offence' was to take part in a protest during which some people, not the majority, were disorderly or aggressive. It is argued that the police had ample opportunity – seven hours in total, or more – to observe the behaviour of the protesters and could have made greater efforts to allow some persons to leave, differentiating between peaceful and non-peaceful protesters in so doing. Article 5 was breached, it is argued, at some point during those seven hours in relation to both Austin and Saxby. It was, it is contended, breached at the point when an argument that they personally could be liable to arrest at some future point would have become implausible had even superficial enquiries been made. Both Austin and Saxby communicated with police about their circumstances; that could have been the point at which both should have been allowed to leave, in a carefully controlled dispersal from the Square. After that point had come and passed, the continued detention, it is argued, breached Article 5 and damages should have been awarded that reflected the length of that period.

The House of Lords' decision in *Laporte* differs greatly from this one in its treatment of the Convention dimension. It takes the Convention rights in question more seriously and adopts a stricter level of scrutiny in relation to the judgments of the officers at the time. The situations in the two instances were roughly comparable, in that in each officers chose to detain protesters on grounds of apprehension of a breach of the peace rather than arresting them or allowing them to proceed with the protest. In each instance, completely peaceful protesters were engaged in a protest in the company of a small number of disorderly or potentially violent protesters, and in each instance this led to their detention. The House of Lords indicated that the police should have made more effort to distinguish between peaceful and non-peaceful protesters in exercising powers to prevent a breach of the peace. However, in *Laporte*, the police, crucially, did not think that a breach of the peace was imminent, although they thought one might arise if the protesters continued, whereas in *Austin and Saxby* it appeared that the police did think that a breach was imminent at the point when the detention occurred. The House of Lords' decision merely limited the use of the immense panoply of powers available under the breach of the peace doctrine to situations where the imminence

of the breach of the peace would warrant arrest. Since in *Austin* the police appeared to take the view that they could have made arrests at the entrance to Oxford Square, the outcome of the decision is not out of harmony – except on the point noted above – with that of the House of Lords. Therefore, most of the findings in *Austin* still stand, despite the later House of Lords' decision in *Laporte*.

The judge considered that Articles 10 and 11 were not engaged in this instance since Saxby was not seeking to exercise rights under those Articles on that occasion and Austin had already had an opportunity to exercise them. She had used her loudspeaker to broadcast political messages before the march arrived at Oxford Square and thereafter for a period. When she was told she could not leave and was imprisoned in the cordon, she used her loudspeaker to comfort those who were trapped in the Square. It is argued, however, that the judge's conception of the exercise of Articles 10 and 11 rights was a very narrow one. Austin was trammelled as to the place and time that she could exercise those rights and the situation in which she could exercise them. The messages she could broadcast were circumscribed by the situation. Austin's intentions in joining the protest would have been to exercise the rights as part of the march, when they could have been publicized more effectively to passers-by, not as part of a group of prisoners trapped by the police on one spot in very uncomfortable conditions. Further, this judgment – which confirms and extends already very broad powers – is not in harmony with the spirit of Articles 10 or 11. If protesters risk arrest or detention when joining protests they may be deterred from doing so.

Was the tort of false imprisonment interpreted consistently with Article 5 in this case? It is suggested that the application of the defence of necessity as interpreted in this case is inconsistent with Article 5 since none of the exceptions in Article 5 cover the defence. In order to align the two, the tort should be reinterpreted to exclude that defence; the position should be that a detention cannot be tortious if a lawful arrest, or a detention short of arrest, based on a clear power, and covered by Article 5(1)(c) (or (b)), has occurred. If the judge considered that apprehension of a breach of the peace provided a lawful power to detain for a substantial period without arrest, it is unclear why it was thought that the defence of necessity was relevant in any event.

Austin and Saxby has confirmed that the police have a very wide range of powers to use even against entirely peaceful protesters if a few protesters are or may be disorderly. Clearly, the police are faced with difficulties in controlling a protest such as that which occurred on May Day in 2001. However, trapping three thousand people for seven hours is a highly unusual event; it has not occurred before or since. That suggests that the police do not normally need to resort to such tactics, which of course could be counter-productive. It is suggested that if further powers to control protests are needed, Parliament should enact them in preference to any further distortions of an already very

broad common law doctrine in order to provide a legal underpinning for police action. This judgment gave the impression of trying to find, after the event, legal justification for police action; in so doing it created a number of extensions to this doctrine. The decision in *Laporte* may signal to judges that they need to rein in this doctrine rather than extending it, so it is possible that a repeat of decisions such as this one will not recur. The police in *Austin* could have employed Sections 12 and 14 of the 1986 Act against the protest beforehand, but chose not to. Curtailment of this common law doctrine might encourage the police to employ the statutory framework that is already in place in order to manage protests – and Lord Bingham clearly signalled in *Laporte* not only that the Convention rights under the HRA had brought about a clear change in the constitutional position of rights to expression and assembly, but that the common law should not be allowed to marginalize or undermine that framework.

6. Conclusions

Before the HRA came into force, the true boundaries of public protest were drawn, not by reference to the constitutional significance in a democracy of rights of political participation or of affording expression, through the medium of forms of protest, to a variety of viewpoints, but often arbitrarily due to the imprecision of the law and the approach frequently taken to it in low level courts or by the police. In 2000 it was tempting to look forward to the use of Articles 10 and 11 in the post-HRA era in the expectation, not only that the boundaries would eventually be re-drawn more precisely, but also that legal discourse in this area would no longer focus simply on disorder, but rather would seek to engage in the ongoing debate, at Strasbourg and in other jurisdictions, as to the values underlying the constitutional significance of protest and the weight they should be afforded. The question whether that expectation would be fulfilled depended partly on the readiness of the domestic judiciary to disregard the outcomes of many of the public protest cases that Strasbourg has considered. But it was also suggested that the impact of the HRA on public protest would be principally determined, not by the Strasbourg jurisprudence it introduced, but by the prevailing and established judicial attitude to public protest, and the extent to which the judiciary might be prepared to move away from it, by giving practical effect to the core values underlying the Convention. Vital, also, was the way that the judiciary were likely to deal with the problematic issue of the margin of appreciation and its role in the Strasbourg jurisprudence. As we have seen, reliance on the outcomes of cases at Strasbourg provides no secure grounding for such protection – rather the reverse.

How far have those expectations been answered, nearly seven years on? This paper has on the whole painted a dismal picture. Over-broad statutory

provisions have been broadened still further by incremental extension; in some post-HRA cases lip service only has tended to be paid to questions of proportionality. The breach of the peace doctrine has been used extensively by police against protesters over most of the HRA period prior to *Laporte* with little attempt by the judiciary, except in *Redmond-Bate*,⁹⁸ to hold it in check, the low point being *Austin and Saxby*. The finding that three thousand mainly peaceful protesters could be trapped for seven hours in a London square, and that an entirely peaceful protester and a bystander caught up in the protest had no redress for the detention, must be one of the low points of the domestic public protest jurisprudence. However, the House of Lords' decision in *Laporte* may signal a change of stance going well beyond its specific outcome. In future post-HRA decisions judges inclined to take the more activist or pro-free assembly stance may be prepared to find where necessary that their decision-making can be rooted in the general principles upheld at Strasbourg as underpinning the Convention, rather than in its particular application. The judiciary can draw upon the general principles and values underlying the Convention – free expression, pluralism, tolerance and the maintenance of diversity as essential characteristics of a democratic society – if the HRA is to provide more than a cosmetic change in approach to the protection of the right of peaceful protest. The Convention jurisprudence clearly recognises the need to protect a plurality of views in a democracy, even in the face of offence caused to the majority. It would be in accordance with the Convention concept of a democratic society to refuse to place those seeking to exercise communicative rights in the same position as football hooligans and to reject a legal tradition of valuing the general societal interest in public order over the exercise of such rights. In accordance with the values of the Convention, safeguarding the interests of minorities in a democracy is not to circumvent the democratic process, but to uphold it by obviating the danger that those interests will be marginalised.

If the judiciary are prepared to take this stance more strongly in the coming years, the nature and structure of judicial argument in public protest cases, as well as the likely outcomes, will change radically. Although some judges have tended post-HRA towards approaches that have been termed 'minimalist' or 'traditionalist,' as in *Austin*, the rather tokenistic changes in legal reasoning that are resulting may still eventually come to influence judicial attitudes. In public order cases such judges are hearing, even if they are unreceptive to, arguments from counsel as to the value of this form of political expression. Now that the judiciary are placed in the position of considering such value and the need, nevertheless, to circumscribe protest within a democracy, they may eventually come to view this matter from a broader perspective and to participate in the debate that has been occurring in other jurisdictions for many

⁹⁸ *Redmond-Bate v. DPP* 163 JP 789, [1999] Crim LR 998, 7 BHRC 375 Queen's Bench Division.

years. *Laporte* appears to signal a receptivity to that approach – an approach which shows a sensitivity to the rights potentially being curtailed. Ultimately, in this particular area of political expression, the Act may be beginning to have a more profoundly educative effect than in others, not only on the public, but also on the judiciary.