

THE RIGHT TO DEMONSTRATE

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I. INTRODUCTION

In 2003, in my profession as a Hong Kong barrister, I defended a group of Falun Gong activists who had been arrested for the offence of ‘obstructing the pavement’ while holding a peaceful demonstration outside the central Chinese Government’s Liaison Office in Hong Kong.

There had only been 16 demonstrators in a large wide-open space which was not crowded. The real reason that they were arrested and charged was that the content of their banner ‘Jiang Ze Min – Stop the Killing!’ was seen as an intolerable insult by the staff of the Liaison Office. The Liaison Office put almost hysterical pressure on the Hong Kong police to intervene. After several hours, the police came up with the obstructing the pavement charge, usually used against street hawkers whose barrows created a blockage. The case turned into a *cause celebre*, because Hong Kong is one of the few places in the world which actually has a constitutionally guaranteed right to demonstrate. Article 27 of the Basic Law of the Hong Kong Special Administrative Region (‘HKSAR’) of the People’s Republic of China provides that ‘Hong Kong residents shall have freedom of association, of assembly, of procession and of demonstration.’

I argued that it was not possible to have a constitutional protection of the right to demonstrate without also having constitutional protection of some degree of permitted reasonable pavement obstruction. As the constitution was a higher legal norm than the law against obstructing the pavement, that obstruction law had to be ‘read down’ so as not to apply to otherwise lawful and reasonable demonstrations. This argument eventually succeeded, although not until the case reached appeal.¹

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¹ *Yeung May Wan & Ors v HKSAR* [2005] 2 HKLRD 212.

While I was preparing the case I searched in vain for material on where the idea of a right of demonstration came from. When the case was over I took a sabbatical to get to the bottom of the mystery, which resulted in my book, *The Right to Demonstrate*.² This article draws on that research. It considers the history of the right to demonstrate, and then goes on to consider related issues including the limits of that right and whether demonstrations which go beyond the permitted legal limits can ever be justified.

II. THE HISTORY OF THE IDEA OF PEACEFUL DEMONSTRATIONS

Riots, mobs and angry crowds are as old as humanity. In contrast, the deliberately peaceful demonstration appears to have developed for the first time in late eighteenth century London. Before the French Revolution political riots were commonplace in eighteenth century London, and even the heavy loss of life and property damage of the Gordon riots in 1780 did not weaken the widely accepted tradition of rioting. However when the French Revolution culminated in the Jacobins guillotining the French aristocracy, a fear of French style revolutionary violence ended the English tolerance of riots. At the same time English Parliamentary reformers were anxious to distance themselves from such violence and emphasise that they stood for peaceful change and renounced the use of force. They wanted to show both that they were not dangerous and that they were worthy citizens who deserved to be given the vote (which until 1832 was only given to three per cent of the population).

The development of peaceful demonstrations coincided with the Industrial Revolution and the development of modern organised trade unions, and involved some of the same people.³ This period also saw a massive increase in literacy, the development of the first mass circulation newspapers, and the creation of the first modern police forces. All of these changes were necessary for peaceful demonstrations to be a practical means of political expression. Slogans on banners were only effective when people could read them. A demonstration reported in newspapers reached far more people than if it was only known to those who saw it in the street. Police have a permanently ambivalent

² Rights Press, Hong Kong and Oxford 2007.

³ EP Thompson, *The Making of the English Working Class* (Penguin Books, London 1991) 747.

relationship with demonstrators. While they have often been used to break up demonstrations, they can also provide protection against a peaceful demonstration degenerating into a brawl when it is attacked or infiltrated by violent people. Another feature of the age when demonstrations developed in Britain was a moral earnestness which took the form of a commitment to law and rationality. The new attitudes were summed up in the marching song of Thomas Attwood's Birmingham Political Union, a body which organised huge marches to call for reform of Parliament – 'See, see we come! No swords we draw/ We kindle not war's battle fires/ By union, justice, reason, law/ We'll gain the birthright of our sires'.⁴

The peaceful demonstration came into its own in two great political crises. In 1829 the Irish leader Daniel O'Connell, organised a series of huge peaceful meetings to campaign for Catholics to be given the vote. His success in pressuring the Duke of Wellington's government by this method into legislating Catholic Emancipation stunned Europe. Then in 1831-32 the mass peaceful demonstration was the weapon of the Parliamentary reformers whose campaign led to the passage of the 1832 Reform Act. Peaceful demonstrations in every town in England in May 1832 brought business to a standstill and made it clear that the country would be ungovernable if Parliamentary Reform was not granted. These great successes made what are now called demonstrations an established part of national culture in the British Isles, although the word 'demonstration' for peaceful political marches and meetings only came into use a few years later in 1839.⁵ They also led to the technique being imitated elsewhere, with particular success in Australia, where in 1856 a trade union campaign of peaceful demonstrations led to Australia becoming the first country in the world to recognise an eight hour maximum working day.⁶ This Australian success in turn led to peaceful demonstrations becoming a favoured form of protest by worker's movements, culminating in the adoption of May Day as the International

⁴ DJ Moss, *Thomas Attwood, The Biography of a Radical* (McGill-Queen's University Press, Montreal 1990) 229.

⁵ See Oxford English Dictionary entry on 'demonstration'. The term was introduced by Temperance campaigners who publicised a march in April 1839 as 'the great demonstration of our Temperance principles'.

⁶ See further H Hughes, 'The Eight Hour Day and the Development of the Labour Movement in Victoria in the Eighteen Fifties' (1961) 9 *Historical Studies* 396.

Workers Day in 1890, to be marked by worker's marches and parades.⁷ As a result by the beginning of the twentieth century peaceful demonstrations were an established form of activity in many countries, including the United States,⁸ France,⁹ Holland,¹⁰ Belgium,¹¹ Denmark,¹² and Switzerland.¹³

III. THE IDEA THAT DEMONSTRATIONS SHOULD BE A RIGHT

However nowhere at the start of the twentieth century was there a recognised right to hold a demonstration. In France demonstrations were illegal but sometimes tolerated. In England the only element of legal protection for demonstrations was the constitutional protection of the right to present a petition. This dated back to Magna Carta, and had been re-affirmed by the 1688 Bill of Rights. The idea that everyone had the right to present a petition was deeply rooted in popular culture, and for this reason many important demonstrations centred around the delivery of a petition, a technique used by the Chartists in the 1840s, by the Womens' Suffrage Movement in the first decade of the twentieth century and by the Jarrow hunger marchers in 1936. However this right gave no protection to stationary public meetings. It was also circumscribed by the provisions of the Tumultuous Petitions Act 1661, which limited the number of persons accompanying the presentation of petitions to twelve. This Act was little used, but its use was threatened

⁷ See P Foner, *May Day: A Short History of the International Workers' Holiday, 1886-1986* (International Publishers, New York 1986).

⁸ As to the development of modern demonstrations in the United States see Foner (n 7) and LG Barber, *Marching on Washington: The Forging of an American Political Tradition* (University of California Press, Berkeley and Los Angeles 2002).

⁹ Demonstrations were illegal under the French Third Republic's Freedom of Assembly Law of 1881, but were increasingly popular. See D Tartakowsky, *Les manifestations de rue en France 1918-1968* (Publications de la Sorbonne, Paris 1997) 14 ff.

¹⁰ EH Kossman, *The Low Countries 1780-1940* (OUP, Oxford 1978) 323.

¹¹ *ibid* 326.

¹² I am grateful to Jens Toftgaard for information on Denmark, drawn from his book *Kampen om København. Magt og demokrati i byens rum 1870-1901* (Copenhagen Selskabet for Arbejder historie, Copenhagen 2008).

¹³ M Reiss (ed), *The Street as Stage: Protest Marches and Public Rallies Since the Nineteenth Century* (OUP, Oxford 2007) 194, 196-197.

against the Suffragette leader Emmeline Pankhurst. It was only repealed in 1986.

English common law also took the view that the use of the highway was only intended for passage and re-passage, and that the owner of the subsoil had the right to prevent any other use,¹⁴ which necessarily included a meeting. In addition, any march or meeting could be dispersed on the ground that it was likely to cause a breach of the peace. The only limit on this power was that peaceful marchers could not be required to disperse where the only breach of the peace in prospect was that of a violent attack against them by their opponents.¹⁵ Not until Lord Denning's dissenting judgment in *Hubbard v Pitt*¹⁶ is there judicial recognition of any right to hold a demonstration as an aspect of civil liberties.

Nor was the position any better in the United States. The First Amendment to the United States Constitution, approved in 1789, famously states that 'the right of the people peaceably to assemble shall not be abridged', and all other constitutional documents and international treaties which refer to freedom of assembly draw their inspiration from that article. However the First Amendment when enacted was not aimed at protecting protest meetings or marches. It was a reaction to the attempt by General Gage, last British colonial governor of Massachusetts, to ban the Massachusetts state assembly from holding its regular meetings because Gage saw it as a hotbed of sedition. So insensitive were the early United States politicians to the right of protest that in 1798 Congress passed a law prohibiting petitioning of Congress, so that independent Americans actually had fewer rights than English people, who could at least rely on Magna Carta and the Bill of Rights to protect their right to petition. In 1877, supporters of the defeated presidential candidate, Samuel Tilden, planned to march to Washington to protest against the well-documented rigging of the election in favour of Rutherford B. Hayes. However Tilman himself, reflecting attitudes to marches to the capital city, announced that such a march would be treason and he would have nothing to do with it.¹⁷ The first march on Washington was by Coxey's Army of the Unemployed in 1894, and

¹⁴ *Harrison v Duke of Rutland* [1893] 1 QB 142; *Hickman v Maisey* [1900] 1 QB 752.

¹⁵ *Beatty v Gillbanks* [1882] 9 QBD 308.

¹⁶ [1976] QB 142.

¹⁷ Barber (n 8) 7.

culminated in the arrest of the march leaders, Jacob Coxey and Carl Browne, for breaking an 1882 law which prohibited the use of the Capitol grounds for political purposes.

IV. EXTENSION OF FIRST AMENDMENT PROTECTION TO DEMONSTRATIONS

The low point of protection of freedom of assembly in the United States was the Supreme Court decision in *Massachusetts v Davis*¹⁸ in 1896. The court upheld the validity of a recently enacted by-law prohibiting all meetings on Boston Common, which had been a traditional place for public meetings in Boston. The court upheld the reasoning of Justice Holmes in the Massachusetts Appeal Court that a corporation was just as entitled to exclude the public from a public place as a private landowner was to exclude the public from a private place. This ruling effectively meant that no-one had a right to assemble except with the permission of the municipal authorities or the owner of private land.

In 1939 the extreme behaviour of Mayor Frank Hague of Jersey City, New Jersey, led to change. Hague announced that he would fight a campaign by the Confederation of Industrial Organisations to promote trade unions by 'fighting the closed shop with the closed city'. All requests to hold meetings were refused, and CIO activists who tried to enter Jersey City were seized, placed on trucks and driven out of the city. The resulting Supreme Court case, *Hague v CIO*,¹⁹ led to the effective overruling of *Davis*. It held that First Amendment protection of freedom of assembly extended to the right to hold the stationary open-air meeting planned by the CIO. The further step of holding that First Amendment protection also extended to marches did not come until the era of the civil rights marchers of the 1960s and the landmark cases of *Edwards v South Carolina*²⁰ and *Shuttlesworth v City of Birmingham*.²¹

V. INTERNATIONAL HUMAN RIGHTS LAW AND THE PROTECTION OF FREEDOM OF ASSEMBLY

The 1948 Universal Declaration of Human Rights declares (Article 20) that '[e]veryone has the right to peaceful assembly'. The Universal

¹⁸ 167 US 43 (1897).

¹⁹ 307 US 496 (1939).

²⁰ 372 US 229 (1963).

²¹ 382 US 87 (1965).

Declaration was based in part on a systematic survey of constitutionally protected rights in the then 55 member states of the United Nations, undertaken by John Humphrey, secretary to the United Nations Human Rights Commission.²² Many of these constitutions were influenced by the United States First Amendment and included protection of the freedom of assembly.

The extent of such protection of the freedom of assembly was delineated more precisely in the European Convention on Human Rights of 1950 and the International Covenant for the Protection of Civil and Political Rights (ICCPR) of 1966. Article 11 of the European Convention provides that:

‘1. Everyone has the right to freedom of peaceful assembly. 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 or of the administration of the state.’

ICCPR Article 21 provides that:

‘The right of peaceful assembly shall be recognised. 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 (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.’

²² Humphrey’s survey is available in many collections of UN documents. I inspected in the microfiche series in the Liu Che Woo Law Library of the University of Hong Kong, entitled ‘United Nations documents and publications’.

There are similar provisions in the 1969 American Convention on Human Rights (Article 15), and the 1979 African Charter of Human and Peoples' Rights (Article 11).

The idea of combining recognition of a right with recognition of permissible restrictions on specified grounds is derived from the constitution of the Republic of Panama.²³ It is particularly apt in relation to the right to demonstrate, as demonstrations frequently cause disruption of traffic and inconvenience to others. It has been said that 'the law of the highway is the law of give and take'²⁴ and this applies particularly to demonstrations, where a balance has to be struck between the right to demonstrate and the right of non-demonstrators to go about their lawful business.

The UN Human Rights Committee, which is responsible for complaints to the UN about breaches of the ICCPR, has produced little jurisprudence about demonstrations.²⁵ In contrast, the case law of the European Court of Human Rights (ECHR) on the interpretation of Article 11 now provides authoritative guidance as to the extent of the right to demonstrate, although it has not yet ruled on all of the legal problems thrown up by this right.

The ECHR was cautious in its early years, showing a reluctance to interfere with the decisions of governments save in the case of very clear breaches of the Convention, such as the complete ban on assemblies without permission by the regime of the Greek colonels.²⁶ As the court has become more established, and a tradition has grown up that nearly all its decisions are implemented by respondent governments, it has tended to become more robust. The case law on the right to demonstrate is an example of this process.

The first major ECHR case dealing specifically with demonstrations was *Rassemblement Jurassien v Switzerland*.²⁷ This concerned the legality of a two day long ban on all political meetings in the town of Moutier on 2 and 3 April 1977. The background to the ban was a series of clashes in Moutier between French speaking supporters and German

²³ Constitution of the Republic of Panama, Article 38.

²⁴ In *Harper v G.N. Haden & Sons Ltd* [1933] Ch 298, 320.

²⁵ The Committee considered demonstrations in a rather opaque and unsatisfactory manner in *Kivenmaa v Finland* Case 412/1990.

²⁶ *Denmark et al v Greece* (1976) 12 Yearbook 196.

²⁷ No 819/78 17 DR 93 (1979).

speaking opponents of the separation of the district from the Canton of Berne. The European Human Rights Commission (the body responsible under the European Convention for decisions on admissibility of cases before the ECHR, until its abolition in 1998) held the complaint inadmissible, as the ban was in pursuit of a legitimate aim, namely public safety and the prevention of public disorder. The Commission stated that a wide ‘margin of appreciation’ should be allowed to in-country authorities to decide how serious a risk of disorder was. It also found that the subsequent discovery of explosives in Moutier confirmed that there was indeed serious tension with the risk of clashes between rival supporters. The Commission found that the ban, in view of its brief duration, was not a disproportionate restriction on the right guaranteed by Article 11.

A year later, *Christians against Racism and Fascism v UK*²⁸ was a challenge to the legality of a two month long ban on all demonstrations in London. The ban had been imposed because of clashes between the far-right National Front and the Anti-Nazi League. It applied to ‘all public processions other than those of a religious, educational, festive or ceremonial character customarily held in the Metropolitan Police District’. The Metropolitan Police District covered a huge area, the whole of Greater London and parts of adjacent counties. The immediate purpose of the ban was to prevent a march by the National Front in Ilford on 25 February 1978 but it also had the effect of banning a march planned by the applicants for 22 April 1978. Surprisingly and disappointingly, the Commission declared this complaint also to be inadmissible, accepting the British Government’s evidence of tension as a result of previous National Front marches, and difficulty in preventing grave damage to persons and property. The Commission therefore held that the ban was necessary in a democratic society for the protection of public order.

It is unlikely that such a ban would be upheld today, as the jurisprudence of the ECHR has since re-affirmed the importance of the right to demonstrate and has held that there is a positive duty on the executive authorities, including the police, to facilitate the exercise of the right. In *Arzte fur das Leben v Austria*,²⁹ the organisation ‘Doctors for Life’ complained that the Austrian police had not fulfilled their obligation to

²⁸ No 8440/78 21 DR 138 (1984).

²⁹ (1991) 13 E.H.H.R. 294.

protect its members' right to demonstrate, because they had permitted disruption by counter-demonstrators. The court found that the police had in fact taken all reasonable steps to protect the complainants' demonstration, but it reaffirmed that the police were under a duty to protect and facilitate the holding of the demonstration. It held that demonstrators must be able to demonstrate without fear that they will be subjected to physical violence by their opponents; that the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate; and that genuine effective freedom of assembly cannot be reduced to a mere duty on the part of the state not to intervene. The case therefore amounted to a substantial change from the non-interventionist stance taken by the European Commission in the *Rassemblement Jurassien* and *Christians against Racism and Fascism* cases.

Shortly afterwards the ECHR further strengthened the protection of the right to demonstrate by its decision in *Ezelin v France*,³⁰ a case from the French West Indian island of Guadeloupe. Ezelin, a lawyer, had been disciplined by the Guadeloupe Bar Council for taking part in a pro-independence demonstration. The ECHR held that this was a breach of Article 11. It held that there was no pressing social need for interference with Ezelin's freedom of assembly, and, applying the principle of proportionality, that it would be disproportionate to permit restriction of Ezelin's right on any of the permitted grounds under Article 11 (2).

VI. INFLUENCE OF EUROPEAN CONVENTION FREEDOM OF ASSEMBLY JURISPRUDENCE ON BRITISH AND COMMONWEALTH LAW

The UK Human Rights Act 1998 incorporated the European Convention on Human Rights into English, Scottish, and Northern Irish law. Although the Act did not come into effect until 2000, its influence was already apparent in the English House of Lords in *DPP v Jones*.³¹ This case finally recognised the existence a right of freedom of assembly which could include demonstrations on the highway. The House of Lords again affirmed the existence of the right to demonstrate in *Laporte v Chief Constable of Gloucestershire*.³² Protesters against the Iraq war were

³⁰ (1991) 14 E.H.H.R. 362.

³¹ [1999] AC 240.

³² [2006] 2 WLR 46.

travelling by coach from London to an air force base at Fairford, Gloucestershire. A demonstration was to be held at the gates of the base, and the police were expecting some demonstrators to be violent and/or commit criminal damage. It was not in dispute that the majority of demonstrators were peaceful. Police stopped and searched the coach six miles from Fairford and found suspicious objects on board. Their response was to keep all the demonstrators on the coach and require the coach to return to London under police escort without stopping. The Chief Constable defended this action on the grounds that he expected a breach of the peace during the demonstration, although he frankly admitted that this was not expected as soon as the demonstrators disembarked from their coach. It was not in dispute that Ms Laporte had no connection with those believed to be planning to commit offences. The House of Lords held that, as there was no imminent breach of the peace expected, the police had acted unlawfully in requiring the demonstrators to turn back, and had breached Ms Laporte's freedom of assembly under Article 11. The case represented a significant change from earlier case law about turning back demonstrators on the highway before they reached the start of their intended action.³³

The impact of the European Convention has also extended to many former British colonies which incorporated provisions from the Convention into their independence constitutions. *De Freitas v Permanent Secretary of Agriculture, Fisheries and Lands*³⁴ concerned the right of freedom of assembly in Article 13 of the Constitution of Antigua and Barbuda. The Minister of Agriculture faced allegations of corruption. De Freitas, a civil servant in his ministry, used his vacation to demonstrate against the minister outside his ministry. He was suspended from his post for breaching a prohibition on demonstrations by civil servants contained in Section 10(2) of the Civil Service Laws. The English Privy Council found that Section 10(2) was unconstitutional as in breach of Section 13 of the constitution. It stated that a restriction on a civil servant demonstrating against corruption in his own ministry was not reasonably justifiable in a democratic society.

³³ In *Moss v McLachlan* [1986] IRLR 76 the courts had upheld the action of the police during the 1984 miner's strike in turning back, on the ground of a likely breach of the peace, groups of striking miners in cars several miles away from a colliery where they intended to picket working miners.

³⁴ [1998] 3 LRC 62.

In *Mulundika & Ors v The People*,³⁵ the applicant and seven others were charged with holding an unlawful assembly contrary to Section 5(4) of the *Zambian Public Order Act*, a pre-independence statute from what had been Northern Rhodesia. The statute provided that no assembly could take place unless a designated police officer or district administrator had first issued a permit. The *Zambian Supreme Court* acquitted the defendants on appeal and struck down Section 5(4) as in breach of the freedom of assembly provision in Article 11 of the *Constitution of Zambia*. It held that Section 5(4) was so wide, leaving an uncontrolled discretion to the police officer, and drafted in a way which was a ‘clear recipe for arbitrariness and abuse’, that it was not a provision which was reasonably justifiable in a democratic society. The Court expressly applied the US civil rights case of *Shuttlesworth v Birmingham*.

VII. HONG KONG’S RIGHT OF DEMONSTRATION

The cases from different jurisdictions above illustrate how the right to demonstrate has become an accepted part of the law of freedom of assembly. They do not explain why Hong Kong in its constitution has a specific right to demonstrate as well as a right of freedom of assembly. This turns out to have quite different roots, traceable to the spread of worker’s demonstrations in Czarist Russia.

The first demonstration in Russia was held in St Petersburg on 6 December 1876. It was organised by ‘Land and Liberty’ (*Zemlia i Volia*), a Populist Social Revolutionary group³⁶ and was held in the square in front of the Kazan cathedral. Some three to four hundred people were present. A red flag was unfurled with a sign reading ‘Land and Liberty’, and the Populist leader, G.V. Plekhanov (then aged 20) began to deliver a speech. The demonstration was however immediately attacked by the police and those taking part beaten and arrested. Plekhanov was helped to escape but many of those present were arrested and sentenced to terms of imprisonment or exile in Siberia.³⁷ Following this episode many Social Revolutionaries gave up the idea of demonstrations and turned instead to assassination. Further demonstrations were however

³⁵ 1 BHRC 199.

³⁶ O Figes, *A People’s Tragedy: The Russian Revolution 1892 - 1924* (Penguin Books, London 1998) 137.

³⁷ J O’Mahony, ‘The Origins of Bolshevism: The Workers Awaken in St Petersburg’ <<http://www.workersliberty.org/node/1819>> accessed 8 October 2010.

periodically organised by other groups. One of the first to see the potential of the peaceful demonstration as an effective means of protest was Lenin, and demonstrations played an important part in the political activities of the Bolsheviks. Demonstrations were often met with murderous responses from the Imperial armed forces, most notably on 'Bloody Sunday', 22 January 1905, when a peaceful crowd, containing many women and children, was fired on in St Petersburg, killing many and leading to the outbreak of the 1905 Russian Revolution. It thus became an article of faith for Russian socialists that working people should have the right to hold demonstrations freely without being repressed by the authorities. This was reflected in the first Bolshevik constitution of the Soviet Union, promulgated in July 1918. Article 15 read as follows:

'In order to ensure for the toilers real freedom of assembly, the Russian Socialist Federated Soviet Republic, recognising the right of the citizens of the Soviet Republic freely to organise assemblies, meetings, processions etc, shall place at the disposal of the working class and the poor peasantry all premises suitable for public gatherings, together with furnishing, lighting and heating.'

This was the first time in the world that the right of procession was specifically recognised in a constitution.

By 1921 the Bolsheviks had crushed all opposition and imposed a totalitarian regime on the nation. The next Soviet Constitution in 1924 dropped the right of procession. However it was cynically restored by Stalin in his model constitution of 1935, which was designed not as a working document but as propaganda aimed particularly at the USA. Article 125 provided that:

'In conformity with the interests of the working people, and in order to strengthen the socialist system, the citizens of the Union of Soviet Socialist Republics are guaranteed by law: (a) Freedom of speech; (b) Freedom of the press; (c) Freedom of Assembly, including the holding of mass meetings; (d) Freedom of street processions and demonstrations. These civil rights are ensured by placing at the disposal of the working people and their organisations

printing presses, stocks of paper, public buildings, the streets, communication facilities and material requisites for the exercise of these rights.'

Anyone who attempted to exercise this right in Stalin's Russia would have been lucky to avoid immediate execution. However the fact that the right was in the Soviet Constitution meant that it was copied and incorporated into constitutions of countries influenced by the Soviet Union, just as the right of freedom of assembly was incorporated into the constitutions of countries like Panama which were influenced by the United States. One constitution which includes a right of demonstration because of the Soviet influence on its drafters is that of Portugal, drafted during its 'Carnation Revolution' in 1974. Another is the 1982 constitution of the People's Republic of China, Article 35 of which provides that '[c]itizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of procession and of demonstration.'

It might be thought strange that the country of the 1989 Tian An Men Square massacre should be one of the few in the world to protect the right to demonstrate in its constitution. However in China, as in Russia, the existence of the constitutional right has eventually had practical effects. Demonstrations are numerous in modern post Tian An Men China, despite being invariably classified as illegal public order incidents by the local authorities. In addition, when Hong Kong was due to revert from British to Chinese rule a joint British-Chinese committee was set up to draft a constitution for Hong Kong, to be known as the Basic Law. The deliberations of this committee remain secret. However it appears that it was the Chinese side, and not the British side, who proposed the inclusion of a specific right of demonstration in the Basic Law. Once incorporated in the Basic Law, the right was subject to interpretation by the Hong Kong courts, which have interpreted the right so as to give it real meaning.

Explicit rights of demonstration also exist in the constitutions of South Africa and of post-Soviet Russia. However because of the way in which freedom of assembly has developed in Europe and the United States, so as to include the right to demonstrate, it must be doubtful whether the additional existence of an express right to demonstrate really adds anything further of substance.

VIII. THE LEGAL LIMITS OF THE RIGHT TO DEMONSTRATE

The legal limits of the right to demonstrate are broadly set by the lists of permissible restrictions in ICCPR Article 21 and European Convention Article 11.

Both lists begin with national security and public safety. There do not appear to have been ECHR cases where national security has been successfully raised as a permissible restriction. In *Seeiso v Minister of Home Affairs*³⁸ an attempt was made by the Government of Lesotho to rely on an alleged threat to national security to ban a public meeting. The High Court of Lesotho struck down this ban and in doing so stated that curtailment of freedom of assembly on grounds of national security needed to be justified by 'clear and cogent evidence'.

Public safety overlaps substantially with public order, successfully raised by the states parties in the *Jurassien* and *Christians against Racism and Fascism* cases. Public order is the permissible restriction most often at issue in demonstration cases, reflecting the nature of demonstrations. Demonstrations range from the strictly law abiding and peaceful through the predominantly peaceful with a few dubious hangers-on, to the 'direct action' demonstration intent on breaking the law. 'Direct action' in turn may be peaceful or violent. Finally there are demonstrations which are a cloak for violent rioting or looting. Police perceptions of particular groups of demonstrators may or may not be accurate in terms of the risk of resulting violence. In addition it may be difficult for the police to distinguish between individuals in a crowd of demonstrators who are totally peacefully and others mingled with them who are bent on clearly illegal activities.

Some of these issues surfaced in the recent House of Lords decision in *Austin v Metropolitan Police Commissioner*.³⁹ An anti-capitalism demonstration in central London had been organised by a group which refused to co-operate with the police or consult them beforehand. The police believed, on the basis of credible evidence later produced in court, that some of the demonstrators would be associated with an anarchist group intent on looting Oxford Street shops. When the demonstration reached Oxford Circus the police employed a technique known as 'kettling', whereby the entire demonstration was arrested, as a means of preventing groups of demonstrators from attacking the shops.

³⁸ 1998 (6) BCLR 765.

³⁹ [2008] 2 WLR 415.

Numerous entirely peaceful demonstrators were detained inside the cordon, and while some were soon released, many were detained for up to eight hours, in the rain, with no food or toilet facilities. One of these was Ms Austin, who had expected to collect her young baby from a crèche but was unable to do so. The police claimed that they had no alternative to use of the ‘kettling’ technique because they were in immediate danger of losing control of the situation, with large numbers of demonstrators inside and outside the police cordon and insufficient manpower to exercise control in any other way. The House of Lords upheld the legality of the ‘kettling’ technique on the facts of the case, finding that it was an emergency in which the police had no practicable alternative. Lord Neuberger went so far as to say that if one went out to demonstrate one must expect the risk of being detained for several hours if an emergency arose, just like a motorist accepted the risk of several hours delay in traffic congestion on a motorway. The case is now (March 2010) under appeal to the ECHR.

A weakness in Ms Austin’s case was that she was unable to identify the officers whom she claimed has refused to let her through the cordon. As other individuals with reasons for being let through the cordon had indeed been let through, the allegation against the police was not that they had created an absolute barrier around the demonstrators, but a barrier which individuals could cross at police discretion. The case therefore turned only the principle of creating this barrier in an emergency situation, rather than on specific actions against Ms Austin. The police were able to point to public safety situations, such as the Hillsborough Stadium football disaster, where stopping a large crowd might be necessary to avoid loss of life. As public disorder can also in extreme cases result in loss of life or serious injury the argument that in principle an emergency required emergency measures was likely to succeed. Nevertheless Lord Neuberger’s judgment in particular seems to undervalue the existence of a right to demonstrate. It is not reasonable to expect demonstrators to contemplate being detained inside a police cordon for hours. It is only too easy for the police to claim that such a method of crowd control is essential when it is merely convenient to the police.

The *Austin* situation of a lawful demonstration partially made up individuals bent on unlawful activity is bound to recur. However neither English nor European Convention jurisprudence has yet worked out a

generally applicable framework to assist in determining what police action in such circumstances can amount to a permissible restriction.

In ICCPR Article 21, the phrase 'public order' is followed in parentheses by the French words 'ordre public'. This concept is taken from French administrative law, and is much wider than that of public order. It has been described as the sum of the legal principles underlying society, and as including human rights.⁴⁰ In the context of freedom of assembly *ordre public* would justify prohibiting a demonstration which would interfere with the administration of justice e.g. a demonstration in a courtroom. The apparent width of the definition of *ordre public* would seem to open the way to oppressively wide restrictions on demonstrations. In fact it has been little used for such a purpose. This is partly because the words do not appear in European Convention Article 11, which has generated much of the case law on freedom of assembly, and partly because the concept is obscure outside the Francophone world. However *ordre public* was used successfully by the Government of Hong Kong in *HKSAR v Ng Kung Siu*⁴¹ to justify - notwithstanding the free speech, freedom of assembly and right to demonstrate provisions in Hong Kong's Basic Law - the arrest of two demonstrators for desecrating a Chinese national flag and a Hong Kong SAR regional flag which were the demonstrators' own property. The arrests were made under anti-flag desecration legislation passed by the SAR to provide for this eventuality. In supporting its position the HKSAR Government relied on the legal prohibition on desecration of the German national flag, which exists as a measure designed to discourage resurgent Nazism or fascism in Germany, an analogy which was accepted as valid by the Hong Kong Court of Final Appeal. However the true reason for upholding the flag desecration law was probably fear of the reaction of the Central People's Government of China had the decision been otherwise. However the *Ng Kung Siu* approach was expressly rejected in the New Zealand case of *Hopkinson*⁴² where an arrest of a demonstrator for burning the New Zealand flag was held to be an interference with his rights of free speech and freedom of assembly. It seems likely that other

⁴⁰ AC Kiss, 'Permissible Limitations on Rights' in L Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 290, 302.

⁴¹ *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442.

⁴² *Hopkinson v Police* [2004] 3 NZLR 704.

common-law jurisdictions called on to decide on arguments about order public and flag desecration will follow the New Zealand rather than the Hong Kong precedent.

Restrictions based on public health have not given rise to jurisprudence. Clearly banning public gatherings, including demonstrations, could be justified on grounds of preventing contagious epidemic disease. Perhaps surprisingly, given that concepts of morality vary widely, there have been few if any cases where the public morals restriction has been relied on.

The final permissible restriction is the protection of the rights and freedoms of others. All demonstrations save perhaps the very smallest constitute some interference with the rights and freedoms of others. One demonstrator occupying a small section of pavement prevents a non-demonstrating member of the public from using that same section of pavement at the same time. The interference with the freedom of non-demonstrators caused by a large demonstration may be very substantial. The adage that ‘the law of the user of the highway is the law of give and take’ therefore applies with particular force to demonstrations. As so often with the law, the correct test would seem to be one of reasonableness based on all the relevant circumstances. A demonstration which blocks entrances to buildings for any significant period of time would seem clearly to be an impermissible interference with the rights and freedoms of others who wish to enter or leave those buildings. More difficulty arises with large well-supported demonstrations causing major traffic disruption. The disruption may be more acceptable in the case of a traditional demonstration venue such as London’s Trafalgar Square than elsewhere. The willingness of demonstration organisers to co-operate with police in arrangements for a large demonstration may reduce the interference with the rights and freedoms of others to acceptable levels, for example if the demonstration organisers undertake to facilitate the passage of emergency vehicles or to avoid their supporters congregating in particularly disruptive locations. At this point skilled negotiation may be called for, as it will be a natural reaction of the police to attempt to persuade demonstration organisers to agree to restrictions, on grounds of minimising disruption to others, which may in fact also seriously reduce the impact of the demonstration. In his path-breaking study of the policing of demonstrations in London by the Metropolitan Police, Waddington showed that the police were more skilled negotiators than most demonstration organisers and

frequently succeeded in getting voluntary agreement to arrangements which were helpful to the police, but not really justifiable as necessary restrictions on the demonstration in question, and which might well not have been upheld by a court.⁴³

Another aspect of the protection of the rights and freedoms of others relates to demonstrations involving hate speech. In this area the law in the United States has diverged from the law in much of the rest of the world. Once the First Amendment right is engaged its protection is absolute, no matter how objectionable the demonstration may be. Thus in *Collin v Smith*⁴⁴ the Illinois Supreme Court struck down as in breach of the First Amendment three ordinances passed by the town of Skokie. Skokie is a suburb of Chicago which at that time had many survivors of Nazi concentration camps among its residents. It passed the ordinances to prevent Neo-Nazis holding a deliberately provocative march through the town. An earlier attempt to stop the Neo-Nazis marching by way of an injunction had also been struck down by the Illinois Supreme Court in *Skokie v NSPA*.⁴⁵ Neither decision was particularly controversial in terms of established US law on the First Amendment. However outrageously provocative and offensive the march was, it was entitled to protection like any other. This remains the position in US law, which, in a similar spirit, has struck down, as unconstitutional breaches of the first amendment, university codes of conduct which attempted to outlaw ethnic hate speech from campuses.⁴⁶

Under the law of the European Convention in contrast, processions involving incitement to racial or religious hatred may lawfully be banned in order to protect the rights and freedoms of others. In Northern Ireland, with its long history of sectarian violence often centred on Orange Order marches, a special mechanism has been set up involving a Parades Commission with power to re-route marches away

⁴³ PAJ Waddington *Liberty and Order: Public Order Policing in a Capital City* (University College London Press, London 1994). This police skill in outwitting demonstration organisers has a long history. The decision of the Chartist leader, Feargus O'Connor, to agree to unhelpful police conditions, which made the Great Chartist March of 10 April 1848 much less visible than it might have been, played a large part in the defeat and collapse of the Chartist movement for Parliamentary reform.

⁴⁴ 578 Fed. 2nd 1197 (7th Cir. 1978).

⁴⁵ 59, Ill 2nd 605, 373 NE 2d (1978.)

⁴⁶ See e.g. *Doe v University of Michigan* 721 F. Supp. 852 E.D. Mich 1989.

from trouble spots. There has been no successful challenge to this part of the Commission's operations.

At least two obvious issues relating to demonstrations in the UK remain to be litigated. Firstly, it is the invariable practice of the Metropolitan Police to object to demonstrations being headed by a vehicle. The police fear that a vehicle could be used as a command post for organising unlawful activity, and prefer to have a police vehicle proceeding in front of the demonstrators.⁴⁷ This seems unjustifiable. A demonstration headed by a colourful float or a band seems entirely legitimate and reasonable.

The other issue is the use of masks or face-coverings by demonstrators. In Denmark demonstrating with faces covered is expressly prohibited by law. In December 2009 there were numerous arrests of climate change demonstrators in Copenhagen, justified by the authorities on the grounds that the demonstrators were breaking this law. Following stone throwing from one part of the demonstration, some 1000 demonstrators were arrested out of an estimated 30,000 to 40,000 taking part. However some of those who were breaking Danish law by covering their faces were merely wearing animal costumes, dressed as polar bears and penguins and carrying banners reading 'save the humans!'⁴⁸ a harmless and appropriate demonstration activity. A distinction has to be drawn between this type of face covering and the 'hoodie' covering his face to avoid being detected in crime, who may also join a demonstration. The issue is further complicated by the growing police practice in many countries of systematically photographing demonstrators. This practice was found in *Wood v Metropolitan Police*⁴⁹ to have breached Article 8 of the European Convention on the particular facts of that case, not because of the fact of photography but because of the retention of the photograph as personal data. Assuming that the law continues to follow *Wood* and restrict retention of photographs of demonstrators, there would seem no privacy justification for a demonstrator covering their face. However comprehensive bans on face covering by demonstrators infringe the traditional religious practices of some Moslem women and effectively prevent them from taking part in

⁴⁷ Waddington (n 43) 88-89.

⁴⁸ R McKie and B van der Zee 'Copenhagen police release hundreds of detained activists' *Guardian* 13 December 2009.

⁴⁹ (2009) 4 All E.R. 951.

demonstrations. It may be thought that a ban in these circumstances is unreasonable, bearing in mind that any veiled demonstrator who commits a crime or incites a breach of the peace can be arrested under existing law.

IX. PURPOSE AND JUSTIFICATION OF DEMONSTRATIONS

Against this background of problems with the regulation of demonstrations it is useful to consider the purpose of demonstrations and the practical, social and ethical justification for demonstrating being a right. This can conveniently be done by examining two countries where there has been significant principled opposition to such a right, Germany and Switzerland.

German suspicion of demonstrations is rooted in history. Germany was the one major European country where holding of demonstrations did not become part of political culture in the late nineteenth and early twentieth century. The first demonstration in Germany, at Hambach in 1832, was followed by laws banning all processions without police permission, and the imprisonment of the organisers. There were no further street demonstrations in Germany until the demonstrations, on a modest scale, for reform of the electoral system for the Prussian Parliament in 1910 and 1911.⁵⁰ Unlike Britain, France or even Russia, peaceful demonstrations did not become part of the national culture. The use of the streets for violent political purposes however erupted in the 1920s with the rise of private political armies, whose members fought and killed each other. This process led directly to the emergence of the Nazi Party and its seizure of power. After World War II many democratic Germans saw street protest as a relapse towards the methods and techniques which had eroded the rule of law and led to the rise of the Nazis.⁵¹ Why go on to the street, the argument went, when the country has a democratic system for deciding political issues.

In Switzerland this argument was taken a stage further, because many Swiss cantons have a procedure known as the Burgerinitiative (Citizen Initiative), whereby a referendum can be called on an issue if this is requested by a relatively small number of citizens. This means that

⁵⁰ J Albrecht and BJ Warneken, *Als die Deutschen demonstrieren lernten* (When the Germans learned to demonstrate) (Ludwig-Uhland-Institut, Tübinger Vereinigung für Volkskunde, Tübingen 1986).

⁵¹ See Reiss (n 13) 15

even if elected politicians neglect an issue, ordinary citizens can ensure that it is debated by requesting a referendum. In this situation, it could be said, the demonstration has a very limited legitimate role.

The short answer to these arguments is that demonstrations are an effective means of promoting any political campaign, as they attract attention and generate debate on the subject of the demonstration. Peaceful law-abiding demonstrations do not do harm, and there is therefore no reason why they should not be permitted in a democracy, just like other uses of the street such as parades, carnivals and street parties.

However the case for the right to demonstrate is stronger than this. Even the best democracies are imperfect mechanisms for articulating public concerns. Many issues are of limited interest to most politicians or to the majority of the electorate, but of intense concern to those affected by them, whether they be workers losing their jobs at a particular factory, ethnic minorities protesting against racist attacks, or local communities protesting about hospital or school closures. Demonstrations provide a means for groups particularly affected by a legitimate issue to bring it to wider attention.

Demonstrations act as a safety valve for strong feelings which otherwise have the potential to unleash violence. It is strongly arguable that it was the absence of a tradition of peaceful demonstrations in early twentieth century Germany which made it easy for violent street armies to take over the streets in the aftermath of World War I.⁵²

Demonstrations give a voice to the voiceless. Many of those who are not able to give a speech or write a letter to a newspaper can make their feelings known by simply turning up or by supporting the demonstration with banners and slogans. The right to demonstrate is thus closely allied to the right of free speech. For all these reasons, the right to hold a peaceful demonstration is a source of strength and stability for a democracy and should be jealously safeguarded.

X. CIVIL DISOBEDIENCE DEMONSTRATIONS

It would be wrong to leave this subject without considering demonstrations in the Gandhian tradition of deliberate peaceful lawbreaking to make a point of principle. The most famous historical

⁵² As to how the Nazi SA did so, see S Reichardt, 'Fascist Marches in Italy and Germany: Squadri and SA' in Reiss (n 13) 169-189.

example is probably the Salt March to Dandi, when Gandhi led a march to the coast, ending on a beach where he and his supporters symbolically broke the Government's monopoly on salt production by evaporating tiny amounts of salt from the sea.

Gandhi developed the idea of deliberate civil disobedience as a result of reading Thoreau's *Walden* while imprisoned in South Africa for organising a march by the Indian community against pass laws.⁵³ Gandhi believed that he had discovered a revolutionary technique of passive resistance to injustice – he called it 'Satyagraha' – which was applicable worldwide as a means of resisting aggression. Debate has continued ever since as to whether this is right, or whether it was the particular circumstances Gandhi faced in British India, combined with his symbolic power as a small, humble, old man defying the might of the British Empire, which led to his success. Gandhi powerfully influenced Martin Luther King who consciously adopted Gandhian techniques as part of the American civil rights movement. However both Gandhi and King were protesting against systems that lacked legitimacy. British India was under foreign occupation and was not a democracy. Scope for effective opposition was limited and Gandhi's technique was more effective than others.⁵⁴ Martin Luther King was operating in a democracy, but the laws of the Southern states of the USA which were broken by the civil rights marchers were laws which were unconstitutional because of their discriminatory purpose. King was a strong believer in the rule of law and only challenged laws which he considered to be unlawful because unconstitutional. The Supreme Court eventually agreed with him.⁵⁵ The use of deliberate lawbreaking as a form of protest becomes much more controversial in a functioning democracy where what is at issue is essentially a difference of political opinion.

Deliberate peaceful lawbreaking by 'direct action' appears to be increasing in popularity in the UK. This may be the result of widespread frustration with the apparent ineffectiveness of the political process in tackling issues of growing concern, particularly environmental issues where there is a long protest tradition of direct action. Recent examples in 2009 have involved mass trespasses at power stations and the stopping

⁵³ M Gandhi, 'My time in jail' published in 'Indian Opinion', *Collected Works of Gandhi*, Vol 9, 181.

⁵⁴ See R Payne *Life and Times of Mahatma Gandhi* (Bodley Head, London 1969).

⁵⁵ See *Edwards* (n 20) and *Shuttlesworth* (n 21).

of a train near the Drax power station as a protest against high carbon emissions and global warming.

Direct action by environmentalists goes back at least to the Kinder Scout Mass Trespass in 1932, in support of the right to roam across the vast moor which was then the Duke of Devonshire's private grouse-shooting preserve.⁵⁶ A fight developed between trespassing walkers and the Duke's gamekeepers. The victorious walkers were prosecuted and sentenced to periods of four to six months imprisonment. These heavy sentences shocked public opinion and strengthened the walkers' cause, leading eventually to the opening up of the moors to public access in 1945. The organiser of the Kinder Scout Mass trespass, Benny Rothman, was from Lancashire, and may have been inspired by Gandhi's visit there the previous year.

The world's most well-known environmental protesters are the Greenpeace Movement, founded in Vancouver, Canada, to protest against American nuclear tests in the Aleutian Islands off Alaska. The Greenpeace founders were consciously influenced by Gandhian ideals and techniques when they sailed their first small fishing trawler into the American nuclear testing zone.⁵⁷ Their campaign did not stop the next test, but made the political cost of testing so high that the programme was dropped. Greenpeace eventually split, with a faction which favoured stronger direct action breaking away. Paul Watson, a key mover in this breakaway faction, became famous for interfering with the Canadian seal hunt by lifting up and carrying away, in defiance of Canadian law, a baby seal about to be killed as part of the annual Newfoundland seal hunt. He later used his ship, the Sea Shepherd, to ram and disable a pirate illegal whaling ship.⁵⁸ Both Watson's actions were spectacularly successful in terms of generating world-wide opposition to the seal hunt and to illegal whaling, but both raise difficult ethical issues.

Ramming a ship at sea is obviously a grossly dangerous action which could result in sinking and loss of life. The helmsman of the Sea Shepherd was skilful or lucky that this did not happen. However it is

⁵⁶ For a full account of the Kinder Scout Mass Trespass, see B Rothman *1932 Kinder Trespass: Personal View of the Kinder Scout Mass Trespass* (Willow Publishing, Altrincham 1982).

⁵⁷ See R Weyler, *Greenpeace: How a Group of Journalists, Ecologists and Visionaries Changed the World* (Raincoast Books, Vancouver 2004) 389.

⁵⁸ *ibid* 408.

easier to make a case for the legality of the ramming than for the legality of saving the baby seal. The ramming occurred outside any national jurisdiction on the high seas, where the whaling ship was killing whales in breach of international treaties. In a sense the whaling ship could be regarded as a pirate or analogous to a pirate. Piracy is by international customary law a crime against the law of nations and in stopping an illegal whaling vessel the Sea Shepherd could be said to be acting in a similar way to national navies suppressing pirates.

The saving of the baby seal, in contrast, was within Canadian jurisdiction and illegal under Canadian law, which prohibited anyone but an authorised hunter from touching a seal. At the same time the cruelty of killing a baby seal arouses deep outrage in many people. It is an unusually strong example of a situation where many would feel that breaking the law was morally justified. The opposition to Watson's action within Greenpeace seems to have been largely tactical. It was feared that it would weaken Greenpeace's overall position in campaigning against the seal hunt, a fear that appears to have been misplaced.

If Watson's interference with the seal hunt is to be regarded as morally legitimate, then the law should reflect this. However it is extremely difficult to draw a line. It is a short step from outrage over killing of a baby seal to outrage over use of live animals for painful experiments, but some animal experiments are aiming at finding cures for distressing human illnesses. For this reason the number of people who would object to interference with animal experiments is probably much greater than those who would object to interference with the seal hunt.

So long as there is room for reasonable people to hold conflicting views – which applies to the great majority of political issues – the proper course in a democracy is to seek to change a law with which one disagrees, and to abide by the law if one fails to change it because the opposing view prevails. Demonstrations which try to impose a point of view by direct action are intrinsically undemocratic. The late Lord Denning expressed this in his usual terse style in *R v Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board*,⁵⁹ a case where public land had been occupied by protesters to prevent a nuclear

⁵⁹ [1982] 1 QB 458.

power station being built on it and the owners successfully judicially reviewed a decision by the Chief Constable not to evict them.

‘This sort of problem is recurrent in modern society. The country as a whole needs to be provided with reservoirs for water, with military areas for defence, with airports for travel, with prisons for criminals, and so forth. The local inhabitants object most strongly. But still it does sometimes happen from time to time that their objections have to be overruled. It is much to be regretted, but, if the national interest demands they must give way – remembering that they are to be fully compensated, so far as money can do it, for any property that is compulsorily acquired or any injurious effects to persons or property.’

Lord Denning’s apparent implication that environmental demonstrations are all motivated by ‘not in my back yard’ syndrome would be unfair. Some are passionate idealists who believe that the Parliamentary system has failed to address such problems as climate change. However there is an assumption of superior wisdom about this belief which entails a degree of arrogance. It may well be that the democratic majority reasonably believe that the Drax power station is the least bad alternative at present for meeting national energy needs at reasonable cost. As with many issues, only time will tell who is right.

Gandhi himself discovered two weaknesses with the application of his Satyagraha philosophy which are highly relevant to all Gandhian inspired direct action. Firstly, some of his demonstrations were taken over by men of violence, and there was nothing he could do to prevent this. In at least one case this caused such bloodshed as to lead Gandhi himself to describe his direct action as a ‘Himalayan blunder’.⁶⁰ Secondly, he had no answer when a group of what were then called Untouchables, who felt he was not representing their interests, applied direct action to him by peacefully invading and occupying his ashram.⁶¹ Any direct action but peaceful environmental demonstrator has to face the possibility that those who want a power station built are eventually

⁶⁰ Payne (n 54) 330.

⁶¹ *ibid* 481.

liable to resort to direct action to impose their contrary views, with a high risk of violent conflict resulting.

Can the law give any accommodation to direct action? My position is that for reasons of democratic legitimacy it generally cannot. The position is of course different where a country is not a democracy and democratic methods of changing unjust laws do not exist. This is not to say that direct action is always morally wrong. However the person who takes direct action in a democracy has to recognise that the law will not condone being broken and that there will therefore be a price to be paid.

In a few situations there may be some scope for direct action which ultimately proves to be legal. It may be that a law may be broken without in any way affecting the rights or freedoms of others or engaging any of the other permissible restrictions under Article 11 of the European Convention. Such a law may deserve to be broken because it is unconstitutional. A likely example is Section 138 of the Organised and Serious Crimes Act 2005, which made it an offence to demonstrate without a permit within a kilometre of Parliament. The Government is pledged to repeal this section, but it has already led to the prosecution of Maya Evans simply for reciting a poem to the dead of the Iraq war at the Cenotaph. A second example is the banning of demonstrations from large privately owned locations which are natural focuses of public activity, notably shopping centres. In the United States the Supreme Court in *Pruneyard Shopping Centre v Robbins*⁶² held that while the First Amendment protection did not automatically extend to assemblies in private property serving a public function, there was nothing to prevent individual states from legislating that first amendment protection should apply to such places, and in some states this has been done.⁶³ The ECHR in *Appleby v UK*⁶⁴ rejected the argument that banning demonstrations in such places was such an extensive restriction of the right to demonstrate that it was not a necessary or proportionate way of protecting the rights and freedoms of others. However as enclosed shopping centres become ever more popular this decision may appear increasingly retrograde and have to be revisited.

⁶² 447 US 74.

⁶³ E.g. New Jersey: see *State v Shack* 277.1 2d 369 (NJ 1971).

⁶⁴ (2003) 37 EHRR 38.

XI. CONCLUSION

The peaceful demonstration is an invention which has been with us for some two hundred years. Its continuing utility and appeal have been shown by the way it has spread round the world since its origins in the nineteenth century British Isles. The law was slow to recognise it, and it is only very recently that the idea of a right to demonstrate has become generally recognised in the world's democracies. Elsewhere it remains unrecognised, or recognised only on paper as in China. The right should be recognised, as it is an important contribution to the political process and to free speech, as well as a channel for strong emotions which might otherwise be transformed into violence. However it is an essential concomitant of a legal right to demonstrate that those exercising the right must act lawfully as well as peacefully. Only in rare situations can direct action be legally justified in a democracy.