

Introductory Note by Francis Bennion

The topic is also dealt with on this website in:

[2000.020 'In Parliament 22 Red Ken and hunting pink', 150 NLJ p.568](#)

(www.francisbennion.com/2000/020.htm)

[2000.048 'In Parliament 43 Lord Donaldson of Lymington and the Parliament Acts', 150 NLJ p.1789](#)

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[2004.028 'Why the Hunting Bill is Unconstitutional', 168 JPN p.754, 25 Sep 2004](#)

(www.francisbennion.com/2004/028.htm)

[2004.034 'Is the Parliament Act invalid?', The Times Law, 9 Nov 2004](#)

(www.francisbennion.com/2004/034.htm)

[2004.037 'Is the New Hunting Act Valid?', 168 JPN \(27 Nov 2004\) 928](#)

(www.francisbennion.com/2004/037.htm)

[2004.042 DT036 - 'Delaying the hunting ban', Daily Telegraph, 27 Dec 2004](#)

(www.francisbennion.com/2004/042.htm)

[2004.134 'Is the Parliament Act valid?', NLJ \(26 Nov 2004\) 1746](#)

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[2004.138 "Is the 'The Parliament Act 1949' unconstitutional?" - Fb interviewed by Stephen Ward LexisNexis Butterworths Internet comment by FB, 2 Dec 2004](#)

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[2005.013 'Curious behaviour of the Attorney General', 169 JPN \(5 Mar 2005\) 168](#)

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[2005.015 'Does the Attorney General Know His Job?', 173 JPN \(2 Apr 2005\) 248](#)

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[2005.061 Objections to the Hunting Act 2004 \('Hunting: necessary action, and high time to take it'\), 8 CI \(Christmas 2005\) 122](#)

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Why the Hunting Bill is Unconstitutional

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In his book *The Victorians* A. N. Wilson says that Disraeli extolled the ideal type of legislator as being 'an English gentleman, born to business, managing his own estate, mixing with all classes of his fellow men, now in the hunting-field, now in the railway-direction . . .'¹ We have travelled a long way since then.

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¹ Arrow Books edition (2003), p. 586.

On 15 September, which as Gerald Howarth MP pointed out in the debate was Battle of Britain Day, the House of Commons passed the reintroduced Hunting Bill through all its stages in a single sitting. The Bill, which will now be considered once again by the House of Lords, would make hunting with hounds a criminal offence. It is expected that if the Lords refuse to pass the Bill as it stands, it will be forced through under the Parliament Acts.

The reintroduced Bill was amended by the Commons so as to defer its commencement to 31 July 2006. In case any reader is puzzled that the Parliament Acts could be used when a Bill previously passed is amended the second time round I give the minister's explanation.

Mr. Alun Michael: The Parliament Acts of 1911 and 1949 enable the will of this House to prevail in the face of disagreement between the two Houses. The procedure is only available if a reintroduced Bill is substantially unaltered, but section 2(4) of the 1911 Act provides that the Commons may suggest an amendment, which can be incorporated in a Bill, if it is accepted by the other place.²

In a wise editorial the Editor of this journal condemned the Hunting Bill in the following words-

It is one thing to dislike or to disapprove of an activity; it is quite another to make it illegal. It is a particularly serious step to criminalize a practice that has existed for centuries and whose adherents are otherwise law-abiding people and, in some cases, dependent on it for a living . . . This is law-making driven by emotion rather than reason. Its effect will be hugely divisive. It will lead to resignations of magistrates and the creation of martyrs. We ignore the wider implications of this sort of legislation at our peril. We should be debating fox hunting in bars and not across courtrooms with one side in the dock.³

A former editor of *The Times*, Lord Rees-Mogg, echoed this by saying that it is not the job of the House of Commons to impose its own private morality on those whose beliefs are different. 'Members of the House of Commons were themselves given a free vote, which means that this is a matter of private conscience, not of public policy. Labour MPs should not try to dictate their personal morality to the hunting community'.⁴

Not all Labour backbenchers voted to ban foxhunting. Mr Barry Sheerman was a brave exception. He said-

I am a political realist, and I know that the steamroller of the Parliament Act will be invoked, but I warn my colleagues that doing so will not do the Labour party or the Labour Government a great deal of good in the long term . . . I do not want to be seen, and I do not want my party to be seen, as willing to ignore other people's minority rights. We do not want that coming back to haunt us—and it will . . . We have a long history as a party that stands up for minorities and goes to the front line to protect their rights, but here we have a different sort of minority that we happen not to agree with, so we are going to trample all over their rights.⁵

What has constitutional law and practice to say about all this? Quite a lot as it happens. The former Master of the Rolls, Lord Donaldson of Lynton, has argued that it would be

² H.C. Deb. 15 September 2004, column 1362.

³ 168 JP (September 18 2004) 725.

⁴ , *Mail on Sunday*, 19 September 2004.

⁵ H.C. Deb. 15 September 2004, column 1293.

unconstitutional to use the Parliament Acts in this way.⁶ It is also possible that the Bill contravenes the Human Rights Act, a matter I will examine later in this article. Then there is the question of the Conventions of the Constitution.

The Conventions of the Constitution

Democracy should not mean that the majority gets its way on every single issue; respect for minorities is the acid test of an enlightened state. The Conservative Prime Minister A. J. Balfour said that the tyranny of majorities may be as bad as the tyranny of kings, so that what would be justifiable against a tyrannical king may be justifiable against a tyrannical majority.⁷ That is the philosophy relied on by diehard foxhunters who say they will risk imprisonment if the Hunting Bill is passed.

In his famous work *The Law of the Constitution* Dicey discussed the Conventions of the Constitution which, he said, consisting (as they do) of customs, practices, maxims, or precepts which are not enforced or recognised by the Courts, make up a body not of laws but of constitutional or political ethics.⁸

There is surely included among these conventions the principle that Parliament ought not to pass laws criminalizing the hitherto lawful activities of a minority on the ground that the majority now consider them immoral. Especially in a multicultural society, where whether a

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particular thing is or is not immoral may well be a matter of dispute and controversy, such matters are not suitable for arbitrary ukase.

Another way of putting it is that Parliament should only enact what is fair. Bullying of a minority over a matter of opinion not affecting the welfare of citizens is demonstrably unfair. As such it is beyond the true scope of the legislature of a democracy, even though not beyond its formal powers. As Lord Mustill said, simple fairness ought to be the basis of every legal rule.⁹

It is true that Dicey thought that the Conventions of the Constitution are in the main precepts for determining the mode and spirit in which the royal prerogative is to be exercised, that is for fixing the manner in which any transaction which can legally be done in virtue of the prerogative (such as the making of war or the declaration of peace) ought to be carried out.

However Dicey recognised that the royal power was anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality most of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority, that is the residue of discretionary power left at any moment in its hands, whether such power is in fact exercised by the Queen herself (as happens less and less frequently) or by her Ministers.

A constitutional custom which applies to the residual royal power must surely also apply to the preponderant portion of the original royal power which has passed to, and is now exercisable by, the Queen in Parliament. So the Conventions of the Constitution must apply to Parliament as well as the Crown.

⁶ I hope to return to that aspect in a later article.

⁷ Reported in *The Times*, 5 April 1893.

⁸ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th edn) p. 277.

⁹ *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 525.

The Human Rights Act

If passed into law would the Hunting Bill contravene the Human Rights Act 1998? Or more accurately would a court, if called upon to do so, make a declaration of incompatibility under section 4 of the Act? I propose to examine the argument that it would, using for reference a recent Scottish case where the 1998 Act was relied on in a hunting matter.

It is alleged by some that if enacted the Hunting Bill would contravene the following articles of the European Convention on Human Rights, which are given force in our law by the Human Rights Act 1998:

Article 8 (Right to respect for private and family life).

Article 9 (Freedom of thought, conscience and religion).

Article 10 (Freedom of expression).

Article 11 (Freedom of assembly and association).

These articles were relied on by the petitioners in the Scottish case brought last year by Jeremy Whaley, a Master of Foxhounds, and Brian Friend, a hunt follower.¹⁰ For Whaley, hunting formed his paid work; for Friend it was his recreation. Both complained that an Act of the Scottish Parliament, the Protection of Wild Mammals (Scotland) Act 2002, infringed these four articles by preventing the petitioners from carrying on fox-hunting in the time-honoured fashion. The judgment in the case, by Lord Brodie, gives pointers to the way English courts might be expected to go in dealing with our Hunting Bill if and when it becomes law.

Private and family life Lord Brodie said the core of judicial knowledge about fox-hunting informed him that it involves the pursuit of a wild animal, a fox, by a pack of hounds, bred and trained for the purpose, the purpose being the killing of the fox, the pack of hounds being accompanied by a number of persons mounted on horseback and, perhaps, at a greater distance, by others on foot. Those involved, whether they are mounted or on foot, include the members of an organised hunt. The hunt is likely to employ persons to assist in its activities. The hunt will require to make arrangements with proprietors of land in order to secure access for the purpose of fox-hunting. Considering all this, Lord Brodie adhered to his initial impression that what is prohibited by the Scottish Act is a quite complex social activity, carried on under public gaze, which clearly extends beyond the sphere of purely private life and therefore does not attract the protection of Article 8.

It might make a difference if the hunting community formed a distinct ethnic group, like gypsies. Whaley and Friend alleged that it did. Was this true? Certainly, said the judge, the European Court of Human Rights has recognised there are individuals whose personal identities are so closely connected with their particular lifestyles that in order that the former be respected so must be the latter. A gypsy who is prevented from living in her caravan is, in a readily comprehensible sense, no longer a gypsy. A Saami in Finland who is prevented from having free access to his hunting grounds and reindeer pastures, is, similarly, no longer a Saami.

Thus, what is essentially an activity which extends beyond the purely private sphere, such as caravan dwelling or reindeer herding, is taken as being so central to the life of the gypsy or the Saami that it falls to be regarded as an aspect of their respective personalities. In that Article 8 guarantees the freedom to develop and fulfil one's personality, in the cases of such individuals it can serve to guarantee a freedom to pursue the relevant activity. That did not

¹⁰ *Whaley and Friend v Lord Advocate* (2003) Outer House, Court of Session.

apply here, said Lord Brodie: 'it is simply not open to the court to find that those who would wish to engage in fox-hunting are a separate group defined by reference to their ethnic origins'.

Freedom of thought, conscience and religion Hunting with hounds is banned in Scotland because it is said to be immoral. If individuals have freedom of conscience they should be able to decide this question of morality for themselves, argued Whaley and Friend. Relying on the case of Diana Pretty, who was recently held not entitled to practise euthanasia on herself just because she conscientiously believed it was not immoral, Lord Brodie disagreed. Fox-hunters could not claim that because they choose to follow a particular activity their freedom

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of conscience has been interfered with because they are prohibited by law from following the activity in the precise manner they would prefer. A fox-hunter is not forced to act contrary to his conscience, since he is free to refrain from acting at all. This reasoning by Lord Brodie may be thought specious. A conscientious Christian prevented from going to church is 'free to refrain from acting at all'. That does not mean his rights of conscience are not interfered with.

Freedom of expression Fox-hunting, submitted Mr Friend, has a ceremonial quality. As appeared from a letter written by Dr Winifred Ewing MSP, it was the 'ceremonial hunt' to which members of the Scottish Parliament objected. The ceremony is an expression of the culture of the fox-hunting community. The Scottish Act contravenes the petitioners' freedom to express their culture. It is true that they could still, for example, wear hunting clothes but, asked Mr Friend, what now was the point of doing that? Lord Brodie dismissed this argument. Whaley and Friend were not prevented from expressing ideas or information: 'They are not prevented from wearing traditional hunting dress and, accordingly, if by doing so they are expressing ideas, they may continue to do so'. Again this is specious. Freedom to express ideas that are lawful is not the same thing as freedom to express ideas that the law has rendered criminal.

Freedom of assembly and association The Scottish Act, argued Whaley and Friend, effectively denies the right of assembly for the purpose of hunting. The position of Scots huntsmen, they said, is similar to the position of Finnish Saami hunters which has been held to be protected. Lord Brodie was unconvinced. The Scottish Act, he held, does not prohibit the assembling of a hunt, on horseback or otherwise, but, rather, a particular activity which the hunt might engage upon. Farmers, landowners and riding enthusiasts remain free to assemble together for a mock chase or drag hunt or simply a communal ride. What is subject to regulation is the nature of the quarry and the method of the kill, not the fact or manner of association. But freedom of association does not stop at freedom merely to assemble together where the purpose of associating is removed.

Lord Brodie administered the final spin by saying that even if the main thrust of the four articles had been infringed, which he didn't think they had, there was a let-out. The four articles allow some play for local discretion, or what is called the margin of appreciation. He held that the provisions of the Scottish Act fell within that margin. Applying judgments made in British and European courts, he held that on this moral issue the court, on democratic grounds, should defer to the judgment of Parliament. Whaley and Friend lost their case.

Conclusion

Lord Brodie's crucial reason is expressed in the following words of his judgment:

What is at issue here is one part of the community imposing its views on another. If one takes the view that [the Scottish Act] involves a moral question: whether it is unjustifiably cruel, in the name of sport, to set one mammal (a dog) to kill another mammal (a fox), then there is a moral judgment to be made and if there is a moral judgment to be made . . . the making of that judgment is one which, in our democracy, it is to be expected should be taken by the democratically elected legislator . . . Cruelty is a concept that does not necessarily require scientific evidence to establish it. It involves a moral judgment. If a democratic Parliament takes the view that a practice is cruel, then it can be said that in banning or restricting that practice, Parliament is acting to protect public morals.

This really applies to clause 2 of Article 8, which says that freedom to manifest one's beliefs shall be subject only to such limitations as are prescribed by law *and are necessary in a democratic society . . . for the protection of . . . morals*. This reference to democracy brings us back to where we started. If respect for a *minority* is the acid test of democracy, should the last word on the morality of hunting really be with the *majority* of the House of Commons? Should not that majority respect the rights of the minority who wish to carry on what has always been a lawful activity in this country? Under Article 8, is this not truly a matter for the individual conscience rather than the interfering monolithic state?

The arguments advanced for the petitioners in the case of Whaley and Friend do not appear to have included the one deployed in this article about the protection of minorities. Perhaps this omission will be remedied in future litigation on what will no doubt become the Hunting Act 2004.