Appendix IX

The Hunting Act 2004: a case study

1 Introduction

The Hunting Act 2004 creates the offence of hunting a wild mammal with a dog, unless the hunting is exempt. This has been one of the most debated pieces of legislation of recent times and the controversy continues. It has been estimated that this issue took up over ten times the amount of parliamentary time than the decision to go to war with Iraq. This case study illustrates a number of important points discussed in the text, including the constitutionality of a statute, its compatibility with European Union law and with human rights law at different levels, symbolic legislation, the strategies and tactics open to committed opponents of a democratically created measure (unhappy interpreters), the relevance of public opinion, legalism, and problems of enforcement and public order in the face of concerted opposition.

This Appendix reproduces the full text of the Act (section A), reproduces excerpts from the speech of Lord Bingham in the leading case on the Act (section B), excerpts from a memorandum on enforcement (section C), a quotation from Jeremy Bentham (section D) and finally some questions and exercises. We begin by setting the Act in context.

2 Context

2.1 Legal challenges

The history of legislation intended to protect animals is set out in Lord Bingham's judgment in *Countryside Alliance* v. *HM Attorney-General* (section B, paras. [37–[38]). Having lost in Parliament, despite support in the House of Lords, its opponents challenged the validity of the Act along three different lines. First the Countryside Alliance challenged the validity of the Act on the basis that the Parliament Act 1949, which purported to empower the House of Commons to pass a Bill on its own when the House of Lords has refused to pass it in two consecutive sessions, was itself invalid. A nine-judge court unanimously rejected this challenge and held that the Hunting Act was valid in constitutional law. The second challenge by the Countryside Alliance and others was that the Act contravened EC principles of free movement of goods and services under

the EC Treaty. This argument was rejected by the House of Lords in the *Countryside Alliance* case. The third challenge was that the Act violated the rights of claimants under the European Convention on Human Rights and the Human Rights Act 1998 in relation to the right to respect for private life and home (Article 8), freedom of association (Article 11), right to possessions (Article 1 of the First Protocol) in connection with the prohibition on discrimination (Article 14). Again the House of Lords rejected all of these claims, but they were not entirely unanimous in their reasons for dismissal of the claims.[1] Lord Bingham's magisterial argument on the human rights issues is reproduced below. It is a very interesting example of contemporary judicial style in handling complex arguments based on a range of sources. A further partial challenge to the Act concerns the burden of proof in cases where one of the exemptions is claimed to show that a particular activity is not exempt.[2] Some consider that this makes the Act 'unworkable'.

2.2 Symbolism

It is sometimes said that laws can have a symbolic function.[3] For example, the Hunting Act can be viewed not solely as a specific attempt to prevent cruelty to mammals, especially foxes, but also an expression of wider values. But, one may ask, symbolic of what? For some fox-hunting is an elitist activity that symbolizes social hierarchy, privilege, clinging to outdated and harmful image of 'Olde England': 'the full pursuit of the uneatable by the unspeakable'.[4] For opponents of the Act, it can represent mean-spirited hostility to a way of life, the ignorance and prejudice of urban dwellers about a valued rural activity and/or puritanical infringement of liberties by 'the nanny state' or envious left-wingers.[5] The Hunting Act is clearly a highly ambiguous symbol and illustrates the dangers of talking loosely about 'symbolic legislation'.

2.3 Unhappy citizens and interpreters

Many people involved with fox-hunting are reluctant or downright refuse to accept the law. They see it as an infringement of their liberty, or as an ignorant

[1] On 24 November 2009 the European Court of Human Rights held that the Act was not in breach of the Convention. The Strasbourg Court unanimously held that the claims that it violated the right to family life, the right to freedom of association, the right to protect property and the right to protection from discrimination were inadmissible. *Friend* v. *United Kingdom*, *Countryside Alliance* v. *United Kingdom* (2010) 50 EHRR.

[2] Discussed in Chapter 10, section 2.3(b).

[3] See Chapters 3, p. 113, 7, p. 200, and 11, p. 367.

[4] Oscar Wilde, *A Woman of No Importance*, Act 1 (1891).

[5] For a passionate, but idiosyncratic, evocation of hunting as a way of life, see Roger Scruton, *On Hunting* (1998). Scruton has also campaigned against the Act, using a mixture of philosophical, political and legalistic arguments. See, for example, 'Does the Hunting Act 2005 [sic] Really Ban Hunting?' (www.huntingmagazine.co.uk/pf_huntingban.htm).

and irrational attack on a reasonable mechanism of controlling the fox population, or as part of a prejudiced and hostile vendetta against a way of life or as an outdated continuation of class war or a combination of these. Unhappy citizens have a number of options that can be pursued in opposing the Act: for example, campaign for its repeal by Parliament, legally challenge its validity or compatibility on the various grounds indicated above,[6] obstruct or impede its monitoring or enforcement, argue that it is unenforceable, claim that particular activities fall outside the Act, disobey it quietly or openly or aggressively (for example, by handing in hundreds of 'confessions'). These, and several other tactics, have been tried with variable success. Those who support fox-hunting but believe in representative government and the rule of law have a dilemma; as do those who dislike fox-hunting, but accept that it is not a sadistic activity and is an important part of rural culture that people have freely chosen.

2.4 Enforcement

Some of the difficulties of enforcing democratically enacted legislation are illustrated by the Hunting Act 2004. Quite apart from the passionate opposition to the Act, there are some real practical difficulties: evidence is difficult to collect because by its nature fox-hunting is difficult to observe and even harder to interrupt; the Act is complex and technical with some fine distinctions between banned and exempted pursuits; and monitoring and enforcement involve considerable police resources that have to compete with other priorities. The unpopularity of the Act in some areas considerably exacerbates the difficulties: for example, both participants and opponents may be biased as witnesses; there have also been reports of intimidation of witnesses; elaborate efforts have been made to disguise 'hunts' and to impede investigation; the existence of two mutually hostile groups raises concerns for public order, which may on occasion be given priority over enforcement of the Act;[7] and those who are less involved question the sense of devoting so much time and resources to what they regard as a marginal issue, an interpretation not shared by committed supporters and opponents of fox-hunting.[8]

2.5 Objects of interpretation

2.5.1 Interpretation: objects

The Hunting Act provides an example of the importance of being clear about the object of interpretation. It is clear that the Act is directed against certain

[6] *Countryside Alliance and Others* v. *A-G* (section B, below).

[7] Association of Chief Police Officers of England, Wales and Northern Ireland circular entitled 'The Hunting Act, 2004: National Tactical Considerations' (17 January, 2005).

[8] One does not need to be pro-hunting to be concerned by the fact that several hundred hours of parliamentary time were devoted to the issue in contrast with fewer than 20 hours' debate about going to war in Iraq (estimates of both figures vary).

institutionalized activities, notably fox-hunting with hounds and hare-coursing. Roger Scruton, a leading opponent of the ban, has pointed out that within the hunting fraternity 'hunting with hounds' is a highly technical activity. It consists of controlling hounds as they are in search of a scent, the hounds strictly following along a scent line, which may or may not lead them to a fox or a hare or a stag. By extension, the hounds can be described as hunting the quarry itself, but those hunting are not: '[h]ow can a huntsman intend an action that is not his own but an action of his hounds?'. The Act, he suggests, is not clear as to the *actus reus* or the *mens rea* of the crime. Such attempts to oppose the Hunting Act 2004 by saying it is meaningless because the technical meaning of 'hunt' is overlooked can be dismissed as legalistic quibbles.[9] The word 'hunt' may be obscure, but the object of interpretation is the whole Act, which is directed against institutionalized activities that result in the killing of foxes, hares and other wild mammals.

2.5.2 Interpretation: comprehensibility

One of the complaints about the Act is that it is difficult for the people most affected – the hunting community, the police, opponents of hunting – to understand. Apart from questions of validity and compatibility, and the burden of proof, no serious doubts seem to have arisen about interpretation as opposed to comprehensibility.

MATERIALS

Section A The Hunting Act 2004

[9] Scruton, 'Does the Hunting Act 2005 Really Ban Hunting?'. The question, what is the meaning of 'hunts' was discussed in *DPP* v. *Wright* [2009] EWHC 105 (Admin.) 105 [2009] 3 All ER 726, [26]–[37], *per* Sir Anthony May P.

Hunting Act 2004

CHAPTER 37

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Hunting Act 2004

2004 CHAPTER 37

An Act to make provision about hunting wild mammals with dogs; to prohibit hare coursing; and for connected purposes. [18th November 2004]

BE IT ENACTED by The Queen's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by the authority of the same, as follows:—

PART 1

OFFENCES

1 Hunting wild mammals with dogs

A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt.

2 Exempt hunting

(1) Hunting is exempt if it is within a class specified in Schedule 1.

(2) The Secretary of State may by order amend Schedule 1 so as to vary a class of exempt hunting.

3 Hunting: assistance

(1) A person commits an offence if he knowingly permits land which belongs to him to be entered or used in the course of the commission of an offence under section 1.

(2) A person commits an offence if he knowingly permits a dog which belongs to him to be used in the course of the commission of an offence under section 1.

4 Hunting: defence

It is a defence for a person charged with an offence under section 1 in respect of hunting to show that he reasonably believed that the hunting was exempt.

5 Hare coursing

(1) A person commits an offence if he—
- (a) participates in a hare coursing event,
- (b) attends a hare coursing event,
- (c) knowingly facilitates a hare coursing event, or
- (d) permits land which belongs to him to be used for the purposes of a hare coursing event.

(2) Each of the following persons commits an offence if a dog participates in a hare coursing event—
- (a) any person who enters the dog for the event,
- (b) any person who permits the dog to be entered, and
- (c) any person who controls or handles the dog in the course of or for the purposes of the event.

(3) A "hare coursing event" is a competition in which dogs are, by the use of live hares, assessed as to skill in hunting hares.

PART 2

ENFORCEMENT

6 Penalty

A person guilty of an offence under this Act shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

7 Arrest

A constable without a warrant may arrest a person whom he reasonably suspects—
- (a) to have committed an offence under section 1 or 5(1)(a), (b) or (2),
- (b) to be committing an offence under any of those provisions, or
- (c) to be about to commit an offence under any of those provisions.

8 Search and seizure

(1) This section applies where a constable reasonably suspects that a person ("the suspect") is committing or has committed an offence under Part 1 of this Act.

(2) If the constable reasonably believes that evidence of the offence is likely to be found on the suspect, the constable may stop the suspect and search him.

(3) If the constable reasonably believes that evidence of the offence is likely to be found on or in a vehicle, animal or other thing of which the suspect appears to be in possession or control, the constable may stop and search the vehicle, animal or other thing.

(4) A constable may seize and detain a vehicle, animal or other thing if he reasonably believes that—
  (a) it may be used as evidence in criminal proceedings for an offence under Part 1 of this Act, or
  (b) it may be made the subject of an order under section 9.

(5) For the purposes of exercising a power under this section a constable may enter—
  (a) land;
  (b) premises other than a dwelling;
  (c) a vehicle.

(6) The exercise of a power under this section does not require a warrant.

9 Forfeiture

(1) A court which convicts a person of an offence under Part 1 of this Act may order the forfeiture of any dog or hunting article which—
  (a) was used in the commission of the offence, or
  (b) was in the possession of the person convicted at the time of his arrest.

(2) A court which convicts a person of an offence under Part 1 of this Act may order the forfeiture of any vehicle which was used in the commission of the offence.

(3) In subsection (1) "hunting article" means anything designed or adapted for use in connection with—
  (a) hunting a wild mammal, or
  (b) hare coursing.

(4) A forfeiture order—
  (a) may include such provision about the treatment of the dog, vehicle or article forfeited as the court thinks appropriate, and
  (b) subject to provision made under paragraph (a), shall be treated as requiring any person who is in possession of the dog, vehicle or article to surrender it to a constable as soon as is reasonably practicable.

(5) Where a forfeited dog, vehicle or article is retained by or surrendered to a constable, the police force of which the constable is a member shall ensure that such arrangements are made for its destruction or disposal—
  (a) as are specified in the forfeiture order, or
  (b) where no arrangements are specified in the order, as seem to the police force to be appropriate.

(6) The court which makes a forfeiture order may order the return of the forfeited dog, vehicle or article on an application made—
  (a) by a person who claims to have an interest in the dog, vehicle or article (other than the person on whose conviction the order was made), and
  (b) before the dog, vehicle or article has been destroyed or finally disposed of under subsection (5).

(7) A person commits an offence if he fails to—
  (a) comply with a forfeiture order, or
  (b) co-operate with a step taken for the purpose of giving effect to a forfeiture order.

10 Offence by body corporate

(1) This section applies where an offence under this Act is committed by a body corporate with the consent or connivance of an officer of the body.

(2) The officer, as well as the body, shall be guilty of the offence.

(3) In subsection (1) a reference to an officer of a body corporate includes a reference to—

(a) a director, manager or secretary,
(b) a person purporting to act as a director, manager or secretary, and
(c) if the affairs of the body are managed by its members, a member.

PART 3

GENERAL

11 Interpretation

(1) In this Act "wild mammal" includes, in particular—

(a) a wild mammal which has been bred or tamed for any purpose,
(b) a wild mammal which is in captivity or confinement,
(c) a wild mammal which has escaped or been released from captivity or confinement, and
(d) any mammal which is living wild.

(2) For the purposes of this Act a reference to a person hunting a wild mammal with a dog includes, in particular, any case where—

(a) a person engages or participates in the pursuit of a wild mammal, and
(b) one or more dogs are employed in that pursuit (whether or not by him and whether or not under his control or direction).

(3) For the purposes of this Act land belongs to a person if he—

(a) owns an interest in it,
(b) manages or controls it, or
(c) occupies it.

(4) For the purposes of this Act a dog belongs to a person if he—

(a) owns it,
(b) is in charge of it, or
(c) has control of it.

12 Crown application

This Act—

(a) binds the Crown, and
(b) applies to anything done on or in respect of land irrespective of whether it belongs to or is used for the purposes of the Crown or a Duchy.

13 Amendments and repeals

(1) Schedule 2 (consequential amendments) shall have effect.

(2) The enactments listed in Schedule 3 are hereby repealed to the extent specified.

14 Subordinate legislation

An order of the Secretary of State under this Act—

(a) shall be made by statutory instrument,
(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament,
(c) may make provision which applies generally or only in specified circumstances or for specified purposes,
(d) may make different provision for different circumstances or purposes, and
(e) may make transitional, consequential and incidental provision.

15 Commencement

This Act shall come into force at the end of the period of three months beginning with the date on which it is passed.

16 Short title

This Act may be cited as the Hunting Act 2004.

17 Extent

This Act shall extend only to England and Wales.

SCHEDULES

SCHEDULE 1

Section 2

EXEMPT HUNTING

Stalking and flushing out

1 (1) Stalking a wild mammal, or flushing it out of cover, is exempt hunting if the conditions in this paragraph are satisfied.

(2) The first condition is that the stalking or flushing out is undertaken for the purpose of—

(a) preventing or reducing serious damage which the wild mammal would otherwise cause—

(i) to livestock,

(ii) to game birds or wild birds (within the meaning of section 27 of the Wildlife and Countryside Act 1981 (c. 69)),

(iii) to food for livestock,

(iv) to crops (including vegetables and fruit),

(v) to growing timber,

(vi) to fisheries,

(vii) to other property, or

(viii) to the biological diversity of an area (within the meaning of the United Nations Environmental Programme Convention on Biological Diversity of 1992),

(b) obtaining meat to be used for human or animal consumption, or

(c) participation in a field trial.

(3) In subparagraph (2)(c) "field trial" means a competition (other than a hare coursing event within the meaning of section 5) in which dogs—

(a) flush animals out of cover or retrieve animals that have been shot (or both), and

(b) are assessed as to their likely usefulness in connection with shooting.

(4) The second condition is that the stalking or flushing out takes place on land—

(a) which belongs to the person doing the stalking or flushing out, or

(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

(5) The third condition is that the stalking or flushing out does not involve the use of more than two dogs.

(6) The fourth condition is that the stalking or flushing out does not involve the use of a dog below ground otherwise than in accordance with paragraph 2 below.

(7) The fifth condition is that—

(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after being found or flushed out the wild mammal is shot dead by a competent person, and

(b) in particular, each dog used in the stalking or flushing out is kept under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (a).

Use of dogs below ground to protect birds for shooting

2 (1) The use of a dog below ground in the course of stalking or flushing out is in accordance with this paragraph if the conditions in this paragraph are satisfied.

(2) The first condition is that the stalking or flushing out is undertaken for the purpose of preventing or reducing serious damage to game birds or wild birds (within the meaning of section 27 of the Wildlife and Countryside Act 1981 (c. 69)) which a person is keeping or preserving for the purpose of their being shot.

(3) The second condition is that the person doing the stalking or flushing out—

(a) has with him written evidence—

(i) that the land on which the stalking or flushing out takes place belongs to him, or

(ii) that he has been given permission to use that land for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs, and

(b) makes the evidence immediately available for inspection by a constable who asks to see it.

(4) The third condition is that the stalking or flushing out does not involve the use of more than one dog below ground at any one time.

(5) In so far as stalking or flushing out is undertaken with the use of a dog below ground in accordance with this paragraph, paragraph 1 shall have effect as if for the condition in paragraph 1(7) there were substituted the condition that—

(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after being found the wild mammal is flushed out from below ground,

(b) reasonable steps are taken for the purpose of ensuring that as soon as possible after being flushed out from below ground the wild mammal is shot dead by a competent person,

(c) in particular, the dog is brought under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (b),

(d) reasonable steps are taken for the purpose of preventing injury to the dog, and

(e) the manner in which the dog is used complies with any code of practice which is issued or approved for the purpose of this paragraph by the Secretary of State.

Rats

3 The hunting of rats is exempt if it takes place on land—

(a) which belongs to the hunter, or
(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

Rabbits

4 The hunting of rabbits is exempt if it takes place on land—
(a) which belongs to the hunter, or
(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

Retrieval of hares

5 The hunting of a hare which has been shot is exempt if it takes place on land—
(a) which belongs to the hunter, or
(b) which he has been given permission to use for the purpose of hunting hares by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

Falconry

6 Flushing a wild mammal from cover is exempt hunting if undertaken—
(a) for the purpose of enabling a bird of prey to hunt the wild mammal, and
(b) on land which belongs to the hunter or which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

Recapture of wild mammal

7 (1) The hunting of a wild mammal which has escaped or been released from captivity or confinement is exempt if the conditions in this paragraph are satisfied.

(2) The first condition is that the hunting takes place—
(a) on land which belongs to the hunter,
(b) on land which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs, or
(c) with the authority of a constable.

(3) The second condition is that—
(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after being found the wild mammal is recaptured or shot dead by a competent person, and
(b) in particular, each dog used in the hunt is kept under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (a).

(4) The third condition is that the wild mammal—
(a) was not released for the purpose of being hunted, and

(b) was not, for that purpose, permitted to escape.

Rescue of wild mammal

8 (1) The hunting of a wild mammal is exempt if the conditions in this paragraph are satisfied.

(2) The first condition is that the hunter reasonably believes that the wild mammal is or may be injured.

(3) The second condition is that the hunting is undertaken for the purpose of relieving the wild mammal's suffering.

(4) The third condition is that the hunting does not involve the use of more than two dogs.

(5) The fourth condition is that the hunting does not involve the use of a dog below ground.

(6) The fifth condition is that the hunting takes place—

(a) on land which belongs to the hunter,

(b) on land which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs, or

(c) with the authority of a constable.

(7) The sixth condition is that—

(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after the wild mammal is found appropriate action (if any) is taken to relieve its suffering, and

(b) in particular, each dog used in the hunt is kept under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (a).

(8) The seventh condition is that the wild mammal was not harmed for the purpose of enabling it to be hunted in reliance upon this paragraph.

Research and observation

9 (1) The hunting of a wild mammal is exempt if the conditions in this paragraph are satisfied.

(2) The first condition is that the hunting is undertaken for the purpose of or in connection with the observation or study of the wild mammal.

(3) The second condition is that the hunting does not involve the use of more than two dogs.

(4) The third condition is that the hunting does not involve the use of a dog below ground.

(5) The fourth condition is that the hunting takes place on land—

(a) which belongs to the hunter, or

(b) which he has been given permission to use for the purpose by the occupier or, in the case of unoccupied land, by a person to whom it belongs.

(6) The fifth condition is that each dog used in the hunt is kept under sufficiently close control to ensure that it does not injure the wild mammal.

SCHEDULE 2

Section 13

CONSEQUENTIAL AMENDMENTS

Game Act 1831 (c. 32)

1 In section 35 of the Game Act 1831 (provision about trespassers: exceptions) the following words shall cease to have effect: "to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other land, nor".

Game Licences Act 1860 (c. 90)

2 In section 5 of the Game Licences Act 1860 (exceptions) exceptions 3 and 4 (hares and deer) shall cease to have effect.

Protection of Animals Act 1911 (c. 27)

3 In section 1(3)(b) of the Protection of Animals Act 1911 (offence of cruelty: exceptions) a reference to coursing or hunting shall not include a reference to—

(a) participation in a hare coursing event (within the meaning of section 5 of this Act), or

(b) the coursing or hunting of a wild mammal with a dog (within the meaning of this Act).

Protection of Badgers Act 1992 (c. 51)

4 Section 8(4) to (9) of the Protection of Badgers Act 1992 (exception for hunting) shall cease to have effect.

Wild Mammals (Protection) Act 1996 (c. 3)

5 For the purposes of section 2 of the Wild Mammals (Protection) Act 1996 (offences: exceptions) the hunting of a wild mammal with a dog (within the meaning of this Act) shall be treated as lawful if and only if it is exempt hunting within the meaning of this Act.

SCHEDULE 3

Section 13

REPEALS

Short title and chapter	*Extent of repeal*
The Game Act 1831 (c. 32)	In section 35, the words "to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other land, nor".
The Game Licences Act 1860 (c. 90)	In section 5, exceptions 3 and 4.

Short title and chapter	*Extent of repeal*
The Protection of Badgers Act 1992 (c. 51)	Section 8(4) to (9).

Section B Extracts from the speech of Lord Bingham in *Countryside Alliance and others* v. *HM Attorney-General and others* [2007] UKHL 52

My Lords,

[1]. Fox-hunting in this country is an emotive and divisive subject. For some it is an activity deeply embedded in the tradition, life and culture of the countryside, richly portrayed in art and literature, a highly cherished, skilful, healthy and useful form of communal outdoor exercise. Others find the pursuit of a small animal across the countryside until it is caught and destroyed by hounds to be abhorrent. Both these deeply held views were fully expressed in the discussions and debates which preceded the enactment of the Hunting Act 2004. The House of Lords in its legislative capacity was much involved in these discussions and debates, and the Act became law without its consent. But this appeal comes before the House in its judicial capacity. Our task is to decide the legal issues which have to be decided. We must perform that task without reference to whatever personal views or sympathies individual members of the committee may entertain. These are irrelevant to the legal judgment we are called upon to make.

[2]. The issue in these appeals is whether the prohibition of hunting wild mammals with dogs and of hare coursing imposed by the Hunting Act 2004 is incompatible with the European Convention on Human Rights or inconsistent with the Treaty establishing the European Community.

[3]. The first group of claimants, headed by the Countryside Alliance, contend that the Act infringes their rights under articles 8, 11 and 14 of and article 1 of the First Protocol to the European Convention, all of them provisions to which domestic courts are required to give effect by the Human Rights Act 1998. These claimants have conveniently been called the human rights, or HR, claimants.

[4]. The second group of claimants, headed by Mr Derwin, contend that the Act is inconsistent with articles 28 and 49 of the EC Treaty, and is accordingly invalid. They have conveniently been called the EC claimants.

[5]. The HR claimants' contentions apply to the hunting of foxes, deer and mink and the hunting (and coursing) of hares. The EC claimants' contentions apply to the hunting of foxes. Fox-hunting, even for the HR claimants, has been the main focus of argument and evidence, no doubt because of its much greater scale and prominence as compared with the other sports, and can best be used to test the strength of the HR claimants' submissions in the first instance, as well as those of the EC claimants.

[6]. The Attorney General and the Secretary of State for the Environment, Food and Rural Affairs, supported by the Royal Society for the Prevention of Cruelty to Animals as interveners, contend that the 2004 Act is not incompatible with the European Convention or the EC Treaty. They prevailed before the Queen's Bench Divisional Court (May LJ and Moses J: [2005] EWHC 1677 (Admin); [2006] EuLR 178) and also, on very similar but not

identical grounds, before the Court of Appeal (Sir Anthony Clarke MR, Brooke and Buxton LJJ: [2006] EWCA Civ 817, [2007] QB 305). The claimants now challenge this judgment of the Court of Appeal. Both the courts below gave very full and helpful judgments, to which reference must be made for a more complete account of the background to these appeals than is given here.

[7]. The Divisional Court gave a succinct summary of the effect of the Act in paragraphs 5–10 of its judgment, which the Court of Appeal reproduced in paragraph 5 of its judgment. Further repetition is unnecessary. The Act makes it a criminal offence, punishable by a fine of up to £5000, to hunt a wild mammal with a dog or help another to do so, unless the hunting is exempt, or to participate in hare coursing. Conviction may lead to the forfeiture of any dog, vehicle or other article used for the purpose of prohibited hunting. Certain activities are exempt from the statutory prohibition, including (in specified circumstances) the hunting of rats and rabbits, falconry, the retrieval of hares which have been shot and the stalking of a wild mammal or flushing it out of cover. A single dog may be used below ground to protect game birds for shooting. There is a further exemption for the hunting of a wild mammal with up to two dogs if the hunter reasonably believes that the mammal is or may be injured.

[8]. The Divisional Court recounted the parliamentary history of what eventually became the 2004 Act in paragraphs 12–21 of its judgment, which the Court of Appeal (with some addition) reproduced (paragraph 6). This account need not be further repeated. The salient points are these. The government had committed itself to a free vote on the banning of hunting. Measures introduced by private members failed for lack of time. In 1999 a committee chaired by Lord Burns was appointed to inquire into the practical aspects of hunting and the likely consequences of any ban. The committee reported in 2000, and its report (not seeking to address the ethical aspects of the subject) informed the subsequent debate. The Court of Appeal included excerpts of the report's summary and conclusions in Appendix II to its judgment. A bill was introduced in December 2000, but was lost in the following year on the calling of a general election. After the election the proposal was revived, and public hearings were held by the responsible minister, Mr Alun Michael MP, at Portcullis House. In December 2002 the government introduced the Hunting Bill 2002, known as "the Michael Bill". This prohibited the hunting of deer and hare coursing. But it permitted the hunting of foxes and mink with a dog if (but only if) the hunting was either exempt or registered. The grounds of exemption very largely foreshadowed those later enacted in the 2004 Act. Registration depended on satisfying a registrar that two conditions were satisfied: first, that the hunting was likely to make a significant contribution to the prevention or reduction of serious damage which the wild mammal to be hunted would otherwise cause to livestock, game birds, crops, growing timber or other property; second, that this result could not reasonably be expected to be made in a manner likely to cause significantly less pain, suffering or distress to the wild mammals to be hunted. This proposal proved acceptable to neither

House of Parliament. In the Commons the Michael Bill was heavily amended, so as to substitute what is now the 2004 Act. It was rejected by the House of Lords. After prolonged debate and amid much controversy the 2004 Act received the royal assent, without the approval of the House of Lords, pursuant to the Parliament Acts 1911–1949.

The HR claims

[9]. The Divisional Court gave particulars of the individual HR claimants in paragraphs 32–41 of its judgment, reproduced by the Court of Appeal in Appendix 1 to its judgment. Its summary need not be repeated. The HR claimants fall into two broad groups. The first is composed of people professionally involved in hunting or hare coursing or activities closely related to these, dependent on the sport for their occupation, livelihood and continuing business (a professional huntsman of staghounds, the owner and manager of a livery business, a professional terrier man, a self-employed farrier, a trainer of hare coursing greyhounds). The second group comprises landowners and tenant farmers, masters of hunts and of a beagle pack, active participants in hunting who permit hunting across their land and, in one case, manage their land specifically for hunting. Common to some members of both groups is a strong psychological and social commitment to hunting as a traditional rural activity involving the individual, the family and the community more deeply than any ordinary recreation. The Divisional Court found (paragraph 135) and the Court of Appeal accepted (paragraph 38) that there are those for whom hunting is a core part of their lives.

[10]. The HR claimants relied, first, on article 8 of the Convention ("Right to respect for private and family life") which provides

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
>
> The content of this right has been described as "elusive" and does not lend itself to exhaustive definition. This may help to explain why the right is expressed as one to respect, as contrasted with the more categorical language used in other articles. But the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.

[11]. The HR claimants helpfully presented their article 8 case under four headings. The first was "private life and autonomy". The authorities principally relied on were *Pretty v United Kingdom* (2002) 35 EHRR 1, *PG and JH v United Kingdom* (Reports of Judgments and Decisions 2001–IX, p 195), *Peck v United Kingdom* (2003) 36 EHRR 719 and *Brüggemann and Scheuten v Germany* (1977) 3 EHRR 244. From the court's judgment in *Pretty* the

claimants drew recognition (para 61) that "private life" is a broad term, not susceptible to exhaustive definition, but covering the physical and psychological integrity of a person, sometimes embracing aspects of an individual's physical and social identity, protecting a right to personal development and the right to establish relations with others in the outside world, and extending to matters within (paras 61, 62) the personal and private sphere. The court held the notion of personal autonomy to be an important principle. The court was not prepared to exclude the possibility (para 67) that denial of a right to procure her own death was an interference with the applicant's right to respect for private life. In *PG and JH* the court accepted (para 57) that a person's reasonable expectations as to privacy may be a significant, if not conclusive, factor. In *Peck* the court repeated (para 57) that article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world, potentially including activities of a professional or business nature. In *Brüggemann*, a 1977 decision of the Commission, reference was made (para 55) to private life as embracing a sphere within which the individual can freely pursue the development and fulfilment of his personality, but it was recognised (para 56) that not all laws having some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do constitute an interference with the individual's private life within the meaning of the Convention.

[12]. The second heading advanced by the HR claimants under article 8 pertained to cultural lifestyle. They relied particularly on *G and E v Norway* (1983) 35 DR 30, which concerned Lapps working as reindeer shepherds, fishermen and hunters living and working in the far north of Norway, and *Buckley v United Kingdom* (1996) 23 EHRR 101 and *Chapman v United Kingdom* (2001) 33 EHRR 399 which concerned gipsies seeking to live in their caravans.

[13]. The HR claimants' third heading related to use of the home. They relied on the Commission's ruling in *Buckley* (p 115, para 63) that "home" in article 8 is an autonomous concept and on the Court's ruling in *Niemietz v Germany* (1992) 16 EHRR 97, paras 29 and 30, that the concept may extend to business premises and a professional person's office. Reference was made to the Court of Appeal's decision in *Sheffield City Council v Smart* [2002] EWCA Civ 4, [2002] LGR 467 and the decisions of the House in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, and *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465.

[14]. The fourth heading advanced on was "loss of livelihood/home", and the authority mainly, and strongly, relied on was *Sidabras and Dziautas v Lithuania* (2004) 42 EHRR 104. This case concerned two men who had, some years before, been employed as KGB officers within the meaning of a 1998 statute. As a result they were dismissed from their jobs, were debarred from a very wide range of public and private sector employments and complained that they suffered constant embarrassment as a result of being publicly branded as former KGB officers. The court found (para 47) that a far-reaching ban on taking up private sector

employment did affect private life. It did not rule on whether article 8 had been infringed (para 63), but found a breach of article 14 of the Convention (para 62) in conjunction with article 8.

[15]. Despite the careful argument of Mr Gordon QC for the HR claimants, I am not persuaded that their claims can be brought within the scope of article 8 under any of the four heads relied on:

(1) Fox-hunting is a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the spectacle. No analogy can be drawn with the very personal and private concerns at issue in *Brüggemann* and *Pretty*, nor with the interception of private telephone conversations (admitted to be an interference within article 8) in *PG and JH*, nor with the disclosure in *Peck* of closed circuit television pictures of the complainant preparing to commit suicide. It is not of course to be expected that there will be a decided case based on facts indistinguishable from those of the case in issue, but none of the decided cases is at all close. With their references to notions of privacy, personal autonomy and choice and the private sphere reserved to the individual, they are in my opinion so remote from the present case as to give no guidance helpful to the claimants.

(2) The Lapps in *G and E* and the gipsies in *Buckley* and *Chapman* belonged to distinctive groups, each with a traditional culture and lifestyle so fundamental as to form part of its identity. The hunting fraternity (in which I include the HR claimants and the many others dedicated to the sport of hunting) cannot plausibly be portrayed in such a way. The social and occupational diversity of this fraternity, often relied on as one of its strengths, leaves no room for such an analogy.

(3) "Home" has been accepted as an expression with an autonomous Convention meaning, and *Niemietz* shows that the expression can cover premises other than the place where a person lays his or her head at night. But it is one thing to recognise that the meaning of "home" should not be too strictly defined or circumscribed, and quite another to suggest that the expression can cover land over which the owner permits or causes a sport to be conducted and which would never, in any ordinary usage, be described as "home": see *Giacomelli v Italy* (2006) 45 EHRR 871, para 76. Some of the HR claimants complain of a threat to their continued occupation of the houses in which they live, and this of course brings them much closer to a complaint under article 8. But it is not the necessary or intended consequence of the 2004 Act that they should be put out of their homes; none of them is said to have been evicted as yet; and it may be that they never will be evicted.

(4) *Sidabras* was a very extreme case on its facts, since the statutory consequence of employment as KGB officers some years before was disbarment from employment in very many public and private employments, and the applicants complained of constant embarrassment. Effectively deprived of the ability to work, the applicants' ability to function as social beings was blighted. Such is not the lot of the HR claimants, to whom every employment is open save that of hunting wild mammals with dogs. But even on the extreme facts of *Sidabras* the court did not, as already noted, find a breach of article 8 but contented itself with finding a breach of article 14 in the ambit of article 8.

I judge the HR claimants' complaints in this case to be far removed from the values which article 8 exists to protect. But in case I am wrong in that conclusion, I shall address below the issue of justification.

[16]. The HR claimants relied, secondly, on article 11 of the Convention, which provides:

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

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

The essence of the HR claimants' case was that since the only purpose of their assembling or associating was to hunt foxes, the prohibition of such hunting effectively restricted their right to assemble and associate.

[17]. In advancing this argument the HR claimants relied on the Commission's observation in *Anderson v United Kingdom* (1997) 25 EHRR CD 172, 174, that "The right to freedom of assembly is one of the foundations of a democratic society and should not be interpreted restrictively", and also on the Court's observation in *Chassagnou v France* (1999) 29 EHRR 615, para 100, that

"Freedom of thought and opinion and freedom of expression guaranteed by Articles 9 and 10 of the Convention respectively, would thus be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests."

Attention was also drawn to *Segerstedt-Wiberg and others v Sweden* (App no 62332/00, 6 June 2006, unreported). In that case the applicants successfully complained that information about them stored on a Secret Police register was an interference with their private life contrary to article 8. The Government argued (para 106) that the applicants' suspicions that the police were holding information on them did not appear to have had any impact on their opportunities to exercise their article 11 rights and the Court found that (para 107) the applicants had adduced no specific evidence enabling the Court to assess how such registration in the concrete circumstances could have hindered the exercise of their rights under articles 10 and 11. But the Court concluded (para 107), without giving reasons, that the storage of personal opinions which was not justified under article 8(2) ipso facto constituted an unjustified interference with rights protected by articles 10 and 11. This would be an obvious conclusion if there were evidence that knowledge of the police practice deterred the applicants from assembling or expressing opinions, but it is puzzling in the absence of such evidence.

[18]. The Court of Appeal (para 107), in agreement with the Divisional Court (para 82) and Lord Brodie in *Whaley v Lord Advocate* 2004 SC 78, para 80,

rejected the HR claimants' complaint under this head, holding that the effect of the hunting bans in England and Scotland respectively was not to prohibit the assembly of the hunt but to prohibit a particular activity once the claimants had assembled. This is so, but I question whether it is a sufficient answer. A right to assemble and protest is of little value if one is free to assemble but not, having done so, to protest. If people only assemble to act in a certain way and that activity is prohibited, the effect in reality is to restrict their right to assemble. I would not be content to treat article 11 as inapplicable on the present facts.

[19]. The HR claimants relied on article 1 of the first protocol to the Convention ("Protection of Property") which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[20]. I do not think that the effect of the 2004 Act is to deprive any of the HR claimants of his or her possessions. This is not a confiscatory measure. But it seems to me indisputable that certain of the claimants have suffered a loss of control over their possessions: there are, for instance, on the largely unchallenged evidence, landowners who cannot hunt over their own land or permit others to do so, those who cannot use their horses and hounds to hunt, the farrier who cannot use his equipment to shoe horses to be used for hunting, owners of businesses which have lost their marketable goodwill, a shareholder whose shares have lost their value, and so on.

[21]. Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of the first protocol and future income, not yet earned and to which no enforceable claim exists, which may not: see, for instance, *Ian Edgar (Liverpool) Ltd v United Kingdom* Reports of Judgments and Decisions 2000–I, p 465; *Wendenburg v Germany* (2003) 36 EHRR CD 154, 169. Thus in *Tre Traktörer AB v Sweden* (1989) 13 EHRR 309 revocation of a restaurant's licence to sell alcohol had adverse effects on the value and goodwill of the restaurant and so was held to be a possession because an economic interest connected with running the restaurant. The distinction was less clearly applied in *Karni v Sweden* (1988) 55 DR 157 where a doctor's vested interest in his medical practice was regarded as a possession, *Van Marle v Netherlands* (1986) 8 EHRR 483 where an accountant's clientele was held to be an asset and hence a possession, and *Wendenburg*, above, at CD 170, where the same rule was applied to law practices: in these cases no finding was made that the assets were saleable, although this may have been assumed. In *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] EWCA Civ 265, [2007] 1 WLR 2092, the Court of Appeal held that the inclusion of Dr Malik's name on a list of those qualified to work locally for the NHS was in effect a licence to

render services to the public and, being non-transferable and non-marketable, not a possession for purposes of article 1. While I do not find the jurisprudence on this subject very clear, I consider that the Court of Appeal reached a correct conclusion in that case basing itself as it did on the very convincing analysis of Mr Kenneth Parker QC in *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792, [2007] 1 WLR 2067, paras 70–76.

[22]. Since this article is in my opinion clearly applicable to the complaints of certain of the HR claimants, it is necessary to consider whether the interference imposed by the Act is justifiable, an issue addressed below.

[23]. Article 14, on which, lastly, the HR claimants relied, provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
>
> As the language of this article makes clear, and as has often been held, this is not a free-standing provision. But nor does it require that any other article should be shown to have been violated. It is enough that there should have been discrimination on a proscribed ground within the ambit of another article of the Convention. The HR claimants say that they are subject to adverse treatment as compared with those who do not wish to hunt and are in no way involved in hunting. This, they say, is on the ground of their "other status".

[24]. The expression "other status" is plainly incapable of precise definition. The Strasbourg court in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56, spoke of "discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other". The House adopted this test in *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1WLR 2196, para 48, and again in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484, paras 27–28, and imprecise though it is it may be hard to formulate any test which is more precise. In the present case, assuming in the HR claimants' favour that they are the subject of adverse treatment as compared with those who do not hunt and are in no way involved in hunting, and assuming further that their complaints fall within the ambit of one or more articles of the Convention, I cannot link this treatment to any personal characteristic of any of the claimants or anything which could meaningfully be described as "status"

[...]

Justification and proportionality

[36]. In paragraph 47 of its opinion in *Adams v Scottish Ministers* 2004 SC 665, the Inner House of the Court of Session said, with reference to the Scottish Parliament's moral judgment expressed in the Protection of Wild Mammals (Scotland) Act 2002,

"The starting point on this issue, in our opinion, is that the prevention of cruelty to animals has for over a century fallen within the constitutional responsibility of the legislature. The enactment of every statute on the subject has necessarily involved the making of a moral judgment. In our view, the 2002 Act should be seen as a further step in a long legislative sequence in which animal welfare has on numerous occasions been promoted by legislation related to contemporary needs and problems."

This succinct statement is, as I respectfully think, entirely correct.

[37]. As recounted in *Animal Welfare in Britain: Regulation and Responsibility* (M Radford, 2001, chapter 3), parliamentary efforts to protect the welfare of animals began in 1800 with a measure seeking to prohibit bull-baiting. These attempts were unsuccessful, *The Times* applauding the rejection of the first bill in 1800 (see Radford, p 34):

> "It should be written in letters of gold that a Government cannot interfere too little with the people; that laws, even good ones, cannot be multiplied with impunity; and that whatever meddles with the private personal disposition of a man's time or property is tyranny."

But the tide of opinion gradually changed. Martin's Act, "to prevent the cruel and improper treatment of cattle" (expressed to include horses and sheep), was passed in 1822. The Society for the Prevention of Cruelty to Animals, founded in 1824 to secure "the mitigation of animal suffering, and the promotion and expansion of the practice of humanity towards the inferior classes of animated beings" (see Radford, p 41), added "Royal" to its name, by permission of Queen Victoria, in 1840. Measures to protect the welfare of animals and prevent the causing of suffering to them were enacted in 1833, 1835, 1837, 1844, 1849, 1850, 1854 1876 and 1894. In 1900 the Wild Animals in Captivity Protection Act was passed. It applied to any confined bird, beast, fish or reptile not included in the 1849 and 1854 Acts, and made it an offence wantonly or unreasonably to cause or permit any unnecessary suffering or cruelty to any of these creatures or to abuse, infuriate, tease or terrify it. By section 4, insisted upon, it is said (Radford, p 85), by the House of Lords, the Act was not to apply to the hunting or coursing of any animal which had not been liberated in a mutilated or injured state in order to facilitate its capture or destruction. During the twentieth century the stream of legislation continued [*the relevant dates were then cited*]. The familiar suggestion that the British mind more about their animals than their children does not lack a certain foundation of fact. Whatever one's view of the 2004 Act, it must be seen as the latest link in a long chain of statutes devoted to what was seen as social reform. It may be doubted if any country has done more than this to try and prevent the causing of unnecessary suffering to animals.

[38]. The controversy surrounding the 2004 Act was protracted and remains acute. But it cannot be too clearly stated that it is not and never has been a contest between those who oppose cruelty to animals and those who support it. These appellants have not sought to impugn the motives of the proponents and supporters of the Act, who must therefore be taken to believe that fox-hunting in its traditional form causes a degree of suffering to the fox which should not be

permitted as a recreational activity. The Attorney General for her part has not suggested, and could not suggest, that the appellants and those who support fox-hunting are in any way tolerant or unmindful of cruelty to animals. They include very many people imbued (unlike many of their urban critics) with a deep knowledge and love of the countryside and the natural world, who would shrink from any act of what they saw as cruelty. But they believe that foxes are a pest; that the fox population must be regularly culled; and that hunting is a more humane means of destruction than the alternatives. They contrast the quick and certain death of a fox caught by hounds with the suffering of a fox which is wounded but not killed by shooting; with the death by starvation of cubs whose mother is shot, there being no close season for shooting as for hunting; and with the slow torture of a fox caught in a snare and not dispatched or released.

[39]. Certain facts pertinent to the issues we have to decide may, I think, be taken as agreed or not effectively disputed in these proceedings:

(1) The fox population in England and Wales is about 217,000. It doubles during the breeding season and reverts to its starting level as a result of natural and unnatural causes, many foxes being killed on the road (Divisional Court judgment, para 24; Court of Appeal judgment, para 7)
(2) Foxes are a pest and the fox population has to be culled (Court of Appeal judgment, para 23).
(3) Traditional means of culling have included hunting with hounds, shooting and snaring.
(4) In the period before the 2004 Act, some 21,000–25,000 foxes were killed by hunting each year (roughly 10% of those who died from all causes), up to 11,000 of these being dug out by terriers (Divisional Court judgment, para 24; Court of Appeal judgment, para 7).
(5) Of those foxes which are not killed each year by hunting or on the road, the great majority, perhaps 80,000, are shot. Even in upland Wales, more foxes are culled by shooting than by hunting (Divisional Court judgment, para 24; Court of Appeal judgment, para 7).
(6) The most humane way of killing a fox is by a well-directed shot from a suitable weapon at an appropriate range. By "humane" in this context is meant that death is inflicted in a way that causes minimum suffering to the fox.
(7) If a fox is shot, and is wounded but not killed, and is permitted to escape, it may very well endure suffering.
(8) If a fox is snared, and is not promptly killed or released, it may very well suffer.
(9) No scientific evaluation has been made of the psychological and physiological effects on a fox of its being pursued by a pack of hounds over what may be a considerable distance and for what may be a considerable period of time before it is caught and killed (if it is) by the hounds. But this process compromises the welfare of the fox and probably falls short of standards we would expect for humane killing (Burns Report, paras 6.49, 6.52; Lord Burns, Hansard HL Debates, 12 March 2001, col 533).
(10) A fox which is caught by a pack of hounds will not be wounded and escape but will be quickly, if not necessarily instantaneously, destroyed (Burns Report, para 6.49).

[40]. There has been much argument in the House and below about the aim of the legislature in enacting the 2004 Act. The Divisional Court set out its conclusion in paragraph 339 of its judgment, which the Court of Appeal fully accepted (para 56) and which calls for repetition:

> "339 We discern from evidence admissible on the principles in *Wilson* that the legislative aim of the Hunting Act is a composite one of preventing or reducing unnecessary suffering to wild mammals, overlaid by a moral viewpoint that causing suffering to animals for sport is unethical and should, so far as is practical and proportionate, be stopped. The evidential derivation for this legitimate aim comprises the terms of the legislation and the admissible contextual background. This background includes the Burns Report, the Portcullis House hearings, the ministerial basis for and the terms of the original Michael Bill, the obvious inference that the majority of the House of Commons considered the original Michael Bill inadequate, and the well-known opposing points of view in the prolonged and much publicised hunting controversy."

Plainly, as I think, the Divisional Court was entitled to have regard to the materials listed, for the reasons it gave at greater length in paragraph 269 of its judgment, and its approach was not challenged, save (by the Attorney General) to suggest that it could have taken account of other parliamentary materials. I consider that the courts below accurately expressed the rationale of the Act. The appellants did not accept this. They pointed out, correctly, that this rationale was nowhere expressed in the Act, that this did not reflect the government's intention in introducing the bill and that virtually no parliamentary statement expressed the rationale in this way. But, as the Divisional Court recorded in paragraph 12 of its judgment, endorsed by the Court of Appeal in paragraph 6, the Labour Party in 1997 had advocated new measures to promote animal welfare, including a free vote in Parliament on whether hunting with hounds should be banned. So concern for animal welfare was the mainspring of the legislation. It was originally proposed by the government, in the Michael Bill, to achieve that end by prohibiting deer hunting and hare coursing but permitting fox, hare and mink hunting subject to regulation according to the principles of utility and least suffering already noted. But the latter proposal, although enjoying a measure of support in the House of Lords, was plainly unacceptable to a majority in the House of Commons, who did not feel that it went far enough. Why not? I do not think the appellants proffered any answer to this question. The only answer can, I think, be that it was felt to be morally offensive to inflict suffering on foxes (and hares and mink) by way of sport.

[41]. The appellants resist this conclusion by pointing out, again correctly, that the Act is very selective: while prohibiting hunting of foxes, deer, hares and mink it permits the hunting of rabbits and rats, is protective of game birds reared for shooting, and does not extend to shooting, fishing or falconry. This selectiveness is relied on as showing that the rationale of the Act cannot be that found by the courts below, for if it were consistency would have required a more far-reaching measure. This is a traditional argument. Thomas Erskine's unsuccessful Cruelty to Animals Bill of 1809 was attacked by its principal opponent on the ground (see

Radford, p 37) that if Parliament were to pass legislation which imposed a punishment for cruelty, while "we continued to practise and to reserve in great measure to ourselves the sports of hunting, shooting, and fishing, we must exhibit ourselves as the most hardened and unblushing hypocrites that ever shocked the feelings of mankind". For nearly two hundred years, the legislative practice in this field has been to address whatever seemed at any given time to the current parliamentary majority to be the most pressing problem. It seems to me clear that this Act was based upon a moral principle, whether one agrees with that principle or not, and I do not think that doubt can be thrown on the rationale of the Act, as expressed by the courts below, by showing that the underlying principle, if carried to its logical extremes, would have justified a much more far-reaching measure.

[42]. The real crux of the appellants' argument is that the prohibition of hunting is not shown to reduce the overall level of suffering endured by foxes as compared with the situation which pertained before the Act. This argument does not of course touch the great majority of foxes comprised within the annual cull which before the Act were either run over on the roads or shot. It concerns the minority of foxes, roughly 10%, which were either pursued or dug out and killed in the course of hunting, and within that minority those which will now, through inexpert shooting, endure a more painful death. I do not for my part think that it is possible to construct any precise calculus of relative suffering. Even if more scientific evidence were available I question if this could be done. There is, however, a body of reputable professional opinion which accepts that the pursuit and digging out of foxes, and their killing by hounds, imposes a degree of suffering. This accords with common sense. To suppose that the contrary is generally true strains one's credulity to breaking point. The degree of suffering is, I think, unknowable. Unknowable also is the future incidence, in a society increasingly sensitive to animal suffering, of foxes wounded by inexpert shooting and left to die. The exemption in the Act which permits the hunting and destruction by two hounds of wounded foxes is clearly designed to reduce this risk, as is the Secretary of State's approval of a code of shooting practice intended to encourage effective shooting and so reduce wounding rates. There are detailed statutory provisions governing, for example, the use of snares: see Wildlife and Countryside Act 1981, s 11. Into the calculation must further be injected the element of moral judgment already repeatedly mentioned: there are many people who would accept such minimum suffering as is inherent in the properly conducted humane slaughter of animals for human consumption but would not accept the infliction of any suffering by way of sport.

[43]. As is evident from the terms of articles 8 and 11 of the Convention (cited in paras 10 and 16 above respectively) what would otherwise be impermissible interferences with protected rights may be justified if three conditions are met. The first of these, that the interference should be "in accordance with the law" or "prescribed by law" is clearly met, since it is the law of which the HR claimants complain.

[44]. The second condition is that the interference for which the law provides should be directed towards one or more of the objects or aims specified in the second

paragraph of the respective articles. Relevant in each of these cases is "for the protection of … morals". This was in my opinion the aim of this Act, since the majority judged that the hunting of wild mammals (with the exceptions already noted) and the coursing of hares by greyhounds was morally objectionable and moral ends would be served by bringing the practice to an end. This does not fall outside the aims permitted under these articles.

[45]. The third condition is that the interference in question is necessary in a democratic society, raising the familiar questions whether there is a pressing social need for it and whether it is proportionate to the legitimate aim pursued. There are of course many in England and Wales who do not consider that there is a pressing (or any) social need for the ban imposed by the Act. But after intense debate a majority of the country's democratically-elected representatives decided otherwise. It is of course true that the existence of duly enacted legislation does not conclude the issue. In *Dudgeon v United Kingdom* (1981) 4 EHRR 149 and *Norris v Ireland* (1988) 13 EHRR 186 legislation criminalising homosexual relations between adult males was found to be an unjustifiable interference with the applicants' rights under article 8. But the legislation under attack had been enacted in each case in 1861 and 1885 and was not enforced in either Northern Ireland or Ireland. During the intervening century moral perceptions had changed. Here we are dealing with a law which is very recent and must (unless and until reversed) be taken to reflect the conscience of a majority of the nation. The degree of respect to be shown to the considered judgment of a democratic assembly will vary according to the subject matter and the circumstances. But the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.

[46]. If, as has been held, the object of the Act was to eliminate (subject to the specified exceptions) the hunting and killing of wild animals by way of sport, no less far-reaching measure could have achieved that end. As already noted, the underlying rationale could have been relied on to justify a more comprehensive ban. The Michael Bill was rejected because it did not go far enough. I am of the opinion that the 2004 Act is proportionate to the end it sought to achieve.

[47]. Article 1 of the first protocol, as noted above (para 19), is not to impair in any way the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. The 2004 Act is a law to control the use of property. It is, in the first instance, for Parliament to decide what laws are necessary in accordance with what it judges to be the general interest. It has decided that the 2004 Act is necessary in accordance with the general interest. As already pointed out, Parliament's judgment is not immune from challenge. The national courts in the first instance, and ultimately the Strasbourg court, have a power and a duty to measure national legislation against Convention standards. But for reasons already given, respect should be paid to

the recent and closely-considered judgment of a democratic assembly, and no ground is shown for disturbing that judgment in this instance.

[...]

[50]. I approach the issue of justification on the assumption that articles 28 and 49 apply, but also on the basis that the measure to be justified is a measure of social reform, not directed to the regulation of commercial activity, of which any impediment to the intra-Community provision of goods or services is a minor and unintended consequence and which bears more hardly on those within this country than outside it. In *Omega*, para 32, the German authorities considered, and the ECJ accepted (para 40), that "the exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity". Here, Parliament considered that the real killing of foxes, deer, hares and mink by way of recreation infringed a fundamental value expressed in numerous statutes and culminating in the 2004 Act. For reasons already given, I am of the clear opinion, in agreement with the Divisional Court (paras 350–351) and the Court of Appeal (para 193) that the 2004 Act is justifiable in Community law. No ruling by the ECJ is necessary to enable the House to decide this appeal.

[51]. No distinction is to be drawn between the hunting of foxes on the one hand and the hunting of deer, hares and mink, or the coursing of hares, on the other. My conclusions, if accepted by my noble and learned friends, make it unnecessary to distinguish between the individual HR and EC claimants.

Section C Extract from Association of Chief Police Officers of England, Wales and Northern Ireland Memorandum on National tactical considerations for enforcing the Hunting Act, suggested principles (pp. 6–7)

THE HUNTING ACT 2004

NATIONAL STRATEGIC CONSIDERATIONS/PRINCIPLES

The purpose of this document is to seek to establish the strategic principles for the police service in respect of the above Act and reflects a degree of consultation within and without the Service.

This is the 'high level' strategic considerations and also the first stage in satisfying the requirement at paragraph 3.51 of the National Policing Plan 2005-8 for ACPO to produce detailed guidance to assist forces in preparing for the implementation of the Act. I anticipate early in the New Year complementing this with tactical considerations and by then hopefully legal 'points to prove' type guidance from the Crown Prosecution Service, with whom we are working closely but respecting their independence as with other government and voluntary agencies on both sides.

The following strategic principles seem relevant to most policing environments as far as the issue of hunting is concerned:

1. The primary responsibility is the prevention of harm to all people involved.

2 The duty of the police is to prevent disorder and if it occurs to minimise its consequences.

3 The police have a duty to prevent the commission of crime and offences.

4 The investigation of offences and the apprehension of offenders is a lower priority ordinarily than the maintenance of order and safety.

5 Police activity should take into account the various calls for service from various groups.

6 Police activity should be led by available intelligence and use where appropriate the National Intelligence Model.

7 An assessment of the likely community impact of police actions (or decision against action) should be made.

8 The priority accorded to proactive measures to tackle persons offending against the Hunting act (if any) should be driven by, amongst other influences:
   a) such offences are not notifiable/recordable offences
   b) resource considerations
   c) what is practicable – safely
   d) what is within the powers of the police

9 Similar considerations to 8) may apply to reactive investigations (i.e. those where persons allege breaches of the Hunting Act) – additionally police will need to take account of the possible consequences of frustrations building up if people feel a legitimate (if disproportionate) expectation is not being fulfilled.

10 Whilst police have a duty to enforce the law when breaches are apparent and to forestall potential breaches, the priority given to this should be determined locally, taking account of 8 and 9 and the National Police Plan's other priorities. Police are of course not the sole element of law enforcement and partners – public and private – have responsibilities too.

11 Operational Commanders may well find that the most proportionate and reasonable response to breaches of the Hunting Act lays in evidence gathering with a view to subsequent prosecution as the Act confers a power to arrest, not a duty. It is a matter that should be decided at the time and location with the appropriate justification being recorded as per individual force practice.

12 Police should always be sensitive to the huge passions on both sides of the debate that led to the Act outlawing the hunting of wild mammals with dogs – other than in exempt circumstances.

13 The principal responsibility for comment on the Act now rests with Government – particularly the Department for Farming, Food and Rural Affairs - although forces may well choose to pass comment, if asked, on local implementation.

Section D The fox-hunter's argument: Jeremy Bentham

(a) Suffering and utility

Jeremy Bentham argued forcefully that the principle of utility applies to all sentient beings and that the interests of the inferior animals [is] improperly neglected in legislation. He ended his argument with the much-quoted dictum: 'the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?' (*Introduction to the Principles of Morals and Legislation* (eds., Hart and Burns) (1970 edn), at 282–3 note b).

(b) Litigation as sport

Bentham satirized the idea of fair procedures in law as being analogous to sport by comparing lawyers to fox-hunters in using spurious justifications for some technical procedural inhibitions on the pursuit of truth:

> The fox-hunter's reason. This consists in introducing upon the carpet of legal procedure the idea of *fairness*, in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called *law* – leave to run a certain length of way for the express purpose of giving him a chance to escape. While under pursuit, he must not be shot: it would be as *unfair* as convicting him of burglary on a hen-roost, in five minutes' time, in a court of conscience.
>
> In the sporting code, these laws are rational, being obviously conducive to the professed end: Amusement is that end: a certain quantity of delay is essential to it: dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it.
>
> In the case of the fox, there is frequently an additional reason for fair play. By foul play, the source of amusement might be exhausted: the breed of that useful animal might be destroyed, or reduced too low: the outlawry, so long fatal to wolves, might extend itself to foxes.
>
> In the mouth of the lawyer, this reason, were the nature of it seen to be what it is, would be consistent and in character. Every villain let loose in one term, that he may bring custom to the court the next, is a sort of bag-fox, nursed by the common hunt at Westminster. The policy so dear to sportsmen, so dear to rat-catchers, cannot be supposed entirely unknown to lawyers. To different persons, both a fox and a criminal have their use: the use of the fox is to be hunted; the use of the criminal is to be tried.
>
> But inasmuch as, in the mouth of the lawyer, it would be telling tales out of school, -from such lips this reason must not be let out without disguise. If let out at all, it must be let drop in the form of a losses hint, so rough and obscure, that some country gentleman or other, who has sympathy for foxes, may catch it up with that zeal with which genius naturally bestirs itself in support of its own inventions.
>
> (IX, *Rationale of Judicial Evidence*, part IV, ch. III (in Bowring (ed.) 7 Works, 454)

QUESTIONS AND EXERCISES

1 The avowed aim of the Act is prevention of cruelty to animals, notably mammals. From the point of view of opponents of the Act, on what grounds can one distinguish hunting mammals with dogs from:

a) bear-baiting (illegal)?
b) boiling lobsters (legal)?
c) licensed hunting of stags (allowed under licence)?
d) an abattoir (regulated)?

2 The validity of the Hunting Act 2004 was challenged on the basis that the Parliament Act 1949, which purported to empower the House of Commons to pass a Bill on its own when the House of Lords has refused to pass it in two consecutive sessions, was itself invalid. It was argued that the Act was therefore invalid.

a) What Act of Parliament did the Parliament Act 1949 amend?
b) What was the legal effect of the amendment?
c) What were the political circumstances in which the Parliament Act was enacted?
d) What would have been the consequences if the Appellate Committee if the House of Lords had agreed that the Parliament Act 1949 was invalid?

3 Several opinion polls between 2003 and 2006 have shown that more people in England and Wales supported a ban on hunting with dogs than opposed a ban, but polls have varied as to the extent of the support and whether it constitutes a clear majority. What should be the relevance of public opinion:

a) in deciding whether the Act should be repealed or strengthened?
b) in guiding policy regarding investigation and prosecution of suspected offence under the Act?
c) in influencing the behaviour of people who enjoy hunting with hounds?
d) on influencing a Member of Parliament in exercise of his 'free vote', if he is personally opposed to the Act, but he knows that a substantial majority of his constituents support it?

4 Formulate an argument justifying the following positions:

a) 'I oppose hunting with hounds, but I do not think that it should be a criminal offence';
b) 'I support hunting with hounds, but I accept that it is now illegal';
c) 'I support the Act, but do not think that it should be vigorously enforced';
d) 'Parliament should not concern itself with such issues'.

5 It is sometimes said that the Hunting Act is 'unworkable'. What might that mean and what are the practical implications?

6 *Judicial techniques of interpretation*
Can you identify at least one example of Lord Bingham using the following techniques:

(a) precedent techniques: distinguishing; overruling; following a decision; relying on an *obiter dictum;* citing a foreign precedent; treating a potentially binding authority as out-dated?
(b) other techniques: literal interpretation; invoking a moral principle; appealing to 'fireside equities'; arguing by analogy?

7 *Conditions of doubt*
What were the main conditions of doubt confronting Lord Bingham in the Countryside Alliance case and how did he resolve them?

WLT and DRM