PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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convincing and compelling reasons'[29] could justify restrictions on a party's freedom of association, none of which could be found in this case. This did not mean that 'the authorities of a State in which an association, through its activities, jeopardises that State's institutions' were not entitled to fight back: 'some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention.'[30] But in this case the ban on the Party had been so immediate that no pattern of subversive action could be pointed to.[31]

To say that the ECHR is rooted in a commitment to civil liberties that is both rational and principled is not to say that mistakes are never made. There have been suggestions that its evaluation of whether emergency measures derogating from basic freedom have been justified has sometimes erred too much on the side of the state authorities.[32] Certainly the European Court has not always got the application of its principles right in its political speech and association cases. During the Cold War period, for example, the European Commission had not found objectionable under the ECHR a ban on the German Communist Party.[33] A couple of cases in the 1980s upheld Germany's controversial prohibition on the employment of extremists in the civil service.[34] Britain's and Ireland's media restrictions on members of a lawful political party, Sinn Féin, were likewise found to pass muster at around the same time.[35] In vain did the Turkish lawyers in the Article 11 cases we have discussed seek to catch the European Court's eye with some of these embarrassing skeletons from the ECHR's past. A different kind of error from the perspective of principle can be seen in *Bowman v United Kingdom*,[36] where restrictions on the funding of political campaigns designed to prevent the well resourced securing an undue advantage at election time were analysed in very narrow terms by the Court, in a way which seemed not to appreciate the importance of the principle of political equality.[37] Viewed overall, however, the record of the European Court in the sphere of political freedom is not a bad one. The European Court is generally appreciative that civil liberties are at the core of the ECHR and it has usually sought to assert them in a manner that has been principled and coherent.

[29] *Ibid* at para 46.
[30] *Ibid* at para 32.
[31] *Ibid* at para 58.
[32] See *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539.
[33] *German Communist Party v Federal Republic of Germany*, App 250/57 (1957) 1 *Yearbook of the European Convention on Human Rights* 222.
[34] *Glasenapp v Germany* (1986) 9 EHRR 25; *Kosiek v Germany* (1986) 9 EHRR 328. See now *Vogt v Germany* (1995) 21 EHRR 205.
[35] *Brind v United Kingdom* (1994) 18 EHRR CD 76; *Purcell v Ireland* (1991) 70 D & R 262.
[36] (1998) 26 EHRR 1.
[37] See C A Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Reappraisal' (2000) 51 *NILQ* 381.

CIVIL LIBERTIES IN BRITAIN

As we have already observed, a commitment to civil liberties disguised as human rights of the type introduced by the Human Rights Act 1998 is a relatively new idea for legal practitioners in the United Kingdom. On the traditional British model, the individual has generally been free to assert his or her civil liberties unless constrained by law from doing so: human rights (of any sort) have simply not come into the equation. In some ways the HRA introduces an awkward note into this well-established constitutional law, with its references to human rights and Convention rights as though these were separate from traditional civil liberties. We have already argued that, however it is described, the ECHR is itself deeply rooted in civil libertarian principle. The substance of the HRA is also in large part designed further to promote civil liberties. The biggest claim that the HRA can make for the attention of civil libertarians lies in its determined protection of the principle of parliamentary supremacy.[38] This is a counter-intuitive point for human rights lawyers, and it may signal a parting of the ways between civil liberties and human rights as the latter term is generally understood. But it is immediately appreciated by the theorist of civil liberties that there would be little point in the protection of the right to vote, and of such freedoms as those of assembly, association and expression, if the political community in which these entitlements were exercised was one in which the ultimate decisions were taken not by the representatives of the people but by an elite guardianship of unelected officers: there is more to the exercise of civil liberties than the right to make irrelevant political noise.[39] As is well known, the key interpretive power in the HRA is set out in section 3(1), under which it is declared that:

> [s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

But where this possibility does not arise, the courts must leave the legislation alone and enforce it, albeit the senior courts may in appropriate circumstances issue a (non-binding) declaration of incompatibility, the effect of which is to put pressure on the executive and legislative branches to consider changes to the offending law.[40] The civil libertarian's theoretically well-grounded commitment to parliamentary sovereignty leads him or her to be more inclined than the human rights lawyer to set limits to what is 'possible' under section 3(1) and causes him or her also and for the same reason to be more relaxed about the issuance of declarations of incompatibility.[41] Rather than abuse the concept of legislative supremacy,

[38] See A Tomkins, ch 3, above.

[39] See KD Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain?' in KD Ewing, CA Gearty and B A Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (London, Mansell, 1994), ch 7.

[40] HRA, ss 4, 10 and Sch 2.

[41] See CA Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *LQR* 248.

therefore, civil libertarians are inclined to celebrate it as the realisation of the essence of their subject in its highest form.

To state the civil libertarian position in these stark terms is certainly to distinguish it from the notion of human rights, particularly when this idea is considered as a set of abstract guarantees of human dignity rather than in the qualified, civil-liberties-oriented form that we have been examining in the ECHR. But it is also to expose civil liberties to counter-attack as involving a commitment to parliamentary sovereignty that is unduly naïve, even gullible, in the optimistic assumption that it would seem to make about the nature of representative government. Rule by the majority has not turned out to be the Nirvana of sensitive, fair and just decision-making that this approach, and the early democratic idealists identified with it, assumed it would be. The 'mistakes' of the European Court of Human Rights, discussed earlier, are few in comparison with the transgressions on civil liberties for which the British legislative branch in the full exercise of its sovereignty must take responsibility. The right to vote has been suspended in war-time. The right of prisoners sentenced to more than a year in jail to sit in the Commons was hurriedly removed in 1981 when just such a person—the Irish Nationalist Bobby Sands—was returned by the constituents of two Northern Ireland counties while he was on hunger strike in the Maze prison (a protest from which he was subsequently to die).[42] The system of local taxation introduced by Parliament in 1988—and immediately labelled a poll tax by its opponents—was perceived by some to be an indirect attack on the right to vote by appearing to identify those exposed to local taxation primarily by reference to the electoral register.[43]

These explicit and implicit attacks on the right to vote have been serious, but it has been in the context of the protection of the civil liberties of expression, assembly and association that Parliament has been at its most cavalier. The political freedoms of particular persons and groups have been effectively suspended, particularly during war-time and also during periods of great internal conflict, such as occurred during the general strike in 1926 and in the depression years of the early 1930s.[44] The Cold War of the post-war decades produced its own litany of illiberal parliamentary actions, as did the counter-terrorism crisis which overlapped with the end of the Cold War and which is still ongoing.[45] Laws like the Emergency Powers Act 1920 and the anti-terrorism legislation passed with disconcerting frequency since 1974 further undermine the optimistic, civil libertarian assumption that democracy and justice are inextricably linked, particularly when the secondary legislation promulgated under such measures and the exercise of official discretion under them is also taken into account.[45a] It is clear from our

[42] Representation of the People Act 1981.

[43] Local Government Finance Act 1988. The tax did not long survive: see Local Government Finance Act 1992.

[44] See generally KD Ewing and CA Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–45* (Oxford, Oxford University Press, 2000).

[45] See generally KD Ewing and CA Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford, Clarendon Press, 1990).

[45a] See now Cabinet Office, Draft Civil Contingencies Bill (2003).

perspective a century on that an early and influential democratic socialist theorist like Eduard Bernstein was being ridiculously idealistic when he wrote that 'the idea of the oppression of the individual by the majority' was 'absolutely repugnant to the modern mind' and that the 'more democracy prevails and determines public opinion, the more it will come to mean the greatest possible degree of freedom for all.'[46]

With Bernstein's assumption no longer available to us, we are brought squarely to the key theoretical challenge facing the civil libertarian: there is no guarantee that the representatives of the people acting collectively and in the exercise of their untrammelled power will preserve for all the civil liberties upon which a properly functioning representative democracy depends; nor is there any guarantee that such an assembly will respect the equal dignity of all the people. It was in an attempt to resolve this conundrum that certain democratically-minded utilitarians developed the idea of human rights in its modern, broadest form, as a kind of fence of basic principle surrounding and circumscribing the political playing field, limiting the freedom of manoeuvre of the democratic body so as to prevent unethical excess, both in the field of civil liberties and in relation to any irretrievable damage that might otherwise be done by such a body to human dignity.[47] To this extent it is true to say that the idea of human rights in this strong form is for many more an answer to anxieties about parliamentarian majoritarianism than it is an independent idea in its own right. It is clear that this 'human rights' solution begs a whole series of questions about who is to say what is excessive in the actions of the parliamentary branch, about why the officials around the political game should be more trusted to know right from wrong than the popularly elected players, and other queries of this sort. Attractive though abrasive responses along these lines are, they do not in themselves directly address the concerns that have led the human rights advocates to the position they find themselves in. If there is to be no ring-fence at all, is the untrammelled power of the legislative branch a matter of no concern to the civil libertarian? Are the excesses which the civil libertarian knows the legislature to be capable of and to have done to be discounted as neither here nor there? Is every reduction in civil liberties promulgated by Parliament to be greeted with a fatalistic shrug of the shoulders, and the remark that our democratic leaders always know best? It is to these questions that we turn in the final part of this chapter.

CIVIL LIBERTIES, THE JUDICIARY AND THE POLITICAL PROCESS

The civil libertarian is of course concerned with attacks on political freedom whatever their source, but a full explanation of his or her position requires a prior questioning of three assumptions that are all too easily made in this area, particularly (it has to be said) by the advocates (in the reactive but nevertheless strong sense

[46] E Bernstein, *The Preconditions of Socialism* (H Tudor ed and trans), (Cambridge, Cambridge University Press, 1993), 141.

[47] R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977), ch 7.

described above) of human rights. First, it is surely wrong to assume that applying a theoretical construct to a real situation (whether based on 'human rights' or 'civil liberties') can ever be other than messy, incomplete and therefore from the perspective of principle unsatisfactory. Secondly, it is equally incorrect to assume that the judges are likely to be more effective guardians of human rights than the legislative branch, merely because they are outside and not within the maelstrom of politics. Thirdly, and mirroring our second false assumption, it is wrong to deny that the legislator has any effective engagement with civil liberties and human rights merely because legislation antagonistic to either or both ideas often gets passed. When these ideas have been more fully explored, it will be possible to develop a more mature understanding of the strengths as well as the limitations of the continued deployment of the concept of civil liberties in a sphere which, it is admitted, is now more often than ever before attracting the language of human rights, albeit a language which, as we have seen is the case with the ECHR, is redolent with civil libertarian principle.

Turning now to the first assumption we have identified, it is surely right to assert that however pure their abstract articulation, all concepts inevitably lose something in their translation into practice. Not only is this bound to happen, but it is also right that it should: a set of ideas imposed from above invariably either fails entirely or succeeds only through distorting reality to fit its ideology and therefore comes at too high a human cost. As we have earlier demonstrated in our discussion of the abstract idea of civil liberties, the subject comes embedded in the society to which it is applied, with exceptions and protections built in for the security and the well-being of the state. It is inevitable that departures from civil libertarian principle will occur from time to time, with inappropriate controls on freedom being imposed, and other anti-civil libertarian tactics being deployed in the pursuit of popular (and sometimes not so popular) goals. The civil libertarian does not welcome this, but knows that it can happen. The price for constructing the foundations of the subject in the real world of politics is that the hurly burly of that chaotic environment can sometimes seem to erode the structure and threaten the entire model. If the answer to this—that what the civil libertarian must do is not just shrug the shoulders but fight back, protect principle and gradually resecure what has been lost by engaging in the political arena (marching, campaigning, writing, debating, appearing on the television and so on)—is thought unsatisfactory, then this is because life itself is unsatisfactory. There may be many weaknesses in rooting civil liberties in the contingent world of politics but there is certainly one enduring strength—the subject is always connected to the community whose political freedom it seeks to protect and with the members of that community whose civil liberties are at the core of its concern.

Declarations of 'human rights' from on high can in contrast seem rather grand, staid affairs, interventions from the minaret, the pulpit or the ivory tower bellowed at the mob below, but rather lost in all the noise. In his or her purest and most uncompromising form, the human rights ideologue rather resembles the spoilt child: 'I know what is right, now do as I tell you.' Politics, like adulthood, is not like

this. If this were what the human rights referee were doing in real life, making decisions without regard to how the political match was unfolding, then he or she would soon find him- or herself being wholly ignored, their rulings initially rejected as fatuously unrealistic and then quite quickly ignored completely. In practice, of course, in order to get noticed and not disappear completely off the political radar, the human rights referee does seek to engage with the world in which he or she finds him- or herself, does try in translating human rights ideas into practice to take account of the mood and spirit of the times and the political atmosphere into which these adjudications on what is right and wrong are delivered. No human rights lawyer or advocate proposes anything other than some type of contextualised approach these days. The problem that emerges however is that, without a strong and mature set of theoretical foundations, such attempts at *realpolitik* can easily collapse into a kind of fatalistic quietism, with all executive and legislative interventions being upheld as necessary and right, simply because they have happened.

These remarks thus lead us directly to recall what we have described as the second questionable assumption that is commonly made by human-rights-based critics of the civil libertarian's commitment to parliamentary sovereignty, namely that the judges around the parliamentary playing field are able efficiently and in a principled manner to do this job of adjudication. That this is not the case can be shown not only (or even necessarily) by demonstrating the theoretical impossibility of the demands made of such officers, but also, and more gloomily, by glancing at the evidence. Turning first to the judicial record on civil liberties prior to implementation of the HRA, it is certainly the case that the rhetoric of this part of state power has been supportive of civil liberties. Indeed the Victorian father of contemporary English constitutional law erected an entire theory of government around the principled excellence of the judiciary in this regard.[48] The empirical narrative tells a rather different story, however. The judiciary's hostility to parliament in the seventeenth century, and its enthusiastic avowal of royal power, was one of the key factors underlying Parliament's assertion of its omnipotence in the aftermath of the 'Glorious Revolution.' When the courts finally reconciled themselves to the reality of parliamentary sovereignty, during the first half of the nineteenth century,[49] they found that they were wholly unprepared for the next phase in Parliament's development, namely democratisation. Their hostility to a constitution rooted in the exercise of power by other than the propertied was still capable of being spotted in the law reports as late as 1910,[50] and their antipathy to the entitlement of women to vote was manifest in their rejection of a series of sometimes quite cleverly constructed legal challenges that were launched in the late Victorian and Edwardian periods: it was apparently 'a principle of the unwritten

[48] See AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (2nd edn, London, Macmillan, 1885).

[49] See eg *Edinburgh & Dalkeith Railway v Wauchope* (1842) 8 Cl and F 710; 8 ER 279. J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford, Oxford University Press, 1999) is an excellent account.

[50] *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87, especially the speech of Lord Shaw of Dunfermline.

constitutional law of the country that men only were entitled to take part in the election of representatives to Parliament.'[51]

Nor have the courts excelled at the protection of the liberties of expression, assembly and association in the face of the kind of legislative hostility to which we have already referred. The story is a depressing one, altogether too long to recount here, with there being only a few dissents and not much more to show by way of a response to the endless cases legitimising the exercise of state power in ways that were inimical (at times grievously so) to individual liberty.[52] Indeed the courts went even further, on many occasions plundering the common law for novel forms of state repression that not even the more reactionary of Cabinet members had dared put before Parliament.[53] The process continued with depressing consistency throughout the democratic era, beginning with the First World War and working its way through the various crises of the twentieth century. Eventually the end of the Cold War in 1989 and the great alleviation in the level of subversive violence that occurred with the IRA ceasefire in 1994 provided some space for a realignment of judicial practice in line with the still frequently deployed language of civil liberties. For the first time, decisions such as in *DPP v Jones*[54] and *Redmond-Bate v DPP*[55] showed a judicial branch sensitive to the underlying importance of the exercise of civil liberties, in the context of association and assembly in the first case and assembly and expression in the second.

The 1990s may come in retrospect to be seen as an Edwardian-style golden age, when freedom thrived in the gap between the end of the Cold War and the start of the new counter-terrorist world order that was inaugurated with the attack on the World Trade Centre and the Pentagon that occurred on 11 September 2001. It was in this liberal atmosphere, and perhaps marking its highest point, that the Human Rights Act 1998 took full effect, on 2 October 2000. There is certainly some evidence that the Act has led to a stronger commitment to political speech in certain cases than might otherwise have been apparent.[56] But can it seriously be said that the pre-HRA cases would have been decided differently if the judges involved in them had had access to a human rights charter? Following the events of 11 September 2001, we have seen a hardening of attitudes on the bench, the beginnings of a

[51] *Nairn v University Court of the University of St Andrew* (1907) 15 SLT 471, at 473 per Lord McLaren. See subsequently *Nairn v University Court of the University of St Andrews* [1909] AC 147. Earlier cases include *Chorlton v Lings* (1868) LR 4 CP 374 and *Chorlton v Kessler* (1868) LR 4 CP 397.

[52] See generally *The Struggle for Civil Liberties*, above n 44.

[53] The classic examples are *Elias v Pasmore* [1934] 2 KB 164; *Thomas v Sawkins* [1935] 2 KB 249; and *Duncan v Jones* [1936] 1 KB 218.

[54] [1999] 2 AC 240. But see H Fenwick and G Phillipson, 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression' [2000] *PL* 627. See further the same authors' 'Direct Action, Convention Values and the Human Rights Act' (2001) 21 *Legal Studies* 535.

[55] *The Times*, 28 July 1999.

[56] *R v BBC, ex parte ProLife Alliance* [2002] EWCA Civ 297, [2002] 2 All ER 756 is an outstanding example but the decision has since been overturned in the House of Lords in a manner which shows little understanding of the importance of the principles of political freedom [2003] UKHL 23; [2003] 2 All ER 977. Compare *R v Shayler* [2002] UKHL 11, [2002] 2 All ER 477. But see the disappointing decision on the right to vote of prisoners in *R v Secretary of State for the Home Department, ex parte Pearson and Martinez* [2001] EWHC Admin 239.

return to the routine deference of the past. Given the context of the current 'war on terrorism', the majority of the important cases so far have involved state action against foreigners suspected of various wrongdoings. Thus, the HRA has proved of no help to the asylum seekers held in Oakington whose victory, secured before Collins J on Article 5(1) grounds just four days before 11 September 2001, was shortly afterwards unanimously overturned by a Court of Appeal presided over by the Master of the Rolls Lord Phillips.[57] The same fleeting victory was also accorded the American leader of the Nation of Islam Louis Farrakhan by the Administrative Court, which deployed ECHR Article 10 against the Home Secretary's refusal to allow him to visit the United Kingdom only to have the ruling overturned by a Court of Appeal that was once again headed by the Master of the Rolls.[58]

Secretary of State for the Home Department v Rehman[59] is particularly instructive demonstration of the general point. The case was concerned with the legal basis upon which the Home Secretary could lawfully deport a person on the ground that it was for the public good in the interests of national security. The Special Immigration Appeals Commission had held that conduct could only constitute a threat to national security if it were targeted at the United Kingdom, its citizens or its system of government, and had concluded that the Secretary of State had failed to prove to a high civil balance of probabilities the acts which were said to have endangered national security in this particular case. The Court of Appeal allowed the Home Secretary's appeal against this decision[60] and the matter was further appealed to the House of Lords where oral argument was heard on 2 and 3 May 2001. The speeches in the case dismissing Rehman's appeal were however not handed down until 11 October, exactly one calender month after the attacks on the World Trade Centre and the Pentagon in the United States. In accepting a very broad definition of the risk or danger to the security or well-being of the nation, the five law lords in the case took an extremely deferential approach to the powers of the Home Secretary in this area, both in relation to his judgment of what constituted a risk to national security and as regards his assessment of the risk posed by individuals being considered for expulsion. The tone of the decision recalls cases of a similarly restrictive nature from the same court legitimising the exercise of state power in a way inimical to civil liberties during both World Wars,[61] the Cold War,[62] and arising out of the conflict in Northern Ireland.[63] Of many quotes that could be taken from the case, it is perhaps Lord Hoffmann's 'postscript' that best captures the atmosphere on the bench:

[57] *R v Secretary of State for the Home Department, ex parte Saadi and others* [2001] EWHC Admin 670, [2001] EWCA Civ 1512, [2002] 1 WLR 356, [2001] 4 All ER 961 for the unsuccessful appeal to the House of Lords, see [2002] UKHL 41; [2002] 4 All ER 785.

[58] *R v Secretary of State for the Home Department, ex parte Farrakhan* (2002) 152 NLJ 708.

[59] [2001] UKHL 47, [2001] 3 WLR 877, [2002] 1 All ER 122.

[60] [2000] 3 WLR 1240.

[61] *R v Halliday, ex parte Zadig* [1917] AC 260; *Liversidge v Anderson* [1942] AC 204.

[62] *Chandler v DPP* [1964] AC 763.

[63] *McEldowney v Forde* [1971] AC 632; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[64]

The decision, and Lord Hoffmann's remarks, are not wholly unexpected. Only those who expect the courts to impose human rights and/or civil liberties protection from on high are entitled to feel let down, but such disappointment reflects a degree of political immaturity, a desire for a benevolent parent to step in and solve a squabble between siblings. Politics is not like this, and civil liberties—like all of life—are part of politics. It is fortunate that the legislative branch has been less pusillanimous than the judiciary in meeting the challenge to civil liberties that has been precipitated by the executive response to the events of 11 September 2001. For the third assumption that the civil libertarian would want to challenge, that the legislature is and always has been uninterested in the protection of civil liberties and human rights, is the most deeply entrenched of all. To some extent the critics of parliamentary sovereignty do of course have a point. As we have already detailed at depressing length, the record here is not honourable from a civil libertarian perspective. But nor is it as dishonourable as is so frequently asserted. Whatever it might mean to say that there has never been a 'culture of rights' in this country, it is certainly the case that the legislature has frequently displayed at least a degree of sensitivity to rights when faced with executive initiatives restrictive of rights and liberty. This is not to say that such sensitivity inevitably or even invariably wins the day. Much depends on the atmosphere of the times and the general political climate: the Official Secrets Act 1911 and the first Prevention of Terrorism Act in 1974 were notably unscathed by their passage through Parliament. However, when the circumstances are right, the legislature can and does win important concessions which both affect the content of proposed laws and constrain executive action in the future. The defence of the realm and emergency powers legislation passed at the onset of, respectively, the First and Second World Wars were strongly influenced in both these ways by the parliamentary debates that accompanied and followed their enactment.[65] The Incitement to Disaffection Act 1934 was seriously undermined by parliamentary hostility.[66] In more recent times, both the Police and Criminal Evidence Act 1984 and the Police Act 1997[67] were strongly affected and modified by the parliamentary debate that surrounded their enactment.

[64] Above n 59 above, para 62.

[65] For the details see *The Struggle for Civil Liberties*, above, n 44, at chs 2 and 8.

[66] *Ibid* at 243–52.

[67] KD Ewing and CA Gearty, *A Law Too Far: Part III of the Police Bill 1997* (Civil Liberties Research Unit, King's College London, 1997).

The Government's legislative proposals in the aftermath of 11 September were markedly improved from the civil libertarian perspective by the changes that were conceded as a result of a strong parliamentary engagement with the relevant issues of principles. Much of the Act in its final form may still be thought deplorable, particularly those provisions which permit the detention of non-residents without charge,[68] which greatly expand state power in relation to terrorism[69] and access to communications data,[70] and which allow for the implementation of the third pillar of the European Union without effective democratic scrutiny. It is also right to decry the fact that the legislation, which is long and complex, was pushed through Parliament at alarming speed. Yet despite all this, important amendments on matters of substance were achieved. Proposals to introduce retrospective criminal legislation on bomb hoaxes were dropped even before the Bill was published after the idea had provoked a strong and very critical response. An expansion of the law to include incitement to religious hatred was omitted after a strongly negative report on the proposal from the Home Affairs Committee of the House of Commons.[71] That body's critical appraisal of the Government's plans also led to other beneficial changes such as the 'sunset' provision limiting the life of the internment power to five years,[72] with its renewal on an annual basis also being required to be based on an annual review by an independent person.[73]

Following other critical reports from another parliamentary body, the Joint Committee on Human Rights, the Government found itself having strongly to defend its assertion that there was 'a public emergency threatening the life of the nation' sufficiently grave to warrant the derogation from ECHR Article 5 that the Home Secretary had judged was necessary in order to be able lawfully to introduce its new detention powers.[74] As a result of legislative pressure, the Act in its final form provides for a committee of privy counsellors to conduct a review of the whole measure[75] and this body was established in April 2002.[76] Of course none of this is perfect, and a parliamentary body operating at the level of civil libertarian perfection would have done much more.[77] But in the context of the time, one of unparalleled anxiety and concern about the future, it was not a bad performance on the whole, and certainly not one which justifies any claim that Parliament is too

[68] Anti-terrorism, Crime and Security Act 2001, Pt 4. See generally A Tomkins [2002] *PL* 205.

[69] See in particular Anti-terrorism, Crime and Security Act 2001, ss 117–120.

[70] *Ibid*, Pt 11.

[71] Home Affairs Committee, First Report, *The Anti-Terrorism, Crime and Security Bill 2001* (HC 351, 2001–02).

[72] See Anti-terrorism, Crime and Security Act 2001, s 29.

[73] *Ibid* s 28. The task has been assigned to Lord Carlile of Berriew who is also responsible for review of certain of the powers in the Terrorism Act 2000.

[74] Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644. The two Joint Committee on Human Rights reports are at HL Paper 37, HC 372 and HL Paper 51, HC 420 respectively.

[75] Anti-Terrorism, Crime and Security Act 2001, s 122.

[76] Its members are Lord Newton of Braintree (chair), Chris Smith MP, Joyce Quinn MP, Sir Brian Mawhinney MP, Alan Beith MP, Terry Davis MP, Baroness Hayman, Lord Holme of Cheltenham and the retired law lord Lord Browne-Wilkinson.

[77] But see further D Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *PL* 323.