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LETTING DOWN THE DRAWBRIDGE: RESTORATION OF THE RIGHT TO PROTEST AT PARLIAMENT

*Kiron Reid*¹

Abstract

This article analyses the history of the prohibition of protests around Parliament under the Serious Organised Crime and Police Act 2005. This prohibited any demonstrations of one or more persons within one square kilometre of the Houses of Parliament unless permission had been obtained in writing from the police in advance. This measure both formed part of a pattern of the then Labour Government to restrict protest and increase police powers, and was symbolically important in restricting protest that was directed at politicians at a time when politicians have been very unpopular. The Government of Tony Blair had been embarrassed by a one-man protest by peace campaigner, Brian Haw. In response to sustained defiance, Mr. Blair's successor as Labour Prime Minister, Gordon Brown, and opposition Conservative and Liberal Democrat MPs pledged to remove the restrictions, but this was not acted on by Parliament until September 2011. This article argues that the original restrictions were unnecessary, and that the much narrower successor provisions could be improved by being drafted more specifically.

Keywords: protest, demonstration, protest at Parliament, freedom of speech, Serious Organised Crime and Police Act 2005, Brian Haw.

Introduction

This is about the sorry tale of sections 132-138 Serious Organised Crime and Police Act 2005 (SOCPA).² These prohibited any demonstrations of one or more persons within one square kilometre of the Houses of Parliament unless advance written permission had been obtained from the Commissioner of Police of the Metropolis. This was contained in the Serious Organised Crime and Police Act but, like many measures in the Act, it had nothing to do with serious or organised crime. A law restricting activity around Parliament may affect only a small proportion of the population. However, symbolically the choice of MPs of the then governing Labour party (many Liberal Democrat, Conservative and a few Labour MPs voted against the

¹ Kiron Reid is Lecturer at the Liverpool Law School, University of Liverpool K.J.C.Reid@liverpool.ac.uk. I am grateful for improvements to the draft suggested by the journal's two referees, and by Barry Godfrey and Nicholas Willmott. My thanks also to Bleddyn Davies, Karl Sharp, Frances Willmott, Brian Thompson and Kim Stevenson for discussing aspects of the law with me during the period of the ban. My initial critique was debated at 'The "War on Terrorism": Legal, Military and Political Strategies' International & European Law Unit Conference, School of Law, University of Liverpool, July 2006, organised by Dominic McGoldrick.

² Background sources are found in the Act's *Explanatory Notes* at paras. 49-52. For Second Reading debate see House of Commons *Hansard*, 7 December 2004, vol.428 cols.1044-1140.

proposals) to restrict protest directed at them is, as evidence of their attitude, so significant that it merits attention. It also impacts on demonstrators from anywhere in the country who might want to express views to their MPs through processions or demonstrations. It is routine and necessary that States provide for special protection around Parliamentary, Government and State buildings. This article argues that the measures enacted around the Palace of Westminster were both legally disproportionate and out of proportion to the real risk of disruption to Parliament by peaceful protesters.

The Government consultation on *Managing Protest Around Parliament* (2007-2008) was a significant indication of willingness to re-examine a roundly criticised measure.³ The lack of ensuing action is considered in the concluding part of this article. Arguably sections 132–8 were unnecessary as, under the Metropolitan Police Act 1839, there was already a ban on demonstrations while Parliament was sitting. However, that was insufficient for the Labour Government, possibly as it only applied to assemblies and processions – not to one man. MPs wanted to end an embarrassing (to them) protest by peace campaigner, Brian Haw. Haw became a *bête noire* of Prime Minister Tony Blair's Government. The successor Coalition Government proposed a Freedom Bill 'to restore the rights of individuals in the face of encroaching state power'.⁴ Both Coalition parties had supported an end to the ban on unapproved protests near Parliament. The initial failure of the Conservative-led Coalition Government to repeal the ban also coincided with a wave of political and public anger at their spending and student funding policies. This may lead the cynical to believe that this failure was deliberate. The restrictions were repealed in September 2011 leading to a genuine small restoration of civil liberties in Britain.

³ Cm 7235 October 2007. A draft of parts of this text was submitted to the Joint Committee considering the draft Constitutional Renewal Bill, June 2008.

⁴ *The Coalition: our programme for government* (Cabinet Office, London, May 2010) p.11. A 'Your Freedom' consultation website was launched by Nick Clegg MP, Leader of the Liberal Democrats and Deputy Prime Minister, 1 July 2010. <http://yourfreedom.hmg.gov.uk/> Archive site viewed 18/02/2012.

1 Historical Background⁵

Protest around or near Parliament is, both in reality and symbolically, important in the life of the nation. Charged political events have been acted out at Trafalgar Square, in Whitehall and in Parliament Square over the centuries. The pictures of protest in the capital illustrate the key events of different eras – rallies at Hyde Park, soap box speakers at Speakers' Corner; marchers thronging across Westminster Bridge or along the Embankment or down Whitehall. There has been much focus on Trafalgar Square – for protest, for celebration such as VE Day, for riot. Even in authoritarian Victorian times protests took place there periodically, and in Parliament Square itself. However, this space was contested as Richter's 'the struggle for Trafalgar Square' confirms.⁶ After the suppression of Chartist demonstrations, protest gatherings were banned there. Demonstrations of the Reform League had been banned at Hyde Park in 1866, leading to disturbances there and in Trafalgar Square.⁷ The Riot (Damages) Act 1886 was a direct result of riots in Trafalgar Square.⁸ Townshend notes that temporary bans were allowed to be extended by the police to a ban on public

⁵ Charles Townshend *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford University Press, 1993) analyses the legal and political context in England over the nineteenth and twentieth centuries, with some Irish content. Most relevant to this article are ch.1 'The English Image of Order', and ch.7 'The Last Postwar' covering the 1970s and 1980s. Ian Heron *Riot! Civil Insurrection from Peterloo to the Present Day* (Pluto, London, 2006) is a history of the 20 major public disorder outbreaks over the last 200 years in England and Wales. Many are political or industrial/workers disputes. Heron's is a popular history written by a left-wing tabloid journalist. Mike Ashley, *Taking Liberties: The Struggle for Britain's Freedom and Rights* (British Library, London 2008) puts many of these events into the social and political history of a survey covering 800 years. The development of historical thinking about the earlier era can be found in succeeding editions of Clive Emsley, *Crime and Society in England 1750-1900* 3rd ed. (Pearson, Harlow, 2005) ch. 9.

⁶ cited by Townshend, *Making the Peace*.

⁷ See Ashley, *Taking Liberties* p.109. A crowd of top and bowler-hatted protesters, confronting a police line at Hyde Park, are pictured tearing down railings.

⁸ The Riot (Damages) Act 1886 provides for compensation out of public funds (the police fund) for loss or damage to property in any house, shop or building, by any persons 'riotously and tumultuously assembled together'. The Home Office reviewed the Act in 2003 but there was no outcome from this review. The Act was therefore the key piece of legislation regarding compensation for the English riots of Summer 2011. The review claimed that 'In the past 20 years riots have occurred in England and Wales in 1981, 1985, 1991, 1995, 2001 and 2002.' (para. 16) and 'In the last 8 years there were 2 instances of riot in 1995, 5 in the summer of 2001 and 1 in 2002.' *Partial Regulatory Impact Assessment*, p. 1. *Riot (Damages) Act 1886 Consultation Paper*, (Home Office, London, 2003). However, that is not what the report showed. The report included public order events recognised as riots for which compensation was paid under the Act. It did not list or count riots under the definition in the Public Order Act 1986 s.1 which were not categorised by the authorities as such. This could be any serious disorder involving 12 people. The fact that compensation must be paid and that the consent of the DPP is required may be reasons why the number of officially recognised 'riots' are very low. The statement preceding the 1995-2002 figure 'Riots are still comparatively rare events' remains correct.

meetings from November 1887 to October 1892, eventually repealed under the same Conservative Home Secretary.⁹

For much of the twentieth century there were specific curbs on demonstrations in Trafalgar Square and Parliament Square, as we shall see. Nevertheless, many iconic protests also took place here in the heart of the capital.¹⁰ General legal restrictions on protest around Parliament which banned protest without permission were introduced by the Labour Government in 2005. Despite a promise by an incoming Labour Prime Minister, Gordon Brown, to remove these restrictions in 2007 this was not done before a Conservative-led Coalition of Conservative and Liberal Democrat MPs came to power in 2010. A year later the restrictions were still not removed due to a lack of action by Parliament. It appeared that critics of the legislation could not agree on how it should be repealed. In consequence Parliamentarians managed to maintain the impression of a fear of protest. The veteran peace campaigner and obsessive protester, Brian Haw, was the symbol of defiance against this restriction on the right to protest. Brian Haw died in June 2011 before any repeal, ten years after starting his protest against Iraq sanctions and, later, the invasion of Iraq.¹¹ Haw was described by Professor Clive Walker as 'a post-modern demonstrator'.¹² He became a symbol, but his protest was more benign than others that followed. He was an example of a long tradition of relentless solitary protesters.

Lacey and Wells contrast the legal 'narrow, "literal"' conception of public order, and the 'broad, political and "metaphysical"' conception,¹³ however political influence has led legal definitions to be both widened with new offences and more widely applied. At the same time the serious legal offences available are rarely charged. None of the incidents highlighted in the review of the Riot (Damages) Act were in Central London so no particular special controls appeared to be justified by the risk of more serious public disorder there than elsewhere. A fear of serious disorder cannot have been the

⁹ Townshend, *Making the Peace* pp.38-40. For details see Rodney Mace, *Trafalgar Square: emblem of empire* (Lawrence & Wishart, London, 1976). This is a masterly fusion of architecture and history from a left-wing or anti-ruling class perspective, chs.6-8 are relevant background to this article. See also Philip Carter, 'Trafalgar Square in history', Oxford Dictionary of National Biography, (Oxford University Press).
<http://www.oxforddnb.com/view/theme/94299>, accessed 5 December 2012.

¹⁰ Mace Appendix 5 is a list of 'Applicants for use of Trafalgar Square for Political Meetings' from 1867 to the end of 1974.

¹¹ 'Peace campaigner Brian Haw dies' BBC news online, 19 June 2011
<http://www.bbc.co.uk/go/em/fr/-/news/uk-13828800>

¹² Clive Walker [2008] *Criminal Law Review* 564, Commentary.

¹³ Nicola Lacey and Celia Wells *Reconstructing Criminal Law* 2nd ed. (Butterworths, London, 1998) pp.115-6.

reason for the ban being introduced, although there has been serious disorder on a small number of occasions subsequently. Anti-Hunting Act protesters did invade the House of Commons chamber in September 2004, one of a number of security breaches. The deployment of armed police apparently in response seemed to miss the peaceful nature of the demonstration. This was one of a number of security breaches but tougher law would not have prevented that.¹⁴ Baroness Miller, then Liberal Democrat Home Affairs spokesperson in the House of Lords, expressed concern that

there is now a conflation of protestors who get in and on to Parliament to make a point about an issue - and terrorists. The protestors have been charged under the Serious Organised Crime and Police Act 2005 - brought in to deal with terrorists.¹⁵

There is no suggestion that attitudes of the establishment to protest are in any way as hostile and authoritarian as in the past when any exercise of free speech could lead to the Crown or Government invoking the criminal law as an instrument of repression. This use of criminal law to suppress free speech in the late-eighteenth century is considered by Robert Walker.¹⁶ Priestly charts the battles over freedom of speech (sometimes understating the point that protagonists often only wanted freedom of speech to promote their own religious standpoints) including the struggle of some MPs themselves to gain such ability in the early modern period.¹⁷ Both Walker and Priestley note that Parliament did not generally uphold free speech, though individual Parliamentarians might have supported it. This is a situation uncannily like the period considered in this article: 2005 to 2011. The Seditious Meetings Act 1817, section 23, held that meetings of more than 50 persons within a mile of Westminster Hall, during sittings of Parliament or of the Superior Courts, for the purpose of considering or preferring a petition, complaint, remonstrance or

¹⁴ 'Pro-hunt protesters storm Commons' http://news.bbc.co.uk/1/hi/uk_politics/3656524.stm 15 September 2004, viewed 04/01/2013. Greenpeace campaigners have unfurled banners on the Palace of Westminster several times before and after increased internal security in 2004. *Papworth v Coventry* [1967] 1 WLR 663 (considered below) is an example of an over zealous use of police powers around Parliament being restrained by the court. My thanks to one of the Journal's referees for highlighting the aspect of the integrity of the Palace of Westminster itself as a security issue.

¹⁵ *Liberal Democrat News* ISSN 0954-5735, 7 March 2008, p.8. Five protesters from the 'Plane Stupid' group had hung banners from the roof on 27 February 2008.

¹⁶ Lord Walker of Gestingthorpe, 'Security, Freedom of Speech and Criminal Justice in the Age of Pitt, Burke and Fox', Presidential address to the Bentham Club, UCL 5 March 2008. Available at: <<http://www.ucl.ac.uk/laws/alumni/presidents/index.shtml>> Thanks to Kim Stevenson for this reference.

¹⁷ Harold Priestley, *Voice of Protest: A History of Civil Unrest in Great Britain* (Leslie Frewin, London, 1968).

address to the monarch or either House of Parliament was an unlawful assembly.¹⁸ These restrictions (along with the Tumultuous Petitioning Act 1661) were only repealed by the Public Order Act 1986. Such wide restrictions would undoubtedly be in breach today of Articles 10 and 11 of the European Convention on Human Rights (ECHR).¹⁹

Townshend highlights F.M.L. Thompson's conclusion that increased policing in Victorian times 'turned the streets "more and more into sterile territory on which the public had the right of passage but nothing else"', a view similar to Mike Brogden's analysis, looking at a half-century later, on the importance of 'moving on' as a police activity: 'The mandate of these officers was to keep the Liverpool streets clean'.²⁰ These views are echoed in much of the critique of regeneration policy of the late-twentieth and early-twenty-first centuries. Housing and city centre shopping regeneration is criticised for marginalising 'the poor', young people, alternative/youth cultures and anyone who is not a consumer.²¹ This article argues that the same debates as highlighted by Thompson about the late-Victorian age and Brogden between the Wars resonate nowadays. The fundamental issue is about control, and protest around Parliament is the extreme example.

¹⁸ David Feldman *Civil Liberties and Human Rights in England and Wales*, 2nd ed. (Oxford University Press, 2002) pp.775-6 considers the relevance of petitioning in modern times. See for detail William McKay (ed.) *Erskine May: Parliamentary Practice*, 23rd ed., ch.34 on public petitions. Gordon Pentland has suggested that Spencer Perceval might not have been murdered in 1812 if there had been a petitioning system that John Bellingham could have used to gain a hearing: "Now the great Man in Parliament House is dead, we shall have a big Loaf!" Responses to the assassination of Spencer Perceval' (University of Liverpool Eighteenth-Century Worlds Lecture, the Athenaeum, Liverpool 27 January 2012). Petitioning has been introduced online via the Downing Street website under the Labour Government and expanded to a right to have large enough petitions considered for debate in Parliament under the Coalition. 'The e-petitions site was relaunched on 29 July 2011'.

<http://www.number10.gov.uk/take-part/public-engagement/petitions/> viewed 18/02/2012.

¹⁹ Card's view was that there should have been enacted in 1986 'positive statutory rights to participate in processions and assemblies.' Richard Card, *Public Order: the New Law* (Butterworths, London, 1987) para.1.18. Arguably the Human Rights Act 1998 (HRA) went a long way to achieving this.

²⁰ Townshend *Making the Peace* quoting Thompson at p.2 and Brogden at n.7. See also p. 40.

²¹ See generally Anna Minton *Ground Control: fear and happiness in the twenty-first-century city*. (Penguin, London, 2010). The Council /Government and public voices in favour of such policies are rarely reflected in such critique by political writers. Minton does consider both sides to some extent. Compare with Labour Minister, Mike O'Brien's confused point: 'Yobs hanging about on street corners and gangs of teenagers roaming shopping centres put off customers and increase fear of crime.' Quoted by K. Reid 'Law and Disorder: Victorian Restraint and Modern Panic' in J. Rowbotham and K. Stevenson (eds.) *Behaving Badly: Visible crime, social panics and legal responses - Victorian and modern parallels* (Aldershot: Ashgate, 2003) ch. 5, p.90. Norton notes that 'Gangs of inner city youngsters may have some form of organization, but not one geared to making demands of elected representatives'. Philip Norton, *Parliament in British Politics* (Palgrave, Basingstoke, 2005) p. 222. He argues that Parliament's role must include helping 'unorganized sections of society'.

A factor linking the late-twentieth and early-twenty-first century 'political riots' over a 40-year period from 1968 to 2011 with the 'political riots' of the mid- and late-Georgian and late-Victorian periods is the symbolism and importance of Trafalgar Square and the proximity to Parliament, with unruly mobs, democrats or working class rebels threatening the political establishment, depending on the observer's point of view. It is that particular arena that is the focus of the rest of this article.²² This writer is concerned with police powers and protests, large and small. Other commentators support a view of local state action as social cleansing, linking the policies of local government and Westminster.²³ Attitudes to this view will depend very much on one's social and political perspective. Those with a state-orientated welfarist view of solving social problems may decry authorities that seek to avoid nuisance on the street to their public. It is easy for left-wing critics to paint a picture of the Capital's prestigious streets being cleared of both protesters and beggars. Critics of regeneration policy in urban areas, particularly the Northern cities and East London, have raised similar concerns.²⁴ While this narrative again reflects only one view - and often not that of the majority elected into public office in the areas concerned - it chimes with similar earlier political analysis and in earlier periods. The use of council and low level police powers is outside the scope of this article, unless directly related to protesters.

The Labour Government that restricted protest around Parliament in 2005 may be no different from those in past times trying, as they saw it, to prevent a breakdown in

²² The activities of the British Union of Fascists and their opponents that led to the Public Order Act 1936 (specifically s.3 regarding processions) are therefore outside the scope of this article, as are the modern activities of the English Defence League and their opponents (Unite Against Fascism) that have caused disruption to communities around the country and stretched police resources.

²³ See section on 2011 conditions below, regarding the restriction on 'sleepover' protests against Westminster Council's plans. In addition many cities have prohibited the distribution of leaflets and setting up stalls without permission – aimed at preventing litter and obstruction to shoppers.

²⁴ Some of these are explored from social science perspectives in: Jacqui Karn *Narratives of Neglect: community, regeneration and the governance of security* (Willan, Cullompton, 2007) about Manchester. Also see Gavin Poynter 'London: Preparing for 2012' ch.11, pp.183-200; Penny Bernstock 'London 2012 and the Regeneration Game' ch. 12, pp.201-218; and 'Olympic Cities and Social Change' ch.18, pp.303-326 by the editors in Gavin Poynter and Iain MacRury (eds.) *Olympic Cities: 2012 and the Remaking of London* (Ashgate, 2009). There have been similar debates about the impact on Liverpool of the European Capital of Culture 2008 title. Although the sociological and criminological perspectives are outside the scope of this article the author would point readers interested to the extensive relevant work published by half a dozen academics in the Department of Sociology, Social Policy and Criminology at the University of Liverpool as a starting point.

society while allowing legitimate protest. And yet the role of an MP is not that of a police officer trying to hold a line. This is people in power deliberately restricting the right to protest. Some events portrayed by critics as disorder are undoubtedly political;²⁵ others may start as a political event but be overtaken by the excitement of the euphoric rush of licence.²⁶ Critically, as will be demonstrated, there was no significant evidence presented of a need for additional powers around Parliament other than those powers that the police had everywhere else. Two remarks about demonstrators are worth noting. Edmund Marshall MP observed in 1982:

In recent years it has also become the fashion for mass demonstrations on political issues to be organised in London, including mass lobbies of MPs... usually, however, the political significance of such a mass demonstration rests more in the televising and reporting of the march through the streets of London.²⁷

While Norton observed 20 years later 'Parliament still serves as a focus for group activity', presciently adding

MPs and peers sometimes complain when there are mass lobbies, or when demonstrators gather outside Parliament, displaying banners and chanting. Though their activities may upset members, the institution of Parliament would be in parlous state if they neglected the institution altogether.²⁸

2 Were Restrictions around Parliament Needed?²⁹

The Trafalgar Square Regulations 1952³⁰ required application to the Department of the Environment to hold a meeting in Trafalgar Square.³¹ The Royal Parks and Other

²⁵ An example being the events that led to the founding of the National Council for Civil Liberties, below.

²⁶ Immediately before the English Summer 2011 riots BBC Radio 4 broadcast a programme glorifying the political nature of riots on the reading of history by those involved, Amanda Vickery, *Voices from the Old Bailey: Series 2* 1. 'Riots', broadcast 27 July 2011. This was about examples of eighteenth century riots. While Vickery ('riots express the collective political voice of the people'), Professor Peter King and Dr. Katrina Navickas played up political interpretations, much of the discussion, including also that of Professor Tim Hitchcock, negated the political interpretation put forward. In contrast, about 2011 the Riots Communities and Victims Panel interim report analysed one of five categories of rioter as 'Opportunists - people who were drawn into riot areas through curiosity or a sense of excitement and then became "caught up in the moment"' but also made clear 'there was no single cause of the riots and that no single group was responsible.' *5 Days in August - Executive Summary*, 6/12/2011. <http://www.5daysinaugust.co.uk>

²⁷ Edmund Marshall, *Parliament and the Public*, (Macmillan, London, 1982) p.29.

²⁸ Norton, *Parliament in British Politics* pp.224 and 226 respectively.

²⁹ General civil liberties and human rights context can be found in the main textbooks including Richard Stone's *Textbook on Civil Liberties and Human Rights* 9th ed. (Oxford University Press, 2012). David Mead *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart, Oxford, 2010) covers the significant legal developments of recent decades.

³⁰ SI 1952/776.

Open Spaces Regulations 1997³² revoked and re-enacted, with minor amendments, the 1952 Regulations and the Royal and other Parks and Gardens Regulations 1977. These also covered Parliament Square Gardens and Hyde Park. Regulation 4 'Acts in a Park for which written permission is required' prohibited 30 activities unless the Secretary of State's written permission had first been obtained. These requirements were wider than those included in the Public Order Act 1986 Part II (POA) and allowed restrictions that could have removed any real, as opposed to imaginary, problem that led to the ban on protests around Parliament. That is, any problem could have been removed if the powers were exercised in a Human Rights Act (HRA) compliant way by the Government that introduced the HRA in 1998. In May 2004 Parliament removed Parliament Square Gardens and Trafalgar Square from the statutory instrument that could have controlled any genuine problems in Parliament Square.³³ There was no explanation in the Explanatory Notes for this change: it is not clear why Parliament decided to do this and then introduce a different and wider restrictive regime. Perhaps they thought that the SOCPA ban was modernising the law in allowing a police-administered system for persons to apply for permission to protest; however, the geographical scope of the controls was wider than needed, even if one accepted that as a legitimate aim (which this writer does not).

Key to the ban on demonstrations around Parliament in SOCPA is the case of Brian Haw. The Government wanted to end his 'unsightly' and 'noisy' anti-Iraq War protest.³⁴ This is illustrated by MPs' debate about the House of Commons Select Committee on Procedure report on Sessional Orders and procedures, and the Government's response on 3 November 2004.³⁵ The subject of questions by various MPs, and the replies by Peter Hain MP for the Government, make it clear that the prime concern was the demonstration by Mr. Haw. Noise nuisance from loudhailers and actual disruption to the work of Houses of Parliament staff and MPs by protesters were other, secondary, influences.³⁶ Summing up for the Government,

³¹ Made under s.2(1) Parks Regulation (Amendment) Act 1926. See Helen Fenwick, *Human Rights and Civil Liberties* 3rd ed. (Routledge-Cavendish, London, 2002) p.435 and *Ex parte Lewis* (1888) 21 QBD 191 (Held, *obiter*, there was no public right to occupy Trafalgar Square for the purpose of holding a public meeting).

³² SI 1997/1639.

³³ The Royal Parks and Other Open Spaces (Amendment) Regulations 2004 (SI 2004/1308).

³⁴ Viewed by author on dates including 1 September 2008.

³⁵ House of Commons Procedure Committee 'Sessional Orders and Resolutions' Third Report of Session 2002–03, HC 855, published 19 November 2003.

³⁶ 3 November 2004, HC, *Hansard* vol.426 col.370-423. Debate on Third Report, Session 2002/3, HC 855. The preceding August 2004 consultation paper was fairly neutral on the reasoning - *POLICING: Modernising Police Powers to Meet Community Needs* (Home Office, London, 2004), pp.19-20.

Caroline Flint argued (col. 419) that the proposed legislation was not just about one man and, like a number of MPs, reiterated that the right to protest was more restricted prior to 1986. However, Lembit Öpik MP, among others, pointed out that the legislation would be much wider-reaching than dealing with the issue that sparked it. This was a trend of much 'New' Labour criminal justice legislation.³⁷ Certain themes have been repeated in criminal justice legislation since 1994 - 'rag bag' Acts of Parliament that include a wide variety of measures the object of which is often not at all obvious without very close examination: legislation such as SOCPA itself that appeared to be about one serious area but actually extended the law much more widely. Some of these changes have had an incremental effect on rights by restricting individual liberty, sometimes in unexpected ways. Harris and Stevenson say that 'modern legislative "hyperactivity"' has negative implications for basic concepts of the Rule of Law and legitimacy. They highlight

the uncontrolled *accretion* of statutory provisions that have expanded the criminal law exponentially and which have been enacted more by "derangement" than any systematic rationale; particularly the collation of often unconnected and 'tidying up' measures found in generic Acts.³⁸

It needs to be considered whether the police, Parliament and local authorities had adequate powers already that could have been used to deal with any real rather than perceived problems. Specifically the Public Order Act 1986 Part II, Criminal Justice and Public Order Act 1994 (CJPOA) and Sessional Order powers, as well as breach of the peace provisions, could all have been used. What is curious is that before SOCPA was enacted the Government removed Parliament Square from regulations on Royal Parks and other spaces that restricted protests, as noted above. The powers that covered everywhere else in England and Wales may have been sufficient.

What of general police powers; was the POA applicable? The Labour Government had changed the definition of a public assembly from 20 people to 'an assembly of 2 or more persons' so almost any gathering of only two people for a political purpose

³⁷ There was much continuity in this style from Conservative to Labour Government, see 'Criminal justice under Labour, ten years on' *Criminal Justice Matters* 67 (1 May 2007). Theoretical and philosophical sources of discussion on liberty (both historical and modern) can be found in Richard Mullender's review of Ben Wilson's *What Price Liberty? How Freedom was Won and is Being Lost* at *Legal Studies* 31 (2011) 492.

³⁸ Candida Harris and Kim Stevenson 'Inaccessible and Unknowable: Accretion and Uncertainty in Modern Criminal Law' *Liverpool Law Review* 29 (2008) 247 at 252 and 255. See also Kiron Reid 'A bonfire of the criminal laws? A review of Law Commission Consultation Paper no.195: Criminal liability in regulatory contexts'. *The Loophole - Journal of the Commonwealth Association of Legislative Counsel* 27(2) (2011) at p.29. Available at: http://www.opc.gov.au/calc/docs/Loophole_May11.pdf

could be subject to conditions although not banned, allowing a great increase in control on rights of assembly.³⁹ This is mitigated as it has to be read and applied in a way that is consistent with Articles 10 (freedom of expression) and 11 (freedom of assembly and association) of the ECHR. However, States have a wide 'margin of appreciation' (discretion) in how they apply permitted restrictions on these rights (for example on the grounds of public safety, or the prevention of crime). The CJPOA criminalises aggravated trespass (s.68), and some forms of trespassory assembly when a banning order is in force (s.14A). The latter could not apply to a single protester (minimum remained 20), and the former could only apply if a protester was deemed to be trespassing on the land (in this case by exceeding their permission to be on the public open space in Parliament Square) with the *mens rea* of obstructing or disrupting a lawful activity and at least the *actus reus* that D does 'anything which is intended by him to' obstruct or disrupt the lawful activity. That could have applied to Brian Haw if his continued protest was not viewed by a court as a reasonable use.⁴⁰

Breach of the peace could be applicable if the definition is satisfied, but this definition is unlikely to extend to a noisy, even highly vociferous, individual. Sedley LJ in *Redmond Bate* made clear that the powers cannot be used against annoying or unpopular small groups (such as evangelical Christian preachers in that case) if they are not otherwise acting unlawfully.⁴¹ Therefore it appears clear that most forms of genuinely disruptive behaviour could be covered by pre-existing legislation, but not a single person protesting peacefully, albeit in a vociferous fashion. Even without a directly relevant power the police still have options; if a person causing a nuisance was hindering the police carrying out their duties they could arrest for obstruction, though subject to constraints as with breach of the peace. This could be obstructing a constable in the execution of his duty section 89(2) Police Act 1996 or in some situations obstruction of the highway, section 137 Highways Act 1980. However, the power is not available for simple lack of co-operation with the police.⁴²

³⁹ Section 16 POA as amended by the Anti-social Behaviour Act 2003, s.57.

⁴⁰ On which see *DPP v Jones* [1999] UKHL 5 allowing a peaceful non-obstructive demonstration on the highway. This was considered regarding Haw's protest by Gray J. in the High Court, see [2002] EWHC 2073, below.

⁴¹ [2000] HRLR 249; [1999] Crim LR 998 DC and Diane Birch Commentary. See also *R v Chief Constable of Gloucestershire Constabulary, ex parte Laporte* [2006] UKHL 55.

⁴² As correctly emphasised by one of the journal's referees. See also on use around the Palace of Westminster, *Papworth v Coventry* [1967] 1 WLR 663.

The 'Sessional Orders' need further explanation. This refers to a particular procedural order of Parliament that at the start of each session instructs the Commissioner of the Metropolitan Police to use powers under section 52 Metropolitan Police Act 1839 to:

take care that during the Session of Parliament the passages through the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Members to and from this House, and that no disorder be allowed in Westminster Hall, or in the passages leading to this House, during the Sitting of Parliament.⁴³

The Commissioner directs his constables to enforce the Act as follows:

That they shall disperse all assemblies or processions of persons causing or likely to cause obstructions or disorder on any day on which Parliament is sitting within the area specified hereunder.⁴⁴

Other powers, or specific offences, can cover disorder but there are no offences that apply to obstruction generally. The activity of Mr. Haw may have disrupted Parliament but was not obstruction, so even this wide power would not cover his one-man protest. The wording of the orders is antiquated and appeared to this writer to reflect the official language of the early Victorian period, which makes the mistake of seeing all forms of protest as contrary to public order, it differs from the tolerant modern language of the HRA era. But this perception is incorrect – the language is far older! Sir Nicholas Winteron MP stated that

All the current Sessional Orders and resolutions date back to at least 1713, and many of them are even older than that.... the order, like the others, is nearly 300 years old, so it is much older than the Metropolitan police to whom it is now addressed [and the] provision to prevent disorder in Westminster Hall ... has become unnecessary because Westminster Hall is now within the parliamentary estate and the precincts of the House.⁴⁵

The historical nature of the Sessional Orders is of current relevance. The antiquity of the procedure may lead to actual problems. In evidence to the Select Committee on Procedure the then Metropolitan Police Commissioner, Sir John Stevens, argued that

The Act is antiquated and not designed for modern day protests and issues. The age of the provision also means that it was not drafted to take account of the rights to peaceful assembly and freedom of expression.⁴⁶

⁴³ For detail of the orders see Commons Journal 261 p.1, (Session 2004-05, Tuesday 23rd November 2004)

<http://www.publications.parliament.uk/pa/cm200405/cmjournal/261/001.htm#page_1>. Para. 3. See further *Erskine May: Parliamentary Practice*, pp.129, 208-9.

⁴⁴ Memorandum by the Clerk of the House and the Serjeant at Arms, 3 July 2003, para.7, Ev 1 in HC 855 above.

⁴⁵ Hansard vol.426 cols.395 and 397, 3 November 2004; see also Memorandum by the Clerk, at fn.4.

⁴⁶ Para.2.1.1, Ev 43 HC 855.

It is not just antiquated language that is a problem. The Sessional Order covers a wide geographical area, far wider than needed. There is no need for it to extend as far as Piccadilly, Leicester Square or Bow Street to achieve its purpose around Parliament.⁴⁷ This covers much of the famous 'West End' of London a mile from Parliament, separated by the Government Ministries along Whitehall. There have been large-scale public order problems at Trafalgar Square and within the area of the Orders. These include, in Victorian times, the riots of 8 February 1886 that predated the Riot (Damages) Act 1886; riots in 1887; violence provoked by the police on the arrival of the National Hunger March, 1932; later the Poll Tax riot of March 1990 and a riot by pro-hunting protesters at Westminster itself, September 2004.⁴⁸ Events such as these are rare and are usually small elements of much larger peaceful demonstrations. Large protests against Apartheid in the 1960s, against nuclear weapons by CND, a school-children's strike in 1972,⁴⁹ and many large scale anti-road protests in the 1990s and anti-Iraq War and student demonstrations more recently passed off almost entirely peacefully.⁵⁰ These protests have not usually had any direct impact upon the work of Parliament.⁵¹ It is possible that some protests

⁴⁷ On areas covered by the police powers under the Sessional Orders: the Select Committee on Procedure Minutes of Evidence 'Memorandum by Metropolitan Police' summarising the evidence by Sir John Stevens of 8 July 2003; para.12 fn.10 of the third report; Memorandum by the Clerk, para.7; *Your Rights: The Liberty Guide* 5th ed. (Pluto, London, 1994) pp.7-8 contains a map.

⁴⁸ On the Victorian riots and legal consequences see *Bailey, Harris and Jones, Civil Liberties: Cases and Materials* 5th ed. (Butterworths, London, 2001) pp.476-7. The 1932 clashes led to the founding of the civil rights group, Liberty: 'In Trafalgar Square, Kidd witnessed police agent provocateurs disguised as workers attempting to incite violence among the peaceful protesters.' Subsequently Ronald Kidd and the founders of the National Council for Civil Liberties writing a letter to the *Manchester Guardian*, 23 February 1934. <http://www.liberty-human-rights.org.uk/about/history/how-liberty-was-founded.php> viewed 10/03/2011. Anti Vietnam War marches often started in Trafalgar Square ending at the American embassy in Grosvenor Square. One on 17 March 1968 turned violent. See http://news.bbc.co.uk/onthisday/hi/witness/march/17/newsid_4090000/4090886.stm

⁴⁹ An estimated 2,500 London school children were prevented from accessing Trafalgar Square on 17 May. The police tactics used were similar to those today - keeping demonstrators split up in isolated groups, like the controversial containment or 'kettling' tactic. The incident is covered in a BBC Four documentary and Schools' Action Union activist Liza Dresner interviewed: TIMESHIFT Series 10, 'Crime and Punishment - The Story of Corporal Punishment' first broadcast: 4 Apr 2011. See further Steven Cunningham and Michael Lavelette 'Children, Politics and Collective Action: School Strikes in Britain' in Barry Goldson, Michael Lavalette and Jim McKechnie (eds.) *Children, Welfare and the State* (Sage, London, 2002) ch.12, pp.178-81. The authors cover school strikes in 1889 1911, 1972 and 1985.

⁵⁰ See 'An anti-apartheid demonstration, Trafalgar Square – Photograph, March 1960' <http://www.20thcenturylondon.org.uk> and protest photographs generally (as at 29/11/2011). Mace includes photographs of an undated Suffragette protest and of protests from 1922–1975, with illustrations of events from 1848, 1866 and 1867.

⁵¹ There was a restrictive interpretation of the police powers under s.52 in *Papworth v Coventry* [1967] 2 All ER 41, DC, discussed in *Bailey, Harris and Jones, Civil Liberties: Cases and Materials* 4th ed. (Butterworths, London, 1995) p.192, see pp.191-3.

might have impacted upon Parliament had they not been prevented from reaching there by the police. For example another education related protest in November 2010 that led to a test case on the kettling of children.⁵² The protest involved school children and there was some trouble in both Trafalgar Square and Parliament Square, albeit much of it after people had been contained for a long time. The police case was that they stopped the crowd to prevent attacks by some elements on the Palace of Westminster and the Liberal Democrat headquarters in Cowley Street.⁵³

A specific concern raised in support of restrictions was Parliament as a terrorist target. It must be noted that police and Government interpretation of what is a security risk has been highly discriminatory, particularly in the Metropolitan Police area; peace campaigners and protesters have generally been held to be a security risk necessitating high levels of policing, but sporting-related processions or large crowds related to film and pop stars or alleged 'celebrities' have not. The distinction appears to be that legal powers are used where there is a political motive but not against large apolitical crowds, ignoring the same or possibly greater security risks attendant on groups that would not otherwise come to the particular attention of the police and may or may not be organised by competent stewards. A clear example: policing of the George Bush Jnr visit to London after the Iraq War on 20 November 2003, when there were warnings of terrorist risk, can be contrasted with the much lower key policing of the England Rugby World Cup victory procession less than one month later, 8 December 2003.⁵⁴ The argument of Parliament as a particular security risk applies to Premiership football grounds, mainline railway stations and many other strategic and symbolic locations in the life of Britain.⁵⁵ Security and vigilance by the authorities, employees and the public at all these locations is vitally important, but

⁵² *Castle v Commissioner of Police of the Metropolis* [2011] EWHC 2317 (Admin) held there was no breach of duty 'to safeguard and promote the welfare of children' under the Children Act 2004 s.11. The case concerned containment by the police of two boys aged 16 and a girl aged 14 taking part in a demonstration in central London against the proposed rise in university tuition fees and the removal of the Educational Maintenance Allowance. A crowd of about 3,000 marching from Trafalgar Square along Whitehall to Parliament Square were contained by the police for seven hours. It was held there was no breach of duty to these young protesters in the way the police dealt with the crowd. This protest on 24 November was two weeks after serious disorder in Westminster after a student demonstration on 10 November.

⁵³ Their intelligence from social media and overheard in the crowd only threatened the Liberal Democrat headquarters, not Parliament, though this group of protesters would have gone past the Palace of Westminster.

⁵⁴ See Andrew Anthony 'England 750,000, Australia nil', *The Guardian* 9 December 2003; 'Thousands protest against Bush' BBC News online, 21 November 2003. The author was a legal observer for Liberty at the George Bush demonstrations and saw lawful protest and almost entirely lawful policing.

⁵⁵ The Counter-Terrorism Act 2008 highlights policing at gas facilities, ss.85-90.

restricting protest is not the same as security and vigilance. The Metropolitan Police were heavily criticised for not being prepared for trouble at student demonstrations in December 2010, but that was unreasonable as there had been little trouble at any student-focused demonstrations for 40 years.⁵⁶ Exceptionally, students at Westminster Bridge were charged by police horses in 1988 when marchers deviated from an agreed route of an NUS anti-student loans march to try to reach Parliament.⁵⁷ There was trouble near Parliament, but none that required any extraordinary police powers to deal with.⁵⁸

3 The Brian Haw Ban and Litigation.⁵⁹

Haw is in the longstanding tradition of individual as well as group protest. Conservative MP Winterton, unaware of the impact of persistence as a strand of protest, stated: 'if a man cannot make his point and get his view across in three years, he will not do it in 30 years'.⁶⁰ Haw on the second anniversary of his protest was able to state

I have had the people of the world on this pavement. Peace is more popular than Parliament... Contrary to the hopes of the government that protest will end now that the war on Iraq is said to be over, I will not go away.⁶¹

Eight years later he had not gone away, despite the 2005 ban. The legislation was specifically enacted by the Government to prevent the annoyance caused to MPs by Haw's continuous four-year one-man anti-Iraq War protest in Parliament Square: a ban on demonstrations to target one man. Initially the primary purpose failed. The High Court ruled that Brian Haw's protest was not covered by the legislation because prior authorisation was only necessary for demonstrations that 'start' after 1 August

⁵⁶ For example BBC Radio 5 live Stephen Nolan show 10 December 2010, 'Adrian Goldberg sits in. Student protests in London- did the police get it right or wrong?'

⁵⁷ Barry Godfrey reminded me that this contradicted my previous sentence. The event led to a letter of protest by playwright Harold Pinter 'Eroding the Language of Freedom' Article in *Sanity*, March 1989, reprinted at: http://www.haroldpinter.org/politics/politics_freedom.shtml# viewed 03/07/2012. A question was asked in Parliament by Nigel Spearing MP (Labour) 29/11/1988, *HC Debs* col. 174-6. It is analysed by S.D. Reicher, 'The Battle of Westminster: developing the social identity model of crowd behaviour in order to deal with the initiation and development of collective conflict', *European Journal of Social Psychology* 26 (1996) 115.

⁵⁸ A review of 20 works on Parliament from the last 60 years, and several earlier ones, revealed no attention to this issue.

⁵⁹ *R (Haw) v Secretary of State for the Home Department* [2006] 2 WLR 50, CA. (In High Court [2005] EWHC 2061).

⁶⁰ Hansard vol.426 col.393.

⁶¹ Press Release 29 May 2003 available at: <<http://www.parliament-square.org.uk>> viewed 4/03/2009.

2005, whereas Mr. Haw started his protest in June 2001 (Simon J dissenting).⁶² His demonstration had started before the legislation had come into force and therefore was not covered. Section 132(1) provided that a person who carried on a demonstration in the designated area was guilty of an offence if when the demonstration started appropriate authorisation had not been given by the police. The High Court quashed regulations by which the Government tried to extend the Act to cover continuing demonstrations.⁶³ Smith LJ supported by McCombe J. took a traditional approach to statutory interpretation that favoured the liberty of the individual:

penal statutes should be strictly construed and, if there is any ambiguity, it should be resolved in favour of the liberty of the subject. If Parliament wishes to criminalise any particular activity, it must do so in clear terms.⁶⁴

This decision was overturned by the Court of Appeal in May 2006 ruling that the legislation did apply retrospectively. The Court of Appeal stated that they construed the statutory language in context and the Parliamentary intention was clearly to regulate all demonstrations in the designated area, whenever they began. They decided this because section 132(6) disapplied the existing section 14 Public Order Act controls to demonstrations in the designated area and would therefore leave continuing demonstrations unregulated unless the new law applied.⁶⁵ The court concluded that any other conclusion would be irrational, even though the legislation was certainly not clear without close interpretation. It could further be argued factually that the subject's protest was not actually continuous and therefore at some point it did end and restart even if the campaigner tried to make it as near continuous as possible. All the reports stated that Mr. Haw lived on the pavement but he must sleep at some point and wake up and continue his demonstration. Therefore on a less

⁶² See the earlier High Court case where Mr. Justice Gray dismissed an application for an injunction against Brian Haw on freedom of expression grounds (a judgment of great clarity despite spelling mistakes in the official transcript on Westlaw) *Westminster City Council v Brian Haw* [2002] EWHC 2073 (QB). This case concerned obstruction of the highway. See paras.21-25.

⁶³ 'Secondary legislation cannot create new criminal offence' *The Times*, 4 August 2005. A matter which the Labour Government intended to 'correct' allowing for criminal offences to be created by regulation without debate in Parliament with its original proposals for the Regulatory Reform Bill. A more restricted set of offence creating powers for regulatory matters was included in the Regulatory Enforcement and Sanctions Act 2008, s.62. On the reduced regulation approach and new civil sanctions see John Macleod *Consumer Sales Law* 2nd ed. (Routledge, Abingdon, 2006) e-Supplement 12 July 2011 <http://www.routledgelaw.com/textbooks/9780415415668/pdf/July2011-update.pdf> [3.02B] pp.41-42, [3.20A-B] pp.68-69. See generally Law Commission Consultation Paper no. 195 'Criminal liability in regulatory contexts' (2010) including discussion of two-step prohibitions and critique of s.62 (at p.62).

⁶⁴ At para.58.

⁶⁵ para.19 relying on a submission by Mr. Clemens on behalf of the police.

generous interpretation it could have been held that the original provision did apply even without the court looking at the purpose of Parliament (which the court at each level did but stated was not the reason for their decision!). This line of argument was not pursued. The continuing publicity around the Brian Haw case, whether one sympathised with the subject or not, kept an apparent lack of tolerance of the Labour Government and Parliament towards protest in the news.⁶⁶ An attempt by Liberal Democrat peer (Baroness) Sue Miller in January 2007 to repeal the restrictions was unsuccessful despite support by the Conservatives.⁶⁷ Notably, Lord Carlile (the Government's 'independent' reviewer of the terrorist legislation) spoke in favour of the repeal. Many peers spoke eloquently in favour of the benefits of protest. Lord Davidson for the Government stressed 'Mr Haw ... is still with us. His right to protest continues. It continues, however, in a proportionate and balanced way.'⁶⁸

The ban has been used to criminalise wholly peaceful protesters. In December 2005 Maya Evans was convicted of 'participating in an unauthorised demonstration' under SOCPA. She was arrested along with Milan Rai as they read out the names of 97 UK soldiers and of Iraqi civilians killed in Iraq at the Cenotaph in Whitehall. They were not doing anything that reasonably could be interpreted as offensive or insulting or as an obstruction or likely to cause a breach of the peace. The High Court recorded

The demonstrations were peaceful and good-humoured. All behaved in a peaceful and orderly way throughout. The demonstrations were as much as anything a demonstration against the requirement that authorisation should have been required in order to demonstrate in Parliament Square and/or in Whitehall.⁶⁹

As Alex Gask, the Legal Officer of Liberty, puts it: 'they certainly did nothing that could sensibly have been considered as any offence other than a breach of

⁶⁶ Legal proceedings against Brian Haw's Peace Camp remained regularly in the news. For example *The Times*, 18 March 2011 p. 4. This noted a pending appeal against an eviction order the day before. A BBC news online story in 2011 showed a similar legal battle to that at the High Court in 2002, 19 June 2011 (above) and many more. On eviction of the sympathiser 'Democracy Village' protesters see *Mayor of London v Hall and others* [2010] EWCA Civ 817, CA; BBC News online 'Parliament Square peace protesters are evicted' 20 July 2010; 'Parliament Square is now Camp Dustbowl' London *Evening Standard* 16 July 2010, and further below.

⁶⁷ Public Demonstrations (Repeals) Bill [HL], HL *Hansard* vol.688 col.1368, 26 January 2007. The Liberal Democrats were the second opposition party in the UK. This was supported by the Advisory Group on Campaigning and the Voluntary Sector chaired by Baroness Helena Kennedy QC: May 2007 report on campaigning and the voluntary sector, para.1.3.2. Available on People & Planet website, viewed at 15/04/2009, <<http://peopleandplanet.org/campaigns/papers/>>

⁶⁸ *Ibid* at col.1392

⁶⁹ *Blum v DPP* [2006] EWHC 3209 (Admin), para.11 (hearing their and two joined appeals).

SOCPA'.⁷⁰ Barbara Tucker was charged and convicted of carrying 'on a demonstration by himself'; she was arrested on Monday 19th December 2005, near Parliament carrying a banner saying 'I am not the Serious Organised Criminal'.⁷¹ These prosecutions rightly open up the law to ridicule.

Peace campaigners acting in support of Mr. Haw subsequently set up a 'peace camp' on Parliament Square in May 2010 which they called a 'Democracy Village'. They were finally evicted from the green after legal action by the Mayor of London, Boris Johnson. They lost a High Court case in June and were denied leave to appeal in July 2010. Mr Johnson said:

I am very, very pleased. The ethos of these kind of protesters is something I have great sympathy for, but this thing was doing too much damage to a World Heritage site. It was an unsustainable expense to the public purse and was becoming an eyesore.

Colin Barrow, leader of Westminster City Council, said:

We are delighted by this decision as we feel the hijacking of one of London's historic public spaces needs to be brought to an end. We all support peaceful protest, but it is completely unacceptable for parts of our city to be occupied and turned into no-go areas by vociferous minorities, however laudable their cause.⁷²

However, this legal ruling did not actually apply to Brian Haw himself and Barbara Tucker, the Court of Appeal batted the issue of proportionality of possession against them back to the High Court.

Apart from the legal cases and initial arrests there was limited coverage in the mainstream media of the scale of continued organised disobedience to the law.⁷³ Various blogs on the internet had kept close watch on the proposals and subsequently on their use.⁷⁴ 'Indymedia' published a timeline of SOCPA events (up

⁷⁰ Email to author 4 April 2008.

⁷¹ *Tucker v DPP* [2007] EWHC 3019 (Admin). Transcript available via Westlaw.

⁷² *Evening Standard* report, above. Similar debate raged about the Occupy protesters at St. Paul's Cathedral in 2011/12, noted below.

⁷³ One rare example is Henry Porter, 'Blair laid bare: the article that may get you arrested' *The Independent*, 29 June 2006.

⁷⁴ These included: <<http://www.repeal-socpa.info/>>; 'Liberty News' <<http://www.melonfarmers.co.uk/awbb06.htm>> (a libertarian site originally set up to monitor and oppose censorship of sex and violence); <<http://www.parliamentprotest.org.uk/>>; Indymedia timeline <<http://www.indymedia.org.uk/en/2006/12/358676.html>>; Mark Thomas 'Loan Mass Demos' <<http://www.markthomasinfo.com/demo/april212007.asp>>. Originally viewed 4/03/2008. The Mark Thomas page was not available at 28/09/2011 but the campaign was featured on BBC Radio 4 (broadcast 14 May 2007): <http://www.bbc.co.uk/radio4/comedy/markthomas.shtml> See also Radio4 29 March 2007.

to 15 May 2007). The nationally known radical comedian, Mark Thomas, organised 'Loan Mass Demos' to try to overburden the police covering Westminster with paperwork to show the strength of feeling about the ban (for example on 21 April 2007).⁷⁵ The 'Parliament Protest/Parliament Square' website listed statistics for arrests and demonstrations linked to this provision, with detailed information following a freedom of information request by Julian Todd, January 2007. The latter revealed 'over 3000 demonstrations notified to the police in 2007'.⁷⁶

These alternative media showed a concerted attempt to overturn the law which had become symbolic of the erosion of civil liberties in Britain. Between 1 August 2005 and December 2006 1,379 demonstrations took place with an authorisation; there were 15 convictions and one caution for taking part in an unauthorised demonstration in the designated area, one conviction for using a loudhailer in the designated area and one conviction for organising an unauthorised demonstration.⁷⁷ Obviously the power can be used in a way which is compliant with the HRA giving peaceful protesters the right to protest. This in itself shows the inherent conservatism of the Convention system that was developed 60 years ago. There is no good reason for most protesters being subject to the registration provisions, unless one believes that all gatherings should be subject to state sanction. The ECHR however, and therefore the HRA, will allow such interference because it is for a legitimate aim. Restrictions must be prescribed by law, they must be for a legitimate aim and they must be proportionate to the objective to be achieved. Whether restrictions are proportionate depends on the circumstances of each individual case and this gives the police and prosecuting authorities wide discretion. There are arguments in favour of controls to assist in effective deployment of police resources, to minimise disruption to the general public, business community, tourists, drivers, MPs and local authorities, but the rights of those who wish to preserve a negative approach to liberty in Britain are not protected by a Convention that allows exceptions in so wide a range of situations. The change in Prime Minister from Tony Blair to Gordon Brown led to signs of an improvement in the approach to law-making and civil rights. The evidence relating to freedom to protest will be considered next.

⁷⁵ These protesters could be noting words of the militant National Union of Mineworkers leader, Arthur Scargill, speaking in 1980: 'Parliament itself would not exist in its present form had people not defied the law.' Cited in *The Oxford Dictionary of Quotations* 4th ed. (1992).

⁷⁶ letter from Home Office, 4 February 2008.

⁷⁷ Lord Davidson, above, col.1391.

4 Reviewing Protest around Parliament

The consultation paper *Managing Protest around Parliament* followed the *Governance of Britain* Green Paper⁷⁸ in which the Government committed to consulting on the sections of SOCPA covering demonstrations near Parliament. This was one of the first Acts of the Gordon Brown Government in July 2007. The White Paper, *The Governance of Britain: Constitutional Renewal*,⁷⁹ followed the consultation in March 2008. It is apparent that this process was a genuine consultation where the Government and civil servants listened to submissions and proposed action that was consistent with the consultation response. This in itself was a significant change in emphasis from the way in which much legislation on criminal justice had been passed, from the CJPOA 1994 up to that point.⁸⁰

The *Analysis of Consultations* document reported clear rejection of the restrictions around Parliament. The Ministry of Justice press release was unequivocal that the Government had accepted the overwhelming sentiment expressed in the consultation exercise: 'The Home Secretary Jacqui Smith will remove the legal requirement to give notice of demonstrations around Parliament and obtain the authorisation of the Metropolitan Police Commissioner.'⁸¹ This was a fundamental change in attitude from previous Government announcements on criminal justice measures which often seemed to pursue stated policy with little regard to consultation or evidence.⁸²

4.1 Amending Public Order Law?

This section analyses the revisions that were suggested under the 2007/08 proposals. There were sensible suggestions in the consultation paper to revise the law about conditions on processions and assemblies that were overlooked because of the strength of feeling of respondents who supported repealing the restrictions and

⁷⁸ Cm 7170 (Green Paper), Cm 7235 October 2007 (Consultation Paper).

⁷⁹ Cm 7342-1.

⁸⁰ By the later part of the decade it was also noticeable that there was more public debate about policing and civil liberties. A high profile example was the 'Taking Liberties' exhibition at the British Library (31 October 2008 to 1 March 2009). A possible turning point for media consciousness was the award to Mark Wallinger of the Turner Prize (art) in 2007 for 'State Britain' a recreation of Brian Haw's protest camp.

⁸¹ 25 March 2008.

⁸² Discussed by Reid, in *Behaving Badly* pp.83-4, 93. Many historical parallels can also be found in Townshend *Making the Peace*. It is ironic that the historic Scottish National Party Government in Scotland decided to ignore the results of a consultation opposing police force centralising by announcing police centralisation as one of their first policies R. Bryan et. al., 'Research Support for a Consultation on the Future of Policing in Scotland' (21 June 2011) <http://www.scotland.gov.uk/Publications/2011/06/20115001/0>; also Scottish Government press release 'Single police and fire services' (8 September 2011). <http://www.scotland.gov.uk/News/Releases/2011/09/08142643>

did not consider the detailed suggestions for amendments to the scheme in Part II POA. Currently a greater range of restrictions can be imposed on processions than on a static demonstration.⁸³ Section 12 states that the senior police officer

may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.

Whereas under section 14 for assemblies:

directions may impose such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary.

The suggestion that the conditions that can be imposed on assemblies and marches should be harmonised (Consultation Paper question 2), subject to appropriate modifications, would give the police more flexibility in deciding the appropriate steps to take in a public order situation. Arguably the senior police officer should be given a greater degree of discretion to impose such conditions as are reasonable and proportionate in the circumstances, while promoting the right of freedom of assembly and association and the right of freedom of expression. Section 14 could simply be amended to be consistent with section 12, making it clear that the conditions imposed can include but are not limited to those listed. This would prevent the problem that arose in the High Court case of *DPP v Jones*⁸⁴ of the wrong type of condition being used. It would also reduce the need the police feel to rely on wide common law breach of the peace powers. To be HRA compliant it would be necessary to state that conditions should only be imposed for such time as reasonable, and to require regular review of the effect on both individuals and the demonstration as a whole.

⁸³ Conditions can apply if what Fenwick calls the triggers are met: the senior police officer present can impose conditions if he reasonably believes that a procession (or assembly) may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the organisers is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do. See Fenwick, *Human Rights and Civil Liberties* p.458.

⁸⁴ [2002] EWHC 110 (Admin). The police had purported to impose on an assembly conditions of a type which the court held would only be appropriate for a procession, so that those particular conditions were invalid. The police had been trying to control access to and exit from a demonstration at Huntingdon Life Sciences. I am grateful to one of the journal's referees for drawing my attention to this *Jones* case, and the point of law.

4.2 Parliament and noise nuisance

SOCPA gave the Commissioner little ability to add conditions on protesters that was not already covered by existing pre-2005 legal powers. However, there was ambiguity about noise nuisance, the SOCPA provisions specifically banned use of loudhailers around Westminster with limited exceptions not available to protesters.⁸⁵ Further thought is needed about unreasonable use of noise to disrupt the business of those working in and around Westminster on a more than temporary basis. If time-limited noise nuisance generally were to be penalised, this would remove politicians from the necessity of being able to deal with hecklers which should surely be one of their skills. This section was concerned with disruption by sustained use of loudhailers outside. The 2007 consultation considered whether there should be different provisions around Parliament than in other locations. Concerns about MPs not being obstructed and allowing the business of Parliament to proceed unhindered are both important.⁸⁶ This does not justify special regulations around Westminster. The same issues apply to every local council in the land; it would be a self-obsessed and out-of-touch local council that called in the police to resolve such matters.⁸⁷ That must surely apply to Parliament as well. It is noticeable however that noise nuisance was not covered by existing powers, except by possible inference under the Public Order Act powers. Even the breathtakingly broad section 54 para.14 of the Metropolitan Police Act 1839 appears to omit protests from its prohibitions; nor is there an equivalent provision for other areas in the eclectic section 28 Town Police Clauses Act 1847.⁸⁸ Clearly, while banning many other forms of nuisance and disturbance of the day, (today one might term it 'anti-social behaviour'), the Victorians were not as concerned about noise nuisance relating to demonstrations as some politicians are today.

There should not be a criminal offence for a person to use a loudspeaker near Parliament (with repeal of the 2005 Act provisions). Existing measures could be revised to make them more practicable for the situation. The Explanatory Notes to the Draft Constitutional Renewal Bill assert that 'the use of loudspeakers will continue

⁸⁵ The issue of noise is covered specifically in s.134(4)(f) and s.137 on use of loudspeakers in the designated area.

⁸⁶ Paras.3.2 and 3.3.

⁸⁷ As a former member of Liverpool City Council the author has argued against the police being called to deal with protesters who disrupted business in the Council chamber (both inside and outside of the Town Hall), for that reason.

⁸⁸ Readers unfamiliar with these wonderfully wide and colourful Victorian provisions should read them (one and two pages long respectively). The Acts still contain various provisions useful to the police. The remaining provisions of the Vagrancy Act 1824 cannot apply to protesters. Thanks to Barry Godfrey for discussing this point with me.

to be governed by section 62 of the Control of Pollution Act 1974 and section 8 of the Noise and Statutory Nuisance Act 1993.’

Section 62 ‘Noise in streets’ generally prohibits operation of a loudspeaker in a street between nine in the evening and eight the following morning (and for commercial purposes not relevant here).⁸⁹ SOCPA used the same wording relating to certain exceptions which include the proviso that the equipment ‘is so operated as not to give reasonable cause for annoyance to persons in the vicinity’. This wording could be incorporated into a condition that the police could impose on users of loudspeakers at processions and assemblies under the POA. Any such provision (in this case condition) should be subject to a warning before any escalation, and escalation thereafter should be initially by means of a fixed penalty under the Penalty Notice for Disorder (PND) scheme.⁹⁰ All of this would have to be interpreted in the context that demonstrations and processions are, by their very nature, usually noisy and intended to be so. This is a part of freedom of expression and association in the situation. Therefore, use of a loudspeaker or other equipment would only be unreasonable if unreasonable in the time-limited context of a demonstration. A higher requirement than ‘annoyance’ would better comply with freedom of expression. Alternatively, if it was felt that restriction was only needed near Parliament because of its unique status, this could be achieved by amending the Metropolitan Police Act 1839. This might cover actual disruption rather than simply annoyance. How this might be done is considered below. Officers would need a power to confiscate equipment if reasonable (also considered below).

Any controls here should be a lower tier penalty to avoid unnecessary punitive measures. Simon Hughes MP had questioned in November 2004 whether any penalty relating to loudhailers would be civil or criminal.⁹¹ In most cases a PND would be equivalent to a civil penalty.

Parliament is of course not a local council office. The 2007 consultation, Government ministers, opposing MPs and Lords have highlighted that it is correctly a focus for

⁸⁹ Section 8 and Sch.2 of the 1993 Act covers consent of local authorities to the operation of loudspeakers in streets or roads. Paras.214-216 of the commentary on the draft bill considers the ECHR implications of the provisions relating to noise.

⁹⁰ The recipient either pays the penalty (currently £50 at lower level), or requests a court hearing, within 21 days of issue. Payment of the penalty discharges their liability and involves no admission of guilt. The PND scheme was introduced under the Criminal Justice and Police Act 2001. See <<http://www.homeoffice.gov.uk/police/penalty-notice/>> viewed 9/09/2011.

⁹¹ above col.378.

protest by a wide range of people wanting to exercise their freedom of expression. The civil rights group, Liberty, does not consider that any additional powers are necessary for the enforcement of Sessional Orders.⁹² To reflect the special status of Parliament, the Sessional Orders should be revised so that they directly cover the area around Parliament only, and the language modernised so that it reflects the HRA era rather than that of the pre-Victorian age. A specific and limited legal provision relating to access to Parliament could be included in an amendment to the Metropolitan Police Act 1839, however, police powers relating to both obstruction of highways and obstruction of officers probably give them sufficient powers. This may not have been a significant issue before the modernisation of public order law 25 years ago. Card says that in London informal agreements usually worked prior to the Public Order Act 1986.⁹³ It is true that the ability to protest near to Parliament was more strictly controlled then. Some specific localised provisions were repealed by the POA which introduced a rational general system of controls with built in safeguards.⁹⁴ The POA was an improvement from restrictive old law and the Constitutional Renewal Bill should have restored the law to a more tolerant path. To give one recent example, protests by Tamil people from April to June 2009 in Parliament Square proved a major challenge for the police but were dealt with in a tolerant way and did not apparently disrupt the work of Parliament.⁹⁵ Any evidence that the specific wide ban was ever needed is lacking. Why then, three years and a change of Government later, was there no change?

Partly this was not the fault of the outgoing Gordon Brown Government, as the Government specifically asked for the view of Parliament about how best to implement the repeal and there was much debate about this. This included the rather ambiguous report of the Joint Committee on the Draft Constitutional Renewal Bill in July 2008 and the more direct Joint Committee on Human Rights report on policing

⁹² *Liberty's response to the Home Office Consultation: Managing Protest Around Parliament*, January 2008, para.35.

⁹³ Card, *Public Order: the New Law* para.4.5, he also gives details of bans on processions prior to 1986 at para.4.6.

⁹⁴ See POA 1986 Sch.3 repealing the Tumultuous Petitioning Act 1661; also Winterton, *Hansard* vol.426 col.398. Card's view was that the POA controls along with the power under the Metropolitan Police Act 1839 s.52 would be sufficient to prevent any disorder that might have been covered by the 1661 and 1817 Acts, para.1.13.

⁹⁵ See Home Affairs Committee: Evidence, Sir Paul Stephenson (Commissioner of the Metropolitan Police, answer to Q307 (Ev 35, 19 May 2009). The police estimated that the Tamil protests on this foreign policy issue cost nearly £8 million of which approximately £3.72 million was genuine additional policing costs. See also BBC News online 'Policing protest: Case studies of how forces perform' 25 November 2009 reviewing a HMIC report. <http://news.bbc.co.uk/1/hi/uk/8377531.stm> viewed 6/12/2011.

protest of March 2009.⁹⁶ The Government had reiterated that it was committed to repealing these provisions, albeit this was a year before they lost office.⁹⁷

5 What has the Coalition done?

Sixteen months after coming to power the Coalition Government repealed the SOCPA provisions in the Police Reform and Social Responsibility Act 2011 Part 3 (PRSA). This provides for more limited restrictions applying just to Parliament Square. There are still restrictions, but these are both qualitatively and geographically less than those under the last Government.⁹⁸ Trafalgar Square, Whitehall, and the Embankment are no longer included. This section will summarise the key provisions and evaluate how they compare to the suggestions made above to deal with the few real problems arising from the antiquated law that had been in place.

Section 141 repeals the SOCPA provisions and restores section 14 POA to govern public assemblies in the formerly designated area. The garden and adjoining pavements of Parliament Square are designated a controlled area.⁹⁹ Various activities are designated as 'prohibited activities' if carried out in the controlled area.¹⁰⁰ These include operating amplified noise equipment; erecting or keeping erected a tent or structure for 'facilitating sleeping or staying in place' and using any tent, etc; and placing or keeping or using in the controlled area any sleeping equipment for the purpose of sleeping overnight (including by another person).¹⁰¹

A constable or Greater London Authority (for central garden) or Westminster City Council (pavements) authorised officer may, if they have reasonable belief, direct a person to cease doing or not to start doing a prohibited activity.¹⁰² These are very

⁹⁶ HC Paper 551-I (2008) and HC 320-I *Demonstrating respect for rights? A human rights approach to policing protest* (2009) respectively.

⁹⁷ HL *Hansard* 16 March 2009 vol.709 answer by Lord West to question from Baroness Miller and to other questions at cols.1-4.

⁹⁸ In force 19 December 2011 Police Reform and Social Responsibility Act (Commencement No 2) Order 2011 (SI 2011/2834). A summary and critique of the key measures can be found at: <http://www.parliamentprotest.org.uk/> Police Reform and Social Responsibility Act 2011 Part 3, by 'Peaceful Demonstrator' 25 September 2011.

⁹⁹ Section 142.

¹⁰⁰ Section 143.

¹⁰¹ Section 143(2). Section 143(2)(b) covers: (i) any tent, or (ii) any other structure that is designed, or adapted, (solely or mainly) for the purpose of facilitating sleeping or staying in a place for any period.

¹⁰² Section 143(1) read with s.148. Constable does not appear to include CSOs which reduces CSOs' ability to assist in regulating this key central London location. The Court of

similar to the broad preventive powers in the Criminal Justice and Public Order Act provisions regarding aggravated trespass. Despite the detailed linguistic effort to cover all eventualities the wording of section 143 raises further questions. Is it an offence to put up a chair in Parliament Square? A chair is not necessarily sleeping equipment but may be used as such. Presumably putting up a chair is covered by the prohibition as it could facilitate staying in a place for any period. The Metropolitan Police and London and local government officials will need to use their powers against chair users in a way that does not discriminate against the elderly or disabled people or the young who want to protest and will be facilitated by a chair. The chair example illustrates why a blanket ban on any type of equipment may be unreasonable and impracticable. A further example: what if a protester brings a sleeping bag to keep warm at night or in winter? Section 143(2) makes clear that the restrictions on sleeping equipment are only to prevent sleeping overnight, so a constable should use common sense. The lack of any 'without authority' or 'without reasonable excuse' exception would prohibit a 'sleepover' demonstration by housing charity Shelter, or a student homeless campaign action, which surely unduly restricts their right to protest peacefully and graphically at the heart of power. There has been criticism in Summer 2011 of 'Westminster council ... plans to fine people who help the homeless in the area around Westminster cathedral piazza, in a move which campaigners say will effectively 'criminalise' rough sleepers in the area.'¹⁰³ There are strong views and reasoned arguments on both sides of the debate by charities, voluntary organisations and local representatives about the best ways to help rough sleepers. Not allowing 'sleep over' protests near the site on this or any other issue appears restrictive of a long-established form of demonstration or publicity stunt.¹⁰⁴ In contrast, a ban on tents at Olympic venues for the London Olympics of Summer 2012 appears more specific and reasonable; although it is doubtful that it should be a criminal law matter, and there was some (perhaps tongue-in-cheek) adverse

Appeal in *Gallastegui* [2013] EWCA Civ 28 (considered below) emphasises that the offence is failing to comply with a direction under s.143(8) rather than putting up a chair or tent *per se*.

¹⁰³ *Charity Choice NEWSLETTER*, Issue 5 (2011) p.3. See also email from Liberty, 10 June 2011. For comparison with the 1920s and 1930s see Stefan Slater 'Street Disorder in the Metropolis, 1905-39' *Law, Crime and History* 1(2012) 59 at 82-86 including several quotes that could apply today.

¹⁰⁴ Here are two examples. The author took part in a Shelter sleepover as part of a student campaign outside Bristol Council House and Cathedral in 1992. In 1995 young barrister and Parliamentary candidate, Russell Pyne, took part in a charity sleepover at Putney Bridge. Why should this be allowed in Bristol or at Putney in London but not at Westminster? In the Public Bill Committee James Brokenshire MP said the ban on tents was for security reasons. Public Bill Committee, 17th Sitting, HC Debs col. 613, 15 February 2011. See also the Home Secretary, Theresa May MP in the Second Reading debate at HC Debs vol.520, col.715, 13 December 2010.

comment from outdoors enthusiasts: 'Outdoors enthusiasts hoping to camp out between catching a few Olympics events around the country will have to think again.'¹⁰⁵

The provisions in the 2011 Act are understandably particularly concerned to prevent persons sleeping, and encampments occupying the Square. Despite criticism by supporters of Mr. Haw, this is a genuine issue and the restrictions would prevent both an eyesore (purely a subjective aesthetic but a nuisance nonetheless) and prevent any real or perceived undue favouritism to a particular group crowding out others.¹⁰⁶ One argument put forward for restrictions is that Mr. Haw's protest prevented other people protesting at that location.¹⁰⁷ This is a potential but hypothetical problem as no such issue appears to have arisen during the ten years of Brian Haw's protest.

Other restrictions introduced in the 2011 Act prohibit the use of loudhailers. This has been discussed above so comment will be made here on the efficacy of the actual provisions enacted. Section 143(2) prohibits 'operating any amplified noise equipment in the controlled area of Parliament Square'. Amplified noise equipment 'means any device that is designed or adapted for amplifying sound, including (but not limited to) loudspeakers, and loudhailers.' A blanket ban may be impracticable and unreasonable. For example, a steward on a march may walk onto Parliament Square to try to direct marchers who have by accident or deliberately strayed onto the Square in breach of a section 11 POA notice. The steward will be acting lawfully if they are on the road (I presume) but not if they are on the pavement or the grass. Again the Act is unduly restrictive in that there is no reasonable excuse provision.¹⁰⁸ It would have been better if the Act had prohibited unreasonable use rather than all

¹⁰⁵ 'Fear of protest camps leads to Olympic ban on tents and camping gear' Liz Roberts, article on outdoor activities website www.grough.co.uk; Home Office Press Release 'Tents banned from Olympic sites' both 25/01/2012.

¹⁰⁶ Gavin Brown points out that the 'Non-stop Against Apartheid' protest in Trafalgar Square from 1986-1990 by the City of London Anti-Apartheid Group had a banner outside the South African embassy continually, but a critical difference with Haw is no tents and no sleeping. Paper at SOLON 'Modern Activism' conference, Liverpool John Moores University, 28 June 2012.

¹⁰⁷ Viewed by author at 1 September 2008 a row of seven tents along the side of the pavement.

¹⁰⁸ There is a reasonable excuse defence for failure to comply with a direction, but not to enable a protester to establish that the direction or any restriction was unreasonable in the first place. This may appear a semantic distinction but it is very difficult in practice to prove the 'reasonable excuse' type defence in various POA, offensive weapons / knives, or other offences by asserting that your conduct is reasonable. Christopher Newman and Ben Middleton complain of lack of certainty in use of this type of defence, 'Any Excuse for Certainty: English Perspectives on the Defence of "Reasonable Excuse"' *Journal of Criminal Law* 74 (2010) 472-486. They discuss the examples of s.5 POA and s.58 Terrorism Act 2000.

use. Failing that, the legislation could still have been drawn up in a way that allowed reasonable exceptions rather than solely at the discretion of the police. Our steward would have to wait for a police officer or other authorised person to come and use a loudhailer instead (allowed under section 143(3)). In the author's experience at demonstrations it is often difficult even to hear official police announcements made through amplified noise equipment.¹⁰⁹ There is a procedure outlined under section 147 where the responsible authority can authorise a person to operate amplified noise equipment in Parliament Square. That includes a requirement that a fee may have to be paid, which restricts the right to protest. The section fails to include any statement that the authority must not unreasonably withhold permission (or alternatively must not withhold permission without good reason). It is a further failure in the legislation that the authority may withdraw an authorisation at any time without a requirement that this not be done unreasonably (in the sense of being disproportionate).¹¹⁰ Therefore the general duties of public authorities not to act unreasonably, and to behave in a rights compliant way under the HRA, must be relied upon rather than clear wording in legislation. The requirement that a public body was acting unreasonably is a high threshold for an applicant to prove. Instead of having a separate procedure for Parliament Square, it would be more effective if a notice requirement to the Metropolitan Police regarding the Square included on the same application form a request to use amplified equipment, either in general or for specified purposes such as stewarding. The notice of authorisation can permit a class of persons to use a type of equipment so this could authorise stewards on a march or at a demonstration to use loudhailers.¹¹¹

The enforcement and penalty provisions are also too wide and punitive. They must be considered with regard to police abuse of their powers against peaceful protesters, and in comparing the penalties for these peaceful breaches of regulations with those for low-level criminal offences. The first step in enforcing the Parliament Square restrictions is a direction by a police officer not to infringe the rules, rather than an automatic criminal offence. That is welcome. The next step is that '[a] person who fails without reasonable excuse to comply with a direction ... commits an offence'. The maximum penalty on conviction is a level 5 fine, i.e. £5,000. Parliament should have included here an intermediate stage that a person incurs a fixed penalty

¹⁰⁹ For example at the Cardiff Unite Against Fascism anti-English/Welsh Defence League demonstration, 5 June 2010.

¹¹⁰ Section 147(6).

¹¹¹ Section 147(5).

(a Penalty Notice for Disorder) first, instead of going straight from usually minor infringement to committing a criminal offence. That would be in line with the Law Commission recommendation that criminal offences should generally be imposed as a first resort only for serious matters, rather than for purely regulatory matters.¹¹² A PND can be an £50 (Lower Tier) or £80 (Upper Tier 'fine').

The maximum penalty here is completely disproportionate to the nature of the conduct and in comparison with other minor criminal offences. The standard scale of fines is from £200 to £5,000.¹¹³ The level of fine is the same as for intentional harassment (s.4A) or for causing fear or provocation of violence (s.4) under the POA. By contrast the section 5 harassment, alarm or distress offence carries a maximum sentence of a level 3 fine (£1,000). It is possible that the high fine level is because the offence involves disobeying a direction from a police officer. There could be similar reasoning for the increase in 2006 of the fine to level 5 from level 3 for the Road Traffic Act 1988 section 163: offence of failure to stop a vehicle when requested to do so by a constable in uniform.¹¹⁴ That offence is akin to obstructing the police, whereas this could be someone simply disagreeing with a police officer or other authorised person. The Parliament Protest blog gives another persuasive example:

a fine of up to £5000 simply for pitching a tent overnight - what is the justification for this excessive fine? This is far more than the £70 fixed penalty notice for, say, illegally parking a vehicle overnight on the highway around Parliament Square.¹¹⁵

The 'repeal-socpa' website highlights potential injustice:

What would effectively be on-the-spot injunctions could not be challenged, must be complied with immediately, can be long-standing and lead to a criminal conviction and a heavy fine if not complied with.¹¹⁶

If a PND were given, a person would have the right to reject it and challenge in court whether they have committed an offence. This Act provides no reasonableness defence to a person charged, but presumably, if they had an option to go to court on the substantive matter of their conduct (as opposed to disobeying a direction), they

¹¹² The Law Commission discuss this in the context of regulatory offences by business, but adopt the reasoning of Professor Andrew Ashworth talking about the general principles on which criminal law should be created. I argue that the same principles outlined by the law reform body should apply generally to the creation of criminal offences: Reid 'A Bonfire of the Criminal law' at pp.33-34.

¹¹³ Criminal Justice Act 1982 s.37 as amended by the Criminal Justice Act 1991, implemented by the Criminal Justice Act 1991 (Commencement No. 3) Order 1992 (S.I. 1992/333), art. 2(2), Sch.2.

¹¹⁴ Penalty increased by Road Safety Act 2006 s. 27 (level 3 if a bicycle).

¹¹⁵ <http://parliamentprotest.org.uk/> viewed at 28/09/2011.

¹¹⁶ <http://www.repeal-socpa.info/> viewed at 28/09/2011.

would still be able to argue that they should not be convicted. The lack of any reasonableness defence should render the provision disproportionate and in breach of article 10 of the ECHR. As highlighted in the quotation, a direction that a person cease doing or not start doing a prohibited activity can last for up to 90 days. The threshold that is included in section 144 before a direction can be given is far too low:

(5) The condition is that the person is operating, or is about to operate, the equipment in such a manner as to produce sound that other persons in or in the vicinity of the controlled area of Parliament Square can hear or are likely to be able to hear.

These provisions look very similar to ones in the CJPOA. However, this similarity is only superficial. The conduct covered by similar wording in the CJPOA, about aggravated trespass or trespassory assemblies, actually involves some real or imminent interference with other persons' rights. This writer submits that there should be actual nuisance before a direction can be given. Even if that is rejected as impracticable (given the difficulty of proof) then there should be proof required that persons could actually hear the sound from the equipment outside the prohibited area of the Square. If people working in Parliament could not actually hear the noise, what is the reason for prohibiting it? The former is preferable however. A test similar to that in section 5 POA could be used, there it only needs to be asserted by a police officer that a person was likely to be caused harassment, alarm or distress. This writer is critical of that over-broad offence, but it has been used as a template by successive Governments for a range of offences, for example regarding harassment. A similar test – that nuisance be likely, based on the objective opinion of a police constable – would be as workable as section 5.

The seizure of equipment used in breach of section 143 is allowed under section 145 'Power to seize property'. It can be retained for 28 days or until the end of court proceedings unless a court orders forfeiture. A 'prohibited item' is defined by reference to the list of prohibited activities in section 143(2). If not claimed, property can be disposed of after 90 days. While these provisions appear reasonable, it will depend on how they are used in practice by the police. Experience from policing of the 'Climate Camp' at Kingsnorth Power station in August 2008 is that powers of seizure under PACE were blatantly abused. That is largely about the culture of the police, but also about the law, their tactics at Kingsnorth did not respect the right to and the benefit of protest, or respect the law.

Unfortunately, despite the advice on training and tactics given to the police in both *Gillan*¹¹⁷ and *Laporte*, coordinated discriminatory and unlawful action has continued to be directed at protesters. The best example of this is, again, the policing of the Kingsnorth 'Climate Camp'. Legal advisors on behalf of many protesters prepared a challenge to the use of general police powers regarding stop and search in an unlawful way.¹¹⁸ A test case was won in June 2010. It is disgraceful that the abuse was not stopped at the time by senior officers or as soon as it was challenged by complainants. It is a further concern that, when clear evidence was presented of the law being broken seven months later, it took a further year and three months for the police to admit that they were in the wrong.¹¹⁹ From film evidence presented at the House of Commons in March 2009 it appears incontrovertible that routine police powers of stop and search as well as section 60 CJPOA were systematically used in an unlawful way.¹²⁰ Like an earlier police operation dealing with climate change protesters at Heathrow Airport, this involved large numbers of officers from many different police forces. Abuse was coordinated and deliberate.¹²¹ The Metropolitan Police have robustly defended their policing of protest generally. Acting Assistant Commissioner Chris Allison, giving evidence to the House of Lords and House of Commons Joint Committee on Human Rights, 25 November 2008 stated:

We have something in the region of 4,500 to 5,000 public order events in London in an average year and, as I say, in the last 12 to 14 years I can only think of two events where before the event occurred we ever contemplated putting any conditions on them whatsoever. Most of the time it has been resolved through dialogue with the organisers to the satisfaction of the organisers and then the satisfaction of others.¹²²

¹¹⁷ *R(o/a Gillan and Quinton) v Commissioner of Police of the Metropolis* [2006] UKHL 12 concerns the use of anti-terrorist stop and search powers against protesters, subsequently considered by the European Court of Human Rights.

¹¹⁸ Climate Camp legal team presentation, National Critical Lawyers Group Conference, Manchester Metropolitan University, 28 February 2009. Thanks also to Dr. Karen Atkinson for discussing these events with me, September 2008.

¹¹⁹ The police agreed they had acted unlawfully. They agreed to pay compensation to three claimants and apologised to 3,500 activists who had been stopped and searched. 'Police to compensate stop-and-search climate camp twins, 13' *London Evening Standard* <http://www.thisislondon.co.uk>; 'Climate campaigners win police payout' Kunal Dutta, *the Independent*, both Friday, 11 June 2010.

¹²⁰ Presented by David Howarth MP (Liberal Democrat Justice spokesperson) on 12 March 2009. Available at You Tube viewed 24/03/2009 <<http://www.youtube.com/watch?v=nooOAVs6U5o>>

¹²¹ For information about tactics at Heathrow see SCHNews Issue 675, 9 May 2009. 'CLIMATE OF FEAR AS COPS CLAMP DOWN ON CAMPERS' RIGHT TO PROTEST AT HEATHROW' <<http://www.schnews.org.uk/archive/news600.htm>> Published by the Justice Collective, Brighton, UK.

¹²² HC 320-II *Demonstrating respect for rights? A human rights approach to policing protest* Seventh Report of Session 2008-09, *Volume II Oral and Written Evidence*, (3 March 2009) p. 38. See also Sir Paul Stephenson and Commander Bob Broadhurst's evidence to the Home

The fact that the vast majority of protests pass off without any problem is commendable but does not remove the significant, if relatively infrequent, problem of excessive police interference at some protests. The police have particular difficulty with direct action and uncooperative protesters. Rush has observed

There is no doubt that members of the public have become more active in pressure politics and that they have also become more willing to engage in various forms of direct action.¹²³

For this article the concern is the police using common law or statutory powers unnecessarily in protest situations. This strikes at the heart of a free society; the use of innocuous seeming seizure powers needs to be systematically monitored. The same must apply to the courts in making banning orders under section 146 that can require the subject not to enter the controlled area of Parliament Square. This is phrased as a preventative order, to prevent a person 'from engaging in any prohibited activity in the controlled area of Parliament Square.' The court must be careful to ensure that any such ban is HRA compliant. This is a post-conviction power which makes it more restricted than some measures in the past. Over-wide pre-trial bail conditions were routinely used against anti-road, anti-fox-hunting and other environmental and social protesters in the recent past.¹²⁴ Bail conditions have continued to be controversial for their use against peaceful protesters, but usually in relation to pre-trial conditions.¹²⁵ Post-trial conditions have more legitimacy, but will require judges to use commonsense and not accept conditions being put forward which are unduly restrictive – preventing participation in protest without good reason. Section 146 does not provide any safeguards – it says only 'as the court considers appropriate'. Better legislative restriction would be narrower and more specific, for example, if it required a reasonable suspicion that the subject would subsequently engage again in a prohibited activity within the time period specified. This could be based on past history, for example, and lack of evidence of change, as with Bail Act tests.

Affairs Select Committee 19 May 2009 for their report on *Policing of the G20 Protests* HC 418, (29 June 2009). For example Commander Broadhurst at p.46.

¹²³ Michael Rush, *Parliament today* (Manchester University Press, 2005) p.266.

¹²⁴ See Reid, *Behaving Badly*, pp.86-7.

¹²⁵ Highlighted by Julian Huppert MP and others in a motion to the Liberal Democrat party conference, Spring 2012. Huppert is a member of the Joint Committee on Human Rights. I am grateful in particular to Gareth Epps, and also to Rodney Pinchen, Julian Huppert and Geoff Payne for discussing relevant points with me.

Of course the police must enforce the law against those who want to use violence or damage property. The concern is that the police, failing to distinguish law-abiding from law-breaking protesters, becomes the authority seeing non-conformity as disorder.¹²⁶ It is well-documented that the police have deliberately exaggerated the risk of violence at protests, presumably to frighten people from joining in.¹²⁷ Many similar issues to those raised by Haw's protest resurfaced at a similarly iconic site at the heart of the City of London shortly after PRSA was passed. The authorities were faced with challenges on a much larger scale during the Occupy protest at St. Paul's Cathedral throughout the Winter of 2011/12. Despite the ramshackle nature of the protest and camp, and initial bad publicity for the protesters, the meek inherited the site if not the Earth for some time following turmoil in Cathedral politics, the support of a Canon Chancellor and a former Archbishop of Canterbury, and supporters thwarted legal moves by the police and the City of London authorities.¹²⁸ Finally, no doubt informed as much by the Brian Haw saga as their own legal and tactical fumbblings, the authorities, by taking a measured and proportionate approach, won a High Court action for possession and the removal of the protest camp.¹²⁹ That is a positive contrast to the heavy-handed methods that had been used at Parliament (by Parliament and sometimes the police) and is hopefully indicative that authorities, police and courts will show commonsense in enforcing the new restrictions. This writer still argues, however, that better legislation could have been enacted and that the provisions should be amended.

¹²⁶ Michael Allen and Simon Cooper: 'Howard's Way - A Farewell to Freedom?' *Modern Law Review* 58 (1995) 364 at 378. There is also a balance to be struck between enforcing the law and freedom of speech. Some police and CPS decisions regarding public order offences interfere with genuine but offensive freedom of expression. Significant cases are considered by Sophie Turenne 'The Compatibility of Criminal Liability with Freedom of Expression' *Criminal Law Review* [2007] 866.

¹²⁷ See variously: letter from the founders of the National Council for Civil Liberties to the *Manchester Guardian*, 23 February 1934 (available on the Liberty website, 4/03/2009); *Austin* [2005] EWHC 480 paras.226-9 regarding May Day 2001; *Sunday Express* 1 March 2009 front page 'MI5 alert on bank riots'; 'Policing demonstrations: Grounds for protest' Editorial, *The Guardian*, 26 October 2009 <http://www.guardian.co.uk/commentisfree/2009/oct/26/police-powers-extreme>

¹²⁸ Sarah Wilson has considered the religious language of the reaction to the camp at St. Paul's and highlights that religious leaders have responded by using ethical messages to influence debate among the secular 'Occupy and Protest! Picketing St Pauls' Paper at SOLON 'Modern Activism' conference, 29 June 2012. See also Ruth Gledhill 'I can't stomach use of force so I quit, St Paul's cleric says' *The Times*, 28 October 2011, p.10.

¹²⁹ *City of London v Samede and Others* [2012] EWHC 34 (QB) 18 January 2012. Mr. Justice Lindblom noted: 'the contrast with the facts of Mr Haw's case in Parliament Square is striking.' (para.137). On the other hand the judge's acceptance that freedom of religion of prospective worshippers at St. Paul's was impinged (under Article 9) seems to set a pathetically low (non-existent?) level of effort being required to exercise your rights (para.162). Worshippers could simply have walked past the protesters. Subsequent cases in 2012 have followed this decision.

The last protest tent in Parliament Square was removed on 3 May 2012 following the failure of a challenge in the High Court.¹³⁰ The lawyers clearly took the wrong tactic in trying to challenge a clear statute prohibiting sleeping equipment on the basis of the test case of a protester camped out in a longstanding protest.¹³¹ If lawyers challenge the use of the rules in a particular limited situation in the future, preventing a chair or tent at a one-night protest for example, then they may be successful. The Act clearly sought to ban camping or sleeping in the Square and, this does not significantly restrict any right to protest *per se*, given that the provisions are for a legitimate aim; therefore there is no basis for a Human Rights Act challenge. A test case on a temporary use of a chair, for example, could invoke British law against age discrimination (potentially against the young or old), or disability discrimination, and combined with use of Article 10 or 11 could establish that the Act would discriminate and therefore disproportionately restrict the right to peaceful protest in a particular case. The Court of Appeal in *Gallastegui* does usefully establish that (in the court's view) an officer is given discretion by use of the word 'may' [may direct a person] in section 143(1) and therefore commonsense should prevail in actual use of the power. This might prevent the need for comedians and protesters to come up with novel ways of using tents and chairs to flout the new restrictions.

Conclusion

Repeal of the restrictions on protest around Parliament was finally implemented as promised by Labour and the Conservative/Liberal Democrat Governments. There is more to be done to improve the measures enacted. A practical solution is that Parliament should keep the Sessional Order but modernise the language – if thought

¹³⁰ Lawrence Conway, 'Final Parliament Square war protester's tent is removed by police after six-year vigil as High Court lifts injunction' *Daily Mail* online 3 May 2012.

¹³¹ *R(o/a Gallastegui) v Westminster City Council* [2012] EWHC 1123 (Admin). The *Independent* newspaper reported this rather sweepingly as 'Parliament Square anti-protest rules upheld at High Court' John Aston, Friday 27 April 2012. An injunction was removed by Thomas LJ, agreeing with Silber J. At the time of writing (5 July 2012) an appeal is pending that is very unlikely to succeed. On 30 Jan 2013 the Court of Appeal upheld the initial decision. *R(o/a Gallastegui) v Westminster City Council* [2013] EWCA Civ 28. This was the wrong case to use as a test case because there was no obvious breach on the facts. Some of the legal arguments put, including that s.143 did not provide discretion for a constable (see paras.14-16) and that a blanket ban on tents cannot be proportionate (para.32) could succeed in another case. Lord Dyson (MR) says that the 'statutory scheme is carefully drafted so as not to impose an absolute ban in all cases.' (para.44 and generally see paras.32-44. However, the Master of the Rolls states that any exception 'would only be in exceptional circumstances' and therefore this very limited exception could be challenged in a different test case, probably covering a short time period. (Dyson LJ at para.44; see also paras.22-23, and point emphasised again at para.45).

necessary add a specific new clause to section 54 paragraph 14 Metropolitan Police Act 1839 to cover obstruction of access to Parliament. This should include a requirement of a warning before an officer or CSO can take any further action. Escalation should then be by means of a fixed penalty with arrest only if necessary. Keeping the Sessional Order is suggested because Parliament is of particular significance in the life of our democracy and that should be recognised. Regarding use of loudspeakers, the above clause could include a specific provision covering use near Parliament. On receipt of a complaint, if a police officer or CSO reasonably believes that noise from a loudhailer is excessive and is persistently hindering the work of any person in Parliament, they may warn the user to reduce the volume. If the user does not do so within a reasonable time, the officer must tell them that they will be subject to a penalty notice and the equipment liable to confiscation. If the user still persists, then the officer or CSO can give a penalty notice for disorder and/or confiscate the equipment. The notice would initially be a civil matter unless not paid and the equipment should be returned by the police in a reasonable time after application in writing by the user and payment of an administrative fee.

More generally on the Public Order Act 1986, as suggested in the original consultation paper the conditions that can be imposed if reasonable and proportionate should be standardised for conditions and assemblies. Rather than an exhaustive list, the current lists should be regarded as examples and the senior police officer given discretion, always subject to protection of the right to peaceful protest and freedom of assembly and association, the application of the HRA and the rule of law in general. This should mean that the law for Parliament Square is the same as for anywhere else in England and Wales.

I described this state of affairs as a sorry tale and, ten years after the start of Brian Haw's protest, it still was. Possibly the end of the story is a hopeful one, of an out-of-touch and authoritarian Parliament that reviewed a mistake made, looked again at the impact of an unnecessary law on British liberties and the impression given to others, listened to public opinion through protests and held a genuine consultation taking the advice of its impartial civil servants: one small but significant victory for deliberative Government.¹³² The restrictions on protest around Parliament were

¹³² The Labour MP Vernon Coaker suggested in the Public Bill Committee that Parliament in trying to deal with an actual problem 'unintentionally' created the situation where people participating in 'a simple and effective protest' could be prosecuted, 17th Sitting, HC Debs col. 599-600, 15 February 2011. See also col.614.

described as symbolic. Just as symbolic is their repeal. It appears that one early promise of a less authoritarian style of Government under Gordon Brown was limited by MPs themselves. The 2010 student protests and 2011 riots caused great debate about policing: from MPs and Peers there should be a focus on how the police use their powers and people most effectively, rather than simply increasing their powers in response to each new demand, real or imagined. If MPs of the ruling party ignore the public – whether over the invasion of Iraq (Labour) or the scale and pace of public spending cuts (Conservative/Lib Dem) they should have to see and hear the protests, not use law to restrict them. If MPs both ignore protests and restrict them, this can only reduce respect for the Mother of Parliaments. The Coalition Government in 2010-11, ignoring huge protests against controversial flagship policies, is likely to disillusion supporters and opponents alike of the effectiveness of the political process, just as did Labour's invasion of Iraq a decade ago. The lack of even token compromise by the Coalition – rather than its tough stance – is a factor that could lead to more civil unrest. The policy commitment to civil liberties of both the Conservative (before the 2010 election) and Liberal Democrat parties, though, have been respected by its actions in the first year and a half in Government.

The 'repeal SOCPA' website has continued to express concern about the creation of 'a new criminal offence for "prohibited activities" in Parliament Square', sharing Liberty's concern that the measures are disproportionate.¹³³ The measures could have been enacted in a way that was clearly proportionate. As some of the restrictions are too wide, they need to be monitored by those concerned with civil liberties to ensure that they are not used by the police in an unreasonable way. The British courts enforcing the HRA, and the Strasbourg court, bound into a more conservative epoch characterised by the huge human rights issues of 60 years ago, have often not been responsive to the nuisance that must be tolerated to protect the right to protest. The Coalition Government are consulting on a plan to create a British Bill of Rights which Liberty opposes but, ironically, should more stoutly protect what are romantically called 'traditional British liberties'. Vigilance is needed by the courts, by Parliament, and by the public watching Parliament to ensure that this repeal genuinely heralds a new era of respect for civil liberties and the ability to protest in Britain.

¹³³ <http://www.repeal-socpa.info/> written prior to the measures being enacted; viewed 28/09/2011.