

Emergency Legislation in the United Kingdom

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Abstract

During emergencies including war, terrorism or other civil contingencies the executive needs additional, potentially extensive powers to curtail the liberty of citizens in order to safeguard the public. This article considers the extent to which Parliament in the United Kingdom has scrutinised emergency legislation since World War One and acted as a watchdog to safeguard the human rights of the population. It analyses the effectiveness of scrutiny by considering the methods used by Parliament to examine the relevant bills, including committee scrutiny and debate on the floor of the House of Commons and the House of Lords. It further considers how Parliament has scrutinised the executive's use of its delegated powers in such situations. The article concludes that, even taking into account the constraints on it, including lack of time and the power of the executive in the Westminster system, Parliament could act as a better safeguard for human rights in times of emergency.

In the British Parliamentary system one¹ of the roles of Parliament is to control the Executive by controlling and scrutinizing the legislation proposed by the Executive.² However, what happens to this scrutiny role when there is an emergency?

There is not only a power, but a duty³ on the state to protect its citizens from threats and ensure the safety and stability of the State. In order to do so, in an emergency the Executive may have to curtail the civil liberties of the subject⁴

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¹ MPs for example also serve constituents directly through surgeries, serve on departmental committees and may have their own particular areas of interest. D. Feldman, *Parliamentary Scrutiny of Legislation and Human Rights*, PL 323, at 324 (2002).

² S. King-Hall, Foreword to J. Eaves, *Emergency Powers and the Parliamentary Watchdog: Parliament and the Executive in Great Britain, 1939-1951* (1957), at 1.

³ Under the ECHR for example there is a duty on the State signatories to secure the rights in Part 1 of the Convention and as well as the State respecting these rights it arguably entails the State protecting citizens from threats to their security and freedom. Article 2 Council of Europe, (2003), Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13, Registry of the European Court of Human Rights <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> accessed on 15 August 2008; and C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* 13 (2002).

⁴ "The willingness of representative democracy to equip itself to fight against forces that would destroy it must entail an openness to the curtailment of civil liberties where this is judged essential

and may need to do so at great speed without the time to pass detailed legislation through Parliament. There is a 'fundamental dilemma' of how to balance scrutiny with freedom to allow the Executive to take necessary action.⁵

This article is completed in light of the consideration of the emergency legislation⁶ passed from World War One ('WW1') onwards. The article will set out the emergency legislation passed by Parliament and next it will consider the scrutiny procedures for all legislation. The scrutiny of the emergency legislation passed will be presented. This will include not only the initial primary scrutiny when the legislation was passed, but also procedures for reviewing this and scrutinizing delegated legislation. The scrutiny of emergency legislation will finally be analyzed in relation to the hypothesis and conclusions drawn from this.

Eaves states that the House of Commons attempted to act as a 'watchdog' over the Executive to control the Executive in an emergency.⁷ The hypothesis of this article is that through its scrutiny of legislation Parliament has acted as an effective watchdog over the legal powers of the Executive during emergency situations.

A. Literature Review

I. Emergency Powers

Two papers written during and following WW2 surveying wartime legislation and comparing the two World Wars have been very useful.⁸ A work by Eaves for the Hansard Society⁹ is one of the inspirations behind this article.

Professor Clive Walker¹⁰ has written widely on the subject of terrorism and law up to the present day.¹¹ In particular he has surveyed the legislation covering this area in the United Kingdom. Additionally, Professor David Bonner¹² has written two works¹³ that have been particularly useful. Many other academics

to survival." C. Gearty, *Rethinking Civil Liberties in a Counter-Terrorism World*, 2 EHRLR 111, at 114 (2007).

⁵ G. Morris, *The Emergency Powers Act 1920*, PL 317, at 317 (1979).

⁶ In this context 'emergency' does not signify that the legislation has been passed at speed, although this is often the case.

⁷ Eaves, *supra* note 2, at 14.

⁸ C. Carr, *Crisis Legislation in Britain*, 40(8) Columbia L. Rev. 1309 (1940); C. Cotter, *Emergency Detention in Wartime: The British Experience*, 6(2) Stan L. Rev. 238 (1954).

⁹ Eaves, *supra* note 2

¹⁰ Professor Clive Walker LL.B., Ph.D, Solicitor, University of Leeds. For an abstract his details and published work see <http://www.law.leeds.ac.uk/about/staff/walker.php> accessed on 2 August 2008.

¹¹ The article has drawn on a number of works by Professor Walker and specific works will be acknowledged through the text.

¹² Professor David Bonner LLB LLM, University of Leicester. For a university profile see <http://www.le.ac.uk/la/staff/db31.html> accessed on 2 August 2008.

¹³ D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game*

have written on terrorism legislation and these will be referred to in the article. The Reviews of Acts of Parliament dealing with terrorism¹⁴ and recommendations have also been useful.

An analysis of the Emergency Powers Act 1920 is given by Gillian Morris¹⁵ and Professor Bonner's written evidence to a Select Committee considering the Draft Civil Contingencies Bill 2004 ('CCB 2004'),¹⁶ provides a reference not only to the Civil Contingencies Bill, but also to the provisions of the Emergency Powers Act 1920 ('EPA 1920'). Professor Walker has produced a comprehensive guide to the Civil Contingencies Act 2004.¹⁷

II. Scrutiny of Legislation

Academic discussion of the scrutiny of legislation and its importance is focussed on three areas – scrutiny of the impact of legislation on Human Rights,¹⁸ scrutiny of delegated legislation¹⁹ and scrutiny of legislation²⁰ deriving from the European Union.²¹

Broadly the literature covers scrutiny of the Executive by the Courts,²² Parliament and other bodies.²³ The Hansard Society reports of 1993²⁴ and 2001²⁵ covering aspects of Parliamentary scrutiny have assisted in examining

Changed? (2007). D. Bonner, *Responding to Crises: Legislating Against Terrorism*, 122(Oct) LQR 602 (2006). These works and others by Professor Bonner will be referenced through the text.

¹⁴ These Reports include Lord Jellicoe, Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (1983), Cmnd 8803 HMSO, London; Viscount Colville, Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984 (1987), Cm. 264, HMSO, London; Lord Carlile, Report on the Operation in 2006 of The Terrorism Act 2000 (2007) Command 7133 <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/TA2000-review061.pdf?view=Binary> accessed on 1 July 2008.

¹⁵ Professor Gillian Morris, Matrix Chambers. G. Morris, *The Emergency Powers Act 1920*, PL 317 (1979).

¹⁶ D. Bonner, Memorandum of Evidence to the Joint Committee on the Civil Contingencies Bill (2003), available at Parliamentary Publications and Records <http://www.publications.Parliament.uk/pa/jt200203/jtselect/jtdcc/184/184we03.htm> accessed on 1 August 2008.

¹⁷ C. Walker, *Civil Contingencies Act 2004 Risk, Resilience and the Law in the United Kingdom*, (2006).

¹⁸ For example see Feldman, *supra* note 1.

¹⁹ E.g., P. Wallington and J. D. Hayhurst, *The Parliamentary Scrutiny of Delegated Legislation* (1988), at 547.

²⁰ Which is often delegated legislation.

²¹ E.g., L. Clapinska, *Post-Legislative Scrutiny of Legislation Derived from the European Union*, 9 EJLR 343 (2007). Lord Hope, *What a Second Chamber Can Do for Legislative Scrutiny*, 24(1) Stat L Rev. 3 (2004).

²² For example Lord Irvine, *The Impact of the Human Right Act: Parliament. The Courts and the Executive*, PL 308 (2003).

²³ Such as the Parliamentary Ombudsmen – see Law Commission, *Post-Legislative Scrutiny* (2006), CM 6945, at 33 para 3.63 (2006), available at <http://www.lawcom.gov.uk/docs/lc302.pdf> accessed on 26 August 2008.

²⁴ Hansard Society Commission on the Legislative Process, *Making the Law* (1993).

²⁵ Hansard Society Commission on Parliamentary Scrutiny, *Report: The Challenge for Parliament: Making Government Accountable* (2001).

Parliament's role. A range of academics have written on the subject, particularly human rights and it is not possible to single out any as particularly influential in this article.

Further issues that are currently the subject of debate are pre-legislative and post-legislative scrutiny of legislation. Kennon²⁶ looks at pre-legislative, while Clapinska²⁷ addresses both types of scrutiny from a European perspective.

B. Methodology

Emergency legislation²⁸ is an interesting case study because although the enabling provision is usually much wider than for other legislation, the procedure for passing the initial primary legislation is the same. Although there are no special procedures this legislation is often passed at speed, shortening the Parliamentary stages (and the time for scrutiny) considerably. The field of emergency legislation is a broad one covering, for example, wartime legislation concerning deployment of the armed forces and statutory requirements for emergency planning and procedure.²⁹ This article will focus on emergency legislation affecting the civilian population in England.³⁰ This type of emergency legislation has been selected as the powers are often extensive and have the potential to affect human rights significantly.³¹

Emergency legislation is often passed in an atmosphere of tension, when the country perceives itself to be threatened and there is a patriotic fervour about combating that threat.³² At the most extreme this can lead to a coalition with no formal opposition.³³

Again there are no special procedures for the passing of delegated legislation.

²⁶ A. Kennon, *Pre-legislative Scrutiny of Draft Bills*, PL 477 (2004).

²⁷ Clapinska, *supra* note 21.

²⁸ Within this article 'emergency legislation' means legislation dealing with emergency situations. It does not signify that the legislation has been passed at a greater speed than other legislation. Where the speed is relevant this will be indicated.

²⁹ See for example Part 1 of the Civil Contingencies Act 2004 ('CCA 2004').

³⁰ This article will consider the position specifically in England. The Westminster Parliament has passed legislation extending to a range of jurisdictions. For example much of the legislation dealing with war extend to the whole of the United Kingdom, some of the terrorism legislation refer to "Great Britain". Although the Civil Contingencies Bill 2004 extends to England and Wales, Scotland and Northern Ireland, the provisions for delegated legislation vary over these jurisdictions. Additionally separate legislation was passed in Northern Ireland to deal with the violence there, which would require detailed analysis which is not possible here.

³¹ Allen describes emergency regulations in WW2 as 'drastic' and Walker describes the powers in Part 2 of the Civil Contingencies Act 2004 as 'of awesome scope'. C. Allen, *Law and Orders. An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law* 53 (2006); Walker, *supra* note 17, at 153.

³² Lord Scarman, *English Law – The New Dimension* (1974), at 14, *cited in* C. Walker, *The Prevention of Terrorism in British Law* 33 (1992).

³³ Eaves, *supra* note 2, at 21.

However, emergency delegated legislation is exceptional because, due to the emergency, the Executive will need a wider range of powers. This may be accepted by the citizen.³⁴ However, any widespread delegation of powers still holds the danger of abuse.³⁵

'Emergency legislation' does not necessarily indicate that legislation has been passed at speed³⁶ although this can be the case.³⁷ Additionally in certain circumstances although the legislation may be passed in Parliament over just a few days, it may have been subject to extensive prior planning in government.³⁸

I. Measuring the Effectiveness of Scrutiny

The effectiveness of Parliament as a watchdog can be measured in a number of ways and these will be set out below.

A purely technical approach could be adopted – how many amendments there are to a bill during its passage through Parliament.³⁹ However, the political make-up of Parliament, with the government normally having a large majority, means that this is not necessarily a good indicator,⁴⁰ and these statistics will not be provided here. The type of amendments passed *is* important – are the amendments made just technical amendments about the drafting of a clause or about the substance of the provision?

Feldman⁴¹ suggests that in relation to committees the effectiveness of scrutiny is the esteem in which it is held and the influence it has on individual members of each House and departments of government.

If the government wanted to pass the legislation with urgency did Parliament actively decide whether this was appropriate? If it was passed at speed how much scrutiny was afforded to the legislation?

Scrutiny of an Act and any delegated legislation made under it will depend on the provisions made in the bill for post-legislative scrutiny and the details of the enabling provisions. Has Parliament ensured that it has the necessary powers to scrutinise the Act and any regulations?⁴²

³⁴ Allen, *supra* note 31, at 42 regarding World War One.

³⁵ I. Jennings, *The Report on Ministers' Powers*, 10(4) Pub. Admin. 333, at 335 (1932).

³⁶ The Civil Contingencies Bill was subject to widespread consultation, *see* Walker, *supra* note 17, at 50, para 2.43.

³⁷ *See for example* the Defence of the Realm Act 1914 which was passed 'at lightening speed'. D. Foxton, *R v. Halliday (ex parte Zadig) in Retrospect*, 119(Jul) LQR 455, at 462 (2003).

³⁸ As regards World War Two legislation *see* C. Cotter, *Constitutionalizing Emergency Powers: The British Experience*, 5 Stan L. Rev. 382 (1952-1953).

³⁹ There may after all just be one, crucial amendment.

⁴⁰ E. Page, *Governing by Numbers Delegated Legislation and Everyday Policy Making* 172 (2001).

⁴¹ Feldman, *supra* note 1, at 347.

⁴² Wallington and Hayhurst regard the roles of Parliament as "a systematic check on a government's legislative ambitions and Executive power," including the scrutiny of delegated legislation, relevant to this and the next criterion for effectiveness, Wallington & Hayhurst, *supra* note 19, at 573.

Has Parliament reserved the most draconian powers for itself, so that they will be debated prior to taking effect rather than made through delegated legislation and scrutinized subsequently? Has it protected⁴³ the human rights of citizens?⁴⁴

In order to assess scrutiny that is available to Parliament, consideration will be given to alternative scrutiny that Parliament could have adopted, but has not.⁴⁵

Finally, the reasons for any perceived deficiencies in scrutiny will be briefly set out and some conclusions drawn from this.

C. Emergency Legislation

Below is a general overview of the legislation in England that will form the basis of the consideration of parliamentary scrutiny in this article.⁴⁶

I. Emergency

‘Emergency’ can cover a number of circumstances including war, international or domestic terrorism, natural disasters, severe strike action and financial or economic crises.⁴⁷

Legislative definitions of ‘emergency’ are relevant in particular to civil contingencies legislation.⁴⁸ The definition of ‘emergency’ will affect the circumstances in which regulations can be made and the extent of such restrictions. It has been controversial in the most recent civil contingencies legislation as will be seen below in discussion of scrutiny of the Bill.⁴⁹

⁴³ Insofar as this is possible while responding to an emergency.

⁴⁴ In relation to legislation post the Human Rights Act 1998 Feldman states “Parliament may legislate in such a way, [incompatibly with the rights under the ECHR] but has a heavy responsibility to ensure that it does not do so lightly, or for inadequate reasons, or inadvertently.” Feldman, *supra* note 1, at 324.

⁴⁵ The measures here will be things that were open to Parliament, but which it did not adopt, rather than a survey of other jurisdictions, as such a wider survey would entail evaluating the effectiveness of such measures in the context of their legal system.

⁴⁶ It is not possible to present a completely comprehensive list of legislation that currently or previously covers emergencies as many statutes contain some provisions of an emergency nature and a general overview is provided here.

⁴⁷ K. Ewing, *The Political Constitution of Emergency Powers: a Comment*, 3(4) Int. J.L.C 313 (2007)..

⁴⁸ The existence of an ‘emergency’ allows a proclamation under s1 of the Emergency Powers Act 1920 and once there is an emergency regulations can be made under s20 of the Civil Contingencies Act 2004.

⁴⁹ The Civil Contingencies Bill 2004, *see below*.

II. War

Under common law a war only exists in Great Britain if the Crown declares war or at the commencement of hostilities. However, since 1945 there has been a reliance on international law rather than a formal declaration of war.⁵⁰ Thus there is no legislation to declare war.⁵¹

Initially restrictions on the population during wartime or for the defence of the realm were the royal prerogative, exercised directly through the monarch. Subsequently Parliament passed Acts of Parliament giving power to the Executive to pass laws in time of emergency or for defence of the realm.⁵²

There were many Acts⁵³ passed directly in relation to each of the World Wars and it is impossible to consider them all within the scope of this article. Therefore the legislation set out below is that which provided the main emergency powers.

In WW1 the initial powers of war were issued through a proclamation under the King's prerogative powers.⁵⁴ The government then sought parliamentary approval through the Defence of the Realm Act 1914. ('DORA') This contained only one substantive section delegating wide power to His Majesty to be made by Orders in Council.⁵⁵ These regulations were to be made "for securing the public safety and the defence of the realm."⁵⁶ A Consolidation Act later in 1914 provided details of the powers setting out the extent of powers to make offences by regulations under the Act and the procedure in such cases.⁵⁷

In World War Two ('WW2') the main pieces of legislation relevant to this article are the Emergency Powers (Defence) Act 1939 ('the EP(D)A 1939') and the Emergency Powers (Defence) (No. 2) Act 1940 which provided the source for regulations.⁵⁸ The 1939 Act was passed prior to hostilities commencing although

⁵⁰ Halsburys Laws, *War and Armed Conflict – 2 War and Neutrality*, Volume 49(1) Reissue, (2005), at para. 406 Existence and Non-Existence of a State of War.

⁵¹ The House of Lords Constitution Committee considered changing this, however, the government decided not to do so. Secretary of State for Constitutional Affairs and Lord Chancellor, *Government Response to the House of Lords Constitution Committee's Report Fifteenth Report of Session 2005-06: Waging War: Parliament's Role and Responsibility*, Cm 6923, at para. 4 (2006), available at <http://www.official-documents.gov.uk/document/cm69/6923/6923.pdf> accessed on 28 August 2008.

⁵² Eaves, *supra* note 2, at 5. Indeed the power to amend primary legislation with delegated legislation, 'Henry VIII power' goes back to the extremely wide powers provided to the monarch and the Executive in the Statute of Proclamations 1539. P. Craig, *Administrative Law* 368 (2003).

⁵³ For example a brief survey of Acts passed in 1914 discloses *inter alia* the Customs (Exportation Prohibition) Act, 1914; the Intoxicating Liquor (Temporary Restriction) Act, 1914; and the Unreasonable Withholding of Food Supplies Act, 1914.

⁵⁴ Cotter, *supra* note 58, at 382.

⁵⁵ DORA 1914, s1 Defence of the Realm Act 1914 (repealed) (as enacted). In effect this delegation was to the government.

⁵⁶ *Id.* DORA 1914, s1. Such Regulations were made throughout the currency of the war.

⁵⁷ Defence of the Realm (Consolidation) Act 1914 ('DOR(C)A 1914') (repealed) (as enacted).

⁵⁸ As with DORA the delegation was to His Majesty and regulations were made by Order in Council: s1 Emergency Powers (Defence) Act 1939 ('EP(D)A 1939') (repealed) (as enacted); and s1 Emergency Powers (Defence) (No. 2) Act, 1940 (repealed) (as enacted).

it was passed with speed. The powers were wide ranging and the scope to use them was equally so.⁵⁹

The Emergency Powers (Defence) (No. 2) Act, 1940⁶⁰ made provision for the imposition of special courts if the country was in a state of “recent or immediately apprehended enemy action.”

Commentators note that in both World Wars the population generally accepted the breadth of the delegated powers as these were considered necessary in the face of the prevailing circumstances.⁶¹

In addition to the statutes directly concerning particular conflicts there are many ‘normal’ Acts containing provisions that could be used in time of emergency. This may be explicitly stated in the Act or it merely allow for particular provisions to be repealed or set aside.⁶²

Although the United Kingdom has been involved in a number of conflicts since WW2 there has not been a formal declaration of war since 1939. However, some legislation dealing with civilians in wartime in this country still exists.⁶³

III. Terrorism Legislation

The most complex emergency legislation in Great Britain is that dealing with terrorism. Great Britain has combated a number of violent groups. Walker⁶⁴ describes four classes of terrorism – Irish terrorism, other nationalist terrorism,⁶⁵ other terrorism originating in Britain⁶⁶ and international terrorism.

The meaning of ‘terrorism’ is a matter for debate.⁶⁷ This article will not add to this academic discussion, nor endorse one particular viewpoint. It will consider the definition and meaning of ‘terrorism’ as defined in British legislation. It will

⁵⁹ Section 1 EP(D)A 1939: “... such Regulations ... as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.” Emergency Powers (Defence) Act 1939 (repealed) (as enacted). Regulations covered *inter alia* employment, trade, supplies and internal trading: Halsburys Laws *War and Armed Conflict – 4 Wartime Emergency Legislation*, 49(1) Reissue, (2005), at para. 506

⁶⁰ Section 1 Emergency Powers (Defence) (No. 2) Act, 1940, *supra* note 58.

⁶¹ “... for the most part, Englishman put up with DORA in the same way that they might put up with a meddlesome, over-bearing nurse whose presence, although distasteful, was necessary to the patient’s surviving his illness.” Eaves, *supra* note 2, at 9. Re WW2 see Allen, *supra* note 31, at 53.

⁶² E.g., pursuant to s1 of the Aerial Navigation Act, the Secretary of State could by Order prohibit aircraft flying “for the purpose of protecting the public from danger.” Aerial Navigation Act 1911 (as enacted) and the Bank Holidays Act 1871, ss 4 and 5 which provide respectively a power by Order in Council to declare that a particular day should or should not be a Bank Holiday. Bank Holidays Act 1871 (repealed). Cotter, *supra* note 58, at 384, n 9.

⁶³ See for example the Trading with the Enemy Act 1939.

⁶⁴ Walker, *supra* note 17, at 17-24.

⁶⁵ Smaller scale terrorism in Wales and Scotland, Walker, *supra* note 32, at 20.

⁶⁶ Such as animal liberationists, Walker, *supra* note 32, at 21.

⁶⁷ See for example C. Walker, *The Legal Definition of Terrorism in the United Kingdom and Beyond*, PL 331 (2007) and G. Fletcher, *The Indefinable Concept of Terrorism*, 4 JICJ 894 (2006).

only focus on any dispute in the meaning or definition of the term if this was a matter raised during scrutiny or academic discussion of particular pieces of legislation.

Following the activities of Irish terrorists on the mainland of Great Britain the Prevention of Violence (Temporary Provisions) Act 1939 was passed.⁶⁸ This introduced powers for the Executive to expel certain British citizens on reasonable suspicion of involvement in violence.⁶⁹ At this stage the violence on the mainland subsided.

1. The 1970s – 1990s

There was a rise in violence in Northern Ireland and in Great Britain in the 1970s. Through the 1970s and 1980s violent incidents in Great Britain continued, leading, as set out below, to the continuation of primary legislation dealing specifically with Northern Ireland. However, the United Kingdom also faced acts of terror from other domestic groups⁷⁰ and international sources.⁷¹

Following the Birmingham pub bombings the Prevention of Terrorism (Temporary Provisions) Act 1974 ('PTA 1974') was passed.⁷² Although the legislation was passed at speed Walker notes that the Home Office had been drafting legislation due to other incidents and that it was based on other pieces of legislation.⁷³ The PTA 1974 only related to Irish terrorism. It introduced "proscribed organisations"⁷⁴ and "exclusion orders"⁷⁵ and offences relating to them. The PTA 1974 was subject to a six month sunset clause, renewable by an Order of the Secretary of State.⁷⁶ It was renewed twice in 1975 by Order.⁷⁷

The PTA 1974 Act was replaced by the Prevention of Terrorism (Temporary Provisions) Act 1976 ('PTA 1976').⁷⁸ This legislation extended powers to exclude

⁶⁸ For a brief history of the conflict regarding Northern Ireland see J. Loughlin, *The Ulster Question since 1945* (1998), the introduction provides history from before 1945, at 1-21.

⁶⁹ S4(1) Prevention of Violence (Temporary Provisions) Act 1939 (repealed) (as enacted). For a history of the passing of the bill and details of its provisions see O. Lomas, *The Executive and Anti-Terrorist Legislation of 1939*, 16 PL (1980).

⁷⁰ Including Scottish and Welsh nationalist terrorism, Walker, *supra* note 32, at 20-21.

⁷¹ Walker cites terrorism originating in Iraq, Iran, Libya and Syria. Walker, *supra* note 32, at 23. A notable incident was the terrorist attack on Pan-Am Flight 103 which crashed over Lockerbie on 21 December 1988 causing 270 deaths. See BBC, *On This Day – 1988: Jumbo Jet Crashes onto Lockerbie*, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/december/21/newsid_2539000/2539447.stm, accessed on 31 August 2008.

⁷² Walker, *supra* note 32, at 31; Prevention of Terrorism (Temporary Provisions) Act 1974 ('PTA 1974') (repealed) (as enacted).

⁷³ Walker, *supra* note 32, at 31-32. The precursors to the Act were in particular the Prevention of Violence (Temporary Provisions) Act 1939 and the Northern Ireland (Emergency Provisions) Act 1973.

⁷⁴ Part 1 PTA 1974, *supra* note 72.

⁷⁵ *Id.*, Part 2 PTA 1974.

⁷⁶ *Id.*, s2 PTA 1974.

⁷⁷ SI 1975/874 (repealed) and SI 1975/1955.

⁷⁸ Prevention of Terrorism (Temporary Provisions) Act 1976 ("the PTA 1976") (repealed) (as enacted).

persons⁷⁹ and added certain safeguards for those that might be excluded.⁸⁰ This legislation remained in place until 1984.

Following a review of the working of the PTA 1976⁸¹ the Prevention of Terrorism (Temporary Provisions) Act 1984 ('the PTA 1984') was enacted, which extended certain provisions to cover international terrorism.⁸²

Lord Colville reviewed the working of the PTA 1984⁸³ and subsequently the Prevention of Terrorism (Temporary Provisions) Act 1989 ('the PTA 1989') was passed. It contained many of the aspects of the previous Acts with minor amendments.⁸⁴

2. Terrorism Legislation 2000 to 2008

In the context of the Northern Ireland peace process the Terrorism Act 2000 ('TA 2000')⁸⁵ was passed repealing the PTA 1989. It is a comprehensive statute⁸⁶ covering the majority of provisions on terrorism and subsequent legislation builds on it.⁸⁷

The Anti-Terrorism, Crime and Security Act 2001 ('ATCSA 2001')⁸⁸ was passed at speed in the aftermath of the terrorist attacks of 11 September 2001 in the USA.⁸⁹ It was passed within months of the attack, in the context of the then Prime Minister declaring the dangers of inaction.⁹⁰

⁷⁹ *Id.*, S5 PTA 1976.

⁸⁰ *Id.*, ss3 and 7 PTA 1976.

⁸¹ Lord Jellicoe, *supra* note 14.

⁸² S12(3)(b) Prevention of Terrorism (Temporary Provisions) Act 1984 ('PTA 1989') (repealed) (as enacted).

⁸³ Viscount Colville, *supra* note 14.

⁸⁴ For a detailed account of the PTA 1989 and its provisions see D. Bonner, *Combating Terrorism in the 1990s: The Role of the Prevention of Terrorism (Temporary Provisions) Act 1989*, P.L.(Aut.) 440 (1989) and Walker, *supra* note 32.

⁸⁵ Terrorism Act 2000 ('TA 2000'), *supra* note 35

⁸⁶ C. Walker, *Clamping Down on Terrorism in the United Kingdom*, 4(5) JICJ 1137 (2006).

⁸⁷ For example the definition of 'terrorism' in the ACTSA 2001 is that in the TA 2000. A. Tomkins, *Legislating Against Terror: The Anti-Terror, Crime and Security Act 2001*, PL (Sum) 205, particularly at 211 (2002).

⁸⁸ Much of the academic opinion on this Act is made through consideration of its effect on Human Rights or democracy. For example Fenwick, *supra* note 1 The explanatory notes provide a neutral account of the provisions in the Act, see Explanatory Notes to Anti-Terrorism, Crime and Security Act 2001, available at http://www.opsi.gov.uk/acts/acts2001/en/ukpgaen_20010024_en_1 accessed on 30 July 2008.

⁸⁹ There are multiple accounts of the background and reasons for the 11 September 2001 attacks. For an account of the details of the events on this day, see The 9/11 Commission Report, Ch. 9, available at http://govinfo.library.unt.edu/911/report/911Report_Ch9.pdf accessed on 30 July 2008.

⁹⁰ "Whatever the dangers of the action we take, the dangers of inaction are far, far greater ... laws will be changed, not to deny basic liberties but to prevent their abuse and protect the most basic liberty of all: freedom from terror." T. Blair, *Speech to Labour Party Conference: Part 2*, The Guardian, 2 October 2001, available at <http://www.guardian.co.uk/politics/2001/oct/02/labourconference.labour6> accessed on 15 July 2008.

ATCSA 2001 covers a wide range of measures,⁹¹ with the most controversial⁹² in Part IV regarding detention of foreign nationals.⁹³ The Secretary of State could make an Order in relation to an individual⁹⁴ who could then be detained indefinitely without trial.⁹⁵

In further measures in 2003⁹⁶ the pre-trial detention period for individuals suspected of terrorism was increased from 7 to 14 days. The government attempted to increase this to 90 days in the Terrorism Bill 2005 (passed as the Terrorism Act 2006) This was, however, defeated,⁹⁷ although the pre-trial detention was further increased to 28 days.⁹⁸

Following a declaration of incompatibility under the Human Rights Act 1998 in *A v Secretary of State for the Home Department the House of Lords*⁹⁹ of the provisions in Part 4 ATCSA 2001 detention without trial of foreign nationals 'control orders' were introduced.¹⁰⁰ In accordance with the provisions of the PTA 2005¹⁰¹ individuals may be made subject to, *inter alia*,¹⁰² strict controls on their movement and communications. The PTA 2005 provides¹⁰³ for two types of

⁹¹ These included *inter alia* provisions on terrorist finances (Parts 1-3), racial hatred (Part 5) and Weapons of Mass Destruction (Parts 6-8), ATCSA 2001, *supra* note 88.

⁹² See for example Tomkins, *supra* note 87, particularly at 212-214.

⁹³ Pt 4, ATCSA 2001 (as enacted).

⁹⁴ On the basis that a foreign national posed a risk to national security and was a suspected terrorist, s21 ATCSA 2001 (as enacted).

⁹⁵ S23(1) ATCSA 2001. These provisions led the UK Government to enter a derogation from the European Convention on Human Rights ('ECHR').

⁹⁶ Criminal Justice Act 2003, s306 amending TA 2000 Schedule 8 II section 36.

⁹⁷ Government amendment 55 to the Terrorism Bill 2005 made the provision an amendment to the Terrorism Act 2000 for 90 day pre-charge detention. This was defeated on 9 November 2005. House of Commons Hansard (2005), Vol. 439, Column 377-8, 9 November 2008 <http://www.parliament.the-stationery-office.com/pa/cm200708/cmhansrd/cm081013/debtext/81013-0016.htm#08101334000001> accessed on 22 November 2008.

⁹⁸ Terrorism Act 2006, s23 amending the Terrorism Act 2000 Schedule 8 II section 36. The government initially sought a 90-day detention. David Davis MP "... a 90-day detention is the equivalent of a six-month jail sentence, and the risks include not only an affront to justice, but a public backlash, in which case legislators' mistakes will become recruiting sergeants for terrorists. ... serious consequences for our national security and our civil liberties if we get the balance wrong." Debate 9 Nov 2005: Column 347 Hansard <http://www.publications.Parliament.uk/pa/cm200506/cmhansrd/vo051109/debtext/51109-16.htm> accessed on 30 July 2008. Terrorism Act 2006 ('TA 2006').

⁹⁹ *A v Secretary of State for the Home Department* [2006] 2 A.C. 221. For an analysis of the case at the time of the decision see A. Tomkins, *Readings of A v Secretary of State for the Home Department*, PL (Sum) 259 (2005).

¹⁰⁰ Prevention of Terrorism Act 2005 ('PTA 2005'). For a description of the structure of the control orders and differences between derogating and non-derogating orders see C. Walker, *Keeping Control of Terrorists without losing Control of Constitutionalism*, 59 Stan. L. Rev. 1395 (2007).

¹⁰¹ *Id.*, Section 1 PTA 2005.

¹⁰² *Id.* There is a detailed list of possible conditions of control orders in s1(4) 1 PTA 2005.

¹⁰³ *Id.* Ss 2 and 4 PTA 2005 *supra* note 100

control order, derogating¹⁰⁴ and non-derogating. Non derogating orders can be made by the Secretary of State, However, the Court must make derogating orders. (s1(2) PTA 2005)

A further Act in 2006¹⁰⁵ introduced a range of measures relating, *inter alia*, to distribution of terrorist publications, preparation of terrorist acts and training associated with terrorism.¹⁰⁶

There is currently a counter terrorism bill before Parliament.¹⁰⁷ The Joint Committee on Human Rights¹⁰⁸ and the Home Affairs Committee¹⁰⁹ reported on the provisions during the consultation phase, expressing grave concerns about certain provisions including the increase in pre-trial detention. (See below regarding the pre-trial detention provisions).

IV. Civil Contingencies Legislation

Civil contingencies legislation provides for response in an emergency (short of war), including an act of terrorism.¹¹⁰

Post WW1 the Emergency Powers Act 1920 ('EPA 1920') was passed. It was a short,¹¹¹ skeleton Act allowing for broad Executive action following a proclamation of emergency.¹¹² Regulations were to be made by Order in Council

¹⁰⁴ For a derogating control order to be made the government would have to make a notification under Article 15 European Convention of Human Rights ('ECHR') Council of Europe, (2003) "Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13", Registry of the European Court of Human Rights <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> accessed on 15 August 2008.

¹⁰⁵ TA 2006, *supra* note 98.

¹⁰⁶ *Id.*, sections 2, 5 and 6-9 TA 2006 respectively.

¹⁰⁷ This includes *inter alia* provisions for an increase of the maximum length of pre-charge detention of terrorist suspects from 28 to 42 days (s22); changes to enable the post-charge questioning of terrorist suspects (ss23-26); requirements on people convicted of terrorist offences to inform authorities where they are living and any changes to their circumstances (Part 4); and enhanced sentencing of offenders who commit offences with a terrorist connection (ss69-70), Counter Terrorism Bill 2008as introduced into Parliament – <http://www.publications.parliament.uk/pa/cm200708/cmbills/063/2008063.pdf> accessed on 24 November 2008.

¹⁰⁸ Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: 42 Days, Second Report of Session 2007–08 (2007), <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/23/23.pdf> accessed on 14 August 2008.

¹⁰⁹ Home Affairs Committee, The Governments Counter-Terrorism Proposals (HC 43, 2007-08) (2007), <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/43/4302.htm> accessed on 29 August 2008.

¹¹⁰ This article will not consider civil protection legislation concerning governmental or other planning for incidents etc. For an overview of the historical legislation and measures currently in force *see* Walker, *supra* note 17, para 2.02 – 2.10 and Part 4.

¹¹¹ The Act as passed contained three sections.

¹¹² S1(1) Emergency Powers Act 1920 ('EPA 1920') (repealed) (as enacted).

and laid before Parliament “as soon as maybe” thereafter.¹¹³ The Act was initially passed to deal with the problems caused by strike action.¹¹⁴

Walker¹¹⁵ identifies a number of factors that led to the marginalisation of the EPA 1920 and its eventual replacement. These included the development of more specific legislation regarding the control of fuel and energy, strikes and terrorism.

The Civil Contingencies Act 2004 (‘CCA 2004’) replaced the EPA 1920. Part 1 of the CCA 2004 regulates the planning for emergencies by the government and other agencies, while Part 2 of the Act concerns emergency powers.¹¹⁶ The CCA 2004 was passed in the wake of a number of events that could have been classed as emergencies,¹¹⁷ although these were dealt with through either existing legislation or new primary legislation dealing with the event.¹¹⁸

Like the EPA 1920 this is a skeleton piece of legislation, with power for Regulations to be made by Orders in Council or a Senior Minister of the Crown.¹¹⁹ Within the CCA 2004 there are two definitions of ‘emergency’, one in each Part.¹²⁰ The decision to invoke the powers in Part 2 must be based on the seriousness of the event, the necessity of the powers and application to the appropriate geographical area.¹²¹ There is no formal proclamation of emergency.

V. Other Domestic Legislation

In addition to the specific legislation contained in the EPA 1920 or CCA 2004 a wide range of legislation contains provisions specifying emergency procedures and powers.¹²² This reflects on the privatisation of utilities and energy provision by private companies.¹²³

¹¹³ *Id.*, s2(1) and 2(2) EPA 1920.

¹¹⁴ Walker notes that a major miners strike was averted in the week that the bill was passed. Walker, *supra* note 17, at 37.

¹¹⁵ Other factors were reform to industrial and union laws and the privatization of nationalized industries, Walker, *supra* note 17, at paras. 2.17-2.22.

¹¹⁶ Part 1 of the CCA 2004 “Local Arrangements for Civil Protection” concerns the duties of public and private bodies to plan for emergencies, Walker, *supra* note 17, at 81. See Chapter 4 for an account of the provisions and effect of Part 1 of the CCA 2004.

¹¹⁷ Including animal diseases such as the foot and mouth outbreak in 2001, blockades of petrol stations and depots in 2000 and floods in 2000.

¹¹⁸ For example during the foot and mouth outbreak animal movement restrictions were imposed under the Animal Health Act 1981 – The Foot-and-Mouth Disease (Amendment) (England) (No. 7) Order 2001.

¹¹⁹ S20 Civil Contingencies Act 2004 (‘CCA 2004’).

¹²⁰ Sections 1 and 19 CCA 2004.

¹²¹ The “triple-lock” – Secs. 19-22 CCA 2004.

¹²² The powers are also known as “sectoral legislation”, Walker, *supra* note 17, at 186, para 5.72.

¹²³ Thus for example although s22(2)(d) CCA 2004 allows emergency regulations to be made to protect or restore a supply of energy, section 96(1) of the Electricity Act 1989 contains a provision specific to that industry for the Secretary of State to issue a direction to preserve *inter alia* the security of installations supplying electricity or mitigating the effects of a civil emergency. CCA 2004, *supra* note 119 and Electricity Act 1989.

VI. European Convention on Human Rights (ECHR)

A number of the provisions of the Convention¹²⁴ is particularly relevant to the protection of human rights during emergency situations.¹²⁵ Article 15 of the ECHR allows derogation from certain of the provisions of the Convention in the case of an emergency, although the limits of this are circumscribed.¹²⁶ The Court regards the decision as to whether a particular matter constitutes an emergency is essentially a matter for the Executive, allowing a wide “margin of appreciation” to the state to determine this and the necessary measures under it.¹²⁷

The UK government has entered two derogations from the ECHR, both in relation to terrorism. The first derogation related to the situation in Northern Ireland and pre-charge detention.¹²⁸ The second made in 2001 concerned the detention without charge of terrorist suspects.¹²⁹ The validity of both derogations has been challenged both by academics¹³⁰ and in the Courts.¹³¹

The Council of Europe has recognised the need for governments to combat the threat of terrorism, though it emphasises that the need to safeguard human rights is even more important in this process.¹³²

The rights included in the Convention are now directly enforceable in the UK¹³³ and decisions such as those on indefinite detention have influenced the shape of legislation.

¹²⁴ The UK signed the Convention in 1951 and allowed individuals the right to complain to the court in 1966.

¹²⁵ Walker includes *inter alia* the right to liberty (Art. 5), fair process (Art. 6), privacy (Art. 8) and free expression and association (Arts. 10 and 11). For the full list see Walker, *supra* note 17, at 216 para 7.03.

¹²⁶ Under Article 15 the measures taken must be limited to “the extent strictly required by the exigencies of the situation,” Council of Europe, (2003) *supra* note 3.

¹²⁷ “It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency.” Republic of Ireland v. United Kingdom, 2 EHRR 25, at para 207 (1978).

¹²⁸ The text of the derogation is set out in Schedule 3 of the Human Rights Act 1998 (‘HRA 1998’).

¹²⁹ Due to the extended detention of suspects under Part 4 ATCSA 2001 (*supra* note 88) and now the Control Order regime under PTA 2005 (*supra* note 100). The Human Rights Act 1998 (Designated Derogation) Order 2001 (SI2001/3644) <http://www.opsi.gov.uk/si/si2001/20013644.htm> accessed on 22 August 2008

¹³⁰ Re both derogation relating to Part 4 of the ATCSA as enacted see Tomkins, *supra* note 87 and the new Control Orders - Bonner, *supra* note 13, at 313-314

¹³¹ In *Brannigan* the first derogation was challenged on the basis *inter alia* that there was no emergency “threatening the life of the nation” and that the measures were excessive. The Court held there was an emergency (para. 49), that the measures were strictly necessary (paras. 59-60) under Article 15. *Brannigan and McBride v United Kingdom*, 17 EHRR 539 (1994).

¹³² Council of Europe, *Human Rights and the Fight Against Terrorism The Council of Europe Guidelines*, at 5 (2005), available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj-s-vict/Guidelines%20CM.pdf accessed on 1 July 2008.

¹³³ *E.g.*, changes the introduction of the “control orders to replace detention without trial – see *supra* note 99 and associated text

VII. European Union

Under both the European Convention and European Community law it is the individual member states that have the right to put measures in place to combat terrorism.¹³⁴ As regards other emergencies there may be European Union legislation that impacts on the emergency procedures.¹³⁵

VIII. International Obligations

The International Convention on Civil and Political Rights ('ICCPR') was signed for the UK in 1968 and was ratified in 1976. Its provisions are similar to those in the ECHR.¹³⁶ Currently individuals do not have the right to petition for a breach of the Covenant.¹³⁷ The UK has also ratified a number of conventions on combating terrorism.¹³⁸

As these conventions have not directly affected individuals they will not be considered here.

D. Scrutiny of Legislation

Three aspects of scrutiny will be enumerated. The importance of scrutiny and the types of scrutiny will be set out and then parliamentary scrutiny will be looked at in more detail. This second section will cover primary and delegated legislation separately.

I. Importance of Scrutiny

There are (at least) four reasons why scrutiny of legislation is important:

¹³⁴ Council of European Union, *The European Union Counter-Terrorism Strategy*, European Union, Brussels, at para. 8(2005), available at <http://register.consilium.europa.eu/pdf/en/05/st14/st14469-re04.en05.pdf> accessed on 15 August 2008.

¹³⁵ For example Directive 85/511 lays down the details of procedures in a foot and mouth outbreak – Council Directive 85/511, European Community, http://ec.europa.eu/food/fs/ah_pcad/ah_pcad_05_en.pdf accessed on 14 August 2008.

¹³⁶ Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights* (1966), available at <http://www2.ohchr.org/english/law/ccpr.htm> accessed on 29 August 2008.

¹³⁷ The UK has not signed and ratified the Optional Protocol to the Covenant. In any event if the UK decided to change this currently any litigant would be expected to exhaust remedies through the ECHR Art' 5(2)(a), see Office of the United Nations High Commissioner for Human Rights, *Optional Protocol to the International Covenant on Civil and Political Rights*, available at <http://www2.ohchr.org/english/law/ccpr-one.htm> accessed on 29 August 2008.

¹³⁸ Including for example – the Convention for the Suppression of Terrorist Bombings ratified in 1982 and the Convention for the Suppression of Financing of terrorism ratified by the UK in 2001 see Foreign and Commonwealth Office, *International Conventions on Terrorism*, available at <http://www.fco.gov.uk/en/about-the-fco/publications/treaties/lists-treaties/international-conventions> accessed on 29 August 2008.

- holding the Executive to account
- improving the quality of legislation¹³⁹
- safeguarding the rights of citizens¹⁴⁰
- preserving the constitutional ideals of democracy and the rule of law¹⁴¹

1. Holding the Executive to Account

This relates in particular to delegated legislation. Under the doctrine of the separation of powers the role of the Executive is to formulate policy and to execute the legislation passed by Parliament. Parliament holds the Executive to account for actions in a number of ways,¹⁴² however, this article will only focus on scrutiny of legislation.

Delegation to the Executive of power to legislate is a longstanding¹⁴³ feature of British governance. This exception to the separation of powers doctrine raises constitutional concerns. Parliament is only delegating legislative power, not ceding it and should therefore consider the delegated legislation made by the Executive. It may be tempting for a government wanting to pass a lot of legislation or with a low majority to implement “Skeleton Acts” and leave the detail to delegated legislation.¹⁴⁴ There is arguably an instinct for the government to move towards more delegated legislation,¹⁴⁵ which Parliament needs to keep in check. In the case of a powerful government delegated legislation increases still further that power, without the need to go through the lengthy and elaborate procedure for primary legislation.¹⁴⁶

¹³⁹ House of Lords Select Committee of the Constitution, *Report: Parliament and the Legislative Process*, 14th Report of 2003-4 (2004), at 8 Ch. 2, para. 1, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/173.pdf> accessed on 3 August 2008 For example considering whether legislation will achieve the aim, any unexpected or unwanted side-effects, scope of the Bill, how is it likely to be implemented, and its effects.

¹⁴⁰ Such as when individuals are criminalized. See House of Lords Select Committee of the Constitution, *id.* Additionally, of course, scrutiny can also safeguard the rights for non-natural persons such as companies.

¹⁴¹ G. Ganz, *Delegated Legislation: A Necessary Evil or a Constitutional Outrage?*, in P. Leyland & T. Woods (Eds.), *Administrative Law Facing the Future Old Constraints and New Horizons* 81 (1997).

¹⁴² The methods open to Parliament include questions to Ministers, tabled questions, departmental select committees and Prime Ministers’ Questions as well as motions in the House of Commons or House of Lords

¹⁴³ At least since the Tudor period – Wallington and Hayhurst, *supra* note 19, at 549.

¹⁴⁴ Craig, *supra* note 52, at 370.

¹⁴⁵ While commending an attempt to improve Parliamentary scrutiny by Mr E Short, then Leader of the House (and a member of the Executive), Drewry notes that one of his suggestions was more use of “framework bills” (although with improved scrutiny of delegated legislation.). G. Drewry, *Reports of Committees: Reforming House of Commons Procedure Another Episode*, 42(1) Mod L. Rev. 80, at 81 (1979).

¹⁴⁶ In particular through the use of Henry VIII powers – Ganz, *supra* note 141, at 64-65.

2. Improving the Quality of Legislation

Sutherland¹⁴⁷ identified five factors to be considered when considering legislation – the necessity of legislation, that the most appropriate measure is selected, that it is proportionate to the aims, that it is consistent with the existing law and that there has been consultation. These are factors that will be considered at the various stages of scrutiny and improvement should contribute to the quality.

3. Safeguarding the Human Rights of Citizens

Rights have been recognized in the UK at common law,¹⁴⁸ and the United Kingdom's signing and ratification¹⁴⁹ of the European Convention on Human Rights ('ECHR') introduced the concept of "Human Rights" directly. Citizens got the right to petition the ECHR in 1966.

The Courts can make rulings based on breach of the Articles of the Human Rights Act 1998. This has increased the number of cases argued on the basis of breach of the Convention rights,¹⁵⁰ because litigants do not have the extended and more expensive referral to the ECHR.¹⁵¹

II. Non-Parliamentary Types of Scrutiny

1. Internal Governmental Scrutiny

When government department officers are preparing policy documents, drafting and prior to introduction of legislation they must bear in mind a number of issues.¹⁵²

¹⁴⁷ Sutherland was reporting in terms of European Community legislation. However, it is argued that these factors are equally applicable to both primary and delegated legislation at the national level. P. Sutherland, *The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the functioning of the Internal Market*, (the Sutherland Report), at 3 (1992), available at http://aci.pitt.edu/1025/01/Market_post_1992_Sutherland_1.pdf accessed on 6 August 2008.

¹⁴⁸ For example, the freedom to do anything that is authorized by law, without interference of the Executive – *Entick v Carrington*, [1765] EWHC KB J98 95 ER 807, available at <http://www.bailii.org/ew/cases/EWHC/KB/1765/J98.html> accessed on 28 August 2008.

¹⁴⁹ Convention for the Protection of Human Rights and Fundamental Freedoms. The UK signed and ratified the Convention in 1952. Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (2008), available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=8&DF=8/31/2008&CL=ENG> accessed on 15 August 2008.

¹⁵⁰ Lord Irvine noted that in 2002 the vast majority of challenges under the HRA have been made as an adjunct to cases brought on other grounds. Lord Irvine, *supra* note 22.

¹⁵¹ A. Lester, *The Utility of the Human Rights Act: A reply to Keith Ewing*, Sum P.L. 249, at 255 (2005).

¹⁵² Cabinet Office, *Guide to Legislative Procedures* (2004), at para. 3, available at http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide.aspx accessed on 3 August 2008. Issues include compatibility with the ECHR (Section 10), Regulatory Impact through a RIA (Section 11) and whether and when delegated legislation is appropriate (paras. 8.18- 8.30).

It is the responsibility of the department that is sponsoring a Bill to ensure that there is consultation with other departments in government.¹⁵³ Consultation between departments about Statutory Instruments (SI) is almost universal.¹⁵⁴

The government producing legislation will of course have to consider whether the legislation will get through Parliament and public opinion.¹⁵⁵

Given the nature of this type of scrutiny and its sensitivity it is difficult to find examples of the impact of it and the form it takes.

2. Parliamentary Counsel

In drafting primary legislation Parliamentary Counsel must prepare legislation that will stand up to scrutiny by Parliament and the Courts. Some go so far as to state that Parliamentary Counsel is “as close as our system has traditionally come to a check on the “constitutionality” of legislation.”¹⁵⁶

Parliamentary Counsel also scrutinise any delegated legislation which amends primary legislation¹⁵⁷ “to ensure the integrity and coherence of the primary statute book.”¹⁵⁸ Through internal scrutiny and discussion with the client departments draft bills will be refined and this internal scrutiny should improve it.

3. Judicial Scrutiny

The English Courts’ ability to scrutinise legislation is mainly manifest in its ability to strike down delegated legislation as *ultra vires*.¹⁵⁹ Due to the doctrine of parliamentary supremacy Acts of Parliament could not be struck down,¹⁶⁰ and this is still the case.¹⁶¹ However, since the Human Rights Act 1998 the Courts have had the power to declare that a statute not compatible with the Act.¹⁶² As far as the individual litigant is concerned this does not provide a specific remedy, but triggers a process in Parliament under which the relevant provision is reconsidered. A remedial order can be made under a special procedure.¹⁶³

¹⁵³ *Id.*, at paras. 6.9-6.11.

¹⁵⁴ Page, *supra* note 40, at 129.

¹⁵⁵ A. Brazier, S. Kalitowski & G. Rosenblatt, *Law in the Making Influence and Change in the Legislative Process* 175 (2008).

¹⁵⁶ Daintith and Page include the non-retrospection, proper use of delegation, and respect for the liberties of the subject among rights safeguarded by Parliamentary Counsel T. Daintith and A. Page, *The Executive in the Constitution, Structure, Autonomy and Internal Control* 254 (1999), cited in R. Hazell, *Who’s the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?*, P.L. 495, at 495 (2004).

¹⁵⁷ Under a ‘Henry VIII’ enabling power in primary legislation.

¹⁵⁸ Answer by Sir Geoffrey Bowman – Q347 Select Committee on the Constitution, *Minutes of Evidence by Sir Geoffrey Bowman*, 24 June 2004, HL 173 2003-04, available at <http://www.publications.Parliament.uk/pa/ld200304/ldselect/ldconst/173/4062303.htm> accessed on 3 December 2007.

¹⁵⁹ Wallington and Hayhurst, *supra* note 19, at 567.

¹⁶⁰ *Id.*

¹⁶¹ A declaration of incompatibility by the court does not invalidate the Act of Parliament – s4(6) (a) Human Rights Act 1998 (‘HRA 1998’).

¹⁶² S4 HRA 1998, *supra* note 161.

¹⁶³ S10 HRA 1998, *supra* note 161.

4. Public Opinion

It is now common¹⁶⁴ for there to be consultation prior to delegated legislation being drafted and there is guidance on how this should be achieved.¹⁶⁵ The level and type of consultation can vary.¹⁶⁶

The introduction of pre-legislative scrutiny by Parliament has posed some difficulties in timetabling consultations so that the Committees considering the draft can see this within the tight timescale for such scrutiny.¹⁶⁷ One solution to this difficulty is publication of the draft Bill as a Green Paper in which case the public can scrutinise the draft and the particular wording used directly in any consultation.¹⁶⁸

Naturally members of the public can also address concerns directly to their MP or the relevant Minister. Public opinion, or politician's (and the media's) interpretation of public opinion, may lead the government to seeking to pass legislation at speed to respond to particular incidents. Whatever the need or desire for this legislation, this quick reaction reduces the amount of time for parliamentary scrutiny (and detailed or formal public consultation).¹⁶⁹

III. Parliamentary Scrutiny

1. Parliamentary Scrutiny of Primary Legislation

The procedures for scrutiny will be described below. Although the Executive may propose legislation, Parliament alone has the authority to pass Acts of Parliament and to scrutinize legislation.¹⁷⁰ However, given the other work of MPs and peers

¹⁶⁴ Page, *supra* note 40, at 130.

¹⁶⁵ Cabinet Office, *Code of Practice on Consultation* (2005), available at <http://www.berr.gov.uk/files/file44364.pdf> accessed on 8 August 2008. The information of consultation on legislation is based largely on a section "Consultation Procedures and [sic] in the UK", in G. Mazarello, Essay: Public Involvement in Scrutiny of Delegated Legislation CLS/2 (2008) (unpublished).

¹⁶⁶ Although the Cabinet office does lay down rules that must be followed. These include that formal consultation should normally last at least twelve weeks and make provision for equal access (e.g. for those with disabilities or ethnic minorities) Cabinet Office, *supra* note 165, at paras 1.5 and 3.7 respectively

¹⁶⁷ Kennon, *supra* note 26, at 483.

¹⁶⁸ *Id.*, at 478, though Kennon notes that this is only possible when there is no urgency

¹⁶⁹ See Papworth – "Legislation which is enacted in a hurry runs the risk of containing flaws and errors ... eg the Dangerous Dogs Act 1991 ... It is right, therefore, for government to seek to outline what its future legislative programme is and for the Bills in question to be subject to both Parliamentary and public consultation and scrutiny." N. Papworth, *Brown's Way*, 157 NLJ 1132 (2007).

¹⁷⁰ Lord Norton "Parliament, then, is important not only for giving assent to legislation but also for subjecting the measures laid before it to scrutiny. Other bodies may study and comment on proposals for legislation, but none has the constitutional authority for giving assent to it that Parliament has." Lord Norton, *Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process*, in A. Brazier, (Ed.), *Parliament, Politics and Law Making – Issues and Developments in the Legislative Process* (2004).

there is only a certain amount of time for them to scrutinize legislation.¹⁷¹ It is felt that the scrutiny of legislation is less than ideal.

One issue is that the timetable for legislation is often tight. The government in effect controls the parliamentary timetable,¹⁷² although there is a process for negotiation with the opposition, which has replaced more longstanding negotiation through the “usual channels.”¹⁷³

a. Procedure for Scrutiny of Primary Legislation

For a detailed account of the Parliamentary procedure of the passing of bills see Greenberg.¹⁷⁴

Pre-legislative scrutiny of primary legislation is not a completely recent innovation, although it has increased in recent years.¹⁷⁵ The process in Parliament varies depending on the type of bill and whether it crosses government departments. It may be considered by a departmental select committee or by a specially formed committee or if the subject is of interest to the House of Lords a joint committee may consider the legislation.¹⁷⁶

The use of pre-legislative scrutiny is welcomed and it is felt that the government are more willing to make changes to the draft bill.¹⁷⁷ Once a bill¹⁷⁸ is introduced in the House of Commons¹⁷⁹ scrutiny begins at second reading with a vote on the general proposal of the bill. Although detailed scrutiny can take place at any stage in passage of a bill through the Houses, detailed clause-by-clause consideration is always carried out by a Public Bill Committee and these are considered at the Report stage. Any member can propose amendments at this stage and any amendments made at Committee stage are considered. At the third reading no amendments can be proposed. The procedure is similar in the House of Lords, although the Committee stage is often a Committee of the whole House of Lords.¹⁸⁰ Amendments made by the House of Lords are considered in the Commons.

There is a convention that first-class constitutional bills have their Committee Stage on the floor of the House of Commons rather than in Standing Committee.¹⁸¹ This convention has been changed over the last years, with the Constitutional aspects of bills being debated by the whole house and other matters by a select committee. Hazell asserts that this practice is due to the government seeking to

¹⁷¹ See *supra* note 1.

¹⁷² Brazier, *supra* note 170, at 25.

¹⁷³ *Id.*, at 22-23.

¹⁷⁴ D. Greenberg (Ed.), *Craies on Legislation: A Practitioners Guide to the Nature, Process and Effect of Legislation* (2004).

¹⁷⁵ Kennon, *supra* note 26, at 478.

¹⁷⁶ *Id.*, 478 -481 sets out the various possibilities

¹⁷⁷ Brazier notes that the government accepted 120 of the 148 recommendations of the Joint Committee considering the draft Communications Bill. Brazier, *supra* note 170, at 32-33.

¹⁷⁸ Here the procedure is set out for a Public Bill.

¹⁷⁹ A majority of government bills are initiated in the House of Commons not the House of Lords.

¹⁸⁰ Additionally amendments can be made at the third reading.

¹⁸¹ There is no definition of such bills R. Hazell, *Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997-2005*, Sum P.L. 247, at 248 and 272 (2006).

get as much legislation through as possible.¹⁸² Hazell¹⁸³ notes that scrutiny by the whole house provides an opportunity for more MPs as a whole to contribute and in particular those with a special interest. However, he argues¹⁸⁴ that such benefits could equally be achieved by altered Committee procedures and that smaller Committees provide better scrutiny of the detailed provisions.

*b. Delegated Powers and Regulatory Reform Committee*¹⁸⁵

If a bill contains enabling provisions for delegated legislation then a memorandum must be submitted at introduction and be updated before introduction in the House of Lords¹⁸⁶ to the Delegated Powers and Regulatory Reform Committee of the House of Lords. The Committee will consider the purpose, whether the matter is suitable for delegated legislation and whether the scrutiny procedure is appropriate. Special consideration will be given to skeleton bills, Henry VIII powers and provisions that allow criminal offences to be made.¹⁸⁷ It makes a report before the Committee stage in the Lords.¹⁸⁸

The Committee is held in high regard and the government will often accept its recommendations.¹⁸⁹

c. Joint Committee on Human Rights (“the JCHR”)

The JCHR was established after the passing of the Human Rights Act, meeting first on 31 January 2001. One of its main purposes is to examine legislation for compatibility with human rights.¹⁹⁰ The JCHR scrutinises all bills for compatibility with the ECHR and reports to Parliament. Its scrutiny of emergency legislation has been considerable and will be examined in the following sections.

¹⁸² In certain bills some clauses are now considered in Standing Committee, and others by the Whole House. *Id.*, at 273-274.

¹⁸³ *Id.*, at 275-276.

¹⁸⁴ *Id.*, at 277.

¹⁸⁵ The Committee was first established in 1992 as the Select Committee on Delegated Powers. It then became the Select Committee on Delegated Powers and Deregulation Committee in 1994 and finally received its current title in 2000. House of Lords Delegated Powers and Regulatory Reform Committee, Guidance for Departments on the Role and Requirements of the Committee (2007), at historical note on first page, <http://www.Parliament.uk/documents/upload/GuidDeptsOct07.pdf>, accessed on 11 March 2008. Much of the material here was presented in Mazarelo, *supra* note 165 in the section “Parliamentary Scrutiny and Control of Delegated Legislation in the United Kingdom.”

¹⁸⁶ House of Lords Delegated Powers and Regulatory Reform Committee, *id.*, at 8 and 10.

¹⁸⁷ *Id.*, paras. 11-20.

¹⁸⁸ *Id.*, para. 5.

¹⁸⁹ P. Tudor, *Secondary Legislation: Second Class or Crucial?*, 29(3) Stat. L. Rev 149, at 152-153 (2000). This article concerns the Delegated Powers and Regulatory Reform Committee, *see supra* note 185.

¹⁹⁰ A. Lester, *Terrorism Legislation and The Human Rights Act 1998* (2000), at 7, n. 18, and at 9.

2. Parliamentary Scrutiny of Delegated Legislation

Delegated legislation¹⁹¹ is often considered as less important than primary legislation. Although considered just the ‘technical matters’ associated with provisions in the main Act of Parliament,¹⁹² many people will be equally or more affected by the detail contained in this legislation. There is, however, a perception that the Executive will try to use ‘skeleton’ legislation with wide enabling powers. The scrutiny of delegated legislation is therefore a vital check on the Executive.¹⁹³ On the other hand delegated legislation developed because the statute book became more complex. It was not possible for Parliament to consider all the necessary legislation¹⁹⁴ and much of the delegated legislation does not warrant detailed scrutiny by Parliament at all.

The various procedures for scrutiny of delegated legislation in Parliament will not be laid out in detail here.¹⁹⁵ Rather the impact of the various procedures on the level of scrutiny will be considered.

The level of scrutiny by Parliament on the floor of the House of Commons or Lords depends on the provisions in the enabling Act. There are no rules for the decision as to which procedure will be specified, although care will be taken in deciding which procedure to use.¹⁹⁶

At the lowest level are statutory instruments that only need to be laid.¹⁹⁷ The most scrutiny is provided to delegated legislation subject to the super affirmative procedure that allows Parliament to consider proposals for any statutory instrument laid in draft.¹⁹⁸ This means that the Minister must consider the recommendations of Parliament, rather than approval or rejection of a resolution of the draft instrument.

The super affirmative and indeed the affirmative procedure are not common¹⁹⁹ with most statutory instruments subject to the negative resolution.

¹⁹¹ There is a range of nomenclature for legislation passed by the Executive (including for example regulations, orders, subordinate legislation or Orders in Council). Halsbury’s Laws, “Statutes” Volume 44(1) (reissue), at para 1500. The term “delegated legislation” will be used to cover all types of legislation passed by the Executive.

¹⁹² Wallington & Hayhurst, *supra* note 19, at 573.

¹⁹³ Hansard Society, *Issues in Law Making 3: Delegated Legislation* (2003), at para. 3.

¹⁹⁴ This was recognized by the Donoughmore Committee, *see* D. William, *The Donoughmore Committee in Retrospect*, 60 *Pub. Admin.* 273, at 281-282 (1982).

¹⁹⁵ Greenberg provides a detailed summary of the various procedures. Greenberg, *supra* note 174, at 270-280, paras. 6.2.1-6.2.13.

¹⁹⁶ Departments will consider precedent, previous parliamentary committees and the justification for the choice that must be provided to the House of Lords Delegated Powers and Deregulation Committee. Greenberg, *supra* note 174, at 280, para. 6.2.13.

¹⁹⁷ *Id.*, at 279, para. 6.2.10.

¹⁹⁸ *Id.*, at 271, para. 6.2.3.

¹⁹⁹ In 2006-2007 205 Statutory Instruments (SI) were subject to a type of affirmative procedure and 1090 to the negative procedure. Two SI were subject to no scrutiny, simply laid and no instruments were passed subject to a mixed procedure (affirmative and negative resolution). House of Commons Information Office, *Statutory Instruments Factsheet L7 Legislative Series* (2008), at 13 <http://www.Parliament.uk/documents/upload/L07.pdf> accessed on 3 August 2008.

All Statutory Instruments are examined by the Joint Committee on Statutory Instruments ('JCSI').²⁰⁰ Although all SI must come before it, due to the sifting process of the Speaker's Counsel, who will make reports on SI of concern, not all are considered in detail.²⁰¹ The JCSI considers whether there are reasons that the instrument should be drawn to the attention of the Houses.²⁰²

The House of Lords Select Committee on the Merits of Statutory Instruments plays a complementary, but slightly different role. It has a wide discretion to decide whether to draw attention to an SI, and includes a consideration of the sensitivity of the SI or the 'unusual use' of delegated legislation.²⁰³

The Departments drafting delegated legislation are aware of the scrutiny that they will receive in both Committees and feel embarrassment if SI are queried by a committee, meaning that SI are drafted carefully.²⁰⁴

E. Scrutiny of Emergency Legislation

Although all forms of scrutiny are important, the judicial scrutiny of legislation has had a significant influence and will be considered in addition to more detailed examination of Parliamentary scrutiny. Discussion of judicial scrutiny will focus on its effect on parliamentary scrutiny and this will therefore be a summary rather than a full account of the case law.

I. Judicial Scrutiny

The World Wars were characterized by judicial deference to the Executive.²⁰⁵ The judges were not entirely inactive however. In WW1 the extent of prerogative powers when there are statutory provisions on a matter was considered.²⁰⁶ The

²⁰⁰ S.O. 151 House of Commons, The Standing Orders of the House of Commons – Public Business (2007), <http://www.publications.parliament.uk/pa/cm200708/cmstords/105/105.pdf>, accessed on 10 August 2008.

²⁰¹ Page, *supra* note 40, G, at 159.

²⁰² The JCSI is established under Standing Orders of the House of Commons. For details of its remit see SO 151(1) House of Commons, *supra* note 200, at 146-148.

²⁰³ The Committee is established under SO 65 of the House of Lords, see House of Lords, The Standing Orders of the House of Lords Relating to Public Business (2007), <http://www.publications.parliament.uk/pa/ld/ldstords/147/147.pdf>, accessed on 10 August 2008. Its terms of reference are set out in its reports: House Of Lords Merits of Statutory Instruments Committee, The Management of Secondary Legislation Volume I: Report (2006), at 2, available at <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldmerit/149/149i.pdf>, accessed on 28 February 2008.

²⁰⁴ Page, *supra* note 40, at 161-167 (regarding the JCSI).

²⁰⁵ Eaves, *supra* note 2, regarding WW1, at 9 and WW2, at 103: "... the inability or the unwillingness of the courts to restrain the Executive's use of emergency powers had been realised for some time." [by 1943].

²⁰⁶ Lord Denedin gave the leading judgment, see particularly at 526, *De Keyzers' Hotel Case* [1920] AC 508.

courts took a more active role in a series of property cases, where the decisions were often based on the necessity of the action to the war effort.²⁰⁷

In WW2 cases on detention²⁰⁸ are notable. In the detention cases courts for the most part decided that it would not inquire into detailed reasons for action under the relevant regulation and the detention was upheld.²⁰⁹ This culminated in the decision in *Liversidge v Anderson*²¹⁰ that the “reasonable cause to believe” in a regulation was interpreted as that the Minister’s subjective determination was valid and objectivity was not required. Viscount Maughan found it important in his decision that the Secretary of State was responsible to Parliament under the regulation, having to report on the number of cases decided against advice.²¹¹

One difference between Parliament and the Courts is that some of the cases were brought or decided after the end of the war, while naturally Parliament’s scrutiny was wholly during or just before hostilities had been commenced.

It would appear that there have not been challenges to the vires of primary or delegated civil contingencies legislation. There is a case where the definition of “requisition” in a regulation made under the EPA 1920 was decided.²¹²

The terrorism cases involve not only the English Courts, but also the European Court of Human Rights (‘ECTHR’). As regards the role of the national Courts Lord Irvine²¹³ states that through the Human Rights Act 1998 the courts have been given “responsibility ... to scrutinise Executive conduct and guard against unjustified interference with Convention rights.”

As with the war cases there remains a deference to the Executive. Thus in cases challenging the validity of the UK derogation under Article 15 ECHR, the Courts both at European²¹⁴ and national level²¹⁵ deferred to the Executive in the matter of whether a state of emergency existed. However, there was more of a challenge to the Executive when the House of Lords held that Part 4 of ATCSA 2001 breached Article 14 ECHR.²¹⁶

The courts played a further role in considering control orders, and the extent to which the Executive could impose restrictions on liberty.²¹⁷ This demonstrates that

²⁰⁷ Cotter, *supra* note 38, at 392-395.

²⁰⁸ Under Regulation 18B – for a detailed account of the treatment of Regulation 18B by the courts see Cotter, *supra* note 8.

²⁰⁹ *Id.*, at 242.

²¹⁰ *Liversidge v Anderson* [1941] 3All ER 338.

²¹¹ *Id.*, at 346-347. However, it is clear that the report to Parliament was not a review of individual cases.

²¹² *France Fenwick Co, Ltd v. The King* [1927] 1 KB 458.

²¹³ Lord Irvine, *supra* note 22.

²¹⁴ *Branningan and McBride v. United Kingdom*, *supra* note 131, para. 43.

²¹⁵ “I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question [whether there is a public emergency], because they were called on to exercise a pre-eminently political judgment” per Lord Bingham, at 102, para. 29, *A v. Secretary of State for the Home Department*, *supra* note 99.

²¹⁶ *Id.*

²¹⁷ Finding on the case of JJ that 18 hour detention amounted to a breach of Art. 5, However, the shorter period of 12 hours and 14 hours did not breach Art. 5 (in the cases of E and MB respectively), *Secretary of State for the Home Department v. JJ*, [2007] UKHL 45, per Lord Bingham, at paras. 24 & 27, <http://www.publications.Parliament.uk/pa/ld200607/ldjudgmt/jd071031/homejj-1.htm>,

the Courts will take action to scrutinize legislation. However, given the deference that is still shown it is vital that Parliament scrutinizes emergency legislation carefully and this will now be considered.

II. Parliamentary Scrutiny of Primary Legislation

Rather than setting out chronologically the scrutiny of emergency legislation some important features of scrutiny are described. One subject that pervades the scrutiny of legislation is speed and this is considered first. Next various procedures used in scrutiny are set out – committee scrutiny, the use of reports and reviews in passing legislation, continuing scrutiny of primary legislation and the scrutiny of delegated legislation.

1. Speed

Emergency legislation is often characterized by being passed at speed. The necessity of such speed is sometimes accepted as a matter dealing with an imminent emergency.²¹⁸ However, in the case of recent terrorism the government has been charged with incorporating “a raft of coercive measures” into a piece of legislation characterised as emergency legislation.²¹⁹

The government may face opposition it was not expecting if Parliament feels that basic civil liberties are being eroded. In WW1 there was opposition to the imposition of courts-martial on civilians, which the Commons had approved on two occasions, but which the Lords opposed when it was brought forward in a bill.²²⁰

The most striking examples of speed in passing emergency legislation are those arising during wartime. The Defence of the Realm Act 1914 put the measures imposed under prerogative powers onto a statutory basis, but when initially announced to the House the bill had not been drafted.²²¹ It was passed with no debate in Parliament.²²² In WW2 the Emergency Powers (Defence) Bill 1939 was passed prior to the outbreak of war and it passed through all its stages in both the Commons and the Lords and received Royal Assent on 24 August 1939.²²³

accessed on 29 August 2008. *Secretary of State for the Home Department v. E.*, [2007] UKHL 47, per baroness Hale, at para. 25, <http://www.publications.Parliament.uk/pa/ld200607/ldjudgmt/jd071031/dept-1.htm>, accessed on 29 August 2008. *Secretary of State for the Home Department v. MB*, [2007] UKHL 46, per Lord Bingham, at para. 11, <http://www.publications.Parliament.uk/pa/ld200607/ldjudgmt/jd071031/home-1.htm> accessed on 29 August 2008.

²¹⁸ See *supra* note 61.

²¹⁹ Tomkins in relation to the Anti-terror Crime and Security Act 2001 Tomkins, *supra* note 92, at 220.

²²⁰ The Defence of the Realm (Consolidation) Bill 1914 – see Cotter, *supra* note 58, at 385-387.

²²¹ Cotter, *supra* note 58, at 384.

²²² Eaves, *supra* note 2, at 9.

²²³ It was evident that MPs understood a need for urgency and the bill was approved in the House of Commons by 457 votes to 4. Eaves, *supra* note 2, at 15.

Parliament will sometimes be pro-active and refuse to pass legislation at the speed which the government expects, if it is felt that it is not as urgent as the government claims. In 1940 Parliament sent a Bill²²⁴ to Committee which did not contain the safeguards which the Minister asserted would be available during debate on the floor. This led to amendments to the Bill being brought forward and the Bill was debated over a number of days.²²⁵

Although not as curtailed as the DORA 1914 some of the terrorism legislation has also been passed at great speed. The 1974 Act was rushed through Parliament in a period of just four days.²²⁶ However, it is not entirely fair to characterize the provisions as completely new, since Parliament had considered similar measures pertaining to Northern Ireland.²²⁷

In the wake of the bombings in the USA of 11 September 2001 the government decided that further legislation was necessary.²²⁸ Although the Bill²²⁹ was considered for some weeks by the government it was subject to very short scrutiny in Parliament.²³⁰

Again the PTA 2005 was passed at speed with short scrutiny, a matter of concern in Parliament, given the extent of the powers provided to the Home Secretary.²³¹ The government tried to assuage this criticism by giving an assurance that it would bring forward legislation in Spring 2006 so that matters could be debated in detail. There was all party agreement that, due to the terrorist attacks on London on 7 July 2005, this timetable would be revised and that measures introducing further criminal offences would take priority. However, the government did not keep this timetable and on 2 February 2006 it decided that the PTA 2005 would

²²⁴ When passed the Emergency Powers (Defence) (No. 2) Act, 1940, *supra* note 58.

²²⁵ Eaves provides detail of the debates of and amendments to the bill. Eaves, *supra* note 2, at 83-87.

²²⁶ The bill was introduced on 25 November and passed by 29 November. Walker, *supra* note 32, at 31.

²²⁷ *Id.*, at 32.

²²⁸ Home Secretary Mr D Blunkett House of Commons Hansard (2001), [Re Anti Terrorism Measures] Vol. 372, Col. 923-939, 15 October 2001, at Col. 923-924, <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo011015/debindx/11015-x.htm>, accessed on 28 August 2008.

²²⁹ That became ATCSA 2001.

²³⁰ 16 Hours of scrutiny in the House of Commons, though longer scrutiny was made in the House of Lords. P. Thomas, *September 11th and Good Governance*, 53(4) NILQ 366, at 381-382 (2002).

²³¹ "... what is the immediate emergency that demands that draconian powers against British subjects be rushed through these Houses of Parliament without proper consideration, scrutiny or debate?" – David Davis MP. David Davis noted that the bill was discussed in the wake of the decision in *A v. Secretary of State for the Home Department*, *supra* note 99.

be renewed²³² and new legislation would be delayed.²³³ This decision was noted with concern by the JCHR²³⁴ and Lord Thomas.²³⁵

There is one further way in which time for debate can be shortened even when overall a bill receives much more scrutiny. Although the Civil Contingencies Bill was debated at length and subject to pre-legislative scrutiny, the government imposed a ‘guillotine’ on the debate in the House of Commons at report stage. This caused much criticism from the opposition, and it was felt that this particularly affected the debate of amendments to Part 2 of the Bill.²³⁶

2. Committee Scrutiny

Very much linked to speed is the level of scrutiny in Committee during (or prior to) passage of a bill.

The only bill subject to formal pre-legislative scrutiny was the Civil Contingencies Bill 2004 (‘CCB 2004’). Prior to being introduced a draft bill²³⁷ was subject to extensive scrutiny. There was a widespread consultation exercise²³⁸ and two committees, the Defence Committee and the Parliamentary Joint Committee,

²³² Renewal is by SI made by the Secretary of State using the super-affirmative procedure of s12(2) (b) and 12(4) PTA 2005, *supra* note 100.

²³³ This process of change is set out in the speech by the Home Secretary, Charles Clarke MP on 2 February 2006 – Hansard House of Commons debates 2 February 2006, at Col. 476, http://www.publications.Parliament.uk/pa/cm200506/cmhansrd/vo060202/debtext/60202-10.htm#60202-10_spm0, accessed on 14 August 2008.

²³⁴ “Instead of detailed debate and scrutiny of a Bill there will now be a single debate in each House with no opportunity to amend the legislation to reflect any concerns about its actual operation, including its compatibility with human rights standards.” Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of Sections 1 to 9) Order 2006 Twelfth Report of Session 2005–06 (2006), at 9, para. 12, <http://www.publications.Parliament.uk/pa/jt200506/jtselect/jtrights/122/122.pdf>, accessed on 14 August 2008.

²³⁵ Lord Thomas House of Lords Debate 15 February 2008, Col. 1217-1218, <http://www.publications.Parliament.uk/pa/ld200506/ldhansrd/vo060215/text/60215-22.htm>, accessed on 14 August 2008.

²³⁶ For example Mr Shepherd MP “Because of the guillotine, it [this democratically elected House] cannot debate such fundamental considerations as the scope of emergency regulations. We never touched on that in our debates, but I have profound misgivings about the scope of some of the regulations.” House of Commons, Debate at Report Stage – House of Commons 24 May 2004, [Civil Contingencies Bill], at Col. 1404 (2004), http://www.publications.Parliament.uk/cgi-bin/newhtml_h1?DB=semukparl&STEMMER=en&WORDS=shepherd&ALL=&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=shepherd&COLOUR=red&STYLE=s&ANCHOR=40524-36_spnw2&URL=/pa/cm200304/cmhansrd/vo040524/debtext/40524-36.htm#40524-36_spnw2, accessed on 15 August 2008.

²³⁷ The draft Civil Contingencies Bill, CM 5843 published on 19 June 2003, is not now available on the uk resilience website or the Office of Public Sector Information website, <http://www.opsi.gov.uk/official-publications/command-papers/5800-5899.htm> and unfortunately had not been stored at the libraries I looked in.

²³⁸ Cabinet Office, Draft Civil Contingencies Bill Consultation Document (2003), http://www.statewatch.org/news/2003/sep/epowersconsultation_doc.pdf, accessed on 15 August 2008.

considered the draft bill. The reports of these committees²³⁹ had a significant effect on the bill. The government accepted some of the recommendations and the bill introduced into Parliament reflected this.²⁴⁰

All bills must pass through the normal committee stage set out above, but it can be shortened very much. The Anti-terror Crime and Security Act 2001 was considered in Committee and reports were made by the JCHR,²⁴¹ the Home Affairs Committee,²⁴² and the Select Committee on Delegated Powers and Regulatory Reform.²⁴³

Containing further provisions on criminal activities the Terrorism Act 2006 was not passed with urgency and therefore received more scrutiny.²⁴⁴ The Home Affairs Committee took evidence on the draft Bill just before it was introduced into the House of Commons.²⁴⁵ The JCHR reported on it,²⁴⁶ as did the Constitution Committee.²⁴⁷

3. Independent Reviews and Reports Prior to Legislating

Prior to the making of the PTA 1984, a review was carried out²⁴⁸ and in the wake of the peace process in Northern Ireland in 1996 the government commissioned a further Inquiry.²⁴⁹ This Report informed the debate on the TA 2000. Thus for

²³⁹ House of Commons Defence Committee, The Draft Civil Contingencies Bill, 7th Report of Session 2002-2003 (2003), <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmdfence/557/557.pdf>, accessed on 20 August 2008 and Joint Committee on the Draft Civil Contingencies Bill, Draft Civil Contingencies Bill Report, together with formal minutes, oral and written evidence (2004), <http://www.parliament.the-stationery-office.co.uk/pa/jt200203/jtselect/jtdcc/184/184.pdf>, accessed on 19 June 2008.

²⁴⁰ For example the government accepted that Emergency Regulations be subject to judicial review and narrowed the scope of the definition of 'emergency'. J. Smookler, *Making a Difference? The Effectiveness of Pre-Legislative Scrutiny*, 59(3) Parl. Aff. 522, at 524 (2006).

²⁴¹ The JCHR had two days to consider the bill and Lord Lester notes that the members "had to act with great speed if we were to make an effective contribution to debate conducted in the atmosphere of emergency and national security." A. Lester, *Terrorism Legislation and The Human Rights Act 1998* 11 (2002).

²⁴² Select Committee on Home Affairs, First Report of Session 2001-02. The Anti-Terror Crime and Security Bill (2001), <http://www.publications.Parliament.uk/pa/cm200102/cmselect/cmhaff/351/35102.htm>, accessed on 10 August 2008.

²⁴³ Select Committee on Delegated Powers and Regulatory Reform, Seventh Report of Session 2001-02 The Anti-Terror Crime and Security Bill (2001), <http://www.publications.Parliament.uk/pa/ld200102/ldselect/lddelreg/45/4502.htm>, accessed on 10 August 2008.

²⁴⁴ The Terrorism Act 2006 passed in five months, see Bonner, *supra* note 13, at 630.

²⁴⁵ Home Affairs Committee, Minutes of Evidence – 11 October 2005 (2005), <http://www.publications.Parliament.uk/pa/cm200506/cmselect/cmhaff/515/5101101.htm>, accessed on 14 August 2008.

²⁴⁶ Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters. Third Report of Session 2005–06 (2005), <http://www.publications.Parliament.uk/pa/jt200506/jtselect/jtrights/122/122.pdf>, accessed on 14 August 2008.

²⁴⁷ House of Lords Select Committee of the Constitution, Terrorism Bill. 4th Report of 2005-6 (2005), <http://www.publications.Parliament.uk/pa/ld200506/ldselect/ldconst/82/82.pdf>, accessed on 15 August 2008.

²⁴⁸ Lord Jellicoe, *supra* note 14.

²⁴⁹ Lord Lloyd, *Inquiry into Legislation against Terrorism*, Cmd 3420 (1996).

example under the Act prosecutions can be brought for acts of terror committed outside the jurisdiction.²⁵⁰

4. Continuing Scrutiny of Emergency Acts of Parliament

When Parliament is considering measures that significantly affect human rights and when it is empowering the Executive to make such legislation it may want to review the working of that legislation. This can be achieved through a renewal clause or a sunset clause.

a. Renewal Clauses

The Emergency Powers (Defence) Act 1939 contained a twelve monthly renewal clause. The Crown could only make the Order in Council renewing the Act following resolutions of each House, thus allowing for an annual debate on the matter.²⁵¹

The procedure of renewal by Order subject to affirmative resolution was followed in a number of the terrorism Acts. The 1974 Act renewal clause²⁵² was modelled closely on similar legislation for Northern Ireland²⁵³ and a renewal clause was maintained, though extended to a twelve monthly renewal²⁵⁴ in 1976, and maintained in 1984 and 1989.²⁵⁵

A different provision was used in Part IV of the ATCSA 2001 with a single renewal meaning that the provisions could be in force for a maximum of 27 months without new primary legislation.²⁵⁶ When the PTA 2005 introduced control orders to replace Part IV of ATCSA 2001 it introduced a twelve monthly renewal.²⁵⁷

b. Sunset Clauses

Sunset clauses are not as common as renewal clauses. All three occurrences are in terrorism legislation. One is a pure sunset clause for the whole Act.²⁵⁸ The second²⁵⁹ combines the sunset clause with a renewal clause and the third²⁶⁰ only applies to part of the Act.

²⁵⁰ This reflects the recommendation of Lord Lloyd that legislation should have regard to the UK's international obligations, B. Brandon, *Terrorism, Human Rights and the Rule of Law: 120 years of the UK's Legal Response to Terrorism*, Crim. LR 981, at 986-987 (2004).

²⁵¹ S11(1) EP(D)A 1939, *supra* note 58.

²⁵² The Act had to be renewed by order after it had been in force for six months and at six monthly intervals thereafter, Section 12(2) PTA 1974, *supra* note 72.

²⁵³ Walker, *supra* note 32, at 32.

²⁵⁴ After the Act was in force for twelve months.

²⁵⁵ S17 PTA 1976, s17(2) PTA 1984, *supra* note 82, and s27(6) PTA 1989, *supra* note 32.

²⁵⁶ After 15 months in force Part IV could be renewed once by the Secretary of State for a further twelve months, s29(20)(b) ATCSA 2001 (as enacted), *supra* at note 88.

²⁵⁷ S13(2)(c) PTA 2005, *supra* note 100.

²⁵⁸ Section 5(2) of the Prevention of Violence (Temporary Provisions) Act 1939, Prevention of Violence (Temporary Provisions) Act 1939 (repealed) (as enacted).

²⁵⁹ Ss 17(2) and 17(3) PTA 1984, *supra* note 82.

²⁶⁰ On the introduction by delegated legislation of measures under the third pillar of the EU, s111 ATCSA 2001, *supra* note 88.

During passage of the CCA 2004 a three-year sunset clause was favoured by certain parliamentarians. This had been recommended by the Joint Committee²⁶¹ and was the subject of amendments passed by the Lords,²⁶² which received much support from the opposition during the third reading debate in the Commons.²⁶³ The government, however, argued that it was unnecessary, because the emergency regulations would be subject to scrutiny once made and there is no sunset provision in the CCA 2004.²⁶⁴

5. Government Assurances

Parliament may be happy to accept a government assurance of its future conduct without this being included in the bill itself. During passage of the PTA 1984 two assurances were provided:²⁶⁵ an annual review by a Commissioner to report prior to the renewal of the Act and the early laying of the renewal order so that the Government could withdraw it and introduce an amended order meeting any concerns expressed by Parliament. The government is, of course, not bound by these assurances²⁶⁶ and may decide not to follow up.²⁶⁷

6. Reports and Reviews for Continuing Scrutiny of Legislation

In order to have feedback on the working of the legislation Parliament may specify that a Committee or individual is appointed to review the working of the Act.²⁶⁸ This has been used extensively in terrorism legislation. The first review was initiated by government, rather than at the request of Parliament,²⁶⁹ However, when terrorism legislation was subsequently renewed the opposition proposed a further review.²⁷⁰ A series of reviews were carried out under the PTA 1984.²⁷¹

²⁶¹ Joint Committee on the Draft Civil Contingencies Bill, *supra* note 239, at 19 para. 38.

²⁶² Amendments 18-20 House of Lords, Hansard Vol. 666, Columns 1319-1365, 16 Nov 2004 at Col. 1356-1365 (2004), http://www.publications.Parliament.uk/pa/ld200304/ldhansrd/vo041116/text/41116-09.htm#41116-09_head0, accessed on 15 August 2008.

²⁶³ It was argued that in practice it would be impossible to debate the bill when considering emergency regulations, and that on principle such powers should be scrutinised separately from the Orders made under them. Mr Allan MP House of Commons, Hansard Vol 426, Col. 1363-1414, 17 Nov 2004, at Col.1370 (2004), <http://www.publications.Parliament.uk/pa/cm200304/cmhansrd/vo041117/debindx/41117-x.htm>, accessed on 15 August 2008.

²⁶⁴ Ruth Kelly MP House of Commons, Hansard Vol 426, Col. 1363-1414, 17 Nov 2004, at Col. 1374 (2004), <http://www.publications.Parliament.uk/pa/cm200304/cmhansrd/vo041117/debindx/41117-x.htm>, accessed on 15 August 2008

²⁶⁵ Walker, *supra* note 32, at 36.

²⁶⁶ And arguably should not be bound – it would thereby be fettering its discretion.

²⁶⁷ For example the assurance of new primary legislation during the passage of the PTA 2005, *see supra* note 233 and related text.

²⁶⁸ Or the government may give an assurance on the matter *see supra* note 265 and associated text.

²⁶⁹ Walker, *supra* note 32, at 34.

²⁷⁰ *Id.*, at 35.

²⁷¹ Sir Cyril Philips and Viscount Colville Walker, *supra* note 32, at 37.

In the PTA 2005 there was a duty to appoint someone to report on the impact of any proposals for new legislation on the PTA 2005 and the use made of derogating control orders.²⁷² Statutory reviews were also used in the TA 2000,²⁷³ subsequently replaced by a provision in the TA 2006.²⁷⁴

A newer innovation is a report to Parliament by the Executive on the working of the Act. This has been used in the PTA 2005²⁷⁵ with the report being provided by the Secretary of State.

7. Initiation of Emergency

Within wartime and civil contingencies legislation the question arises of Parliamentary scrutiny of the initial decision of the proclamation of war or declaration of emergency. There is no parallel in terrorism legislation. However, as with all emergency legislation there is the question of Parliamentary scrutiny of the delegated legislation produced by the government.

The Select Committee on the Constitution recommended²⁷⁶ a new convention that the government should seek Parliamentary approval to enter into armed conflict in order to strengthen the power of Parliament to challenge the Executive. However, the government rejected this as unnecessary due to the high level of Parliamentary scrutiny.²⁷⁷

The EPA 1920 included Parliamentary scrutiny of the proclamation of an emergency, and the bill was amended during its passage to increase the scrutiny of Parliament. The time for recall of Parliament was reduced from seven to five days and any proclamation of emergency would expire after one month.²⁷⁸ This was not carried through into the CCA 2004, where there is no scrutiny by Parliament of whether an emergency occurs.

III. Scrutiny of Regulations and Orders

1. Level of Scrutiny

No provision was made for the scrutiny of emergency regulations by Parliament in WW1. For the most part "... Parliament made few more attempts to control or influence the use by the Executive of its powers."²⁷⁹ The emergency regulations in

²⁷² The initial review was to be after nine months and annually thereafter, s14(3) with terms of reference in s14(4) PTA 2005, *supra* note 100.

²⁷³ S126 TA 2000 as enacted, *supra* note 35.

²⁷⁴ This review is of Part 1 of the TA 2006 which introduces a range of offences and of the TA 2000, which is amended by Part 2 of the TA 2006, *see* s36 TA 2006, *supra* note 98.

²⁷⁵ Provided by the Executive every three months, s14(1) PTA, 2005 *supra* 100.

²⁷⁶ Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility*, Vol. 1 Report - 15th Report of Session 2005-06 (2006), at 41, para. 103 and at 42, para. 108, available at <http://www.publications.Parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf>, accessed on 2 August 2008.

²⁷⁷ Department for Constitutional Affairs and Lord Chancellor's Department, *supra* note 276.

²⁷⁸ Parliament must be recalled within 5 days if it is adjourned and will sit during the period of the emergency – s1(2) EPA 1920, *supra* note 112.

²⁷⁹ Eaves, *supra* note 2, at 9.

WW2 were subject to the negative resolution procedure.²⁸⁰ There were arguments in Parliament for the use of the affirmative resolution procedure, however, this was resisted as too time consuming.²⁸¹

Initially Parliament did not pray often against the defence regulations. However, in 1943 the attitude began to change.²⁸² Eaves²⁸³ attributes this to the improvement in Britain's position in the war, the inability or unwillingness of the Courts to restrain the Executive and the prospect of the Executive powers remaining in place even after the war ended. One particular prayer during the early period does demonstrate parliamentary scrutiny. Regulation 18B²⁸⁴ allowed the Home Secretary very broad powers of detention.²⁸⁵ In Parliament this regulation was prayed against and there was opposition to it from a great number of MPs.²⁸⁶ Although there was no division the government issued an amended regulation, which included further safeguards against abuse.²⁸⁷ Parliament continued to monitor the use of the regulation and the court cases that arose under it. Concern about the lack of judicial control was raised on a number of occasions in the House.²⁸⁸

A major improvement in the level of scrutiny was made during the war with the establishment of a select committee to scrutinize delegated legislation.²⁸⁹ The Committee was established following concerted pressure by backbench MPs.²⁹⁰

Turning now to terrorism legislation under the TA 2000²⁹¹ the Secretary of State may proscribe organisations.²⁹² Much of the literature on this matter deals

²⁸⁰ S8 EP(D)A 1939, *supra* note 58.

²⁸¹ Eaves, at 19.

²⁸² Eaves, *supra* note 2, at 100. Eaves sets out the nature of each prayer.

²⁸³ Eaves, *supra* note 2, at 103-105. As to judicial scrutiny of the Executive in emergencies, *see* note 206 and related text.

²⁸⁴ Other regulations raised included 39B(1), 39B(2) and 39B(3) on influencing public opinion and providing for censorship, and 2D allowing for suppression of newspapers. Eaves, *supra* note 2, at 68-77.

²⁸⁵ The power in the original regulation was "to make provision ... for the detention of persons whose detention appears to the Secretary of State to be necessary or expedient in the interests of public safety or the defence of the realm ..." as cited in Cotter, *supra* note 8, at 239.

²⁸⁶ Mr D Foot moved the prayer on 31 October 1939. Eaves, *supra* note 2, at 37. Eaves provides a full account of the scrutiny of regulation 18B both by Parliament and the Courts at Chapter 3, 35-67.

²⁸⁷ Broadly the changes were that (i) the Secretary of State had to have "reasonable cause to believe" in the relevant facts before exercising the powers; (ii) the person had to be of "hostile origin" and that due to recent acts by that person it was necessary to control him. Eaves, *supra* note 2, at 38-39.

²⁸⁸ This included a question to the Prime Minister on 11 November 1941, a debate on the regulation on 26 November 1941 and criticism during the debate on continuation of the Act. Eaves, *supra* note 2, ch. 3.

²⁸⁹ "The Select Committee on Statutory Rules" was established in June 1944. It was to report orders or rules to Parliament. The grounds included making charging orders, ouster clauses and unexpected or unusual use of powers. Order of House of Commons 21 June 1944, cited in Eaves, *supra* note 2, at 113-114.

²⁹⁰ Eaves, *supra* note 2, at 113.

²⁹¹ TA 2000 Part 2, s3, *supra* at note 35.

²⁹² This triggers a range of offences committed if a person is a member of the organisation.

with the primary legislation, and describes the use made of the powers rather than scrutiny of the delegated legislation by Parliament.²⁹³ The extent of the Parliamentary scrutiny was challenged in the High Court. However, the issue was not considered in the judgment²⁹⁴ and concern was expressed in the House of Lords on this point and the inability to amend the Order to remove any particular organisation from the list to be proscribed.²⁹⁵ However, debates of other Orders indicate that certain members of the opposition in the House of Lords, although accepting the principle of proscription are keen for the process of proscription to be clear and to allow for a proper debate.²⁹⁶

An innovative provision was proposed in government amendments to the Counter-Terrorism Bill 2008 allowing Parliament to scrutinize the necessity of the pre-charge detention of particular individuals following a report from the Secretary of State.²⁹⁷ The Secretary of State must lay any order made by him to authorize the extension of pre-charge detention past 28 days as soon as reasonably practical. The order will lapse if a resolution is not passed in each House within seven days.²⁹⁸

2. Scrutiny of Emergency Provisions in ‘Normal’ Legislation

Since the 1980s and 1990s there is a range of legislation which provides the Secretary of State with the power to impose emergency provisions. The scrutiny of emergency provisions for energy and water usage, and control of animals during an animal disease outbreak will be considered here.²⁹⁹

The scrutiny of the use of such emergency powers varies. In relation to energy an Order in Council can be made which will expire after 28 days unless confirmed by a resolution of each House,³⁰⁰ whereas under the Water Resources Act 1991³⁰¹

²⁹³ See for example detailed description of these powers and criticism of the principle: Brandon, *supra* note 250, at 996.

²⁹⁴ *R. (on the application of the Kurdistan Workers' Party and others) v. Secretary of State for the Home Department; R. (on the application of the People's Mojahedin Organisation of Iran and others) v. Secretary of State for the Home Department; R. (on the application of Ahmed) v. Secretary of State for the Home Department*, [2002] EWHC 644, at para. 50.

²⁹⁵ Lord Goodhart, *Debate on Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2002*, 30 October 2002, <http://www.publications.Parliament.uk/pa/ld200102/ldhansrd/vo021030/text/21030-15.htm>, accessed on 15 August 2008.

²⁹⁶ Lord Dhokia raises the issue of the criteria for proscribing international organisations in *Debate on Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005*, 13 October 2005, at col. 492, <http://www.publications.Parliament.uk/pa/ld199697/ldhansrd/pdvn/lds05/text/51013-22.htm>, accessed on 15 August 2008.

²⁹⁷ Government amendments, replacing Clauses 25 and 26 of CTB 2008, 11 June 2008, House of Commons, Hansard, Vol. 477, Col. 402-3 (2008), <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080611/debtext/80611-0019.htm#080611121000036>, accessed on 22 November 2008. Note that these provisions are not now in the Bill.

²⁹⁸ Clauses 23(1) and 28(1)(b) CTB 2008, *supra* note 297.

²⁹⁹ It has not been possible to survey all such legislation. These have been chosen as the first three are basic services and the last affects a particular industry.

³⁰⁰ Sec. 3(1)(b) Energy Act 1976.

³⁰¹ The Secretary of State can make a drought order authorizing the Authority to “prohibit or limit the use of water for such purposes as the water undertaker thinks fit” through an “emergency

the Secretary of State can make emergency provisions with no provision for special scrutiny by Parliament on the introduction or use of this provision. The Animal Health Act 1981 allows the Secretary of State to impose orders on animal movement and sale, but with a special provision for scrutiny.³⁰²

3. Reservation of Powers to Parliament

To maintain its status even when passing a wide enabling provision Parliament may reserve certain powers to itself. In WW2 the powers to impose conscription and courts-martial of civilians were reserved.³⁰³

The EPA 1920 reserved the powers to impose military service or to break strikes³⁰⁴ and section CCA 2004 imposes various limitations on the scope of regulations made under it. This includes reserving the power of military conscription and industrial action, and offences punishable by more than three months imprisonment.³⁰⁵

4. Dealing with a Large Amount of Regulations in a Short Period

As described above the sheer amount of Regulations dealt with during WW2 made scrutiny difficult and the establishment of the Select Committee assisted with this.

A different issue arose under the EPA 1920, which was invoked on twelve occasions, all dealing with strike action.³⁰⁶ Emergency regulations were not made in all the cases when there was a proclamation.³⁰⁷ On each occasion that the powers were used a wide Code of regulations was invoked rather than tailor made regulations for each occasion.³⁰⁸ This may have lessened the scrutiny of Parliament, and imposed wider restrictions on the population than necessary.³⁰⁹

One suggestion to ameliorate this is the production of draft regulations that can be scrutinized before the emergency occurs. The government resisted the recommendation³¹⁰ in relation to the CCB 2004.³¹¹

drought order." A breach of conditions imposed under the Order is a criminal offence. Secs. and Ch. in General Water Resources Act 1991.

³⁰² Sec. 8(1) Animal Health Act 1981.

³⁰³ Sec. 1(5)EP(D)A 1939, *supra* note 58.

³⁰⁴ Cotter, *supra* note 38, at 397.

³⁰⁵ S23 CCA 2004, *supra* note 29.

³⁰⁶ For detailed description of the use of the powers of proclamation and of regulations *see* Morris, *supra* note 5, at 335-345.

³⁰⁷ Thus in 1966, 1970 and 1972 powers were made at an early stage, *id.*

³⁰⁸ Walker, *supra* note 17, at 184, para. 5.66.

³⁰⁹ *Id.* This is practice heavily criticized by Walker, However, this may partly be explained by the fact that the regulations were all dealing with the effects of strike action.

³¹⁰ Joint Committee on the Draft Civil Contingencies Bill, *supra* note 239, at 51-52, para. 196.

³¹¹ The government stated that the regulations might be misleading or highlight potential weaknesses or targets. Cabinet Office, *supra* note 152, at 18, para. 36. Although the requirement to publish draft regulations could have been included in the Act, the government could decide to publish it in any event.

F. Effectiveness of Scrutiny

Having described in some detail the scrutiny afforded by Parliament to emergency legislation the quality of this scrutiny will now be examined. Returning to the factors in effective scrutiny these will now be considered to prove the hypothesis that Parliament acts as an effective watchdog over the Executive in emergency legislation.

The range of amendments made will not form a separate section, as this can be seen in the consideration of the other factors – the scrutiny of Bills and provision for scrutiny of the subsequent Acts; the effectiveness of scrutiny of legislation passed quickly; a provision for and actual scrutiny of delegated legislation; how Parliament ensures it is informed when scrutinizing legislation; and finally the reservation of powers to Parliament. It will be seen that there is an overlap between the sections, thus for example the reservation of powers by Parliament under the EPA 1920 is considered under the scrutiny of bills section.

I. Scrutiny of Bills and Acts

1. Committees

The Parliamentary Committees have made a particular contribution to the scrutiny of legislation. Although the level of scrutiny does depend somewhat on time the JCHR Committee on the ATCSB 2001 overcame this to have an influence and government accepted the JCHR recommendation that the Home Secretary must have ‘reasonable’ belief that a person is involved in international terrorism before exercising powers under Part 4 of the Act.³¹²

Pre-legislative scrutiny of the draft CCB by the Joint Committee led to a number of amendments by the government before introduction of the bill itself. It accepted the recommendation³¹³ to narrow the scope of ‘emergency’ to exclude “political, administrative or economic stability” and “education services.”³¹⁴ The “triple lock” was also included in the Bill.³¹⁵ Parliamentary scrutiny of emergency regulations was increased so that Parliament can amend regulations rather than simply annulling or approving them.³¹⁶

It is notable that a member who sat on the Joint Committee scrutinizing the draft bill and another member on the Standing Committee made significant contributions to debates during passage of the bill.³¹⁷ Although some

³¹² Lester, *supra* note 241, at 18.

³¹³ Joint Committee on the Draft Civil Contingencies Bill, *supra* note 239, paras. 52 and 54.

³¹⁴ Cabinet Office, The Government’s Response to the Report of the Joint Committee on the Draft Civil Contingencies Bill (2004), at 8, paras 8-9, <http://www.ukresilience.gov.uk/preparedness/ccact/~media/assets/www.ukresilience.info/govtresp%20pdf.ashx>, accessed on 19 June 2008.

³¹⁵ *Id.*, at 6, para. 3.

³¹⁶ S27(3) CCA 2004, *supra* note 119.

³¹⁷ See for example Mr Allan MP (member of the Joint Committee) (member of the Select Committee), House of Commons, Hansard, Vol 426, Column 1363-1414, 17 Nov 2004 (2004), <http://www.publications.Parliament.uk/pa/cm200304/cmhansrd/vo041117/debindx/41117-x.htm>,

recommendations of Committees were accepted many were not, for example the government did not accept that draft emergency regulations should be published or that there should be a five-year sunset clause in the Act.³¹⁸ Although all the bills covered here have nominally passed through all stages many did not go through a lengthy scrutiny in Committee at all.³¹⁹ The JCHR did achieve some modest success in getting the ATCSB amended, but the bill had 14 Parts and 129 sections, so in practice scrutiny was minimal at best.

2. Scrutiny on the Floor of the Commons and the House of Lords

There have been amendments to bills due to the debate on the floor of the House. These often strengthen the scrutiny of Parliament. Thus in the EPA 1920 the time limit for recalling Parliament after a declaration of emergency was reduced from fourteen to five days and Parliament also reserved to itself the powers of military and industrial conscription.³²⁰

The government accepted an amendment to the CCB 2004³²¹ so that emergency regulations cannot amend the Human Right Act 1998, following debate in both the House of Commons and Lords.³²²

3. The Value of Renewals of Legislation

The very fact that there is an annual debate can arguably keep the issue alive in the minds of parliamentarians and the public.³²³ However, the renewal debates on the PTA 1976 have been characterized as “short, poorly attended and conducted late at night.”³²⁴

In the case of the PTA 2005 the renewal clause meant that the government could renew the legislation, rather than having to bring forward new primary legislation, in accordance with the assurance given to Parliament.³²⁵

The effectiveness of renewals is undermined by the fact that Parliament has no opportunity to scrutinize each part of the Act and make amendments,³²⁶ hence the call for sunset clauses rather than renewal.

accessed on 15 August 2008. It is acknowledged that the contribution may not necessarily be due to committee membership.

³¹⁸ See *supra* note 264 and associated text.

³¹⁹ For example the DORA 1914, *supra* note 55.

³²⁰ Cotter, *supra* note 58.

³²¹ S223(5) CCA 2004, *supra* note 119.

³²² This amendment was also made in response to criticism of civil liberties groups. Ruth Kelly, House of Commons Hansard, Vol 426, Column 1363 - 1414, 17 Nov 2004, at Col. 1382 (2004), <http://www.publications.Parliament.uk/pa/cm200304/cmhansrd/vo041117/debindx/41117-x.htm>, accessed on 15 August 2008.

³²³ Walker, *supra* note 323.

³²⁴ Walker, *supra* note 32, at 35.

³²⁵ See note 233 and related text.

³²⁶ There were attempts to improve this with an assurance by the government that it would make amendments to orders to accommodate concerns about renewal. However, this was not successful, as the government never amended the orders Walker, *supra* note 32, at 36.

4. Legislating at Speed

As set out above³²⁷ Parliament will sometimes extend debate on a bill which the government want to pass quickly, thereby allowing time for amendments to be made³²⁸ and “to discuss things quietly.”³²⁹

However, the successes for Parliament in scrutiny set out above must be set against the fact that Parliament for the most part allows the government to push through legislation at great speed. This might arguably be a necessity, for instance in wartime when hostilities have or are about to commence.³³⁰

Even on very detailed bills Parliament has accepted curtailed debate.³³¹ While complementing the House of Lords on its scrutiny of the Anti Terror Crime and Security Bill,³³² Fenwick severely criticizes the response of the House of Commons to emergency legislation in general, and that bill in particular.³³³

This can be related to politicians reflecting public outrage at terrorist violence,³³⁴ particularly in the House of Commons,³³⁵ rather than taking time to reflect on whether the measures in the government’s bill are necessary or workable. One might hope that Parliamentarians would step back slightly from the public mood.³³⁶ However, it would seem that politically this may be made difficult for the Executive.³³⁷ Whatever the reason this can have important consequences for the legislation.

³²⁷ In relation to the Emergency Powers (Defence) (No. 2) Act, 1940 *see* note 58.

³²⁸ For example a review by a three person panel of all cases passing through the special courts that sentenced the defendant to death, P. Rava, *Emergency Powers in Great Britain*, B.U.L. Rev 403, at 441 (1941).

³²⁹ Full quote “we are not so afraid of Hitler that we cannot take time to discuss things quietly”, Sir Archibald Sotheby during debate on the bill cited in Eaves, *supra* note 2, at 85.

³³⁰ Cotter notes that between the declaration of war on 4 August 1914 and the passing of DORA 1914 prerogative powers were being used that needed to be translated into statute. However, the Emergency Powers (Defence) (No. 2) Act, 1940 indicates that even in war not all bills will be urgent, Cotter, *supra* note 58.

³³¹ As in the CCB 2004, *see supra* note 236.

³³² Fenwick, *supra* note 98, at 729-730.

³³³ “[A] range of illiberal measures that had been kept on file, awaiting their chance, were rapidly accepted by a supine Commons.” *Id.*, at 729.

³³⁴ Walker notes of the bombings in Birmingham in 1974: “[t]he nation was horrified ... The public bayed for official vengeance.” Walker, *supra* note 32, at 31.

³³⁵ Fenwick states that in contrast to a “supine” House of Commons, while Thomas notes that “[p]aradoxically it fell to the un-elected House of Lords to offer a degree of meaningful reflection and opposition to the Bill.” Fenwick, *supra* note 98, at 729 and Thomas, *supra* note 230, at 381.

³³⁶ Walker (in relation to the PTA 1974 passed in the wake of the Birmingham pub bombings): “[d]emocracy surely demands more than consideration of a Bill at leisure behind a veil of official secrecy followed by a legislative stampede.” Walker, *supra* note 32, at 32.

³³⁷ “[I]t is all too easy for the Executive to use its control over a legislative chamber – particularly when a nation is in the grip of horror and panic – to introduce repressive laws. ... Additionally, a climate can be created where any dissent is deemed and supportive, soft on terrorism or even unpatriotic.” H. Kennedy, *The Hamlyn Lectures: Legal Conundrums in our Brave New World 4* (2004).

Some regard the decision in *A v. Secretary of State for the Home Department*³³⁸ as a “landmark.”³³⁹ Tierney³⁴⁰ sees it as an indication of the failure and emasculation of Parliament, with the courts being obliged to step in to fill a possible constitutional gap.

Lack of time for initial scrutiny means that even when amendments are made they are not systematically thought through. In the case of ACTSA 2001 this led to scrutiny provisions that are complex³⁴¹ and contain anomalies of the matters that are subject to scrutiny³⁴² and of the details of the way the scrutiny is to work.³⁴³

5. Reservation of Powers

The reservation of powers under wartime legislation has been considered above. There is one aspect of civil contingencies legislation that produced a strong debate on whether powers should be reserved and if so which powers. Although the CCA 2004 was amended to protect the Human Rights Act 1998, Parliament failed to ensure that other constitutional enactments were statutorily protected, although the Minister was clear that this “must not be seen as casting doubt on the fact that emergency powers cannot be used to make substantive amendments to constitutionally important enactments.”³⁴⁴

Parliament’s record in protecting human rights during emergencies has been a mixed one. Some of the amendments achieved³⁴⁵ during wartime were made explicitly on the basis of protection of human rights.³⁴⁶ The protection of the

³³⁸ *A v Secretary of State for the Home Department*, *supra* note 99.

³³⁹ Arden states that “... it is a landmark decision in a [sic] favour of liberty and freedom of the individual. It will be cited in the English courts for many years to come.” M. Arden, *Meeting the Challenge of Terrorism: The Experience of English and Other Courts*, 80 ALJ 818, at 824 (2006).

³⁴⁰ “The importance of parliamentary assertiveness in scrutinising designations of purported emergencies is therefore vital not only in the interests of fundamental liberties but also to prevent a constitutional vacuum being created which the courts may inappropriately be tempted to fill.” S. Tierney, *Determining the State of Exception: What Role for Parliament and the Courts?*, 68(4) Mod. L Rev 668, at 671-672 (2005).

³⁴¹ Walker notes that in the Act (as enacted) a review of the whole Act under s122, a time limit applies of 15 months on Part IV of the Act, subject to an order of the Secretary of State extending this (s29), limitation on the duration of any scheme relating to retention of communications data retention (s104) and a sunset clause on the introduction by delegated legislation of measures under the third pillar of the EU (s111). Walker, *supra* note 72, at 269-270.

³⁴² *Id.*, at 270.

³⁴³ For example the Committee reviewing the Act has no power to take evidence, but has the power to specify that a provision of the Act shall cease to have effect unless renewed by a resolution of each House. Walker, *supra* note 72, at 269-270 (These provisions s122 and 123 ACTSA 2001 are still in effect).

³⁴⁴ R. Kelly, House of Commons Hansard, Vol 426, Col. 1363-1414, 17 Nov 2004 at Col. 1382 (2004), <http://www.publications.Parliament.uk/pa/cm200304/cmhansrd/v041117/debindx/41117-x.htm>, accessed on 15 August 2008.

³⁴⁵ The amendment would not necessarily be made by parliament – the government might agree to withdraw a regulation altogether or amend it. Eaves, *supra* note 2, at 39.

³⁴⁶ Mr Foot MP opposed Regulation 18B (under the EP(D)A 1939) on the basis that it abolished the Habeas Corpus Act. *Id.*, at 40.

HRA 1998 from amendment by emergency regulations under the CCA 2004³⁴⁷ is another very obvious protection of human rights.³⁴⁸

However, the weaknesses of parliamentary scrutiny are demonstrated in the legislation concerning indefinite detention.³⁴⁹ Parliament passed legislation³⁵⁰ that was subsequently held to breach the ECHR. This meant that nine individuals were discriminated against and held under indefinite imprisonment for up to three years³⁵¹ in breach of the ECHR, and went through a lengthy court case up to the House of Lords to get a ruling to that effect.³⁵²

Following the declaration of incompatibility legislation was then rushed through Parliament³⁵³ to introduce a new regime of control orders. Given the situation after the judgment in *A v. Secretary of State for the Home Department* this speed may have been necessary in order to maintain control over some of the individuals, but the effect was a further Act that was passed without full scrutiny. The government initially agreed that this legislation would be replaced with an opportunity to carefully consider such detention which has not been brought forward.³⁵⁴

II. Parliament Keeping Itself Informed

1. Reports and Reviews to Assist Parliament

The opposition in 1982 obviously felt that reviews were of some value as they proposed a review of the 1976 Act, as concerns grew about the legislation.

There are, however, a number of issues that undermine the usefulness of reviews or reports. The first is the narrow scope of the terms of reference, which

³⁴⁷ Under s20(5)(b)(iv) CCA 2004, *supra* note 119.

³⁴⁸ Although it is possible that a derogation would be entered in an emergency under Article 15 of the ECHR the Act would still protect the fundamental rights in Arts. 2, 3, 4(1) and 7. Council of Europe, *supra* note 3.

³⁴⁹ As regards the ATCSA 2001 Part 4 Lord Nicholls in his judgment in the case of *A v Secretary of State for the Home Department*, *supra* note 99, stated that “[i]n enacting legislation ... Parliament and ministers must give due weight to fundamental rights and freedoms ... In the present case I see no escape from the conclusion that parliament must be regarded as having attached insufficient weight to the human rights of non-nationals ... the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period.”

³⁵⁰ Part 4 of the ATCSA 2001 – it is noted that there was concern expressed particularly in the House of Lords and the JCHR, *supra* notes 241 and 332.

³⁵¹ Not all were in detention for this length of time as two left the country, one was transferred to Broadmoor Hospital and one released on strict bail conditions. *A v. Secretary of State for the Home Department*, *supra* note 99 per Lord Bingham, at 89.

³⁵² The decision of the Court of Appeal was handed down on 25 October 2002 and that of the House of Lords on 16 December 2004 and the litigants had a hearing at the SIAC before these decisions.

³⁵³ The PTA 2005, *see supra* note 100.

³⁵⁴ A further review has been ordered into Control Orders following further Court cases – BBC Report “Review of Control Orders Sought”, 16 September 2009, <http://news.bbc.co.uk/1/hi/uk/8258644.stm>, accessed on 20 November 2009.

are set by the government. Walker³⁵⁵ states that reviews of Lord Shakleton in 1976 and Lord Jellicoe in 1982 were hampered by the fact that they were not to consider the necessity for terrorism legislation, simply the working of the Acts.

Poor timing of the publication of the reports has also undermined their impact on both new legislation³⁵⁶ and the renewal of existing legislation.³⁵⁷ In 2006 and 2007 the JCHR raised the timing of the publication of the report into the working of the Act, which was at the same time or just before the laying and debate of the Renewal Order for the PTA 2005.³⁵⁸ In 2008 it recommended changes to strengthen the role of Parliament including the statutory reviewer being appointed by, and reporting directly to Parliament and the Report being published a month before the debate on renewal of the Control Order Regime.³⁵⁹ The government has indicated that it does not believe that the strengthened safeguards are necessary.³⁶⁰

2. Scrutiny of Delegated Legislation

Certainly through the World Wars this was the main focus of Parliamentary scrutiny.³⁶¹ Although Parliament may have erred in not providing for formal scrutiny in DORA those in Parliament did exercise scrutiny of government action through questions, motions to reduce appropriations, and adjournment motions in the House Commons or Lords.³⁶²

In WW2 there was a provision for scrutiny and there are examples such as the scrutiny of Regulation 18B.³⁶³ Parliament made prayers against Regulations that undermined the role of Parliament,³⁶⁴ or where a particular regulation extended very wide power. Eaves³⁶⁵ notes in particular the prayer against a regulation

³⁵⁵ Walker, *supra* note 32, at 34.

³⁵⁶ Lord Shakleton reported after the passing of the Prevention of Terrorism (Temporary provisions) Act 1976. *Id.*

³⁵⁷ The 2006 review of Lord Carlile on the PTA 2005 was published on the same day as the renewal order and the 2007 and 2008 reviews just before the renewal order.

³⁵⁸ Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006 Twelfth Report of Session 2005–06, 12th Report of 2005-06, at 9, para. 14 (2006), <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/122/122.pdf> accessed on 14 August 2008 and Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008” Tenth Report of Session 2007–08 (2008), <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/57/57.pdf>, accessed on 24 August 2008, at 9, para. 20.

³⁵⁹ Joint Committee on Human Rights, *id.*, at 11-12, para. 33.

³⁶⁰ Home Office, The Government’s Reply to the 10th Report of the Joint Committee on Human Rights Session 2007-08 HL PAPER 57, HC 356, at 2 (2008), <http://www.official-documents.gov.uk/document/cm73/7368/7368.pdf>, accessed on 26 August 2008.

³⁶¹ In part due to the fact that the Executive was taking on the legislative functions of Parliament, Eaves *supra* note 2, at 17.

³⁶² Cotter, *supra* note 58, at 389.

³⁶³ See *supra* note 238 and related text.

³⁶⁴ Eaves, *supra* note 2, at 116.

³⁶⁵ *Id.*, at 117-118.

relating to transport that provided for “removing or modifying ... any prohibitions or restrictions imposed by or under any Act.” Parliament also concerned itself with freedom of expression, and censorship of the press.³⁶⁶

Parliamentary pressure during WW2 led to one of the most important aids to scrutiny of delegated legislation, the Scrutiny Committee. The current JCSI shares a number of the terms of reference with the original committee³⁶⁷ and officials treat seriously the possibility of any questions by the Committee about SI.³⁶⁸

Parliament met with only mixed success in scrutiny of these regulations. Some were either amended or abolished.³⁶⁹ However, Regulation 2D was used in a way to control the press that received severe criticism in Parliament.³⁷⁰

Parliament is sometimes slow to exercise its powers even when scrutiny is provided for.³⁷¹ Again when considering the regulations made under the EPA 1920 Parliament only secured amendments to regulations in one case,³⁷² and Morris states that the safeguards in the EPA 1920 are formalities rather than an effective mode of scrutiny.³⁷³

As mentioned above the control of terrorism related delegated legislation is not so evident, but this is partly due to the lack of such regulations. The provision in the Counter-Terrorism Bill currently before Parliament arguably blurred the lines between the judicial and legislative roles and this has been raised by the JCHR.³⁷⁴ The parliamentary safeguard will be weakened by the inability of Parliament to consider evidence relating to the individual case, due to national security and the potential prejudice to any subsequent trial.³⁷⁵ Ultimately the

³⁶⁶ Regs 39A, 39 B and 39C (re freedom of expression) and 2C and 2D (re censorship of the press) *id.*, at 68-73. Eaves details the history of these regulations and opposition in Parliament.

³⁶⁷ The imposition of charges, exclusion of the courts in the enabling Act, unusual or unexpected use of the enabling power, unjustified delay in publication or any other special reason. *Id.*, at 114 and SO 151(1) (B) House of Commons, *supra* note 200.

³⁶⁸ Page describes its influence as “pervasive” and that it is perceived by certain departmental lawyers as helping them avoid doing a bad job. Page, *supra* note 40, at 161 and 167.

³⁶⁹ Including Regs 39A, 39b and 39C. Eaves, *supra* note 2, at 71-72.

³⁷⁰ *Id.*, at 73-74.

³⁷¹ Eaves, *supra* note 2, at 99. Particularly in WW2. However, one must be careful not to thereby claim that parliament was disinterested in scrutiny as the country faced the danger of invasion and there was more unity in Parliament. For example, it can be seen that when WW1 ended Parliament’s concern with the control of delegated powers was expressed strongly leading to the Donoughmore Report. Wallington and Hayhurst, *supra* note 19, at 549.

³⁷² Morris, *supra* note 5, at 333.

³⁷³ *Id.*, at 333-334.

³⁷⁴ Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Eleventh Report) 42 Days and Public Emergencies, Twenty-First Report of Session 2007–08, Stationery Office, London, at 15, para. 36 (2008), <http://www.publications.Parliament.uk/pa/jt200708/jtselect/jtrights/23/23.pdf>, accessed on 22 August 2008.

³⁷⁵ Mark Durken MP stated in the second reading debate: “If the Home Secretary comes to tell Parliament that the extension has been triggered, what is Parliament to do? Can we seriously question that? We face the scenario of the judicial process potentially being corrupted, with the cross-linking of the judicial process and the parliamentary process in a way that is dangerous.” 1 Apr 2008, Col. 673, <http://www.publications.Parliament.uk/pa/cm200708/cmhansrd/cm080401/debtext/80401-0011.htm>, accessed on 1 September 2008.

House of Lords' defeat and other opposition in the House of Commons led to the government withdrawing provisions extending pre-trial detention to a maximum of 42 days,³⁷⁶ and potential weaknesses in the Parliamentary scrutiny provisions were mentioned during the debate in the House of Lords.³⁷⁷

There is no systematic provision for scrutiny of emergency orders passed under normal legislation. It could be argued that drought orders are less important than those restricting energy use,³⁷⁸ however, such orders will still have a significant effect on the population. It is surprising that there is no additional scrutiny of animal health orders given the severe impact of animal movement restrictions on the industry.³⁷⁹

3. Failure to Declare Emergency

This article has focussed on the scrutiny of the Executive of delegated legislation once an emergency has been declared. However, there is little attention either in academic literature³⁸⁰ or Parliament on the failure to declare an emergency³⁸¹ or to make emergency regulations.³⁸² This may be because governments have very readily resorted to emergency powers.³⁸³ However, it is conceivable³⁸⁴ that there may be times when the government is reluctant to exercise emergency powers, and might use provisions under normal legislation to their full effect without

³⁷⁶ Per Secretary of State, House of Commons, Hansard, Vol. 480, Col. 620, 13 October 2008, <http://www.parliament.the-stationery-office.com/pa/cm200708/cmhansrd/cm081013/debtext/81013-0016.htm#08101334000001>, accessed on 22 November 2008.

³⁷⁷ Per Lord Lester, at Col. 654; and Lord Steyn, at Col. 687, House of Lords Hansard, Vol. 703, Column 632 [Debate on Counter Terrorism Bill] (2008), <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80708-0002.htm#08070843000002>, 8 July 2008.

³⁷⁸ *Supra* note 300 and related text.

³⁷⁹ The estimated costs of the Foot and Mouth disease outbreak in 2001 were £170m on industries related to agriculture and between £2.7 and £3.2 bn on tourism. I. Anderson, *Foot and Mouth Disease: Lessons to be Learned Inquiry Report*, HC888, (2002), at 132-133, para. 14.1, http://archive.cabinetoffice.gov.uk/fmd/fmd_report/report/index.htm, accessed on 26 August 2008.

³⁸⁰ Walker considers the position of the Executive in tort, noting that in order to safeguard the protection of rights under the royal prerogative thus obligating the state to have in place security measures. Walker, *supra* note 17, at 209, para. 6.48. A question then arises of state liability for failure to exercise powers to actually safeguard citizens, if necessary invoking the CCA 2004. This would, of course be a difficult case to prove given that the course of events for any potential litigant may have been unaltered (even if petrol rationing begins, there is no guarantee that any individual would have been able to get fuel from a finite supply).

³⁸¹ Under the EPA 1920, *supra* note 112.

³⁸² Under the CCA 2004, *supra* note 119.

³⁸³ Morris, *supra* note 5, at 350.

³⁸⁴ Perhaps if it does not want to appear to have failed to manage a situation or to be regarded as weak by the public. There was for example suspicion that the timing of the 2001 election affected the response to the foot and mouth disease outbreak. Leading article: *No Easy, Clean Answers to the Foot-and-Mouth Crisis*, The Independent, 18 April 2001, <http://www.independent.co.uk/opinion/leading-articles/article681733.ece>, accessed on 29 August 2008.

Parliament having any extra scrutiny.³⁸⁵ Alternatively it may simply delay implementing emergency provisions.³⁸⁶

Formal scrutiny of the failure to exercise powers is a feature of other jurisdictions, and Bates asserts that such scrutiny should be systematic and should therefore be carried out by the Legislature rather than the Courts.³⁸⁷

It is of course, preferable for the country to be governed under normal legislation³⁸⁸ even in emergency or under emergency plans already in place and published so that the citizens can know what the potential powers are.³⁸⁹ However, if there is an emergency and the government is not using its powers there is currently nothing Parliament can do, apart from applying pressure.

III. Powers that Parliament Could Use to Strengthen Scrutiny

When considering whether Parliament has acted as an effective watchdog of the Executive, as well as considering the use of the powers it already has, it is useful to consider what Parliament could have done to improve scrutinizing legislation. This section will also summarize some of the powers which Parliament has sought that have been mentioned earlier.

Others have commented more generally on the strengthening of scrutiny, particularly of delegated legislation³⁹⁰ and some of these comments apply equally to emergency legislation.³⁹¹ More sunset clauses would offer the most comprehensive opportunity to scrutinize primary legislation, however, as with all post-legislative scrutiny this should be balanced against the time and cost for such legislation, both within Parliament and for those preparing the legislation.³⁹²

As recommended by the JCHR³⁹³ the provisions for a Report should specify that Parliament should take a pro-active role appointing the individual or panel reporting, the terms of reference and timing of publication.

³⁸⁵ Being delegated legislation it might be some time before this got fully considered.

³⁸⁶ During the coal strike of 1972 an emergency was only declared under the Emergency Powers Act 1920 when the country only had two weeks' supply of coal left. Morris, *supra* note 5, at 337.

³⁸⁷ J. Bates, *The Future of Parliamentary Scrutiny of Delegated Legislation*, 19(3) Stat. L. Rev. 155, at 159-160 (1988).

³⁸⁸ This is well illustrated by the opposition in the House of Lords to the imposition of courts-martial for civilians, rather than the use of a normal court. *Supra* note 220 and text.

³⁸⁹ For example the duty on Category 1 Responders to consider publications of the plans it has in place to maintain its functions during an emergency, s2(1)(f) CCA 2004.

³⁹⁰ See for example House Of Lords Merits of Statutory Instruments Committee, *supra* note 203.

³⁹¹ Such as a guarantee for the time for debate Hansard Society, *supra* note 193, at 6 under "Lessons from Scotland." Concern was expressed that the time for debate on the emergency regulations under the CCA 2004 would be limited to 90 minutes and in effect Parliament will be dependent on the government to agree to a debate. House of Commons, Hansard, [Consideration of House of Lords Amendments – Civil Contingencies Bill 2004] Vol. 426, Col. 1363-1414, 17 Nov 2004, at Col. 1365 (2004), <http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo041117/debindx/41117-x.htm>, accessed on 15 August 2008. While it is acknowledged that others such as forward planning of the publication and timing of delegated legislation would be out of place – House of Lords Merits of Statutory Instruments Committee (2006) *supra* note 2003, at 26, para. 66.

³⁹² Law Commission, *supra* note 23, at para. 2.21.

³⁹³ See note 358.

The use of active consultation and pre-legislative scrutiny is encouraged³⁹⁴ and although not suitable for most emergency legislation could be used for draft regulations for civil contingencies, allowing Parliament to consider these regulations in a measured way in the light of the responses of agencies and other interested parties. Walker asserts³⁹⁵ that this should be done, even if the actual regulations made in an emergency would differ.

All emergency legislation should specifically exclude business in Parliament from emergency regulations and any detention of Members of Parliament should be subject to confirmation by Parliament.³⁹⁶

IV. Reasons for the Current Position

There are a variety of reasons posited for the current level of scrutiny of emergency legislation. Some of these have been touched on above, and these will now be brought together so that the whole picture can be seen.

The same difficulties that affect all Parliamentary scrutiny are also evident in emergency legislation. The British Parliamentary system, which usually entails a government with a substantial majority means that defeating the government is hard.³⁹⁷

Walker³⁹⁸ states that one reason for the lack of scrutiny is that opposition can only be confrontational, rather than principled or less emotional. However, Eaves³⁹⁹ commenting on the coalition government, notes that the opposition and cut and thrust of normal politics is the “most effective safeguard ... to Executive action.” When the coalition government was formed backbench MPs faced this challenge by forming an informal ‘shadow opposition’ to maintain the scrutiny.⁴⁰⁰

The seriousness of the situation and imminent danger do mean that the Executive needs sufficient powers to tackle the threat to the citizen.⁴⁰¹ It may be unfair, particularly at a distance to criticize Parliament for not amending bills or regulations when parliamentarians (and the public) may accept that the ensuing powers are justified.

³⁹⁴ House of Lords Merits of Statutory Instruments Committee, *The Management of Secondary Legislation: Follow-Up*, at 7, para. 13 (2008), <http://www.publications.Parliament.uk/pa/ld200708/ldselect/ldmerit/70/70.pdf>, accessed on 9 April 2008.

³⁹⁵ Walker, *supra* note 17, at paras 5.66-6.68.

³⁹⁶ C. Walker, *Note by Professor Clive Walker, Specialist Adviser to the Committee* (2003), reproduced in Appendix 5 of Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill Report*, together with formal minutes, oral and written evidence, at 102 (2004), <http://www.Parliament.the-stationery-office.co.uk/pa/jt200203/jtselect/jtdcc/184/184.pdf>, accessed on 19 June 2008.

³⁹⁷ Smookler, *supra* note 240, at 532.

³⁹⁸ C. Walker, *The Governance of Special Powers: A Case Study of Exclusion and the Treatment of Individual Rights under the Prevention of Terrorism Acts*, in C. Gearty & A. Tomkins (Eds.), *Understanding Human Rights* 611-639, at 636 (1996).

³⁹⁹ Eaves, *supra* note 2, at 127.

⁴⁰⁰ *Id.*, at 22.

⁴⁰¹ In relation to war “the ability to maintain national unity is essential.” Professor Laski cited in Eaves, *supra* note 2, at 35.

The more threat there is and the more imminent (as in the wake of a recent outrage), the higher the emotions and stakes if the wrong decisions are made. This could lead to a tendency to err on the side of the authorities when deciding whether or not further powers that curtail liberties should be provided.⁴⁰²

The voice for the increase in powers may be much stronger than that for the protection of civil liberties.⁴⁰³ This is partly due again to the power of the Executive, which has many more resources compared to either the opposition⁴⁰⁴ or individual MPs or peers⁴⁰⁵ to research and consider the issues around a bill.

Parliament may not be provided with (or require the government to provide) the necessary expertise and information to properly scrutinize legislation.⁴⁰⁶ The suitability of Parliament as a scrutineer may be severely compromised if it is unable to see relevant information that cannot be released.⁴⁰⁷

G. Conclusions

The survey above shows a varying picture of the scrutiny offered by Parliament. It is operating under a number of constraints when scrutinizing emergency legislation, including the British parliamentary system itself. This is not something that could be easily tackled, but it causes or exacerbates the problems experienced in scrutiny, in particular the speed of passage of legislation and the use of guillotines to bring debate to an end even when there is more time for scrutiny in general.⁴⁰⁸

In other respects the deference to the Executive is perhaps more surprising. An example is the lack of use of the power to amend or challenge the Regulations in the first part of WW2. Although the conditions of war must be taken into account,⁴⁰⁹ the scrutiny powers were included in the WW2 legislation with a knowledge of the promulgation of draconian regulations in WW1.⁴¹⁰

⁴⁰² "Terrorism is about political drama. Drama is meant to engender emotions ... Some call this capacity of political violence to skew policy and action 'the politics of the last atrocity'. The resultant danger of ill-considered, ill-defined 'panic' legislation is manifest." Walker, *supra* note 86.

⁴⁰³ "The problem for civil libertarians is that authoritarians always have the best rhetoric. They claim the songs, the flags, the pictures of the dead and the dying ... they persuade us that the sacrifice of liberty is worth the warm blanket of security." Kennedy, *supra* note 337, at 1.

⁴⁰⁴ The opposition does receive 'Short money' to assist in carrying out parliamentary business. R. Kelly, *Short Money* (2008), <http://www.Parliament.uk/commons/lib/research/notes/snpc-01663.pdf>, accessed on 30 August 2008.

⁴⁰⁵ Feldman, *supra* note 1.

⁴⁰⁶ For example *see supra* note 355 on the narrow terms of reference of the reports on terrorism legislation.

⁴⁰⁷ A concern being expressed about the Counter-Terrorism Bill passing through Parliament, *supra* note 377 and text.

⁴⁰⁸ As in the CCB 2004, *supra* note 97.

⁴⁰⁹ Eaves notes that one reason for increased scrutiny was an improvement in the military position of the country, *see supra* note 283.

⁴¹⁰ Eaves, *supra* note, at 9.

The willingness of the House of Commons to accept the provisions in the ATCSB 2001 is a further example of failure of Parliament to act as a watchdog, although this did not extend to the House of Lords.

Parliament can play its watchdog role and this seems most successful in Committees,⁴¹¹ where as Walker suggests success must be measured not only in terms of actual amendments, but information provided to Parliament and influence over the Executive.

However, the problems shown by instances such as indefinite detention and the lack of power that Parliament has to actually amend legislation indicate that Parliament checks the Executive to a certain extent, but that the hypothesis of my article is not proved. There is often a need for the Executive to hold great power during an emergency. Parliament as a watchdog does not appear to have the power, or assert the power it does have, to fully control the Executive in exercising the enabling powers.

⁴¹¹ *Supra* note 312 and related text.