HYBRID BILLS AND THE PROTECTION OF HUMAN RIGHTS: THE PARLIAMENT SQUARE LITIGATION 2002-2007.

A. Introduction

The provisions of the Serious Organised Crime and Police Act 2005¹ which were enacted to prohibit unauthorised demonstrations in the vicinity of Parliament Square were constitutionally questionable from the start. They regularly received bad publicity². Gordon Brown, in first statement in the House of Commons as Prime Minister, announced that “it would be right to change the laws that now restrict the right to demonstrate in Parliament Square.”³

The person whose demonstration had given rise to this ill-fated legislation, Mr Brian Haw, had already had his petition for leave to appeal against the decision of the Court of Appeal⁴ (confirming the validity of that legislation, insofar as it purported to apply to him) refused on 19 February 2007⁵.

The Court of Appeal (and the house of Lords) did not consider the question whether, if this legislation had had the meaning which the Home Secretary contended for it, it would have been, as a matter of Parliamentary procedure, ‘hybrid’ and would therefore have followed (which this legislation did not do) the quasi-judicial procedure for ‘hybrid bills’.

For the position here was that described by Christopher Hughes (himself a writer on the Federal Constitution of Switzerland), when he put the matter in a broader European context:

“...equality before the law is the principle that the law shall neither favour or disfavour any particular persons, and that the law shall not be capricious or arbitrary- for all arbitrariness picks out named persons, favouring or disfavouring them. Justice, fairness, equity, these are words which can only be fully defined by making use of the idea of equality. As applied to the wording of a law, these principles mean that the wording must be ‘general’. It is usual to find this principle of Equality before the Law explicitly stated in the written constitutions of continental countries... the experience of this country has shown that here at any rate the principle is equally secure when embodied in a network of Standing Orders of the two Houses, Committees and administrative practices.”⁶

B. Was the legislation to evict Mr Haw from Parliament Square ‘hybrid’ ?

¹ Sections 132-138 and the delegated legislation discussed herein.

² See, for example, *Goodbye Magna Carta* (by Dan Kieran), *The Sunday Times (news Review)*, April 8, 2007.

³ *Hansard (House of Commons)*, 3 July 2007, col.818.

⁴ *R (on the application of Haw) v Secretary of State for the Home Department* [2006] 3 All ER 428.

⁵ Decision of an Appeal Committee of the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, and Lord Carswell) noted [2007] 1 All ER at page xix.

⁶ C.Hughes, *The British Statute Book*, Hutchinson, 1957, pp.35-36. Equality before the Law is, of course, enshrined in the European Convention on Human Rights (largely written by English and Scottish lawyers), Article 14.

In order to examine this issue of ‘hybridity’ it is first necessary to look at the pre-existing rights of Mr Haw, as vindicated by the Queen’s Bench Division in *Westminster City Council v Haw* [2002] EWHC 2073 (QB); 2002 WL 31050512. It should be noted, however, that the writer’s purpose in discussing Parliamentary procedure in this context is not to make use of the “British courts’ new-found willingness to engage in fundamental constitutional questions.”⁷ As in *R (Jackson) v A-G*⁸ this review of an Act of Parliament can be justified as an exercise in statutory interpretation.⁹

It is submitted that the fact that the ‘hybrid bill’ procedure was not used to prohibit unauthorised demonstrations in Parliament Square necessarily indicates that this legislation did not have the meaning which the Court of Appeal (and, by default, the House of Lords) gave to it, but that the original decision of the Divisional Court¹⁰ was correct in law.

C. *Westminster City Council v Haw* (2002)

When Lord Scarman (some 30 years’ ago) was in the forefront of the argument that the United Kingdom should incorporate the European Convention on Human Rights into its domestic law, he identified three deficiencies in the common law of England: (1) it did not recognise a right to privacy; (2) it did not give sufficient protection to prisoners, once it had convicted them and sent them into the dark; and (3) it did not permit political protests to be held on public highways.¹¹

As if to vindicate Lord Scarman’s analysis of what a Human Rights Act would do to the law of public highways, in October 2002 the Queen’s Bench Division held that the Human Rights Act 1998 was the principal reason why it refused to grant Westminster City Council an injunction against the conduct of Mr Haw.¹²

Mr Haw had been holding a (seemingly never-ending) political protest on the pavement in Parliament Square, opposite the House of Commons, since June 2001. His protest related to the policies of the British government towards Iraq. He displayed a large number of placards on some of the grass, and on part of the pavement, in Parliament Square. These placards encroached upon the pavement (which was 11 feet wide) by some 18 inches¹³ Mr Haw also kept a bed near his placards and this bed encroached upon the pavement by about 2 feet.¹⁴

⁷ A.McHarg, *What is delegated legislation ?*, [2006] PL539, at p.560.

⁸ [2006] 4 All ER 1253 (HL)

⁹ See: J.Allen, *The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition ?*, (2007) 18 KLJ 1-22,

¹⁰ *R(Haw) v Home Secretary* [2006] 2 WLR 50.

¹¹ Guest lecture to law students, Polytechnic of the South Bank, Autumn Term 1979.

¹² *Westminster City Council v Haw* [2002] EWHC 2073 (QB); 2002 WL 31050512; decision noted at 166 JP 823.

¹³ Westlaw transcript (2002 WL 31050512) paragraph 16.

¹⁴ *ibid*

Gray J agreed with Westminster City Council that these obstructions caused to the pavement¹⁵ were not *de minimis*. His Lordship also agreed with Westminster City Council that these obstructions were “wilful” because they were deliberate¹⁶. But His Lordship held that these obstructions were not unreasonable because: (1) the pavement was little used;¹⁷ and (2) Mr Haw was exercising his freedom of expression under Article 10 of the European Convention on Human Rights in relation to a political issue.¹⁸

“...the best test of truth is the power of thought.”¹⁹

D. Do political placards infringe the Control of Advertisements Regulations ?

In essence, Gray J took the view that, after the Human Rights Act 1998, the use of a public highway for a political protest was as reasonable- and as lawful- as using it for selling hot dogs from a van, distributing advertising material outside stations, or collecting money for charitable causes on Saturday mornings.²⁰

Gray J did not agree with Westminster City Council’s argument that Mr Haw’s use of the highway could not be lawful because he was displaying advertisements, contrary to s.224, Town and Country Planning Act 1990. In His Lordship’s view an ‘advertisement’, in its ordinary connotation, applied to “material which promotes a product or service”.²¹ His Lordship also took the view that the placards were not ‘advertisements’ within the meaning of s.336 of the 1990 Act (which defines ‘advertisements’ to include “announcements” or “directions”) because:

“it does [not] appear to me that Mr Haw is announcing anything or directing anyone anywhere to do anything.”²²

It is submitted that this definition of an ‘advertisement’ renders *ultra vires* the time-limits placed upon the display of political posters by the Town and Country Planning (Control of Advertisements) Regulations 1992.²³ But one undesirable consequence of such an approach is that it might lead to the uncontrolled spread of political murals and slogans on exterior walls, as in the sectarian enclaves of Northern Ireland.

¹⁵ The grass in Parliament Square came under the jurisdiction of the Greater London Authority and not under the jurisdiction of Westminster City Council: see Westlaw transcript (2002 WL 31050512) paragraph 15. The G.L.A. was not a party to the proceedings. In August 2007 it took eviction proceedings against an encampment of later-arriving demonstrators, relying on reasons of public health and the prevention of litter: see (*London*) *Evening Standard*, 21 August 2007.

¹⁶ See footnote 13 above.

¹⁷ The pavement was “not easily reached by pedestrians”. It was used by “less than 30 pedestrians per hour”: per Gray J, 2002 WL 31050512, paragraph 21.

¹⁸ Westlaw transcript (2002 WL 31050512) paragraphs 22-24.

¹⁹ -per Gray J quoting Justice Oliver Wendell Holmes (“echoing John Stuart Mill”): 2002 WL 31050512, paragraph 23.

²⁰ -*ibid*, paragraph 17, citing *Nagey v Weston* [1965] 1 All ER 78.

²¹ -*ibid*, paragraph 19.

²² -*ibid*, paragraph 20, per Gray J. The word “not” has clearly been omitted from the Westlaw transcript accidentally.

²³ S.I. 1992/666, Schedule 2, Class F (advertisements relating to pending Parliamentary, European Parliament, and local government elections).

E. A protester, a wayfarer, or a settler ?

“An itinerant showman who erects a temporary structure for his performances may be in exclusive actual possession, and may, with strict grammatical propriety, be said to occupy the ground on which his structure is placed, but it is clear that he is not such an occupier as the [Poor Relief Act 1601] intends... A transient, temporary holding of land is not enough to make the holding rateable. It must be an occupation which has in it the character of permanence; a holding as a settler not as a wayfarer.”

-per Lush J in *R v St Pancras Assessment Committee* (1877) 2 QBD 581, at p.588.

In *Westminster City Council v Haw* it was clearly necessary for the Council to prove that Mr Haw was something more than an “itinerant showman”. There seems to have been no dispute about this fact. Gray J recited a passage from the witness statement of Mr Haw in which he (Mr Haw) claimed to have been conducting his protest on a “24-hour-a-day basis every day” since June 2001. His Lordship further stated that he (Mr Haw) “sleeps and eats” on the pavement in Parliament Square.²⁴ These facts were recited as if they were an admission by Mr Haw, rather than a finding of fact in his favour.²⁵

These assertions by Mr Haw do not seem to have been contested by Westminster City Council. The Council no doubt took the view that, the more clearly Mr Haw claimed to treating the pavement as his home, the more likely it would be that the court would view his conduct as a wilful obstruction of the highway (“without lawful authority or excuse”), contrary to s.137, Highways Act 1980.

F. How can a person have a ‘home’ on a public street ?

After the judgement of Gray J in his favour, Mr Haw continued to exercise his right to protest in Parliament Square- so much so that, by July 2005, the Divisional Court had reason to record that “He [Mr Haw] lives on the pavement in the square...”²⁶

This finding of fact was made in judicial review proceedings brought by Mr Haw against the Home Secretary and the Metropolitan Police Commissioner.²⁷ The respondents did not appeal against that finding of fact, or attempt to withdraw from any concession which they had made to that effect, when (on other grounds) they appealed to the Court of Appeal. On the contrary, that court (in the judgement given by Sir Anthony Clarke MR), stated that, on the facts as they stood in May 2006:

“He [Mr Haw] lives on the pavement.”²⁸

²⁴ WL 31050512, paragraph 5.

²⁵ -*ibid*

²⁶ *R(Haw) v Home Secretary* [2006] 2 WLR 50, at p.52; [2006] 3 All ER 428, at p.431: per Smith LJ, paragraph [1].

²⁷ --*ibid*

²⁸ -per Sir Anthony Clarke MR: *R (on the application of Haw) v Secretary of State for the Home Department, Commissioner of Police of the Metropolitan Police Service* [2006] EWCA Civ 532; 2006; WL1209016: Introduction; [2006] 3 All ER 428, at p.448. [2006] 3 WLR 40, at p.42, paragraph 1. Decision noted in [2006] PL 622.

It seems therefore an indisputable (or undisputed) fact that at some time, not long after June 2001, a section of the pavement in Parliament Square became Mr Haw's home- the place where he ate, slept, and had his being.

It is a common proof in the law of landlord and tenant that a person may have two "homes" (but not three).²⁹ But there is no mention in any of the reported cases involving Mr Haw that he was living in any other place but the pavement in Parliament Square.

G. Do encamped protestors commit the crime of "sleeping rough" ?

The criminal offence commonly known as "sleeping rough" arises out of one of the permissible permutations of the language of section 4 of the Vagrancy Act 1824:

"wandering abroad and lodging in any barn, or outhouse..... or in the open air.... and not giving a good account of himself or herself...".

This offence ceased to be punishable by imprisonment in 1982.³⁰ It ceased to be punishable by anything more than a level 1 fine in 1991.³¹ In any event, the offence is only committed by a person who fails to give "a good account of himself or herself."

It is implicit in the judgement of Gray J in *Westminster City Council v Haw*³² that anyone exercising his or her freedom of expression under Article 10 of the European Convention on Human Rights will be able to give a "good account of himself or herself". Mr Haw did not cease to be a political protester while he was asleep, or temporarily absent from the site, because his placards continued to express his political views, 24 hours per day.

H. Serious Organised Crime and Police Act 2005

Mr Haw's protest could not avoid coming to the attention of the government and to members of both Houses of Parliament and embarrassing many of them, as no doubt he intended it to do. The procedures then in place to ensure that passageways to and from Parliament were kept free from obstructions took the form of instructions to the Metropolitan Police Commissioner contained in Sessional Orders of the House of Commons. In November 2003 (29 months after Mr Haw's protest had begun), the House of Commons Select Committee on Procedure recommended that:

²⁹ Megarry, *The Rent Acts*, 11th ed.1988, Vol.1, pp.239-241; *Residential Occupation* [by L.W.Blake], (*'Mainly for Students' series*), *Estates Gazette*, 25 June 1988 and 9 July 1988.

³⁰ Criminal Justice Act 1982, s.70(1)(a)(i).

³¹ Criminal Justice Act 1991, s.26(5): this is the only statutory provision which actually uses the phrase "sleeping rough".

³² See footnotes 4 and 12 above.

“...the Government should introduce appropriate legislation to prohibit long-term demonstrations and to ensure that the laws about access are adequate and enforceable.”³³

The government’s response to this Report was published by the Select Committee in May 2004. The government was quoted as stating that its first principle was that the right to free expression under Article 10 of the European Convention on Human Rights should be protected. The government went on to state that:

“it [the government] accepts that access to Parliament must be maintained, [and that] the working environment of Parliament [be] safeguarded, and [the government also accepts] the right of people working in Parliament not to be subject to anti-social behaviour.”³⁴

I. Controlling demonstrations in Parliament Square

The legislation which emerged in the light of the Select Committee’s Report was that which was eventually contained in sections 132-138, Serious Organised Crime and Police Act 2005. Section 138(1) of that Act empowered ‘the Secretary of State’³⁵ to specify an area as “the designated area” for the purposes of sections 132 to 137 of the Act. Section 138(2) stipulated that no point in the area so specified should be “more than one kilometre³⁶ in a straight line from the point nearest to it in Parliament Square”.

The ‘designated area’ had to be specified in legislation because s.132(1) of the Act created a new offence, namely the offence of organising a demonstration, or taking part in a demonstration, or carrying on a demonstration (“by himself”), in a public place in the designated area, if- “when the demonstration starts”- authorisation had not been given under s.134(2) of the Act. Section 134(2) of the Act imposed a duty on the Metropolitan Police Commissioner to give authorisation for such a demonstration if notice had been given under s.133(2) of the Act. Section 133(2) required 6 clear days’ notice before the demonstration was due to start, “if reasonably practicable”. In any event, not less than 24 hours notice had to be given to the police.³⁷

Although the Metropolitan Police Commissioner was under a duty to give authorisation for a demonstration, if proper notice of it had been given to the police, he was empowered to impose such conditions as, in his “reasonable opinion”, were

³³ Report on Sessional Orders and Procedures, Third Report, Session 2002/03 (HC 855): quoted in Home Office’s Explanatory Notes to the Serious Organised Crime and Police Bill, paragraph 50. See also Rudi Fortson’s annotations to s.132, Serious Organised Crime and Police Act 2005, in *Current Law Statutes Annotated*.

³⁴ Report on Sessional Orders and Procedures, Second Special Report 2003/4 (HC 613): quoted in Home Office’s Explanatory Notes to the Serious Organised Crime and Police Bill, paragraph 51.

³⁵ The office of Secretary of State is, of course, a portmanteau one: see: Interpretation Act 1978, 1st Schedule (“‘Secretary of State’ means one of Her Majesty’s Principal Secretaries of State.”). The indexer of the 2005 Act, in *Current Law Statutes Annotated*, assumed (no doubt correctly) that Parliament intended the relevant powers to be exercised only by the Secretary of State for Home Affairs.

³⁶ The use of metric measurements met with some opposition when the Bill was being debated in the House of Lords and even the government minister (Baroness Scotland of Asthal) admitted to disliking such measurements: Hansard (HL), vol.671, col.770 (6 April 2005).

³⁷ Section 133(2)(b), Serious Organised Crime and Police Act 2005.

“necessary” for preventing one or more specified hindrances, disorders, dangers, and disruptions.³⁸

None of these risks were foreseen to arise out of the conduct of Mr Haw himself. Nevertheless, the Parliamentary Under-Secretary of State for the Home Department (Caroline Flint) informed the House of Commons, on 7 February 2005, that police officers from Charing Cross Police Station regularly made visits to Parliament Square to “check behind paraphernalia for devices left, or by people who are protesting, but by people who might use the protest for their own motives to cause a security problem....”³⁹

J. The pre-existing demonstrator

The provisions of the 2005 Act relating to the procedure for giving notice of demonstrations, and for obtaining authorisations for them, came into force on 1 July 2005 by a Commencement Order made on 7 June 2005.⁴⁰ The remaining provisions of sections 132-137 of the Act came into force on 1 August 2005.⁴¹

The relevant paragraph of the Commencement Order provided that the words “demonstrations starting” in s.132(1) and s.133(2) of the Act were to take effect as if they were references to demonstrations “starting or continuing” on or after 1st August 2005.⁴² The Commencement Order also provided that, for the purpose of giving notice of a demonstration which was “due to start or continue” on or after 1st August 2005 the Act would come into force on 1st July 2005.⁴³

The power to specify the metes and bounds of the “designated area” was exercised by the (then) Home Secretary⁴⁴ on 8 June 2005.⁴⁵ The area so ‘designated’ clearly included all of Parliament Square and would have included some of the pavements in Trafalgar Square had those pavements not been expressly excluded by the statutory instrument,⁴⁶ in conformity with an undertaking given to Parliament on 6 April 2005.⁴⁷

The question arose, however, whether statutory provisions which did not purport to come into force until 1st July 2005 could instantaneously criminalise a demonstration

³⁸ See: s.134(3), Serious Organised Crime and Police Act 2005.

³⁹ Hansard (HC), 7 February 2005, col.1291 (Third Reading); quoted by Smith LJ in his judgement in the Divisional Court: [2006] 3 All ER 428, at pp.437-438.. [2006] 2 WLR 50, at p.59, paragraph 40.

⁴⁰ Paragraph 3(1)(o),(q), and (r), Serious Organised Crime and Police Act 2005 (Commencement No.1, Transitional and Transitory Provisions) Order 2005, S.I. 2005/1521(C.66). This statutory instrument was signed by a “Parliamentary Under-Secretary of State” at the Home Office (Paul Coggins). This authorisation was, no doubt, given in exercise of the constitutional convention recognised by the Court of Appeal in *Carltona Ltd v Commissioner for Works* [1943] 2 All E.R.560; but see footnote 35 above.

⁴¹ Paragraph 3(1)(p); paragraph 3(5); and paragraph 4(2), S.I. 2005/1521(C.66), above.

⁴² Paragraphs 3(5) and 4(2), of S.I. 2005/1521 (C.66), above.

⁴³ Paragraph 3(1)(p) of S.I. 2005/1521(C.66), above..

⁴⁴ Charles Clarke (“One of Her Majesty’s Principal Secretaries of State”).

⁴⁵ Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005 S.I. 2005/1537.

⁴⁶ Paragraph 2(3), S.I. 2005/1537, above.

⁴⁷ Hansard (HL) Vol.671, col.770 (Baroness Scotland of Asthal).

which had started in June 2001- four years before demonstrations in Parliament Square were required to obtain prior authorisation from the police.

In favour of Mr Haw's contention that his demonstration did not require any such authorisation was the fact that s.132(1)(c) of the 2005 Act was worded to create a criminal offence if- and only if- "when the demonstration starts" the person who carries on the demonstration did not have authorisation in accordance with the statutory provisions which did not come into force until 1st July 2005. It is, of course, a long-established presumption of the common law (enshrined in Article 7 of the European Convention on Human Rights) that the legislation does not create criminal offences with retro-active effect.⁴⁸

Any argument that Parliament intended Mr Haw (because he did not have a prior "authorisation") to become guilty of a criminal offence on the midnight hour of 30th June/1st July 2005 would be open to the criticism that this would make him a criminal because he could not "call back yesterday, bid time return".⁴⁹

At best, any such argument (making use of the legerdemain with dates in the Commencement Order⁵⁰) would fall foul of the dicta of Lord Bridge in *R v Bloxham* [1982] 1 All ER 582, at p.585, [1983] 1 AC 109, at p.114:

"As a general rule, ambiguities in a criminal statute are to be resolved in favour of the subject..."

-or, as Forbes J⁵¹ once put it:

"Whenever there are fine lines to be drawn, I always draw them on the side of the accused." ⁵²

K. Drawing fine lines

The Serious Organised Crime and Police Act 2005 received Royal Assent on 7 April 2005. On 8 April 2005 Mr Haw's solicitors wrote to the Home Secretary asking when sections 132-138 of that Act were to come into force, and asserting that s.132(1) did not apply to Mr Haw. A reply was sent dated 20 July 2005 stating that the Commencement Order⁵³ had already been made on 7 June 2005.⁵⁴

Presumably having been alerted in some other way, Mr Haw had issued proceedings in the Administrative Court on 15 July, seeking a declaration against the Home Secretary and the Metropolitan Police Commissioner that sections 132-138 of the

⁴⁸ *Waddington v Miah* [1974] 1 WLR 683; [1974] 2 All ER 377; 138 JP 497; 18 Sol.Jo.365 (HL)- another case where a person failed to get permission for something which did not require permission at the time when he did it (entering the U.K. "without leave").

⁴⁹ Shakespeare: *Richard II*, Act III, scene ii. (24 hours is the minimum period of notice specified in s.133(2)(b): see footnote 37 above.)

⁵⁰ S.I. 2005/1521 (C.66) above.

⁵¹ Sir Hugh Forbes (1917-1985).

⁵² This statement was made by Forbes J when he was sitting as the 'red judge' at Maidstone Crown Court, addressing his remarks to prosecuting counsel (this writer's pupil-master), Michaelmas Term, 1973.

⁵³ S.I. 2005/1521(C.66), see footnote 40 above.

⁵⁴ Per Sir Anthony Clarke MR, paragraph [12] of the judgement of the Court of Appeal: [2006] 3 All ER 428, at p.451; paragraph [11] in the Westlaw transcript 2006 WL 1209016

2005 Act did not apply to him. On 26 July 2005 the Divisional Court (Smith LJ, McCombe J; and Simon J) gave Mr Haw permission to apply for judicial review. This application succeeded (Simon J dissenting) on 29 July 2005.⁵⁵

The majority of the Divisional Court preferred a literal interpretation which excluded Mr Haw from the scope of s.132(1) to a purposive approach which (according to the Home Office) clearly included him, almost by name.⁵⁶

And this brings us, very neatly, to the question which was posed early on in this article, namely: Was the legislation 'hybrid'? For this is the essential question which was not considered by the Court of Appeal when (on 8 May 2006) it reversed the decision of the Divisional Court and held that Parliament had intended sections 132-138 of the 2005 Act to come into force so as to apply to demonstrations starting before its commencement, "as surely as those starting after".⁵⁷

The nature of hybridity is a question which does not appear to have been the subject of much academic discussion since the publication of Christopher Hughes's book.⁵⁸

L. The nature of 'hybridity'. ?

Erskine May defines a 'hybrid bill' as follows:

"Hybrid bills are public bills which are considered to affect specific private or local interests, in a manner different from the private or local interests of other persons or bodies in the same category, so as to attract the provisions of the standing orders applicable to private business."⁵⁹

Hughes observed that:

"Parliament is too slow to be anything but a lawgiver. It is not yet a despot... the rule of formal generality, of 'equality before the law' is preserved by the distinction between Public and Private Bills- the procedure for boiling the Bishop of Rochester's cook⁶⁰ would now be by 'Hybrid Bill'. The general statute book is therefore, with some exceptions, kept clear of what is formally 'particular'.⁶¹

It is, of course, not open to the courts to refuse to apply an Act of Parliament because, when it was a Bill of Parliament, it did not follow the procedures for a private or hybrid bill:

⁵⁵ [2006] 2 WLR 50; [2006] 3 All ER 428, at pp.431-448; see also footnote 26 above.

⁵⁶ See the argument of the Home Office recited by Smith LJ at paragraphs [41]-[42] of his judgement: [2006] 3 All ER 428 at p.438. The Home Office drew the court's attention to the words of Caroline Flint, recorded in *Hansard* and quoted above: see footnote 39.

⁵⁷ *R (on the application of Haw) v Secretary of State for the Home Department and another* [2006] 3 All ER 428, per Sir Anthony Clarke MR at p.455, paragraph [24]; 2006 WL 1209016, paragraph [23]. Decision noted in [2006] PL 622.

⁵⁸ See footnote 6 above. Christopher Hughes (1918-2005) was Professor of Politics at Liecester University. See his obituary : *The Times*, December 9, 2005/December 13, 2005.

⁵⁹ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed., 2004, p.566.

⁶⁰ 22 Hen.8, c.9 (1530): *An Act against poisoning*.

⁶¹ C.Hughes, *The British Statute Book*, p.139.

“The authority of *British Railways Board v Pickin*⁶² is unquestioned... Lord Reid quoted with approval a passage of Lord Campbell in *Edinburgh and Dalkeith Rly Co v Wauchope*⁶³ where he said: ‘All that a Court of Justice can do is look to the Parliament roll; if from that it should appear that a bill has passed both Houses and received Royal assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor what was done previous to its introduction, or what passed in Parliament during its... various stages through both Houses..’”⁶⁴

However, the question in Mr Haw’s case was a one of construction, not of sovereignty. Did Parliament intend to criminalise one (notorious) pre-existing demonstration as well as all future unauthorised demonstrations ?

It is submitted that, if Parliament had intended to legislate in such a way, well knowing that Mr Haw was carrying on a pre-existing demonstration in the ‘designated area’, it would have recognised that the legislation in question was ‘hybrid’. Having regard to the fact that the Hybrid Bill procedure was not used (a fact which was not considered by the Court of Appeal) it is submitted that the decision of the Divisional Court was correct, and that it was not permissible to disregard the literal meaning of the words “when the demonstration starts” in s.132(1) of the 2005 Act, or to adopt (as the Court of Appeal did) a purposive construction of the legislation which ignored the dicta of Lord Bridge in *R v Bloxham*.⁶⁵

M. The Aircraft and Shipbuilding Industries Bill of 1977.

Christopher Hughes made the point that, in borderline cases, the boundary between a public bill and a hybrid bill⁶⁶ is an “indeterminate or even a movable one”:

“it may depend upon the words used rather than the functions performed, or it may shift with an alteration in the climate of opinion or with a different conceptions of the functions of government.”⁶⁷

The most recent examination of this paradigm shift took place in 1977 when certain provisions in the Aircraft and Shipbuilding Industries Bill were held to be ‘hybrid’ by the Examiners of Petitions for Private Bills appointed by the House of Lords.⁶⁸

The Examiners took as their starting point the statement of Mr Speaker Hylton-Foster on the Bill for the London Government Act 1963:

“I think that a hybrid bill can be defined as a Public Bill which affects a particular private interest in a manner different from the private interest of other persons or bodies of the same category or class.”

The Examiners went on to note that the breadth of this definition had been narrowed by a previous ruling by Mr Speaker Clifton-Brown on the Bill for the Iron and Steel

⁶² [1974] AC 765, [1974] 1 All ER 609

⁶³ (1842) 8 Cl & Fin 710 at 725, 8 ER 279 at 285

⁶⁴ -per Lord Bingham of Cornhill: *R(Jackson) v A-G* [2005] 4 All ER 1253, at p.1266, paragraph [27].

⁶⁵ [1982] 1 All ER 582, at p.585. [1983] 1 AC 109 at p.114, and see the above discussion: ‘The Pre-existing demonstrator’.

⁶⁶ A bill introduced by the government cannot be a private bill, but it can be a hybrid bill.

⁶⁷ C.Hughes, *The British Statute Book*, p.34.

⁶⁸ House of Lords, Sessional Papers 1976-77, (Vol.5), 71: *Aircraft and Shipbuilding Industries Bill: Certificate from the Examiners that certain Private Bill Standing Orders should apply to the Bill and Statement of Reasons therefor*.

Act 1949 and a subsequent ruling by Mr Speaker King on the Bill for the Iron and Steel Act 1967. The effect of these rulings was that:

“...the defences of the subject against selective ill-treatment can be turned by drafting a category or class that comprises him and his fellow victims and nobody else.”⁶⁹

In the particular circumstances of the Aircraft and Shipbuilding Industries Bill the Examiners were finally led to conclude:

“...whether a Bill is or is not hybrid has degenerated into a question whether Parliamentary Counsel who draft Bills for the Government have been successful in drawing a class into which the undertaking intended for nationalisation can be fitted but which excludes the undertakings that the Government does not wish to nationalise; and it is curious that the answer to the question whether a constitutional right of such importance as the right of a subject to plead his cause before Committees of either House might depend on the opinion of officers of the House about the meaning of such phrases as ‘engaged in the business of repairing, refitting or maintaining ships’ and ‘entitled to a licence to occupy a dry-dock or graving dock’.”⁷⁰

The Examiners recognised that the draftsman of the Aircraft and Shipbuilding Industries Bill failed to avoid hybridity because:

“...he had [had] to rely on such information as the Government could glean from sources that were not always sympathetic. Had he has the knowledge available to us he would in all probability have succeeded. As it was that knowledge was denied him, and the attempt failed.”⁷¹

Erskine May summarises the matter as follows:

“A bill has not been regarded as hybrid if all the persons or bodies affected by it, and no others, belong to a category or class germane to the subject-matter of the bill...”⁷²

In sum, the position is exactly the reverse of what every undergraduate law student learns about the law of incitement, namely that whilst it is (theoretically) lawful to incite an impossible crime (e.g. to rob a non-existent wages clerk), any prosecutor can easily turn this defence by framing the charge in sufficiently broad terms (e.g. to “rob a woman at Bow”).⁷³ The Parliamentary draftsman, by contrast, must draft his legislation in sufficiently narrow terms, so as to avoid the risk of ‘hybridity’, i.e. so as to include only those persons or bodies who are germane to the subject-matter of the bill, “and no others”.

N. The germane ‘category or class’.

It is clear that the category or class which was germane to sections 132-138 of the Serious Organised Crime and Police Act 2005 was the class of demonstrators who did not have authorisation (under a procedure commencing on 1 July 2005) when their demonstrations began. If Parliament had intended the provisions to come into effect

⁶⁹ -*ibid*, p.5.

⁷⁰ -*ibid*, p.12: these questions were described as ‘trivialities’ on p.10.

⁷¹ -*ibid*, p.(13).

⁷² *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed., 2004, p.641.

⁷³ *R v Fitzmaurice* [1983] QB 1083, [1983] 1 All ER 189.

so as to criminalise demonstrators who had already begun their demonstrations on a date when authorisation could not have been granted it would have realised that that demonstrator, or those few demonstrators, were being discriminated against, separately from everybody else in the germane class. In short, the legislation would have been ‘hybrid’.

It is no answer to the charge of ‘hybridity’ in the case of sections 132-138 to point out that Mr Haw was not the only resident in the ‘designated area’. Not every householder or every shopkeeper in the ‘designated area’ could have been required to take down posters from their windows on or before 1st July 2005. The legislation was worded so that it only applied to demonstrations “in a public place in the designated area”.⁷⁴ Indeed, the ‘designated area’ itself was expressly defined to include pavements as well as streets; it did not go so far as to include any buildings which abutted those pavements.⁷⁵

O. Conclusion.

It is transparent from *Hansard* that (as the Home Office was afterwards very eager to assert),⁷⁶ Parliament knew, that Mr Haw was in a unique (or almost unique) category or class- he was a person (probably the only person) who was not capable of getting the appropriate authorisation at the time when his demonstration began.

At no point was it ever argued by the Home Office, or the Metropolitan Police Commissioner, that there were other people living on the pavement in the designated area, who, like Mr Haw, had acquired rights to use that space as a protest station.⁷⁷

Viewed in this way, the deprivation of Mr Haw’s right to continue with his protest in his own home resembles injurious affection to, or the compulsory acquisition of, property without compensation.⁷⁸

And yet, why does it matter ? Perhaps, when all is said and done, Lord Scarman was misguided when he looked forward to a time when malcontents, such as Mr Haw, could use public highways as encampments for political purposes.⁷⁹ But there is a special providence in the fall of a sparrow. “The right of a subject to plead his cause before Committees of either House”⁸⁰ is not a constitutional right which should be lightly taken away. More important property rights and interests than those

⁷⁴ Section 132(1), Serious Organised Crime and Police Act 2005.

⁷⁵ Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005 S.I. 2005/1537; note also the express exclusion of some of the pavements in Trafalgar Square referred to in footnotes 46 and 47 above.

⁷⁶ See footnote 56 (and footnote 39) above.

⁷⁷ Mr Haw had probably also acquired rights under Article 8 of the European Convention on Human Rights and Article 1 of the First Protocol of that Convention.

⁷⁸ It certainly does not justify the “Road Traffic” classification chosen for the Commencement Order. There is a presumption that land cannot be taken, or damaged, by the Crown, even in war time, without compensation, unless Parliament expressly excludes the right to compensation: *Burmah Oil Co v Lord Advocate* [1965] AC 75, [1964] 2 All ER 348; see also Article 1 of the First Protocol of the European Convention on Human Rights.

⁷⁹ See footnote 11 above.

⁸⁰ See footnote 70 above.

represented by Mr Haw (including the rights of corporations) will be put at risk if Parliament and the courts forget that “the rule of formal generality, of ‘equality before the law’ is preserved by the distinction between Public and Private Bills.”⁸¹

L.W.Blake*

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⁸¹ Christopher Hughes, see footnote 61 above.