LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's second reading briefing on the Civil Contingencies Bill in the House of Commons

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at
www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

Parliamentarians may contact Gareth Crossman, Head of Policy at Liberty.
Direct Line: 020 7378 3654
Email: GarethC@liberty-human-rights.org.uk

Introduction

1. Before engaging in substantive consideration of the Bill it is worth reflecting on the history of emergency powers legislation. Within days of the outbreak of the First World War parliament passed the Defence of the Realm Act 1914, giving the Government power to make regulations for 'securing the public safety and defence of the realm'. As the Act lapsed at the end of the war, the Government introduced the Emergency Powers Act in 1920. This and the 1964 Emergency Powers Act (and several amendments) have, along with civil defence acts in 1948 and 1986, formed the basis of emergency powers legislation for over 80 years. In this time, the United Kingdom has experienced the Second World War, the Cold War and decades of sectarian violence in Northern Ireland, including attacks on mainland Britain.

2. We do not dispute that there may be grounds for updating civil contingency measures. Certainly, earlier laws could not anticipate the problems arising out of, for example, a communications network breakdown. The Bill gives sweeping powers[1] to a Government Minister to make oral or written regulations allowing for, among other things, the confiscation or destruction of property without compensation, forced movement to or from a place or forcing/prohibiting travel at specified times, and the prohibition of peaceful protest. The Bill also permits the creation of criminal offences for failing to comply with these powers, and allows the Minister to overrule primary legislation. Clearly, if these powers are to be used, then the trigger to their use should be carefully defined to ensure they are invoked only when absolutely necessary. It is also vital that Parliament be allowed proper scrutiny.

3. A draft Bill was published in the summer of 2003[2]. This proposed that far greater powers be conveyed to the Government than the Bill itself. For example, the draft:

- Gave regulations the power of primary legislation for the purposes of the Human Rights Act 1998. This meant that no challenge to the regulations on

[1] Clause 21(3)
[2] Liberty's response drafted by Alex Bailin at Matrix Chambers is available at www.liberty-human-rights.org.uk. Follow links to Policy Papers 2003.

human rights grounds could be made through the courts other than by the making of a 'declaration of incompatibility', which would not have any practical impact.

- The definition of emergency included situations presenting a serious threat to the activities of the Government, the performance of public functions or the activities of banks or other institutions. While these may be consequences of an emergency they should not, in themselves, act as a trigger.

- Did not allow for any amendment to the regulations, or require parliamentary approval for their renewal.

- Did not have a requirement that the regulations be proportionate written onto the face of the Bill.

After publication of the draft, Liberty gave evidence to a Parliamentary Joint Committee on the Bill, and were twice invited (along with JUSTICE) to discuss our concerns with the Cabinet Office bill team. We are pleased that many of our points were addressed in the published Bill. While some concerns remain, we believe that pre-legislative scrutiny of this kind can be extremely beneficial in identifying and resolving areas of conflict without engaging the full mechanism of Parliament. We hope that other Government bills will be afforded similar scrutiny prior to publication.

4. The Bill remains the most powerful piece of peacetime legislation ever proposed in the UK. It seeks to grant the Government unprecedented powers to make emergency regulations which are unavailable under existing laws. The Bill necessarily requires the closest scrutiny: it is in times of emergency that citizens' fundamental rights are at greatest risk.

Background

5. A state of emergency has been declared on 12 occasions since 1920, the last being in 1974, and only ever in times of industrial unrest. The present Government has shown an increased willingness to declare an emergency: a 'technical' state of

emergency was declared in 2001 following the September 11 attacks in the United States. This enabled the Government to derogate from article 5 of the European Convention on Human Rights (ECHR)[3], thereby permitting indefinite detention without trial under the Anti-Terrorism Crime and Security Act 2001. It is worth noting that none of the other 43 signatories to the ECHR felt the need to derogate from their human rights commitments.

6. In the Emergency Powers Act 1920, an emergency was defined as "*any action taken or immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated*, *by interfering with the supply and distribution of food, water, fuel or light or with means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life*". The 1920 Act was passed in the context of post-revolutionary Europe and was primarily directed at industrial action, prevalent in Britain at that time.

7. The Emergency Powers Act 1964 further widened the definition of an emergency to "*there have occurred or are about to occur events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel or light or with means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life*".

8. It could be argued that the definitions are outdated in their restrictive references to food, water, fuel, light and locomotion, but at the core of an emergency is the disruption of the provision of the essentials of life to the community. This should remain the touchstone of any modern definition.

The structure of the Bill

9. The Bill is divided into two main parts. Part 1 deals with local arrangements for civil protection. As these are essentially logistical provisions Liberty does not comment, other then to say that our observations on the definition of emergency in Clause 18 in Part 2 hold true for the definition in Part 1 at Clause 1.

[3] by reliance on article 15

10. Part 2 covers emergency powers. The Queen, through order in Council (or a Government Minister if this is not practicable), may make regulations if satisfied that the meaning of emergency in Clause 18 is satisfied and that an emergency has occurred, is occurring or is about to occur.[4] It must be necessary to make provision to prevent, control or mitigate aspects or effects of the emergency[5]. The need to make a provision must be urgent[6] and existing law must be insufficient to deal with the emergency[7]. The scope of the regulations in Clause 21 has been explained in paragraph 2 above. The power to disapply or modify other acts of Parliament does not extend to the Civil Contingency Bill/Act itself. Regulations under Clause 21 can also require a person or body to act in accordance with a function, and allows for the creation of tribunals with the power to enforce the regulations.

11. There are limits on the regulations contained in Clause 22. Regulations can only be made to prevent, control and mitigate the emergency, and must be proportionate. They need to specify to which part of the United Kingdom they apply. They cannot require someone to provide military service or prohibit strike action. They cannot create offences other than those described in Clause 21 (offences of failing to comply with the regulations).

12. Regulations last for 30 days, or for a stated shorter time, but can be renewed. They must be laid before Parliament as soon as is practicable, and shall lapse after seven days unless both Houses of Parliament approve them.

Commentary

13. Liberty's primary concern is the meaning of emergency in Clause 18. This has been improved since the draft bill, in that there must be 'an event or situation which threatens serious damage'[8]. However, the event or situation itself need not be of any seriousness. This means that a relatively innocuous event may be considered to have implications of damage sufficient to trigger the emergency powers. The decision as to

[4] Clause 20 (2)
[5] Clause 20 (3)
[6] Clause 20 (4)
[7] Clause 20 (5) & (6)
[8] As opposed to the 'event or situation which presents a serious threat' in the draft bill

whether the definition of emergency has been satisfied is effectively made by a Minister[9]. As the damage needs only be threatened, rather than actual, this may be a highly subjective decision based on assumptions as to cause and effect. Although parliamentary scrutiny is required, this is not likely to occur for several days, by which time the regulations may already have had considerable impact. The nature of the regulations – such as movement to or from a place, or the destruction of property – means that their effect is required to be immediate (i.e. before parliamentary consideration can take place).

14. The need for a high threshold is illustrated by the Government's observation that flooding could trigger the use of emergency powers[10]. How bad and widespread would such flooding need to be? How many properties would need to be affected? How many people's safety would need to be compromised? However devastating the personal consequences of one's own home being damaged, or even destroyed, flooding would have to be on a truly massive scale to warrant the use of emergency powers. Accordingly, Liberty believes that the event as well as the damage must be defined as 'serious'.

15. In addition to concerns that such powers might be abused by a non-benign administration in the future, there is a fear that administrative convenience could become a justification for substantial expansion of the authorities' powers. Powers have been afforded for the ostensible purpose of tackling a specific and serious threat, but then used in a fashion not envisaged at the time the legislation was passed. By example, Section 44 of the Terrorism Act of 2000 was designed to grant the police much greater stop and search powers when and where a very real threat to security was present. However, over recent months, we have seen Section 44 applied across the entirety of metropolitan London, and used against non-violent protestors in London and elsewhere. Every step must be taken, and every assurance sought, that the Civil Contingencies Act would not be used in such an indiscriminate fashion.

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[9] Although the Queen is the primary decision maker she will effectively be acting on the instructions of one or more Ministers.

[10] See paragraph 35 of the explanatory notes.

16. In discussion with the bill team it was proposed (and we believed agreed) that the threat of serious damage should also be 'immediate'. Although it could be argued that the requirement of proportionality would compel there to be a degree of immediacy we believe that, given the severe restrictions on rights and liberties that the regulations are likely to entail, it is important that this be written onto the face of the Bill. There is at Clause 20 (4) a requirement that the necessity for provision of regulations is urgent, which would appear to satisfy the need for immediacy. However, this only covers the urgency of making the *regulations,* not the damage they are intended to prevent. Under the Bill it would be possible to say there is an urgent need for regulations to combat serious damage, even though the likelihood of that damage is not immediate. Given the subjective nature of the making of regulations, and the likely delay before parliamentary scrutiny, we believe it is necessary for the threat of serious damage to be immediate.

17. Liberty are concerned that one of the definitions of 'damage to human welfare' in Clause 18 (2) involves, causes (or could cause) disruption of an electronic or other system of communication or disruption of facilities for transport. As the definition already includes disruption of a supply of money, food, water, energy or fuel it is difficult to see how the disruption of transport facilities, that do not also affect the supply of any of these, could be deemed an emergency. Similarly, the disruption of a communication system should not be considered sufficient to trigger emergency powers, unless it has a consequences already provided for, such as the supply of money, energy, health services, loss of human life, damage to property and so on.

18. Clause 21 covers the scope of the emergency regulations. As already stated, these will necessitate serious restrictions on rights and liberties. We do not object to any individual type of regulation listed at 21 (3) (a)-(q) as we can envisage situations in which their need *could* be justified in order to combat, or mitigate against, the effects of an emergency. Were emergency powers not in force, the making of regulations would almost certainly result in breaches of the Human Rights Act 1998. As the explanatory notes say at Paragraph 72,

> *"Any regulations of this nature would give rise to issues under Article 1 of Protocol 1 of the ECHR (right to property). Regulations may prohibit the*

movement of people from or to a specified place (clause 21(3) (d)). Such regulations would give rise to issues under Article 5 (right to liberty) and possibly Article 11 (freedom of assembly and association). Regulations can be made which require a person or body to act in performance of a function (clause 21(3) (k)). This could give rise to issues under Article 4.2 (prohibition on forced labour).”

Liberty emphasise that the extremely broad powers to be conferred upon the state necessitate the definition of emergency be set at an appropriately high level before the regulations can be triggered.

19. Clause 21 (3) (j) allows regulations to disapply or modify other acts of parliament. The implications are considerable, as the majority of our rights and entitlements derive from statute. A welcome measure, not contained in the draft, is that the Civil Contingency Bill itself is ring-fenced. The regulations cannot, for example, allow the definition of emergency to be relaxed, or the scope of regulations be broadened[11]. Liberty would like to see this exclusion extended to the Human Rights Act 1998. The explanatory notes to the Bill state at Paragraph 76,

“It has been suggested that the limits on the exercise of the power imposed by the Human Rights Act are illusory on the basis that the regulations could disapply the substantive provisions of the Human Rights Act. Clause 21(3) (j) enables regulations to "disapply or modify an enactment or a provision made under or by virtue of an enactment". This argument does not appear to be persuasive. Having taken Parliamentary Counsel's advice on how the normal principles of the construction of delegated powers would apply to this particular provision, it is not possible to envisage circumstances in which this power would lawfully enable regulations to make a substantive amendment to a "constitutional enactment", such as the Human Rights Act.”

If this is the case then we see no reason why immunity cannot be extended to cover the Human Rights Act, in order to safeguard Parliamentary Counsel's belief against future challenge.

[11] Although it is worth noting that clause 18 (5) allows the Secretary of State to amend the definition of what ‘threatens damage to human welfare’.

20. Clause 25 relates to the duration of regulations. From the day they are made, regulations lapse at the end of a period of 30 days, or earlier as specified. The situation may arise that the regulations are no longer needed before the end of the 30 day period, or before any shorter specified time. To satisfy proportionality requirements, the Clause should allow for the Secretary of State to give notice that the regulations have lapsed at any time when their existence is no longer justified under the definition of emergency.

21. Clause 26 deals with Parliamentary scrutiny with, crucially, Clause 26 (3) allowing amendments to be made to regulations. This is vital as it is easy to envisage a situation where the Government would propose regulations which parliamentarians thought were partly justified but partly excessive, but they would have to let them stand or fall as a whole. It is not feasible that in a state of emergency any MP or peer would risk the security of the nation by voting against them, however valid the grounds. It is essential that this ability to amend remains unaltered during the Bill's progress through Parliament.

Gareth Crossman
Liberty