

**Civil Liberties, Terrorism, and Liberal Democracy:  
Lessons from the United Kingdom**

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In 1922 the Unionist government in Northern Ireland sought to quell rising violence through the temporary use of emergency powers. Fifty years later, the 1922-43 Civil Authorities (Special Powers) Acts remained ensconced in the Northern Irish constitution. Upon the assumption of direct rule, Britain incorporated these measures into the 1973 Northern Ireland (Emergency Provisions) Act. Although intended to operate for a short period, the emergency provisions remain in place. Similarly, Westminster's temporary adoption of legislation to counter the Irish Republican Army's 1939 mainland campaign led to the entrenchment of emergency law in Great Britain. Allowed to expire in 1953 and repealed in 1973, the 1939 Prevention of Violence (Temporary Provisions) Act was reintroduced in 1974 as the Prevention of Terrorism (Temporary Provisions) Act. The statute is still in effect.

These "temporary" measures posed a significant challenge to civil liberties, contributed to the disaffection of the minority community in Northern Ireland, led to the suspension of the Northern Parliament, and provided a basis for successive cases brought against the United Kingdom (UK) in the European Court of Human Rights. Yet the Northern Ireland and British governments maintained and even expanded many of these emergency powers. Why was this so? Was it because successive governments in Northern Ireland have been faced with an emergency situation requiring extraordinary measures, or were the reasons more complex? Is there something about emergency law that, once introduced, leads to its entrenchment? Is there something about terrorism that demands these types of statutes? What lessons can be drawn for other liberal, democratic states facing a terrorist challenge? Are any of the elements that contributed to Britain's introduction and use of emergency law similarly at work in other states?

This paper examines these questions and proposes that a confluence of primary factors and secondary circumstances – many of which are common to liberal, democratic states – perpetuated the emergency measures beyond their intended life. The first of five primary factors, the seeming efficaciousness of the measures, provided a clear reason for their retention. Put simply, they appeared to work. Second, the sheer persistence of the Northern Ireland conflict, built on deep divisions in the Province and a long history of paramilitarism, suggested that the issue that the legislation sought to address was not going to just disappear. Third, Britain's previous use of emergency law in Ireland and, fourth, the continued perception in Westminster of Northern Ireland as a place that allowed – indeed demanded – the use of such measures also contributed to the statutes' retention. Finally, the symbolic importance of the legislation provided further justification for their continuation. Repeal of the measures

would have meant either that violence was no longer an issue (and here appeal to the long-standing nature of the Northern Ireland conflict would suggest otherwise), or that some measure of violence was somehow acceptable. Neither of these claims was made.

At least three secondary conditions contributed to the retention of emergency law by helping to create an environment in which such measures could be used. First, within Britain, the counterterrorist provisions greatly overlapped with ordinary criminal law. Most of the activities banned, particularly after 1972, were already illegal. What made them a part of counterterrorist legislation was the intent of those engaged in such behavior, extensions of the penalties associated with such actions, and alterations to the court system for those suspected of acting with terrorist intent. Second, the nature of the legislation itself did not suggest that repeal of such measures was necessary. Here the paper focuses on the formal structure of the provisions themselves. Third, the context within which the British state operated, while it mitigated the more extreme aspects of emergency law, also supported the establishment and operation of the statutes. The use of liberal discourse in Great Britain to defend the utilization of emergency measures provided justification for the suspension of liberal ideals. Various international treaties protecting the right of contracting states to introduce emergency legislation; confusion in the international arena, and particularly in international law, over how to handle terrorist violence; and the mistaken application of a “hierarchy of rights” both inside the United Kingdom and abroad contributed to the use of liberalism to justify emergency law.

Many, if not all of the primary factors and secondary conditions that contributed to the retention of emergency law in the United Kingdom are also at work in other liberal, democratic states faced with a terrorist challenge. The paper highlights these elements, concluding with additional lessons, such as the importance of the social and political context into which domestic statutes are introduced, parallel obligations held by states, the use of liberal discourse to undermine itself, and the significance of precedent in counterterrorism, that come from observing Northern Ireland and Great Britain.

### **THE NORTHERN IRELAND CONFLICT: A BRIEF HISTORY**

Escalating Loyalist and Republican militance in the late nineteenth and early twentieth century brought the issue of Irish independence to a head. The British government found itself embroiled in an increasingly unpopular Anglo-Irish war. In an effort to alleviate the drain on British resources and to meet at least some of the conflicting demands in Ireland, while protecting British interests, the Lloyd George administration in 1920 secured the passage of the Government of Ireland Act. This statute

created two Irish Parliaments, with the six northeastern counties incorporating a majority Unionist population to be governed from Belfast, and the remaining twenty-six counties, predominantly Nationalist and Republican to be administered from Dublin. In accordance with the 1920 act, the North formed a Parliament. Dáil Éireann in the South, however, rejected the legislation and refused to recognize the subsequent elections. The violence increased as Sinn Féin and the Irish Republican Army (IRA) continued to press for a united Ireland. Lloyd George invited northern and southern leaders to London to renegotiate the Government of Ireland Act. The discussions resulted in the signing of the 1921 Articles of Agreement for a Treaty between the Irish Free State and Britain. The agreement granted the island dominion status, required members of Parliament to take an oath of allegiance to Britain, and allowed Ireland to conduct its domestic and international affairs with a high degree of independence. The North had the right to opt out of the new state within a year. If it opted to do so, a border commission would verify the new boundary between what was to become Northern Ireland and the Irish Free State. Within five months the North exercised its right to secede, choosing to maintain closer links with the British government.

In the South the Dáil narrowly passed the 1921 Treaty, resulting in a violent civil war between those who accepted the twenty-six county unit and those wanting to press for full Irish independence. With the civil war demonstrating the strength of anti-partition sentiment just over the southern boundary, the presence of a sizable Catholic minority in the North claiming allegiance to the South intensified Unionist fears that the North would be drawn into a united Ireland. The Northern Ireland Ministry of Home Affairs held that the IRA was “carrying on a systematic and persistent attempt to render the government of Northern Ireland impossible.”<sup>1</sup> Efforts by southern Nationalists to raise the issue of border revision in London highlighted the precarious nature of the new state. Viewing previous British measures in Ireland as inadequate, upon the formation of the Northern state Unionists insisted that more stringent measures be taken. The 1920 Government of Ireland Act, which continued to govern the North’s relationship with Britain, empowered the Northern Ireland Parliament to make laws to preserve the “peace, order and good government” of the Province. Although technically subservient to Westminster, the Northern Ireland Executive in actuality held a high degree of autonomy and made the final decisions for how security matters in the Province would be handled.

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<sup>1</sup> Minute Sheet Ministry of Home Affairs, Ref. S/266, 1922, PRONI HA/32/1/206.

Immediately following partition the Unionist government introduced a series of emergency measures aimed at consolidating control of the Province. The 1922 Civil Authorities (Special Powers) Act (SPA) was by far the most wide-sweeping of these measures and became instrumental in maintaining Unionist control of Northern Ireland.<sup>2</sup> Amended in 1943, the act empowered the Northern Ireland Parliament to impose curfew; proscribe organizations; censor printed, audio, and visual materials; ban meetings; processions, and gatherings; restrict the movement of individuals to within specified areas; and detain and intern suspects without bringing charges. The statute authorized extensive powers of entry, search, and seizure; altered the court system; and, most important, empowered the Civil Authority (the executive in Northern Ireland): “To take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order.” The Unionist government introduced more than 100 regulations under this last clause, levying the vast majority against the minority population.<sup>3</sup> The 1922 SPA became one of the central grievances voiced during the civil rights marches of the late 1960s and ultimately led to the downfall of the Northern Ireland Parliament. Unionists, however, had intended this statute to be temporary. The Executive initially defended enactment of the legislation by claiming its use as a distinctly provisional measure necessary to secure law and order. Section 12 of the act limited the duration of the statute to one year, unless otherwise determined by the Northern Parliament. Within a few years, however, the government’s rationale for maintaining the legislation shifted: what had been an interim means to establish peace became a necessity for maintaining the North’s constitutional position. In April 1928 the Unionist government called for the permanent entrenchment of the SPAs. In 1933 the Northern Parliament made the 1922 SPA indefinite, and in 1943 it introduced a second act that made minor amendments to the 1922 statute. For purposes of this paper, I refer to these statutes as the 1922-43 SPAs.

The late 1960s and early 1970s witnessed spiraling violence in Northern Ireland. In 1972 Britain prorogued the Northern Parliament. Direct rule did not, however, eliminate the presence of the emergency legislation. Although the British government claimed to replace the 1922-43 SPAs with the 1973 Northern Ireland (Emergency Provisions) Act (EPA), the latter statute simply renamed the vast majority of the Special Powers regulations. The 1973 EPA retained the government’s extensive powers of detention, proscription, entry, search and seizure, restrictions on the use of vehicles, the blocking up of roads, the closing of licensed premises, and the collection of information on security forces. In addition

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<sup>2</sup> 1922 SPA, Civil Authorities (Special Powers) Act (Northern Ireland), 1933, 23 & 24 Geo. V, c. 12, and Civil Authorities (Special Powers) Act (Northern Ireland), 1943, 7 & 8 Geo. VI, c. 2. [Hereafter 1922-43 SPAs]

<sup>3</sup> See L. Donohue, “The 1922-43 Special Powers Acts: Regulating Northern Ireland,” *Historical Journal*, Cambridge University Press, Vol. 1, 1999.



the statute eliminated juries from the court system and established certain crimes as “scheduled” offenses, regardless of the perpetrator’s motivation. It also retained the general powers allocated to the Civil Authority in Northern Ireland, authorizing that the secretary of state for Northern Ireland “may by regulations make provisions additional to the foregoing provisions of this Act for promoting the preservation of the peace and the maintenance of order.”<sup>4</sup> Initially the 1973 EPA also was intended as a temporary measure. In 1974 the secretary of state for Northern Ireland claimed, “The [1973 EPA] makes emergency provisions and is by its nature temporary, to cover the period of an emergency.”<sup>5</sup> For twenty-six years, however, this legislation remained in force. In 1975 the British government amended the 1973 Act and three years later consolidated the two statutes into the 1978 EPA. Further replacements in 1987, 1991, and 1996 did little to change the content of the earlier acts except to expand certain powers and allow a small number of others to lapse.<sup>6</sup> As with the justification for the 1922-43 SPAs, the rationale behind the retention of the 1973-96 EPAs changed subtly: they became seen as a critical part of the ongoing fight against terrorism.

Not only did emergency legislation become a permanent feature of the Northern Ireland legal system, but for more than 60 years Westminster has retained emergency provisions aimed at countering Northern Irish violence in Great Britain. In January 1939 the IRA initiated a mainland bombing campaign. The British government responded by passing the 1939 Prevention of Violence (Temporary Provisions) Act (PVA),<sup>7</sup> which introduced powers of expulsion, prohibition, arrest and detention. It too was intended as an interim statute: “We have tried to make it clear...that the Bill...is a temporary measure to meet a passing emergency. We have expressly restricted the duration of the Bill to a period of two years.”<sup>8</sup> Although the IRA’s mainland bombing campaign ceased within a year of the statute’s introduction, it was only in 1953 that Westminster allowed the 1939 Act to expire, and it was not until 1973 that the government repealed it.

In 1974 IRA bombing of two pubs in Birmingham left 21 people dead and 160 injured. The British government responded by reintroducing powers contained in the 1939 act, with the addition of proscription, a provision employed under the 1922-43 SPAs and the 1973 EPA. Again, this legislation

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<sup>4</sup>Owing to its wide provisions, this clause in Parliamentary debates earned the title, “Henry VIII subsection.”

<sup>5</sup>Merlyn Rees, *HC Debs*, 9th July 1974, Vol. 876, col. 1273.

<sup>6</sup> Northern Ireland (Emergency Provisions) Amendment) Act, 1975, Eliz. II, c. 62; Northern Ireland (Emergency Provisions) Act, 1978, Eliz. II, c. 5; Northern Ireland (Emergency Provisions) Act, 1987, Eliz. II, c. 30; Northern Ireland (Emergency Provisions) Act, 1991, Eliz. II, c. 24; Northern Ireland (Emergency Provisions) Act, 1996, Eliz. II, c. 22.

<sup>7</sup>Prevention of Violence (Temporary Provisions) Act, 1939, 2 & 3 Geo. VI, c. 50. [Hereafter 1939 PVA]

<sup>8</sup>Sir S. Hoare, Home Secretary, *HC Debs*, 24th July 1939, Vol. 350, col. 1054.

was intended to be in place for a limited period: during his introduction of the 1974 Prevention of Terrorism Bill, the British Home Secretary, Roy Jenkins, asserted, “I do not think that anyone would wish these exceptional powers to remain in force a moment longer than is necessary.”<sup>9</sup> The government built mechanisms into the statute to prevent it from remaining on the books simply as a result of inertia. The 1974 Prevention of Terrorism (Temporary Provisions) Act (PTA), however, belied its title: not only did it reintroduce measures in place from 1939 to 1973, but it remained in force over a quarter of a century later.<sup>10</sup> In 1991 Jenkins wrote, “I think that the Terrorism Act helped to both steady opinion and to provide some additional protection. I do not regret having introduced it. But I would have been horrified to have been told at the time that it would still be law nearly two decades later. ... [I]t should teach one to be careful about justifying something on the ground that it is only for a short time.”<sup>11</sup>

### **PRIMARY FACTORS CONTRIBUTING TO THE RETENTION OF EMERGENCY LAW**

A combination of primary factors and secondary conditions contributed to the retention of emergency measures in the United Kingdom. This section focuses on the first. The seeming efficaciousness of the provisions, the long history of the Northern Ireland conflict, Britain’s previous use of emergency law in Ireland, perceptions in Westminster that such measures were both necessary and acceptable outside of Great Britain, and the symbolic importance of “antiterrorist” measures provided a direct impetus for the introduction and continued operation of the extraordinary provisions.

#### ***Impact on Violence***

One of the most obvious reasons for maintaining the emergency laws was their seeming effectiveness. Declining levels of violence in Northern Ireland and Great Britain immediately followed the introduction of the 1922 SPA, 1973 EPA, 1939 PVA and 1974 PTA. In Northern Ireland a high of 80 murders and 58 attempted murders in April 1922 plummeted to 1 murder and 11 attempted murders by September of that year. These figures continued to fall throughout the balance of 1922 and into 1923.<sup>12</sup> Similarly, immediately following the introduction of the 1973 EPA, the number of deaths and injuries in the Province decreased: from a high of 467 deaths in 1972 to 250 in 1973 and 216 in 1974. Injuries also dropped: from 4,876 in 1972 to 2,651 in 1973 and 2,398 in 1974.<sup>13</sup> As already noted, within a year of

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<sup>9</sup>Roy Jenkins, *HC Debs*, 28th November 1974, Vol. 882, col. 642.

<sup>10</sup>See footnote 9.

<sup>11</sup>R. Jenkins, *A Life at the Centre* (1991), p. 397.

<sup>12</sup>Letter from the Imperial Secretary to the Under Secretary of State, Home Affairs, 21 June 1923, PRO HA 267/362.

<sup>13</sup>*Northern Ireland Annual Abstract of Statistics* and Irish Information Partnership.

the introduction of the 1939 PVA the IRA's mainland campaign had ceased. When violence rose again in the 1970s in Great Britain, immediately following the introduction of the 1974 PTA a similar drop in the number of deaths related to political violence ensued.

It is uncertain to what degree special powers were responsible for these decreases. For instance, following the establishment of direct rule in 1972, the increased effectiveness of the security forces, improved intelligence, growing rejection by the communities in Northern Ireland of the use of violence for political ends, the 1974 IRA cease-fire, the drying up of IRA funding from the United States, greater selectivity of terrorists in choosing targets, greater cross-border cooperation with the Republic, and increased media attention all may have played significant roles in helping to reduce and focus the violence. However, statistics on the operation of the 1973 EPA and the 1974 PTA suggest that wide use was made of provisions relating to the collection of information during the first few years of the statutes' operation: under the 1973 EPA, 4,141 people were arrested in 1975, 8,321 in 1976, and 5,878 in 1977.<sup>14</sup> *Pari passu*, under the 1974 PTA, the British armed forces detained 1,067 people in 1975, 1,066 in 1976, and 853 in 1977.<sup>15</sup> This brought the number of people held for questioning over the three-year period under powers provided by emergency legislation to more than 21,000. From its introduction in 1974 until its renewal in 1996, some 27,000 people were arrested under the PTA alone. Although the security forces subsequently charged fewer than 15 percent of those arrested with a crime,<sup>16</sup> the information gathered during questioning most likely had a significant impact on the level of violence. Certainly under the 1922-43 SPAs, which were considerably more far-reaching than their post-1972 counterparts, Northern Ireland suffered significantly less in terms of statistical eruptions of violence. Members of Parliament (MPs) from Northern Ireland highlighted this fact in Westminster.<sup>17</sup> The effectiveness of the 1922-43 SPAs became the basis for the shift in the justification of the measures: they came to be defended as a means of maintaining the status quo rather than as a means to establish law and order. This same alteration marked British defense of emergency measures: their efficaciousness became a reason for their retention. Considering the wide-ranging nature of the powers exercised under the legislation, the acts'

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<sup>14</sup>*Statistics on the Operation of the Northern Ireland (Emergency Provisions) Act 1991 for 1993*. Northern Ireland Office Statistics and Research Bulletin 1/94. Table 7a, 9.

<sup>15</sup>*Statistics on the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976 -- First Quarter 1980*. Home Office Statistical Bulletin. 29 April 1980. Issue 7/80. Table 1, 5.

<sup>16</sup>Mr. Canavan, *HC Debs*, 14th March 1996, Vol. 273, col. 1162.

<sup>17</sup>See Ian Paisley, *HC Debs*, 8th December 1977, Vol. 940, col. 1736. For an examination of the 1922-43 SPAs as breeding subsequent violence, see Gerry Fitt, *HC Debs*, 18th March 1981, Vol. 1, col. 382 and *Disturbances in Northern Ireland: Report of the Commission appointed by the governor of Northern Ireland*. September 1969. Session 1969/70 Cmd 532, para 229(a).

seeming effectiveness does not come as a great surprise: it appears at least arguable that if more leeway is afforded the security forces and less stringent measures required in the court system, more information can be gleaned and more convictions obtained.

In addition there also existed a tendency within the security forces to support the extension of such measures as part of their arsenal in the fight against terrorism. Once the powers had been gained, those wielding them were unwilling to see them diminished. Parliamentarians realized this during the 1981 renewal of the PTA.<sup>18</sup> As time passed and the security forces became familiar with the operation of a particular statute, significant alterations might be considered inconvenient.

### ***Persistence of the Northern Ireland Conflict***

Was emergency law maintained simply because an emergency continuously existed? The numbers would suggest otherwise. Northern Ireland was distinguished in part from 1922 to 1968 precisely by the lack of immediate violence. Was there something beyond the absence of violence – something about the nature of the Northern Ireland conflict, the contrary demands of the two dominant ethnic groups and the intractable nature of the violence – that created a situation within which emergency legislation tended to permanence? Northern Irish politics since 1922 have been built around deep ethnic divisions and divergent political aspirations. Housing distribution, employment patterns, education, interpersonal relationships, and social activities all cut along ethnic lines.<sup>19</sup> Divergent constitutional aspirations further underlay the Catholic-Protestant divide. In this context, each side calls on specific historical events to legitimate their grievances against the other side. For Republicans the twelfth century Norman invasions, sixteenth century Surrender and Re-grant treaties and Nine Years' War, and seventeenth and eighteenth century plantations and penal laws provide grounds for their struggle against the Loyalists. The sixteenth century risings by the Irish Catholics, the 1689 Siege of Derry, the 1690 Battle of the Boyne, and agrarian risings throughout the eighteenth century supply the basis for Loyalist claims. Repeated reference to past events served to justify not only the Republican view of the British government as an outside, conquering power, but also physical force organizations as a "legitimate" tool to rid the country of British presence. From Theobald Wolfe Tone and the 1791 Society of United Irishmen to the Young Ireland movement, Fenian Brotherhood, Irish Republican Brotherhood and the Defenders, Republican violence was directed against the state and its institutions. In turn, the Loyalist

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<sup>18</sup>E.g., "It is my impression that once a government have these powers in their control they are very reluctant to give them up." (Gerry Fitt, *HC Debs*, 18th March 1981, Vol. 1, col. 382)

<sup>19</sup>For more detailed discussion of the entrenched divisions in Northern Ireland see D. Boulton, *The UVF 1966-1973: an Anatomy of Loyalist Rebellion* (1973), F. Boal and J. N. Douglas, *Integration and Division: Geographical Perspectives on the Northern Ireland Problem* (1982), F. Boal and A. Robinson, "Close Together and

counter-revolutionary tradition sought to uphold the authority of the state. The Planters' home guards in the 1780s, the Rifle clubs, and Young Ulster at the end of the nineteenth century professed devotion to the British Crown. These physical force organizations both emphasized and further entrenched divisions between the communities. By the time of partition and throughout Unionist rule of the North from 1922 to 1972, two very different histories had been constructed, further reinforcing divisions within the Province.

The entrenched ideologies of the two dominant ethnic groups, and in particular the two extremes, lent its own dynamic to the maintenance of emergency law from 1922 to 1972. Because the central issue rested on the constitutional status of the North, minority aspirations threatened the foundation of the state. Any Nationalist or Republican attempt to gain power or to garner support for a united Ireland was perceived as an attack on the Northern Ireland constitution. As defenders of the state, Unionists immediately exercised their authority to secure the Northern government: they hailed emergency legislation as critical to gaining control of the Province. To have lost control, particularly at the time of partition, would have meant not just civil disorder, but a change in the structure of government. Because of the political aspirations of both Nationalism and Republicanism – a united Ireland and the absence of ties to Great Britain – the threat to the constitutional position of the North remained long after the violence had subsided. The history of force in Irish affairs, and the episodic use of violence as advocated by Republicanism, was enough to remind Unionists of the threat in their midst. Emergency measures had to be maintained.

Following World War II, the Unionist government slightly relaxed provisions introduced under the 1922-43 SPAs by suspending a handful of regulations. This was the first and only time that the Northern government actually withdrew any of the emergency powers. They were swiftly reintroduced.<sup>20</sup> What was significant, though, was the temporary repeal of the regulations. One explanation for this lay in the impact of World War II: having demonstrated their loyalty to the Crown in contrast to the South's neutrality, Northern Unionists could look upon their links with Britain with increased confidence. Winston Churchill's leadership and implacable support for Unionists secured their position in the United Kingdom. Moreover, the passage of the 1949 Government of Ireland Act reaffirmed that Northern

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Far Apart: Religious and Class Divisions in Northern Ireland," *Community Forum*, No. 3 (1972), F. Burton, *The Politics of Legitimacy* (1978), and J. Darby, *Northern Ireland: Background to the Conflict* (1986).

<sup>20</sup>S.R.O. 147/1949 and S.R.O. 187/1951 repealed a number of regulations under the 1922-43 SPAs. See also S.R.O. 176/1955 and S.R.O. 199/1956.

Ireland would remain part of the UK until a majority in the Northern Parliament decreed otherwise.<sup>21</sup> Unionists had established such a clear hold on the political machinery that the possibility of losing a majority in Parliament seemed increasingly unlikely. Unionists' newly found confidence, together with the relative calm in Northern Ireland and the lack of an immediate threat from the IRA, thus contributed to the repeal of the emergency provisions. Although divisions in Northern Irish society remained, the degree of security felt by the Unionists, in juxtaposition to the constitutional threat wielded by nationalism and Republicanism, had increased. The advent of the 1956-62 IRA campaign, however, led to the swift re-enactment of emergency measures.

Prior to this time Unionists believed the North was under siege: following partition violence erupted in both the North and the South. Even after Unionists restored civil order in the Province, sporadic outbreaks of Republican violence occurred. Just over the border a distinctively Irish, Catholic state was being formed: in the 1932 Free State general election, Eamonn deValera and Fianna Fáil gained control of the southern Parliament. The Northern Executive expanded its emergency powers: between 1922 and 1949 alone, the Unionist government issued statutory instruments adjusting more than fifty regulations.

As Britain assumed direct rule, the conflicting aims of Nationalists, Republicans, Unionists, and Loyalists continued to influence the existence of emergency law. Just as a threat had existed during the operation of the Northern Parliament, violent opposition faced Britain. Even though Westminster did not share Unionists' urgency, (in terms of the impact on the survival of the British – versus Northern Irish – state), Britain too became caught in the deep provincial divisions. The long history of Republicanism and Loyalism and their ideologies made it difficult for Westminster to respond to the conflict via ordinary legislation. The sense that whatever statutes the British government might introduce would be rejected by paramilitaries safe in their own communities permeated parliamentary consideration of the measures. Measures implemented by the British government, the Diplock courts, the withdrawal of special category status, the advent of supergrass trials, and the media ban all were attempts to isolate “terrorists”. Attempts to bridge the ideological divide met with little success. Emergency legislation became hailed as necessary in the distinctively Northern Irish context.

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<sup>21</sup> Government of Ireland Act, 1949, 12 & 13 Geo. VI, c. 41.

*Prior Emergency Measures*

Not only did a long history of division and a physical force tradition accompany governmental consideration of emergency law, but there was a long history of Britain enacting emergency measures in Ireland. This precedent played a role in influencing, on the state side at least, the acceptability of employing emergency legislation to address Northern Irish affairs. Between 1800 and 1921, the government introduced more than 100 Coercion Acts in Ireland to minimize violence and to establish law and order.<sup>22</sup> For instance, in 1803 the government followed “An Act for the Suppression of the Rebellion which still unhappily exists within this Kingdom, and for the Protection of the Persons and Properties of His Majesty’s faithful subjects within the same”<sup>23</sup> with “An Act for the Suppression of Rebellion in Ireland, and for the Protection of the Persons and Property of His Majesty’s Faithful Subjects there.”<sup>24</sup> These were succeeded by “An Act for the More Effectual Suppression of Local Disturbances and Dangerous Associations in Ireland,”<sup>25</sup> and “The Protection of Life and Property in Certain Parts of Ireland Act.”<sup>26</sup> Responding to the land war agitation, the British government enacted the Protection of Person and Property (Ireland) Act in 1881.<sup>27</sup> In the following year it passed the Prevention of Crime (Ireland) Act.<sup>28</sup> The preamble of the latter statute explained the purpose of emergency measures in the Irish context: “Whereas by reason of the action of secret societies and combinations for illegal purposes in Ireland the operation of the ordinary law has become insufficient for the repression and prevention of crime, and it is expedient to make further provision for that purpose, [this statute is now] enacted.” Similar to the 1973 EPA, this legislation allowed for the suspension of trial by jury in cases of treason, murder, attempted murder, manslaughter, aggravated crimes of violence against the person, arson and attacks against the dwelling-home. The statute was the first to make an offense of intimidation. Like the 1922-43 SPAs, the Prevention of Crime Act included powers against rioting, unlawful associations, curfew, freedom of movement, and newspapers advocating offenses against the Act, and it empowered security forces to search for illegal documents and arms. It withdrew privilege against self-incrimination from witnesses, enabling magistrates to summon witnesses and compel them to answer questions under oath.

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<sup>22</sup>M. Farrell, “The Apparatus of Repression,” Field Day Pamphlet (1986), p. 1. For other accounts of emergency legislation in Ireland and Great Britain prior to 1921 see C. Campbell, *Emergency Law in Ireland 1918-1925* (1994), Osborough, “Law in Ireland 1916-26,” (1972) 23 N.I.L.Q., 48-82 and E. Mulloy, “Emergency Legislation: Dynasties of Coercion,” Field Day Pamphlet (1986).

<sup>23</sup>“An Act for the Suppression of the Rebellion which still unhappily exists within this Kingdom, and for the Protection of the Persons and Properties of His Majesty’s faithful subjects within the same,” 1799, 39 Geo. III, c. 11.

<sup>24</sup>See footnote 1.

<sup>25</sup>“An Act for the more effectual Suppression of Local Disturbances and Dangerous Associations in Ireland,” 1833, 3 Will. IV, c. 4.

<sup>26</sup>“The Protection of Life and Property in Certain Parts of Ireland Act,” 1871, 34 & 35 Vict., c. 25.

<sup>27</sup>Protection of Person and Property Act, 1881, 44 & 45 Vict., c. 4.

In 1887 the government passed the Criminal Law and Procedure (Ireland) Act,<sup>29</sup> which drew on previous coercion measures, granted powers of inquisition to magistrates, and empowered the Attorney general to conduct interrogation in private. “Whereas it is expedient to amend the law relating to the place of trial of offenses committed in Ireland, for securing more fair and impartial trials, and for relieving jurors from danger to their lives or property, and business,” trials could be transferred to different counties where a “more fair and impartial trial” could be held with or without a special jury. Thus, interestingly, the same concerns addressed by Lord Diplock in 1972 were at issue in the nineteenth century. The 1887 act also allowed the Lord Lieutenant and Privy Council to proscribe organizations. The nineteenth century witnessed a slew of Peace Preservation (Ireland) Acts,<sup>30</sup> adjustments to the judicial procedure, and tightening of explosives and firearms measures. In sum, the historical use of special powers to address unrest punctuating rule of Ireland created a sort of internal legitimacy that supported the continued use of similar measures immediately following partition and through direct rule. The perception in Westminster of Ireland as a “place apart” helped to legitimize further Britain’s application of similar measures 1972-2000.

### *Perceptions from Westminster of Northern Ireland as a “Place Apart”*

The view that Northern Ireland bears a unique history within which special powers are acceptable, or even necessary, played a role in annual consideration of emergency legislation. In 1972 one MP commented: “I have great sympathy with those who have protested in this debate that the [Northern Ireland] order provides for internment in another and more sophisticated form. But internment has been one of the facts of Irish history and one of the means for securing the State in Ireland, north or south.”<sup>31</sup> Another MP asserted: “We have never been able to maintain a Northern Ireland state, since its very inception, without some kind of repressive law.”<sup>32</sup> Parliamentarians viewed Northern Ireland as different from the rest of the United Kingdom. It was a “place apart”. In 1979 the secretary of state for Northern Ireland, Humphrey Atkins, contended, “Northern Ireland, for reasons that cannot be undone, is not like any other part of the United Kingdom. New structures of government must be based on a

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<sup>28</sup>Prevention of Crime (Ireland) Act, 1882, 45 & 46 Vict., c. 25.

<sup>29</sup>Criminal Law and Procedure (Ireland) Act, 1887, 50 & 51 Vict., c. 25. This statute was not repealed until the 1973 Northern Ireland (Emergency Provisions) Act.

<sup>30</sup>See for example the Peace Preservation (Ireland) Act, 1870, 33 & 34 Vict., c. 9; the Peace Preservation (Ireland) Acts Continuance Act, 1873, 36 & 37 Vict., c. 24; the Peace Preservation (Ireland) Act, 1875, 38 & 39 Vict., c. 14; the Peace Preservation (Ireland) Act, 1881, 44 & 45 Vict., c. 5; and the Peace Preservation (Ireland) Continuance Act, 1886, 49 & 50 Vict., c. 24.

<sup>31</sup>*HC Debs*, 11th December 1972, Vol. 848, col. 80.

<sup>32</sup>J. Maynard, *HC Debs*, 2nd July 1979, Vol. 969, col. 987.



recognition of that fact.”<sup>33</sup> Atkins later added, “I hope that it will be clear to the House that the Government are [*sic*], and will continue to be, sensitive to the special problems of Northern Ireland.”<sup>34</sup> Responding to protestations that the powers in the 1975 EPA would not be accepted in England, the Minister of State for Northern Ireland replied, “Of course, but the same situation does not apply in England.”<sup>35</sup> During deliberations over the elimination of juries in the 1973 EPA, A.W. Stallard asserted, “The ...impression I got...was that...this step would never be taken [in England] but that it was good enough for Northern Ireland.”<sup>36</sup> More than two decades later, MPs were still voicing similar sentiments: Kevin McNamara stated, “no one in Britain will undergo the [EPA] procedures that apply in Northern Ireland.”<sup>37</sup> Commenting later on the government’s decision in 1974 to introduce the Prevention of Terrorism (Temporary Provisions) Bill, Roy Jenkins wrote: “I always believed in keeping as much as possible of the contagion of Northern Irish terrorism out of Great Britain. I thought we had responsibilities in Northern Ireland, both to uphold security and to assuage the conflict, but I did not think they extended to absorbing any more than we had to of the results of many generations of mutual intolerance.”<sup>38</sup> Tom Litterick commented: “I view with trepidation the prospect of discussing the internal affairs of a foreign country. Ulster is a foreign country. I have been there and it is, in every sense, unmistakably a foreign country.”<sup>39</sup> Thus, in the view of many British legislators, Northern Ireland was alien territory with its own ingrained history. “We should remember that we cannot allow ourselves to be swayed too much by our sometimes frantic considerations of present events because, as the House should know, present events are very similar in Ireland to what has gone on before. There is nothing exceptional about them.”<sup>40</sup>

The brevity and perfunctoriness of the procedure for renewing emergency legislation further reflected the perception such measures were somehow acceptable in the Northern Ireland context. In the House of Commons, debates tended to be held late at night, rarely lasting more than ninety minutes. Even shorter and less detailed debates marked consideration of the measures in the House of Lords.<sup>41</sup> Not only did the British government allocate limited time for the consideration of emergency legislation but, after the introduction of the 1973 EPA, it appended the renewal of other statutes to the debates surrounding the emergency measures. Within a few years, Parliament began considering the renewal of

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<sup>33</sup>Humphrey Atkins, *HC Debs*, 2nd July 1979, Vol. 969, col. 928.

<sup>34</sup>*HC Debs*, 2nd July 1979, Vol. 969, col. 930.

<sup>35</sup>J. D. Concannon, *HC Debs*, 6th December 1978, Vol. 959, col. 1580.

<sup>36</sup>A.W. Stallard, *HC Debs*, Standing Committee B, 1972-73, Vol. 2, col. 52.

<sup>37</sup>Kevin McNamara, *HC Debs*, 19th February 1996, Vol. 272, col. 61.

<sup>38</sup>Jenkins, *supra*, p. 377.

<sup>39</sup>Tom Litterick, *HC Debs*, 8th December 1977, Vol. 940, col. 1710.

<sup>40</sup>Tom Litterick, *HC Debs*, 30th June 1978, Vol. 952, col. 1784.

<sup>41</sup>In support of this point see Jellicoe Report, para. 14.

the 1974 Northern Ireland (Young Persons) Act<sup>42</sup> and the 1974 Northern Ireland Act concurrent with retention of the 1973-5 EPAs.<sup>43</sup> This allowed for even less direct discussion of the emergency measures under review. In addition, attendance at the annual renewals steadily eroded in the years following the introduction of emergency law, which further reflected the general view in Westminster of the acceptability of applying emergency law to Northern Ireland.

### ***Import of Emergency Legislation***

As political violence increased in both Northern Ireland and Great Britain after 1972, broad support within Britain for more stringent measures grew. Terrorist legislation became a statement that violence would not be tolerated. In urging fellow members to pass the 1974 Prevention of Terrorism Bill Lord Hailsham stated, “Apart from [the Bill’s] practical value...its moral impact is hardly less important and would, I fear, be considerably blunted if we did not acceded to the Government’s request to enable the Bill to receive the Royal Assent so as to place it on the Statute Book tomorrow. ...I would suggest to pass it without amendment.”<sup>44</sup> He later added, “If one yields to terrorism of this kind other terrorists in Britain will draw the obvious moral that the gun and the bomb pay off because the British do not have the courage to resist them.”<sup>45</sup> Statements in both Houses of Parliament frequently supported the use of emergency measures to demonstrate Britain’s rejection of terrorism. Because of this, any repeal or repudiation of the measures assumed new import. In the absence of a cessation in terrorist activity, repeal might have indicated a level of acceptance either of some degree of violence or of the use of violence for political ends. Further, no real indication was given in any of the statutes as to what circumstances would have to change, or to what extent, to justify their repeal. This made it less than clear as to when the legislation could be rescinded without altering the initial connotation entailed in its enactment. The 1974 Birmingham bombings provided the main impetus for the enactment of the 1974 PTA.<sup>46</sup> As repeatedly cited by MPs in Westminster, the need to be *seen* as responding to this event – and indeed to the slew of terrorist incidents in Britain immediately preceding Birmingham – was as important as the specific aspects of the statute itself. Successive Secretaries of State for Northern Ireland and Home Secretaries for the United Kingdom asserted that the government’s first duty was to protect the life and property of its citizens; it had to be seen as acting in accordance with this aim. Government-appointed reviewers such as Lord Jellicoe, Lord Shackleton, and Sir George Baker and government ministers such as Roy

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<sup>42</sup>Northern Ireland (Young Persons) Act, 1974, Eliz. II, c. 33.

<sup>43</sup>See for instance *HC Debs*, 26th June 1975, Vol. 894, col. 814, *HC Debs*, 30th June 1977, Vol. 934, cols. 633, and *HC Debs*, 8th December 1977, Vol. 940, col. 1678.

<sup>44</sup>*HL Debs*, 28th November 1974, Vol. 354, col. 1509.

<sup>45</sup>*HL Debs*, 28th November 1974, Vol. 354, col. 1517.

<sup>46</sup>*HC Debs*, 28th November 1974, Vol. 882, cols. 634-944 and *HC Debs*, 25th November 1974, Vol. 882, cols. 29-45.

Jenkins, argued that not only did the statutes serve as a moral statement, but that specific provisions of the acts also bore a presentational aspect. Proscription under the 1974 PTA served mainly in this capacity.

The central purpose underlying the introduction of proscription in Great Britain was to reduce the affront caused to the public by seeing overt support for Republican organizations.<sup>47</sup> Successive reviewers emphasized this aim. For instance, the Jellicoe Report noted that proscription bore both a practical and presentational value: “At the least practical level it enshrines in legislation public aversion to organizations which use, and espouse, violence as a means to a political end.”<sup>48</sup> If public displays supporting proscribed organizations could be prohibited, public outrage and disorder might likewise be avoided. Lord Shackleton juxtaposed considerations of civil liberties with the moral disapprobation assigned Republican paramilitary activity. Although there seemed to be agreement that freedoms should not be lightly infringed, the great offense caused by seeing support for the IRA outweighed other considerations. Individual reviewers expressed this sentiment in their consideration of the 1973-96 EPAs: for instance, “Proscription is an expression of the outrage of the ordinary citizen, who comprise the overwhelming majority, at the barbarous acts of these organizations, and at the revolting glee with which they claim responsibility for the organization, usually with personal anonymity, together with their public displays in particular areas.”<sup>49</sup> From 1974 to 1996 in Britain only ten charges were brought under the provisions of the 1974-96 PTAs governing proscription. This contrasts sharply with the number of similar charges brought in Northern Ireland under the 1973-96 EPAs.<sup>50</sup> The variance can be understood more clearly in the context of the aim of the Northern Ireland government. From 1922 to 1972, any expression of Republicanism represented an attack on the constitutional position of the North. Under Unionist control of the Province, security forces brought a significant number of charges for violations of the provisions related to proscription. British security forces, in contrast, used them sparingly, relying on them instead as an indicator of public outrage and, relatedly, as a possible preventer of civil disorder stemming from outrage. Because of the moral aversion demonstrated in Britain by the use of such measures, once in place they became difficult to rescind. Although Viscount Colville, who conducted the 1986 review of the PTA, noted the limited use made of proscription within the bounds of the legal

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<sup>47</sup>Roy Jenkins, *HC Debs*, 28th November 1974, Vol. 882, col. 636.

<sup>48</sup>*Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976*. By the Rt. Hon. Earl Jellicoe, DSO, MC. February 1983. Session 1982/83 Cmnd 8803, para. 207. [Hereafter Jellicoe Report]

<sup>49</sup>*Review of the Northern Ireland (Emergency Provisions) Act 1978*. By the Rt. Hon. Sir George Baker OBE. April 1984. Session 1983/84 Cmnd 9222, para 414. [Hereafter Baker Report]

<sup>50</sup>Between June 1978 and end 1983, some 537 charges were brought under section 21 of the 1978 EPA. (Baker Report, para. 412)

system, he recoiled from recommending its repeal. He was concerned that it would be perceived as “a recognition...that the leading merchants of Irish terrorism were no longer disapproved.”<sup>51</sup>

Britain’s failure to include Loyalist paramilitaries in provisions relating to proscription further emphasized that the primary function of the provision was to express public outrage and, adjunctly, to avoid civil disorder. Numerous cases of Loyalist paramilitary activity occurred in Britain 1972-96.<sup>52</sup> Their existence challenged Lord Shackleton’s insistence that “the Protestant extremist groups are not engaged in violence against the community in Great Britain and...their activities are not in any way comparable to those of the IRA.”<sup>53</sup> Clive Walker, an academic, notes the dubious basis of this reasoning and concludes that “the true basis for proscription under Part I is the prevention of public offense and disorder. Thus, it is not the paramilitary activity in Britain *simpliciter* which justifies listing but the degree of resultant public outrage. In fact, Loyalist criminality in Britain has not provoked public condemnation to the same degree as Republican misdeeds.”<sup>54</sup>

Unwillingness to rescind emergency measures once enacted was linked to the moral import assumed in their enactment. Withdrawing them would have been akin to surrendering to terrorism: “I welcome the legislation because it is a signal to the men of violence that the Government will not weaken in their fight.”<sup>55</sup> Thus the statutes were transformed from “emergency provisions” into “antiterrorist legislation.”<sup>56</sup> This verbiage demonstrated a rejection of terrorism, which became inextricably linked to the renewal of emergency measures. In the annual debates on the Prevention of Terrorism Act, the Labour Party went out of its way to indicate that in opposing the legislation, it was by no means going soft on terrorism.<sup>57</sup> Likewise, anyone who called for an inquiry into the operation of the emergency

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<sup>51</sup>*Review of the operation in 1986 of the Prevention of Terrorism (Temporary Provisions) Act 1984.* By the Viscount Colville of Culross QC. Session 1986/87, para. 13.1.6. [Hereafter Colville 1987]

<sup>52</sup>Loyalist cases in Britain during that time included: *Hamilton v. H.M. Advocate* [(1980) S.C. 66] Re: UDA activities in Dumfries; *Sayers v. H.M. Advocate* (1982) J.C. 17] Re: UVF unit in Glasgow; *Walker, Edgar and Others v. H.M. Advocate* [*Times*, 14 March 1986, 2] Re: gun-running funds in Glasgow for the UVF; *H.M. Advocate v. Copeland, Robertson and Others* [(1987) S.C.C.R. 232] Re: UDA activity in Glasgow; and *Forbes v. H.M. Advocate* [(1990) S.C.C.R. 69] and *Reid v. H.M. Advocate* [(1990) S.C.C.R. 83] Both Re: UDA members in Perth. Cited in Walker, *supra*, p. 57.

<sup>53</sup>*Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976.* By the Rt. Hon. Lord Shackleton, KG, OBE. August 1978. Session 1977/78 Vol. xxiii Cmnd 7324, para. 110. [Hereafter Shackleton Report]

<sup>54</sup>Walker, *supra*, pp. 57-8.

<sup>55</sup>Ian Paisley, *HC Debs*, 19th February 1996, Vol. 272, col. 104.

<sup>56</sup>Compare *HC Debs*, 17th April 1973, Vol. 855, cols. 275-392 and *HC Debs*, 18th April 1973, Vol. 855, cols. 627-28 to *HC Debs*, 9th January 1996, Vol. 269, cols. 31-115 and *HC Debs*, 19th February 1996, Vol. 272, cols. 41-108.

<sup>57</sup>“I hope that our debate today will be conducted on the understanding that, whatever our disagreements, we all occupy...common ground. Certainly I do not propose...to accuse the Home Secretary of being negligent in the cause of civil liberties, and I suspect that neither he nor his Minister will want to accuse us of being irresponsible in the

measures risked being seen as retiring from the fight on terrorism. In suggestions in 1981 that the government institute a review of the emergency measures, the opposition stated: “My right hon. and hon. Friends supported the motion calling for an inquiry, but there should be no misunderstanding about our reasons. We do not believe that there should be any lowering of our guards against terrorist activity and the continuing threat of it. Our vote did not signify any complacency or moral weakness, faced as we are by deadly, clandestine groups in our midst.”<sup>58</sup> Labour’s later decision in 1996 not to oppose the renewal of the Prevention of Terrorism Act primarily rested on the party’s decision that it could not be seen as tolerant of terrorism. In discussions on the 1996 EPA, Labour announced that primarily because of the retention of provisions relating to internment, it would oppose the bill on the second reading but would not divide the House on the third reading, as some sort of emergency legislation was necessary. Barry Porter immediately clarified the implication of this position: “I do not believe that many people in Northern Ireland, certainly in terrorist organizations, will read the details of the opposition’s reasoned amendment. ...[T]he headline will be, ‘Labour Party votes against anti-terrorist legislation.’”<sup>59</sup> Nick Hawkins put the point in an even more partisan fashion: “Unless and until [the Labour Party] support[s] the Government on every piece of anti-terrorist legislation, the voters of Britain will never take seriously any of the weasel words of Labour spokesmen from the leader downwards on the strength of the Labour Party’s policy on crime. If the Opposition will not support us on measures against terrorism, they cannot be taken seriously.”<sup>60</sup>

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face of terrorism.” (Roy Hattersley, *HC Debs*, 7th March 1983, Vol. 38, col. 569) See also *HC Debs*, 9th January 1996, Vol. 269, col. 94.

<sup>58</sup>Neville Sandelson, *HC Debs*, 18th March 1981, Vol. 1, col. 379.

<sup>59</sup>*HC Debs*, 9th January 1996, Vol. 269, col. 43.

<sup>60</sup>*HC Debs*, 9th January 1996, Vol. 269, col. 75.

Given the import of the enactment of emergency measures, their repeal might have been interpreted as meaning either that rejection of paramilitary violence had altered, or that the threat was no longer relevant.<sup>61</sup> From 1973 to 1996, however, no sustained breaks in paramilitary activity in either Northern Ireland or Great Britain occurred. Even after the 1994 cease-fires, punishment beatings, movements of arms, and racketeering continued, suggesting that paramilitary activity was not so much ended as funneled into other channels. Either violence still existed within society, in which case the moral import of the enactment of emergency measures proved a stumbling block to removing them, or a cessation in violence had occurred. In the latter case, the onus was on those opposing emergency legislation to demonstrate that the threat no longer remained. This transferred the burden of responsibility from those seeking to extend anti-terrorist law to those seeking to repeal it. This transfer guaranteed the survival of emergency measures beyond their temporary intent. The British government ultimately made the repeal of the Prevention of Terrorism Act dependent on a solution to the Northern Irish political situation. “Until [the conflict] is resolved and until there is an end to the threat, we must be able to look for the protection that the [PTA] provides.”<sup>62</sup> MPs repeatedly cited this as a reason for voting for renewal of emergency legislation. For instance, during consideration of the 1996 EPA one MP stated, “I [support the Bill] for one clear and simple reason -- the conditions that originally made the emergency powers necessary have still not gone away. ...[I]n Northern Ireland, there is still no universal renouncement of violence for political ends.”<sup>63</sup> The 1994-96 cease-fires did not diminish this threat: “The PTA will remain necessary even if the temporary cease-fire is reinstated.”<sup>64</sup> Similarly, “Even if the cease-fire were continuing, we would have to keep in place some emergency measures for quite some time.”<sup>65</sup> And again, from a Northern Ireland Unionist politician, “It is important that we do not lose the protection that the Prevention of Terrorism Act and the Northern Ireland (Emergency Provisions) Act provide with regard to terrorist acts. It is not wise to leave the United Kingdom without some permanent protection.”<sup>66</sup> Why? Because “there is always a need to be cautious when dealing with terrorism. ...[I]t is, to a great extent, unpredictable. There is always a danger of resurgence.”<sup>67</sup>

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<sup>61</sup>Fear that paramilitary interpretation of the withdrawal of emergency legislation would be to see it as a concession or as an “invitation” to intensify the armed struggle further discouraged the relaxation of the statutes. (B. Dickson, “Northern Ireland’s Emergency Legislation -- the Wrong Medicine?,” (1992) Public Law, 597)

<sup>62</sup>Mr. Gardner, *HC Debs*, 18th March 1981, Vol. 1, col. 351.

<sup>63</sup>David Wilshire, *HC Debs*, 9th January 1996, Vol. 269, col. 54.

<sup>64</sup>David Wilshire, *HC Debs*, 14th March 1996, Vol. 273, col. 1147.

<sup>65</sup>A.J. Beith, *HC Debs*, 14th March 1996, Vol. 273, col. 1149.

<sup>66</sup>David Trimble, *HC Debs*, 8th March 1995, Vol. 256, cols. 379-380.

<sup>67</sup>Piers Merchant, *HC Debs*, 9th January 1996, Vol. 269, col. 90. As long as this threat remained, “[i]t would be criminally irresponsible to forswear the use of the power of internment.” (David Trimble, *HC Debs*, 19th February 1996, Vol. 272, col. 96)

Not only did the danger exist, but no politician would want to be seen as responsible for violence, should it occur after the statute had been repealed. In 1984 the Prevention of Terrorism Act was extended to include international terrorism, making the statute's repeal even more remote. Between 1984 and 1996, more than 21 percent of those detained under either the 1984 or the 1989 PTA and subsequently charged with an offense were involved in international terrorism. In 1995 the figure rose to 50 percent. This led one MP to comment that it was vital for Britain to "continue to have on the statute book legislation which will enable a democratic society to respond to the ever-present threat of international terrorism, regardless of the situation in Northern Ireland."<sup>68</sup> During his introduction in the renewal debates in 1996, the Home Secretary agreed that "there is always likely to be terrorism of an international kind. ...[T]he manifestations of it are increasing; and...the need for the [PTA] in order to counter them therefore remains."<sup>69</sup> Basing the withdrawal of a temporary statute on the cessation of international terrorism undermined the act's claim to transient status and placed repeal even further beyond reach. As long as violence continued, in relation either to Northern Ireland or to international disputes, the use of emergency legislation as a way to condemn terrorism added to the propensity of such legislation to remain in force.

### **SECONDARY CONDITIONS CONTRIBUTING TO THE RETENTION OF EMERGENCY LAW**

The primary factors outlined above – the seeming efficaciousness of the measures themselves, the long history of conflict in Ireland North and South, perceptions in Westminster of Northern Ireland as a place where such measures were somehow acceptable, and the moral import associated with the introduction of counterterrorist legislation – played a direct role in the introduction and retention of emergency law. At least three secondary factors – the overlap between criminal law and counterterrorist measures, the formal impeccability of the legislation, and the context within which the two states operated – created an environment within which such measures could be maintained.

#### ***Overlap between Criminal Law and Counterterrorist Measures***

In regard to the first of these secondary elements, emergency legislation introduced in the Northern Irish context, particularly by Westminster after 1972, was that, while some civil rights otherwise protected were violated, many of the acts prohibited by the statutes already were forbidden under criminal law. This reflected the nature of Republican strategy: acts were orchestrated to undermine law and order, thus increasing the insecurity of the citizens and moving the state toward ungovernability. As a result, offenses tended already to be covered by criminal statutes. What made these offenses "terrorist" was the motivation and organization of entities using them for political or ideological ends. In this respect,

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<sup>68</sup>Andrew Hunter, *HC Debs*, 14th March 1996, Vol. 273, col. 1143.

emergency legislation was employed to reject the use of violence for political means by (1) highlighting the aims of individuals engaging in such behavior, (2) increasing penalties associated with otherwise ordinary criminal activity, and (3) altering the manner in which the state addressed transgressions of the law.

Scheduled offenses under the 1973 EPA included violations of common law such as murder, manslaughter, arson and riot, and infringements of already existing criminal statutes.<sup>70</sup> The government's determination to defeat (particularly Republican) terrorism, (defined in the 1973 EPA as "the use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear,")<sup>71</sup> caused these acts to be incorporated into emergency legislation. Under the 1973 EPA, summary conviction or conviction on indictment, while applied to offenses in ordinary law, carried tougher penalties than could otherwise be levied. In addition, the pursuit of charges for crimes scheduled under the 1973 EPA was conducted within a specially constructed judicial setting: not only did Diplock courts provide the setting for cases relating to scheduled offenses, but both the 1973 EPA and the 1978 EPA limited the location for trial on indictment of a scheduled offense to the Belfast City Commission or the Belfast Recorder's Court.<sup>72</sup> From 1973 through 1996, the government altered provisions of the EPAs relating to scheduled offenses on only one occasion: the 1985 Northern Ireland (Emergency Provisions) Act 1978 (Amendment) Order that granted the attorney general greater discretion to certify out cases relating to kidnapping and false imprisonment, and offenses carrying less than a five-year penalty. The government subsequently incorporated this order into the 1987 EPA. (The government rejected Sir George Baker's other proposals to certify out robbery or aggravated burglary, or to extend to the Director of Public Prosecutions the ability to deschedule certain cases.) Although this alteration allowed the attorney general to certify out specific cases, after the formation of the 1973 EPA the British government did not remove any scheduled offences from the statute.

Not only were offenses already cited in other statutes appended to emergency legislation, but some of the measures introduced under the 1922-43 SPAs, 1973-96 EPAs, and 1974-96 PTAs gradually influenced ordinary law. For instance, Regulation 4 of the 1922 SPA empowered the civil authority to ban meetings, assemblies, and processions. At its repeal in 1951, the Public Order Act was introduced

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<sup>69</sup>Michael Howard, *HC Debs*, 14th March 1996, Vol. 273, col. 1129.

<sup>70</sup>This included statutes such as the Malicious Damage Act, 1861, 24 & 25 Vict., c. 97, Prison Act (Northern Ireland), 1953, 2 Eliz. II, c. 18, Firearms Act (Northern Ireland), 1969, Eliz. II, c. 12, Theft Act (Northern Ireland), 1969, Eliz. II, c. 16, and Protection of the Person and Property Act (Northern Ireland), 1969, Eliz. II, c. 29.

<sup>71</sup>1973 EPA, Part IV, section 28.

<sup>72</sup>In accordance with Baker's recommendations, in 1987 section 6 of the 1978 EPA was amended to allow scheduled offenses to be tried at Crown courts outside of Belfast.



and became the primary instrument used to prohibit marches and processions.<sup>73</sup> The Unionist government used this statute, amended in 1963 and again in 1970, in the same way it previously operated Regulation 4.<sup>74</sup> Regulation 24C of the 1922-43 SPAs prohibited the display of the Tricolour. Responding to widespread support from the Unionist population, in 1954 the Northern Executive incorporated the measure into the Flags and Emblems (Display) Act (Northern Ireland).<sup>75</sup> Because Britain had recognized the Republic of Ireland in the interim, the new statute did not follow Regulation 24C in banning the Tricolour outright. Instead, it forbade interference with the flying of the Union Jack and empowered the security forces to ban any flags or emblems likely to lead to a breach of the peace. More recently the Criminal Evidence (Northern Ireland) Order 1988 limited an individual's right to silence.<sup>76</sup> According to one account, "The Order was prompted primarily by the need to encourage those who were suspected of terrorist activity to answer questions when there was not enough evidence to convict them."<sup>77</sup> It reflected the widespread belief among the security forces that maintaining silence was evidence of training in "anti-interrogation techniques".<sup>78</sup> The government aimed this provision at individuals suspected of involvement in terrorist activity or paramilitary financial affairs.<sup>79</sup> However, because it was enacted via the Order in Council procedure, it applied to all criminal suspects in Northern Ireland. The impact of the emergency measures also can be seen in the powers incorporated into the 1984 Police and Criminal Evidence Act.<sup>80</sup> Reflecting steps by Westminster to counter Republican violence in Great Britain, "the widely increased police powers within the police and Criminal Evidence Bill suggest that the emergency nature of the [PTA] will to an even greater extent be subsumed within everyday police practice." As a result, "what was abnormal in 1982 becomes normal in 1983; likewise emergency measures become standard and unexceptional."<sup>81</sup> In Northern Ireland the norms shifted so as to incorporate what had hitherto been emergency measures into ordinary law.

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<sup>73</sup>Public Order Act (Northern Ireland), 1951, 14 & 15 Geo. VI, c. 19.

<sup>74</sup>Public Order Act (Northern Ireland), 1963, Eliz. II, c. 52 and Public Order Act (Northern Ireland), 1970, Eliz. II, c. 4.

<sup>75</sup>Flags and Emblems (Display) Act (Northern Ireland), 1953, 2 & 3 Eliz. II, c. 10.

<sup>76</sup>For background on the introduction of the order see J. Jackson, "Recent Developments in Criminal Evidence", (1989) 40 N.I.L.Q., 105-30 and J. Jackson, "Developments in Northern Ireland," *The Right of Silence Debate* (1990). For criticism of the statutory instrument see SACHR, *Fourteenth Report of the Standing Advisory Commission on Human Rights*, HC 394 (1988/89) and A. Ashworth and P. Creighton, "The Right of Silence in Northern Ireland," *Lessons From Northern Ireland* (1990).

<sup>77</sup>J. Jackson, "Curtailing the Right of Silence: Lessons from Northern Ireland," (1991) *Crim. L.R.*, 404-15, quote from p. 413.

<sup>78</sup>Home Office Circular, para. 41, cited in C. Walker, *The Prevention of Terrorism in British Law* (2nd ed., 1992), fn. 30, p. 74.

<sup>79</sup>Tom King, *HC Debs*, 8th November 1988, Vol. 140, cols. 183-7.

<sup>80</sup>Police and Criminal Evidence Act, 1984, Eliz. II, c. 60.

<sup>81</sup>J. Sim and P. Thomas, "The Prevention of Terrorism Act: Normalising the Politics of Repression," (1983) 10 *Journal of Law and Society*, 75. See also M. O'Boyle, "Emergency Situations and the Protection of Human Rights," (1977) 28 N.I.L.Q., 160-87.

In brief, the incorporation of already existing statutes into emergency measures mirrored to the gradual impact of the emergency measures on ordinary legislation. Because many of the crimes cited in the 1973 and subsequent EPAs fell under ordinary criminal legislation, their inclusion did not represent a significant point of departure. Making their appearance unusual was the focus of the measures on the political intent behind the actions themselves, the alteration in penalties associated with engaging in such activities with terrorist intent, and the court system in which cases relating to breaches of the measures were conducted.<sup>82</sup> These elements recognized the unique nature of the challenge being mounted against the state and indicated rejection of the use of violence for political ends, tying into the import borne by the introduction and operation of the emergency provisions.

### ***Formal Impeccability of the Legislation***

A second factor that was conducive to the continuation of the emergency measures – even if it did not actively encourage the extension of them – was the formal impeccability of the legislation. Had the provisions represented a significant departure from established, accepted norms, pressure on the government to withdraw the statutes would have likely increased. This formal consistency lent the emergency measures a degree of legitimacy they otherwise might have lacked and bolstered their acceptability as a means to counter Northern Irish violence. Emergency legislation provided sets of general rules that governed affairs within the states. Far from being decided on an ad hoc basis, the legislation both supplied and made provision for the further introduction of legal codes. The Northern Ireland government did introduce numerous regulations aimed at preventing particular events from occurring,<sup>83</sup> but for the most part, once enacted, they remained law and became a standard that the government later applied to similar cases.<sup>84</sup>

Both the Northern Ireland and British governments clearly promulgated all measures to the affected parties. The Northern Ireland Executive regularly published every statutory instrument introduced under the 1922-43 SPAs in the *Belfast Gazette* and the four main Northern newspapers. The Ministry of Home Affairs also frequently directed that the information be issued to provincial radio stations. In addition, for orders relating to the prohibition of meetings or assemblies in a particular area,

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<sup>82</sup>For further discussion of the assimilation of emergency legislation into normal law see P. Hillyard, *Power and Politics*, (1981), p. 88, D. Walsh, “Arrest and Interrogation: Northern Ireland 1981,” (1982) 9 B.J.L.S., 53-7, and D. Bonner, “Combating Terrorism in the 1990s: the Role of the Prevention of Terrorism (Temporary Provisions) Act 1989,” (1992) Public Law, 473-4.

<sup>83</sup>For instance, in 1954 the Minister of Home Affairs directed that two newspapers, *The United Irishman* and *Resurgent Ulster* be banned. In the absence of any measure specifically authorizing such prohibition, the Ministry issued Regulation 8 under the 1922-43 SPAs. (S.R.O. 179/1954, 21.12.54)

<sup>84</sup>These met what Lon Fuller has termed the “requirement of generality”: rules existed. (See Lon Fuller, *The Morality of Law*. New Haven, 1964.)

the government issued copies of the statutory instruments to the local papers. All regulations made under the legislation had to be laid before both Houses of Parliament soon after their creation. The publication of regulations was subject both to section 1(4) of the 1922 SPA and to section 4(1) of the 1925 Rules Publication Act (Northern Ireland).<sup>85</sup> The Northern government also periodically ordered reprints of the 1922-43 SPAs and all regulations issued under the acts. Similarly, the British government ensured that emergency measures were clearly promulgated. Her Majesty's Stationery Office published the acts, and the *London Gazette* carried notice of any statutory instruments introduced under their auspices.

Britain's efforts to publicize emergency law fell short of those exerted by the Unionist government. A few explanations are possible. First, many of the regulations issued by the Northern Executive, particularly after the civil disorder had abated, focused on preventing certain acts from occurring. For instance, Republican assemblies, the circulation of printed material, and the construction of monuments involved many people in the Province and represented events under way. As the Unionist government sought to prevent the occurrence of the events themselves, it lay in their best interests to ensure that those involved be adequately informed of the law. To accomplish this, the government made use of various media and official sources.<sup>86</sup>

A second explanation concerns the extremity of the measures themselves. The need for the publication of the laws depends to some extent upon the degree to which the requirements of the rules depart from generally agreed perceptions of right and wrong.<sup>87</sup> Perceptions within the Nationalist and Republican communities of the moral acceptance of commemorating Nationalist or Republican holidays, rallying for a united Ireland, or disseminating literature in accordance with these views radically differed from the commonly agreed standards within the Unionist block. It was not obvious that such events should be banned. In contrast, provisions such as those in the 1973 EPA relating to murder or attempted murder would have fallen more clearly within the understood moral norms of the various communities.

A third explanation relates to the principle of marginal utility, which limited the extent to which the requirement of publicisation could apply. As Lon Fuller writes, "It would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him."<sup>88</sup> Not

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<sup>85</sup>Rules Publication Act (Northern Ireland), 1925, 15 & 16 Geo. V, c. 6.

<sup>86</sup>Adjunctly, by ensuring that the regulations were clearly promulgated, the strength of the Northern government, in contrast to the vacillation seen as characterizing previous British rule of Ireland, could also more clearly be seen.

<sup>87</sup>"[T]o the extent that law merely brings to explicit expression conceptions of right and wrong shared in the community, the need that the enacted law be publicized and clearly stated diminishes in importance." (Fuller, *supra*, p. 92)

<sup>88</sup>*Ibid.*, p. 49.

only did the size of the United Kingdom in relation to the Province here play a role, but the relatively marginal status of legislation relating to Northern Irish affairs in relation to the other daily concerns of individuals in Great Britain was also relevant. Northern Irish legislation – along with the exercise of British legislation relating to Northern Irish affairs – focused on a minority of the overall population in the UK. Further, the relative constancy of the 1973-96 EPAs and 1974-96 PTAs suggests that there was very little new about which the population had to be informed. This contrasts with the more than 100 regulations introduced by the Northern Ireland government, covering powers that ranged from internment to prohibitions on the flying of the Tricolour. These considerations aside, neither government made a secret of the emergency provisions adopted, as the laws were generally available to the population in both Northern Ireland and Great Britain.

Emergency legislation introduced in the Northern Irish context avoided retroactive application. For the most part, emergency law also met requirements of clarity: it maintained accepted norms relating to legislative drafting and language. The one measure that challenged this formal criterion lay in the 1922 SPA's provision for an individual to be found in violation of the statute "if [he or she] does any act of such a nature as to be calculated to be prejudicial to the preservation of peace or maintenance of order in Northern Ireland." This wording implied unpredictability and the possibility of inconsistent law. It failed to indicate clearly particular instances in which an individual could be found in violation of the statute. Nevertheless, although in this respect the provision was open to challenge under a principle of fairness, its formal qualities met a number of other formal standards. Moreover, the Unionist government refrained from acting on this provision, preferring instead to issue regulations and establish precedent through the codification and retention of statutory instruments. As a result, this clause received minimal attention and did not become a target for opponents of the statute. Instead, attention tended to be drawn toward the discretionary power of the minister of home affairs to issue regulations -- a power frequently employed during the tenure of the Northern Parliament.

Emergency measures met the criterion of non-contradictoriness. In addition the legislation refrained from placing unreasonable demands on the population. The governments employed the special powers to meet their aims: defense of the Northern Irish constitutional structure and protection of citizens and property within the United Kingdom. The specific requirements of the provisions themselves – proscription or otherwise – did not lay beyond reach. In addition, emergency enactments did not represent a frequent departure from some previous state of affairs. The 1920 Restoration of Order in Ireland Act, the 1914-15 Defense of the Realm Acts, and nineteenth century Coercion Acts predated the introduction of Northern Irish emergency law. The Northern Executive took many of the initial regulations in the 1922 SPA from these statutes. Britain subsequently incorporated them into the 1973

EPA. Even the 1974 PTA found precedent in the 1939 PVA, which itself had been on the statute books for thirty-four years.

Within the provisions themselves there was also a fairly high degree of constancy: although numerous regulations were introduced under the 1922 SPA immediately after its enactment, the Unionist government made very few changes to the statute itself. Additional measures served to clarify the original intent of the government in protecting the constitutional status of the North. From 1972 to 2000, amendments to the 1973 EPA and 1974 PTA largely centered on cosmetic alterations to the existing statutes, leaving the vast majority of provisions included in the 1973 and 1974 acts untouched. Finally, discrepancies between the law as written and the law as administered were not apparent. The governments maintained congruence between official action and the rules. Although these measures altered judicial procedure, due process and rights of appeal were carried out in accordance with requirements under the legislation. The enforceability of the statutes further ensured the ability of official action to relate directly to the declared legal standard: from 1922 to 1972, the Royal Ulster Constabulary inspector general repeatedly emphasized that unless the regulations could be administered by the police force, they should not be introduced. This rationale prevented the enactment of provisions relating to renderings of “A Soldier’s Song”, wearing of the Easter Lily (to commemorate the 1916 Easter Uprising), and the prohibition of various meetings and assemblies. From 1972 the vast majority of rules issued by the British government similarly could be put into effect.<sup>89</sup>

In sum the structure of emergency measures suggests that the 1922-43 SPAs, the 1973-96 EPAs, and the 1974-96 PTAs demonstrated a significant degree of formal legitimacy. The extent to which emergency law satisfied these principles may have varied slightly; but for the most part it met the standards. Additionally, the procedures via which emergency measures were enacted largely were consistent with the manner in which other statutes passed into law. The powers *enshrined* in the legislation may have deviated from other standards – this, precisely, was one of the distinguishing characteristics by virtue of which they were considered emergency law – however, the governments enacted the statutes via proper Parliamentary procedure. This formal correctness engendered a reassuring sense of legitimacy, thus contributing to the retention of special powers long beyond their temporary

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<sup>89</sup>There was one possible exception to this standard: the 1975 Northern Ireland (Emergency Provisions) Regulation required drivers to lock and immobilize unattended vehicles. Parliament explicitly recognized that the provision would be difficult, if not impossible, to enforce. (*HC Debs*, 11th December 1975, Vol. 902, cols. 742-90.) It was justified, however, by the responsibility borne by drivers to ensure that their vehicles were not employed to the detriment of third parties. While this provision did not hold individuals accountable for conditions beyond their control, it did border on a Parliamentary enactment not entirely enforceable. This regulation stood as an anomaly, though, as the civil authority could implement the vast majority of emergency measures. This contributed to the consistency between statutory form and official action.

invocation. Had the emergency measures violated these principles, their acceptance within Northern Ireland and Great Britain might have stood in greater question.

***The International Arena and Domestic Counterterrorist Law***

Although arising from disparate modes of justification, the types of emergency measures introduced by the Unionist government and by Westminster overlapped to some extent. This in part may have resulted from the common origins of the measures: as previously noted, the Northern Executive drew the 1922 SPA from British legislation employed earlier in Ireland. Immediately following partition, with a civil war just over the border, it was unlikely that Westminster would censure Unionist imitation of previous British policy. Moreover, the introduction of the 1972 Detention of Terrorists Order immediately following direct rule confirmed that Britain was still ready and willing to employ such measures with regard to Northern Ireland. Why did Britain continue after 1972 to support this legislation? Was there something about the structure of the British state that lent itself to entrenching emergency law?

The options available to the Northern government and to Westminster were more limited within the UK than they might have been in totalitarian regimes. To whatever degree Unionists isolated the minority community from the nucleus of political power, the structure of the Northern Parliament still reflected that of a democratic state. The majority community had to be kept satisfied, and so there were limits on what the Northern Irish, and later, British, government could do. Parliamentarians recognized that the Northern Irish conflict was “an extremely difficult war for a democracy such as [Britain] to fight.”<sup>90</sup> The political or ideological motivation of those engaging in the acts separated acts of terrorism from those of mere criminality. In attempting to meet the challenge, the Northern government enacted broad-sweeping legislation. While seeking to demonstrate that it would not tolerate terrorist acts, the British government walked a fine line between allowing what it saw as too much leeway for subversive organizations and violating rights otherwise protected in a liberal, democratic state.

Largely as a result of the lack of clarity between acceptable measures and unacceptable provisions, Britain altered its use of emergency law after 1972. Thus, while the basic emergency measures remained the same, the specific provisions metamorphosed in response to internal demands, internal reviews, and international attention. For instance, the security forces drew the interrogation techniques introduced in the early 1970s from British operations in Palestine, Malaya, Kenya, Cyprus, and elsewhere. It was not until they appeared in the Northern Ireland context (i.e., within the United

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<sup>90</sup>W. Benyon, *HC Debs*, 2nd July 1979, Vol. 969, col. 1005.

Kingdom) that they received such widespread attention and condemnation that Britain was forced to abandon their use. Because of the state structure, such techniques were unacceptable. By contrast, seven-day detention and its disparate application to the minority community in the North continued well into the next decade. The European Court of Human Rights witnessed challenges to both of these aspects of interrogation; however, partially reflecting the mitigated measures in place, Britain maintained a borderline acceptability.

Exclusion also underwent dilution during the tenure of direct rule. In response to Unionist agitation, Britain included the principle of reciprocity in the 1974 Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order. The government later incorporated this instrument, with some alterations, into the 1976 PTA.<sup>91</sup> Two years later, in response to Lord Shackleton's recommendation that a survey of exclusion orders be conducted to determine if any of them should be revoked, Westminster announced that it would implement a standard review of exclusion orders to be instituted three years after the making of the initial order. In 1982 Lord Jellicoe proposed that exclusion orders be retained with some modifications.<sup>92</sup> The government accepted his findings and altered the appropriate provisions in the 1984 Prevention of Terrorism (Temporary Provisions) Act. The statute limited exclusion to a period of three years, after which time the secretary of state could renew the order. It exempted any British citizen resident in Great Britain three or more years prior to consideration of exclusion.<sup>93</sup> Westminster's introduction of the 1996 Draft Prevention of Terrorism (Temporary Provisions) Regulations further modified the provisions in accordance with the European Covenant on Human Rights. These changes gradually reduced the more severe effects of exclusion, making the presence of the measure, while still exceptional, more palatable than previously. Other alterations, such as the extension of the requirement of reasonable suspicion for the exercise of various powers, and the extension to detainees of certain rights they otherwise would hold under the Police and Criminal Evidence Act, demonstrated the "normalization" of emergency law. Similar dilution of emergency measures contributed to the entrenchment of the legislation.<sup>94</sup> Parliamentary scrutiny of the measures clearly highlights this process of normalization, as well as the growing acceptance of emergency legislation

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<sup>91</sup>The time limit for making representations against an exclusion order after being served with notice increased from 48 hours to 96 hours, and in the event that the individual had not already been removed from the UK with his or her consent, the right to a meeting with an advisor was made absolute, rather than being dependent on whether the secretary of state determined the request to be "frivolous."

<sup>92</sup>See Jellicoe Report, para. 188.

<sup>93</sup>Similarly, an individual resident in Northern Ireland three or more years could not be excluded from the Province. Clause 7 made an absolute right of appeal for individuals to meet with an adviser to make representations protesting the issuance of exclusion orders. The length of time within which such meetings were arranged was extended from 96 hours to 7 days after the initial order was made.

<sup>94</sup>While many of the measures were diluted, others, such as those relating to financial support of proscribed organizations, grew more strict.

throughout the 1980s and into the 1990s. Following the 1976 general review of the PTA, the terms of reference for independent reports consistently accepted “the continuing need for legislation against terrorism.”<sup>95</sup> Analysis was based on the operation of the statute, and not on whether the legislation was necessary or appropriate. By the early 1970s, the government had established a framework within which minor adjustments could be made.

Not only did the British state operate within certain limitations imposed by its governmental structure, but the international community likewise influenced Britain’s alteration of emergency law. The changes encouraged by the international environment implicitly supported the retention of some, albeit modified, form of emergency measures. Thus international considerations contributed to – particularly Great Britain’s – retention of such provisions. From 1922 to 1972, as a result of Northern Ireland’s structural subservience to Westminster, measures enacted by the Unionist government were largely considered a UK internal matter. During the post-World War I rebuilding period, World War II, and the immediate aftermath of the World War II, minimal attention was drawn to the operation of the 1922-43 SPAs. With the advent of the civil rights marches in the 1960s, however, and the increased international attention on civil rights issues, the Northern Irish situation gained more prominence. Aided by the rapidly expanding media industry and highlighted by Westminster’s assumption of direct rule, more attention was placed on Northern Ireland and, consequently, on Britain’s response to events related to provincial affairs. Britain also began to look to the international arena to aid in reducing violence associated with Northern Ireland. This generated further attention to affairs within the United Kingdom. For instance, the Republic of Ireland became increasingly involved via the Anglo-Irish intergovernmental talks. This alteration brought into sharp relief issues arising under the introduction and operation of emergency measures that related to international agreements into which the United Kingdom had entered.

### ***Treaties Protecting the Ability of Contracting States to Introduce Emergency Legislation***

Various treaties to which the UK was a signatory protected the ability of contracting states to introduce emergency measures in times of need. For instance, Article 4 of the International Covenant on Civil and Political Rights allowed for derogation from obligations under the treaty in times of public emergency.<sup>96</sup> Upon ratification of the covenant in 1976, the British government entered a derogation in respect to Northern Ireland. Britain withdrew the derogation in 1984 only to reinstate it in 1988.<sup>97</sup>

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<sup>95</sup>See for instance Shackleton Report.

<sup>96</sup>See *International Covenant on Civil and Political Rights 1966*, in I. Brownlie, *Basic Documents on Human Rights* (3rd ed., 1994), p. 127. Although some articles were exempted from derogations, such as those relating to the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and the right not to be enslaved or held in servitude, a general derogation could be established.

<sup>97</sup>For the text of this subsequent derogation see <http://www.law.qub.ac.uk>.



Similar to Article 4 of the International Covenant, Article 15 of the European Convention on Human Rights and Fundamental Freedoms allowed that “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”<sup>98</sup>

During the introduction of emergency measures, MPs appealed to the derogations provided by these agreements: “We know that every human rights convention admits of some circumstances in which ordinary principles may be set aside.”<sup>99</sup> And again, “the principle [of derogation from the normally accepted principles of the judicial process] is well recognized in the European Convention of Human Rights.”<sup>100</sup> In its exercise of emergency powers after-1972, the United Kingdom government chose to avail itself of the right to derogate from the standards when it was brought before the European Court for violations of the covenant.<sup>101</sup> In *Brogan and Others v. UK*, four people, detained between four and seven days under the PTA on suspicion of involvement in Northern Irish terrorism, submitted complaints to the European Commission on Human Rights that the UK’s actions had violated the convention.<sup>102</sup> Article 5, paragraph 3 of the document demanded that anyone arrested “be brought promptly before a judge or other officer authorized by law to exercise judicial power and...be entitled to trial within a reasonable time or to release pending trial.”<sup>103</sup> In November 1988 the European Court ruled that even the shortest period for which one of the four individuals had been held, four days and six hours, violated the convention. Because no provisions existed in the UK to allow the government to compensate the individuals, the country was also found in violation of Article 5, paragraph 5, which stipulated that anyone who had been the victim of arrest or detention should have an enforceable right to compensation. The British government insisted that seven-day detention was required and examined two possible courses of action.<sup>104</sup> Either a judicial element could be inserted into the procedure to extend the seven-day detention, or the UK could derogate under Article 15.<sup>105</sup> In December 1988 Britain announced that it

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<sup>98</sup>*European Convention on Human Rights and Its Five Protocols*, in Brownlie, *supra*, p. 331. Britain withdrew its derogation under Article 15 in 1984 as part of its criminalization of terrorist violence. See Jackson, *supra*, p. 235.

<sup>99</sup>*HC Debs*, 5th July 1973, Vol. 859, col. 812. See also EPA debates, *HC Debs*, 17th April 1973, Vol. 855, col. 298.

<sup>100</sup>*HC Debs*, 5th July 1973, Vol. 859, col. 843.

<sup>101</sup>For discussion of multiple cases under consideration by the European court of Human Rights see Jackson, *supra*, pp. 507-35.

<sup>102</sup>Publ Eur Ct HR, Ser A, No. 145-B.

<sup>103</sup>*European Convention on Human Rights and Its Five Protocols*, in Brownlie, *supra*, p. 329.

<sup>104</sup>Douglas Hurd, *HC Debs*, 6th December 1988, Vol. 143, cols. 210-11.

<sup>105</sup>The derogation was an option in *Brogan and Others v. UK*; it had not been possible in the first case to come before the court: *Ireland v. UK* (1978) 2 E.H.R.R. 25, since the breach established in that case was non-derogable under Article 3.

would pursue the second route, and a year later it reaffirmed the derogation, stating that it would be maintained as long as deemed necessary.<sup>106</sup> Although *Brannigan & McBride v. UK* subsequently challenged the validity of this derogation, once again contesting the length of detention, the court found in the UK's favor.<sup>107</sup> According to the preconditions for derogation, that there existed a "war or other public emergency threatening the life of the nation," that the derogation was "strictly required by the exigencies of the situation," and that measures were not inconsistent with the state's other international obligations, the court determined that the derogation was valid.<sup>108</sup> Simultaneously, the court noted its concern about the long-term, apparently unexceptional character of the "emergency" in Northern Ireland.<sup>109</sup>

These international agreements became a yardstick by which Britain could measure its incursions into civil rights.<sup>110</sup> In 1972 Lord Diplock sought to adjust existing criminal procedures in a manner consistent with Article 6 of the European Convention. In his 1975 review of the 1973 EPA, Lord Gardiner wrote, "The British Government has acted legitimately, and consistently with the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in restricting certain fundamental liberties in Northern Ireland."<sup>111</sup> These findings followed on concerns voiced in the House of Commons that emergency measures introduced by Westminster, and particularly with respect to

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<sup>106</sup>Written Answer by Mr. Waddington, *HC Debs*, 14th November 1989, Vol. 160, cols. 209-10, reprinted in S. Marks, "Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights," (1995) 15 *O.J.L.S.*, 71.

<sup>107</sup>Publ Eur Ct HR, Ser A, No 258-B. For other applications challenging the validity of the derogation see Application Nos 14672/89, 14705/89, 14780/89, 14880/89, 18317-320/91, 18414/91, 18627-628/91, 19431/92, 19504/92, and 20440/92. Reprinted in Marks, *supra*, fn 18, p. 71.

<sup>108</sup>"The Jurisprudence of the Commission and Court of Human Rights has established the following characteristics of an emergency where Article 15 of the Convention is invoked: (i) the emergency must be actual or imminent, (ii) its effects must involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; and (iv) the crisis or danger must be exceptional in that the normal measures or restrictions, permitted by the convention for the maintenance of public safety, health, and order, are plainly inadequate." (K. Boyle, "Human Rights and Political Resolution in Northern Ireland," (1982) 9 *Yale Journal of World Public Order*, 159) For further discussion of the margin of appreciation granted in emergency circumstances see C. Feingold, "The Doctrine of Margin of Appreciation and the European Convention on Human Rights," (1977) 53 *Notre Dame Lawyer*, 90-106 and the European Court of Human Rights' decision in *Lawless v. Ireland* (1961) 1 *E.H.R.R.* 15. For analysis of *Lawless* see A. Robertson, *Human Rights in Europe* (1st ed., 1977), pp. 51-3, 111-14, 212-21.

<sup>109</sup>Only four states of emergency were declared in Northern Ireland 1972-80 under the Emergency Powers Act (Northern Ireland), 1926, 16 & 17 *Geo. V*, c. 5 and the Emergency Powers (Amendment) Act (Northern Ireland), 1964, 12 & 13 *Eliz. II*, c. 34: (i) issued: 10 February 1972, withdrawn: 16 November 1973; (ii) issued: 16 November 1973, withdrawn: 19 May 1974; (iii) issued: 19 May 1974, withdrawn: 19 September 1974; (iv) issued: 11 January 1979, withdrawn: 14 January 1979. (<http://www.law.qub.ac.uk>)

<sup>110</sup>Following *Ireland v. UK* and *Brogan and Others v. UK*, *Fox, Campbell and Hartley* was the third finding by the European Court of Human Rights that the Britain's counterterrorist legislation violated the European Covenant. This case focused on requirements of "suspicion" versus "reasonable suspicion" and the use of arrest to gather information. For analysis of this case see W. Finnie, "Anti-terrorist Legislation and the European Convention on Human Rights," (1991) 54 *M.L.R.*, 288-93.

the Diplock Court system, would lower the UK's standing in the international arena.<sup>112</sup> Reviewers frequently examined powers under the 1973-96 EPAs and 1974-96 PTAs against findings by the European Court.<sup>113</sup> Colville's 1987 review cited the damaging effects of exclusion on the British government's civil rights reputation in the eyes of the international community. The existence of this provision prevented the UK from ratifying Protocol four of the European Convention on Human Rights which declared the right to move freely and to choose where to live within one's own country. Not only did the international community allow for derogation but, as its influence led to a watering-down of emergency measures, an "acceptable level" of the suspension of human rights was obtained.

The international arena also had influence over Britain's counterterrorist legislation through the European Convention for the Suppression of Terrorism. In May 1973 the Consultative Assembly of the Council of Europe adopted Recommendation 703, which condemned international terrorist attacks. It invited governments of member states "to establish a common definition for the notion of "political offense" in order to be able to refute any "political" justification whenever an act of terrorism endanger[ed] the life of innocent persons."<sup>114</sup> The underlying rationale was that because crimes were so odious in terms of the methods adopted to obtain certain results, they should no longer be classified as political offenses for which extradition was not possible.<sup>115</sup> The ministers of justice of the member states of the Council of Europe recommended further action that resulted in the drafting of the European Convention on the Suppression of Terrorism. The document removed certain offenses from consideration as political offenses.<sup>116</sup> Article 2 listed other offenses that could be removed from classification as

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<sup>111</sup>*Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland.* Chairman: Lord Gardiner. January 1975. Session 1974/75 Cmnd 5847, chapter 7, no. 4.

<sup>112</sup>"When we sit in and observe trials in [other] countries, our position and the respect in which British law is held in those countries will be severely diminished and hampered." (*HC Debs*, 17th April 1973, Vol. 855, col. 315)

<sup>113</sup>See for example *HC Debs*, 19th February 1996, Vol. 272, cols. 42-4, 81-4, 89-90 and *HC Debs*, 14th March 1996, Vol. 273, col. 1160.

<sup>114</sup>*Explanatory Report*, European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, 1977/78 Cmnd 7031, vol. xiii, 11. [Hereafter Explanatory Report]

<sup>115</sup>The European Convention on Extradition (c.f. Article 3, para. 1) states that extradition shall not be granted in respect of a political offense. For discussion of extradition concerns between the United Kingdom and the Republic of Ireland see M. McGrath, "Extradition: Another Irish Problem," (1993) 34 N.I.L.Q., 292-314.

<sup>116</sup>This included any offenses under the Convention for the Suppression of Unlawful Seizure of Aircraft [Treaty Series No. 39 (1972), Cmnd 4956] or the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [Treaty Series No. 10 (1974), Cmnd 5524], any serious offense against internationally protected persons, kidnapping, the taking of hostages, or unlawful detention, an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if individuals are so endangered, or acting as an accomplice in any of the above offenses. (European Convention, Article 1)

political offenses, notwithstanding their political content or motivation.<sup>117</sup> In expediting extradition, member states relied on the operation of mechanisms that already had been established. This overtly supported member states' measures, placing faith in the mechanisms of the European Commission on Human Rights and Fundamental Freedoms to address any deviation. In the interim, politically motivated terrorism could be made subject to ordinary rules governing extradition.

The United Kingdom ratified the European Convention on the Suppression of Terrorism on July 24, 1978 and instilled it as domestic law on June 30, 1978.<sup>118</sup> Although the first article technically eliminated the possibility for a requested state to invoke the political nature of an offense in order to oppose an extradition request,<sup>119</sup> Article 13 allowed contracting states to make exceptions with regard to the application of Article 1.<sup>120</sup> Seven of the eighteen initial signatories, including Denmark, France, Germany, Italy, Norway, Portugal, and Sweden, chose to avail themselves of this option. In its derogation, though, France asserted the need to tighten legislation to combat terrorism: "This signature is the logical consequence of the action we have been taking for several years and which has caused us on several occasions to strengthen our internal legislation."<sup>121</sup> At the time the statement was made, Britain was implementing its policy of Ulsterization (transferring primary security responsibility to provincial forces) and criminalization (criminalizing individuals convicted of paramilitary activity by removing political status from the prisons). Both the international support for the criminalization of terrorist acts (such as that signified by the European Convention on the Suppression of Terrorism), and the concurrent tightening of counterterrorist measures within other member states, created a context within which the adoption of emergency law reflected an accepted international norm.

### ***Contradictions in International Law Regarding Counterterrorist Provisions***

Aside from general curtailment of some of the worst human rights' abuses by states, general support in the international arena for the introduction of some sort of domestic counterterrorist legislation, and overall acknowledgment of the right of states to derogate from their responsibilities in times of "great need", the international community has said very little about the issue of, specifically, counterterrorist law. This stems in part from the failure of the international community to agree on a common definition

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<sup>117</sup>These offenses included acts of violence not covered by Article 1, acts against property, offenses creating a collective danger to persons, or accomplices in the aforementioned acts.

<sup>118</sup>Suppression of Terrorism Act, 1978, Eliz. II, c. 26.

<sup>119</sup>Explanatory Report, para. 31.

<sup>120</sup>"Any state may, at the time of signature or when depositing its instrument or ratification...declare that it reserves the right to refuse extradition in respect of any offense mentioned in Article 1 which it considers to be a political offense, an offense connected with a political offense or an offense inspired by political motives." (Article 13)

<sup>121</sup>European Convention on the Suppression of Terrorism, 8.

of “terrorism”.<sup>122</sup> The aims, structures, targets, strategies, and tactics of terrorist organizations vary widely. Cultural and historical considerations may provide a certain amount of concurrence within a particular region, such as Western Europe or South America, as to what constitutes a terrorist act; however, cultural, ethnic, or religious connections between neighboring states and substate movements may blur the distinction between “terrorism” and “liberation”. The very characterization of terrorist acts as “grave breaches” or war crimes assumes that acts of terrorism during struggles for liberation can be distinguished from individual acts of international terrorism; yet the success of attempting to make such a distinction is less than clear. Failure to grasp a common definition of terrorism limits the international community’s ability to direct the scope and direction of counterterrorist statutes. The lack of clarity in determining what constitutes a terrorist act also reflects jurisprudential dispute over whether terrorism constitutes its own formal branch of international law, or whether it is simply a manifestation of acts conducted within the auspices of other areas: the law of the seas, air and space law, and so on. It is not the intent of this paper to delve into these and other factors influencing international treatment of terrorism and counterterrorist domestic and international law.<sup>123</sup> However, some aspects of the principles that underlie the structure of the United Nations and the international community do bear mention, because their impact on the international community’s lack of guidance on domestic counterterrorist law has to some extent served to perpetuate emergency measures in the United Kingdom and would have similar impact on other liberal, democratic states considering counterterrorist law.

The principle of equal rights and the self-determination of a “people” are at the heart of the United Nations’ Charter.<sup>124</sup> This document also pre-supposes a vision of state sovereignty, territorial integrity, and political independence. As the scope of “self-determination” has expanded – particularly since 1945 period – these principles have come into frequent conflict. Ethnic groups live across modern geographic demarcations; but the context of nationality must operate through traditional mechanisms of sovereign state administration. Thus, while most states in the world agree to the principle of self-determination, international law views the exercise of the right to self-determination as subject to participation in democratic processes.<sup>125</sup> Yet the majority/minority mechanisms present in liberal,

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<sup>122</sup>In 1937 the world community agreed in principle as to what constitutes international terrorism. Since then, however, states have failed to accept a common definition. For further discussion of this point see for example *International Terrorism: National, Regional, and Global Perspectives*, ed. By Yonah Alexander. (Praeger Publishers: New York), 1976.

<sup>123</sup> For further discussion of these matters see Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*. (Kluwer Law International: The Hague), 1997; and *Terrorism and International Law*, Ed. By Rosalyn Higgins and Maurice Flory. (Routledge: London), 1997.

<sup>124</sup>For further discussion of definition of a “peoples” and the conflict between self-determination and state sovereignty, see E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*. (Martinus Nijhoff Publishers: the Netherlands), 1996.

<sup>125</sup>Chadwick, *Self-Determination*, 3.

democratic states often preclude the possibility of minority self-determination. Additionally, it is less than clear exactly what rights entitlements are involved in self-determination. How can international law determine which “peoples” can exercise this entitlement? This issue links directly to the Northern Ireland situation, where Republican organizations claim the right of the whole island of Ireland to self-determination, and not just the people living in the area currently referred to as Northern Ireland. Further compounding international treatment of the issue is the question over how self-determination can be achieved. The concept of a “people” was originally tied to distinct groups within a particular territory. In large part as a result of the successful use of violent force in armed struggles in the post-1945 period by auto- or self-determined peoples for the right of self-determination, the concept of a “people” gradually been expanded. It is now understood to include groups living under colonial domination, alien occupation, or a racist regime.<sup>126</sup> It is unclear, however, how far the concept of a “people” can be applied, or what should occur if claims of competing peoples come into conflict.

In addition to the vagueness and contradiction inherent in the right to self-determination of a people, the application of the principle itself, if backed at an international level, contradicts the principles of state sovereignty and the territorial integrity of the existing state. The principle of nonintervention encourages states to handle domestic disputes independently of any international customary law. Yet self-determination suggests that Nationalist movements are themselves legitimate actors in the international arena, and thus subject to protection under international norms. The 1977 Protocol to the Geneva Conventions of August 1949 addresses the Protection of Victims of International Armed Conflicts, and the International Humanitarian Law of Armed Conflict extends to attempts to establish self-determination. The crucial difference in the 1977 extension of international humanitarian law is that state actions, in particular those dealing with domestic armed conflicts, are no longer beyond the scope of international inquiry. Further, acts of terrorism perpetuated by or on behalf of people struggling for their right to self-determination constitute a separable and different phenomenon that could be prosecuted under international humanitarian law. However, the UN only regulates states in their use of force. International humanitarian law generally applies between states party to the same treaties or other parties that accept the same treaties. For example, it relates to domestic liberation conflicts through states’ acceptance of the 1949 Geneva Conventions. Reflective of the aim of states to deny the challenge to state political legitimacy posed by Nationalist terrorist movements, ruling governments have stopped short of

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<sup>126</sup>Additional Protocol to the 1949 Geneva Conventions, relating to the protection of victims of international armed conflicts (Protocol I) Article 1(4). Geneva, 8 June 1977. Quoted in Chadwick, *Self-Determination*, 17, fn 9. This new scope evolved after the UN admitted various new states that formerly were colonial territories that had been subjected to human right abuses.

advocating the application of international humanitarian law to sub, antistate terrorist organizations. Governments prefer to deal with terrorism as criminal activity and to prosecute it within a sovereign, domestic framework of penal law.

In the case of the United Kingdom, the government made every effort to address the violence through domestic statutes. It repeatedly denied the Republic of Ireland or the international arena any role in what it claimed were the “internal workings” of the state. It was only in the early 1980s, with the initiation of the Anglo-Irish process, and, more formally, in 1985 with the signing of the Anglo-Irish Agreement, that the British government recognized any role that a state external to the UK might have vis-à-vis Northern Ireland. By handling the violence as a UK internal matter, the state sought to deny legitimacy to terrorist organizations. This refusal of states to elevate these organizations to equal status in the international arena prevents international humanitarian norms relating to conduct in war from being applied to measures adopted by either the terrorist organizations or by the states themselves. If the states were to involve international humanitarian law in wars of self-determination, it might imply that the manner in which the state ensures its own survival no longer lies within domestic jurisdiction. This of course violates the principle of state sovereignty. So while most states are prepared to allow cautiously that the right to self-determination is a principle of the UN system and of international customary law, they are not prepared to accept the practical impact of such a concession: the legitimization of antistate terrorist organizations, the possible fragmentation of state territory, constitutional alteration, the application of international humanitarian law, the erosion of state sovereignty, and limitations on the state’s right to self-defense.

### *The Establishment of A “Hierarchy of Rights”*

The international legal system contributes to the retention of emergency measures through the rights discourse inherent in liberal, democratic thought. The propensity of Britain to appeal mistakenly to this discourse served to further entrench emergency law in the UK. To explain what I mean by this, it is helpful to compare the Northern Ireland Parliament’s justification of emergency law to that engaged by Westminster: in Northern Ireland justification for the 1922 SPA rested in part on the claim that for those who did not challenge the state, such measures in no way infringed their freedom: “One great feature about this Act which we now propose to continue is that while it places great powers in the hands of the government in regard to dealing with disorder and the disorderly elements in our midst, it does not tend in any way to infringe on the liberty of any law-abiding subject.”<sup>127</sup> This assertion not only reflected the security Unionists felt that the measure would not be applied to those individuals supporting the

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<sup>127</sup>Second reading in the Senate, 1928, PRONI HA/32/1/619.

constitutional position of the Northern state, but it also ignored the impact of legislation that violated, in any measure, the rights of any citizens in the state. MPs in Westminster recognized that both the 1973 EPA and the 1974 PTA violated the rights of the citizens. They justified the measures, however, in terms of the duty the government bore to protect its citizens: “If the Government are not to forfeit their right to be called a Government, if the rule of law is to be anything other than a hollow mockery, if the Government are to be entitled to the regard and obedience of their citizens, it is their solemn duty to consider how these murders can be ended.”<sup>128</sup> This implied that the citizens bore a right to be protected by the government, a right that in turn placed a correlative duty on the government to create and enforce measures protecting the citizens. This right was clearly a derivative of the most basic right of all: the right to life, which imposed a duty on citizens to abstain from causing death. The state’s obligation to enforce the duty corresponded to a separate right of the citizens to protection from the government, creating a duty for officials to pursue and effectuate individuals’ rights.<sup>129</sup> Not only did international covenants to which the United Kingdom was a signatory recognize the right to life and the duty of others to abstain from taking that life, but the articles delineating derogations implied the entitlement of the citizen to expect protection from the government. Further, the international arena widely recognized the right to life as the most fundamental right within a state, along with the ability of the state to suspend other rights to protect that entitlement.

With this rationale driving Parliament, and reflected in its international agreements, a hierarchy of rights emerged in Westminster in which the government was called on to protect the most basic of individual entitlements. Those of lesser importance had to be sacrificed to protect the more basic rights of the citizenry: “Where there is a terrorist situation in any country, the rights of the individual in the community have to be surrendered to a degree in order that his real rights may be defended and eventually maintained. We must keep that principle before us. We have to surrender certain rights in Northern Ireland for the greater welfare of the whole community, so that the rights of the individual may be defended.”<sup>130</sup> William Whitelaw, secretary of state for Northern Ireland, emphasized, “[the PTA] infringe[s] our shared concept of civil liberties. But that is the price which the House has always accepted must be paid for protecting the most fundamental liberty of all – the liberty not to be killed or maimed when going about one’s lawful business.”<sup>131</sup> The basic right to life and protection from physical harm

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<sup>128</sup>John McQuade, *HC Debs*, 2nd July 1979, Vol. 969, col. 948.

<sup>129</sup>The concurrence of these two rights was a matter of practicality and not logic, as one did not necessarily entail the other. The right of the citizen to be protected against other citizens could be simply a nominal right; however, in any operative legal system, the officials will be under a moral duty and perhaps also a legal duty to take all reasonable steps to avert and rectify violations of basic rights.

<sup>130</sup>Ian Paisley, *HC Debs*, 8th December 1977, Vol. 940, col. 1737.

<sup>131</sup>William Whitelaw, *HC Debs*, 18th March 1981, Vol. 1, col. 341.



was placed even above the right to self-determination: “More important to most people than the right of self-determination is the right to stay alive – which is why we must accept the necessity, however regretfully, of these emergency powers.”<sup>132</sup>

In protecting this most basic entitlement – the right to life – the Northern Ireland Parliament and Westminster violated what they considered to be the lesser rights or freedoms of the citizens. To act in this manner, however, was to risk further alienating the population. In the case of Northern Ireland, where the aim of Republican paramilitarism was to draw an ever sharper distinction between the state and the citizens, this was a route of maximum possible risk. For instance, government ministers recognized that internment had done more harm than good. The secretary of state for Northern Ireland, Merlyn Rees, said, “I feel that the key is internment. Whoever one talks to in the minority group in Ulster, one can be in no doubt that since internment the political situation has changed radically. Internment has hardened attitudes.”<sup>133</sup>

Not only was this a risky approach for Westminster to adopt, but the hierarchical claim made in Parliament was simply a wrong claim. The legislation did not, in fact, establish that the right to life and property were the two most important rights and thus all lesser rights could be suspended. Rather it established that the most important right that a citizen bore was the right not to be afraid. The actual impact that terrorism had on life and property in the United Kingdom was much less than the impact of other acts. For example, each year more people are killed in driving accidents in Northern Ireland than have been killed by terrorist violence in thirty years of the Troubles. Yet the government has not suspended all civil rights with counter-accident legislation to protect the life and property of citizens. The main function of counterterrorist law is to respond to the fear engendered by terrorism. Secondly, it attempts to control the risk associated with the loss of property or life, or both.<sup>134</sup> Terrorism, by its very nature, however, is not a controllable event. By introducing emergency law, some sense of control over a situation in which one would otherwise be afraid is gained. This is a very different claim than that put forth in Parliament: rather than life and property as the first concerns, the right not to be afraid played a central role in the adoption and maintenance of emergency legislation. It is the fear of losing life and property, and not the actual loss thereof, that provided the ultimate justification for Westminster’s introduction – and retention – of emergency law.

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<sup>132</sup>John Biggs-Davison, *HC Debs*, 8th December 1977, Vol. 940, col. 1748.

<sup>133</sup>Merlyn Rees, *HC Debs*, 25th November 1971, Vol. 826, col. 1661, re-quoted in *HC Debs*, 11th December 1975, Vol. 902, col. 762. See also *HC Debs*, 17th April 1973, Vol. 855, col. 354.

<sup>134</sup>When an individual gets into a car, s/he perceives some sort of control over whether s/he will get into an accident and/or be hurt. S/he can wear a seat belt, drive more carefully, come to a full halt at four-way stops, etc. There is some sense that the risk associated with this behavior can be controlled.

**CONCLUDING REMARKS: LESSONS FOR LIBERAL, DEMOCRATIC STATES**

There is very little either new or temporary about emergency measures enacted to combat political violence in the United Kingdom. The 1922-43 SPAs and the 1973-96 EPAs derive from a common history and, to an extent, incorporate similar measures to try to address political violence in Northern Ireland. The 1939 PVA and 1974-96 PTAs also share a significant degree of overlap in the provisions contained in the statutes and in their entrenchment in British policy toward the North. This paper suggests that a number of factors contributed to the longevity of such measures. Ultimately, the use of special powers depended upon the Northern Ireland and British governments' ability to justify their use. In Northern Ireland this took the form of appeal to the concept of reason of state to prevent the North from being incorporated into a united Ireland. In contrast, Westminster claimed to be protecting the lives and property of individuals within the state. In both cases emergency measures initially intended as a temporary solution became constitutionally entrenched, their presence inextricably linked to the politics of Northern Ireland.

To a great extent, the elements that contributed to the entrenchment of emergency law in the United Kingdom can be seen to be at work in other liberal, democratic regimes. It is at least of serious question whether "temporary" counterterrorist law would prove to be so in other, similar states. Many of the same elements that contributed to the Northern Ireland Executive and later the British government's retention of emergency powers would likewise play a role in the retention and evolution of counterterrorist measures in liberal, democratic regimes. The extension of state powers may well be effective in its application; the more efficacious such measures are perceived to be, the greater the pressure will be on governments to retain them to prevent future loss of life or property. Similarly, the import assumed in the adoption of "counterterrorist" or "antiterrorist" measures will be shared by any liberal state faced with such challenge. Terrorism strikes at the very core of an open society, playing on the vulnerabilities inherent in the freedoms and rights of its citizens. The wholesale rejection of terrorist techniques as a means to draw attention to the aims of those inflicting the damage will be a central element in the introduction of countermeasures. Once these countermeasures become law, as in Britain, the onus will be transferred from those needing to prove that an emergency exists to those seeking to repeal the measures to demonstrate that they are no longer necessary. The very nature of terrorism, though, makes it difficult to gauge at what point the threat posed by an individual, a terrorist organization, or an entire movement no longer poses a danger to the citizens or to the state. And what happens if, as in the United Kingdom, counterterrorist measures aimed at one particular conflict are used to address other violence within the state? The possible repeal of such measures would become even more remote. Depending upon the context into which the state introduces counterterrorist law, historical concerns may

highlight an ongoing conflict, of which the paramilitarism is just one aspect – with the actual use of counterterrorist measures creating precedent for future introduction or expansion of statutes.

Not only might primary factors play a role in the retention of such measures, but the secondary factors creating conditions favorable to the retention of counterterrorist law exist in other geopolitical regions. The crossover with criminal statutes may similarly be an issue, as will, if enacted properly, the formal consistency of the measures themselves. The context and international arena in which Britain finds itself are extremely similar to that in which other states operate – most directly those in Europe, and adjunctly others, such as the United States, Australia, New Zealand, Canada, and elsewhere. Treaties to which other liberal states are party and confusion in the international arena over how to handle terrorist violence will influence just as readily other states facing a terrorist challenge. The general support within the international arena for the enactment of some sort of counterterrorist legislation, and the simultaneous lack of real direction on what form it should take, would lead other states to retain their own measures just as Britain retained its domestic legislation. It is unlikely that the international arena will be able to provide more detailed guidance, until such time as fundamental principles – such as self-determination, state sovereignty, territorial integrity, and a state’s right to self-defense – can be reconciled. Possible application of international humanitarian law and the construction of a common definition or understanding of terrorism likewise would need to be broached. Regardless, liberal states’ adherence to the discourse of rights, and the tendency of British Parliamentarians in particular to view counterterrorist legislation as reinforcing a hierarchy of rights, wherein the right to life and property assume dominance, are likely to be reflected in other liberal regimes. The right not to be afraid deserves particular attention here in the possible introduction and operation of emergency legislation in other states, because it is this entitlement that justified the suspension of “lesser” rights and the retention of emergency law.

Aside from the tendency of counterterrorist measures to become permanently embedded in state law, what other lessons can be drawn from Northern Ireland and Britain’s experience in the introduction and operation of counterterrorist law? Perhaps less obvious than the connection between foreign policy and international terrorism is the link between domestic policy and domestic terrorism. Britain’s experiences highlight the importance of the social and cultural context into which domestic statutes are introduced. Whereas in Northern Ireland the disparate application of such measures played into centuries-old ethnic, social, and political divisions, the danger of the disparate use of wide powers in a state’s social and political context cannot be taken lightly. In Northern Ireland the use of these powers contributed substantially to the prorogement of the Northern Parliament and the ongoing grievances of the minority community throughout the Troubles. Attempts in the present round of talks to address parity of esteem and to meet the demands of the vast majority of political parties to repeal special powers

directly relate to the operation of such measures throughout the twentieth century. In addition to the liberal, democratic state's obligation to protect the life and property of the citizens – liberal values that became trump cards in the British context – the parallel obligations that governments bear toward their populations must not be lost.

In the United Kingdom the emergency measures shared a common initial perception: they represented extraordinary moves designed to meet the needs of a passing emergency. Over time, however, they became standard and unexceptional, a baseline from which further extraordinary powers could be introduced. The repeal of the measures that might reverse this steady progression, however, became extremely unlikely, in light of the primary and secondary factors addressed earlier in this paper. Britain's experiences highlight the importance of not borrowing blindly from other countries, but rather of carefully evaluating the measures to be introduced, how they will be implemented, and the full impact they are likely to have on those who constitute the state itself.

Throughout the twentieth century terrorist violence in the United Kingdom fluctuated. At times when the level sharply increased, the Northern Ireland and British governments were placed under severe pressure to enact counterterrorist measures. Although such provisions were to some extent effective, there were some significant costs, as discussed in the introduction of this paper, with regard to civil liberties. These costs included increased friction in the North between the minority and majority communities, the prorogation of the Parliament, and unwelcome international attention on the domestic affairs of the United Kingdom. When violence linked to terrorist attack decreased, the government did not repeal emergency measures. Factors playing a role in maintaining emergency law both in the face of immediate violence and in its aftermath are not singular to the United Kingdom. In adopting counterterrorist law, countries need to be cognizant of both the possible domestic impact of counterterrorist measures and elements forcing temporary measures into permanent entrenchment in domestic law.

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The Executive Session convenes a multi-disciplinary task force of leading practitioners from state and local agencies, senior officials from federal agencies, and academic specialists from Harvard University. The members bring to the Executive Session extensive policy expertise and operational experience in a wide range of fields - emergency management, law enforcement, national security, law, fire protection, the National Guard, public health, emergency medicine, and elected office - that play important roles in an effective domestic preparedness program. The project combines faculty research, analysis of current policy issues, field investigations, and case studies of past terrorist incidents and analogous emergency situations. The Executive Session is expected to meet six times over its three-year term.

Through its research, publications, and the professional activities of its members, the Executive Session intends to become a major resource for federal, state, and local government officials, congressional committees, and others interested in preparation for a coordinated response to acts of domestic terrorism.

***For more information on the Executive Session on Domestic Preparedness, please contact:***

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*The Internet and Conservation Project*, an initiative of the Taubman Center with additional support from the Kennedy School's Environment and Natural Resources Program, is a research and education initiative. The Project focuses on the constructive and disruptive impacts of new networks on the landscape and biodiversity, as well as on the conservation community.

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