

Courts and Late-Modern Security Crises: Judicial Deference, Temporary Emergency
Power and the Rule of Law in Quebec and Northern Ireland

by

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Abstract

Historically, in the common law jurisdictions examined in this study, judicial responses to emergency powers in times of real or perceived emergencies have consistently shown patterns of deference to executive government authority, although there are notable exceptions. This dissertation seeks to ground recent debates around the legal responses to national security threats and further conceptualize contemporary theoretical and constitutional issues in historical examples from Canada and Ireland, and in particular, Quebec and Northern Ireland in the 1970's. A comparative examination of the 1970 October Crisis involving the FLQ in Quebec and the extended conflict in Northern Ireland involving the IRA through the 1970s and 1980s analyzes the effects of temporary emergency measures and related accommodations of the regular criminal law. While the legal regulation of political power in times of crisis is pertinent to the continuously evolving national security narrative, there are other important checks, including enhanced parliamentary controls, re-imaginings of the rule of law and entrenched rights, which are referred to here but also warrant further study.

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First, and foremost, I dedicate this dissertation to my mentor, coach and friend, Judge Andre Guay, Ontario Court of Justice, who in the years that I have known him taught me the values of hard work and perseverance. While such values are central to this effort, the unparalleled support and strength of my mother, Susan Pacione, is and always will be a source of inspiration and encouragement.

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Chapter 1 - From Politics to Law: Establishing a Context for Emergency Powers

In 2002, Kent Roach argued that the events of 11 September 2001 did not fundamentally differ from a long history of moments of crises in Canada.¹ Roach sought to refute the common assertion that those events ‘changed everything’. A comparative examination of historical examples of political violence and crises in Quebec and Northern Ireland suggest the validity of his argument. This project draws on some of the current theoretical debates concerning the rule of law and emergency powers to illuminate historical and more contemporary tensions between the government and judiciary, in particular the role of judges in times of emergency.² I argue that on one hand these two interestingly similar historical case studies illustrate patterns of judicial deference that help to legitimate executive authority, while on the other they reveal moments of resistance to political power that appears to vindicate formal claims about the rule of law—a central proponent of legitimate government.³ These cases demonstrate not only the difficulties in managing tensions between security concerns and civil liberties, but also raise important questions about the fallibility of judges and the rule of law.

For the purpose of this work, I ascribe my understanding of the rule of law to an essentially liberal perspective informed, in part, by positivist English jurisprudence from Jeremy Bentham through to H.L.A. Hart. In this vein, Albert Venn Dicey offers a rather

¹ Kent Roach, (2002) “Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism,” 47 *McGill Law Journal*, p. 895. [Hereafter: Roach, “Did September 11 Change Everything?”]

² The emergencies I refer to here are of a political and legal nature, namely national security threats.

³ The concern here is that ‘executive authority’, the power to apply the decisions necessary to maintain the sovereignty of existing political authority (and often enlisting the argument that such powers maintain the rule of law), is exercised in modern parliamentary systems by the Prime Minister and the Cabinet, and, is not, as I will present in later chapters, sufficiently vetted or regulated by either legal or political mechanisms in times of national security threats.

basic definition of the rule of law, which we can use as a starting point, he writes: first, in opposition to arbitrary and discretionary power, one may not be punished unless in accordance with a specific breach of ordinary law through the ordinary courts—rule of law is a constraint on political power; second, that no one is above the law—“every man, whatever be his rank or condition, is subject to ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”; and third, general constitutional principles and rights (such as the right to liberty) are the result of judicial decisions “and their as value precedent”—the common law.⁴ While simple, Dicey’s conception of the rule of law is institutional and procedural, both aspects which I explore in later chapters.

Contemporary fascination with concepts such as ‘emergency’, ‘states of exception’ and ‘temporary emergency power’ have underpinned much of the recent debate concerning the role and response of executive authorities and the judiciary in times of crisis. However, the crux of this study focuses upon histories of the judicial function in Canada and Ireland in times of legislated emergencies—how judges have historically struggled with upholding the civil liberties and maintaining the rule of law.

In a broad sense, there are two ways in which modern states respond to emergencies, whether real or perceived: (1) militarization, notably through martial law, detention without trial and selective assassinations all of which are removed from effective oversight of judicial institutions; and (2) criminalization, the modification of the

⁴ See generally, A.V. Dicey, *Introduction to the Study of the Law of the Constitution*. 8th ed. London: Macmillan and Co., 1915, p. 179-201; Dyzenhaus provides a more nuanced understanding of Dicey’s third component of the rule of law, see David Dyzenhaus, “The “Organic Law” of *Ex Parte Milligan*,” in Austin Sarat, ed., *Sovereignty, Emergency, Legality*. New York: Cambridge University Press, 2010, p. 43-4; and Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*. Ann Arbor: The University of Michigan Press, 2003, p. 8; for another recent and sophisticated conception of the rule of law that highlights its counter-hegemonic possibilities, see generally E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act*. Harmondsworth: Penguin, 1977.

existing criminal justice system in order to secure convictions more effectively than under the regular process.⁵ Accordingly, the parallel experiences of Ireland and Lower Canada just before and at the turn of the nineteenth century illustrate how revolutionary moments—the 1798 Irish Rebellion and the 1837-38 Lower Canada Rebellions—reflected the tendency to resort to predominately militarized responses to domestic security threats, especially in colonial contexts. As the British colonial administration was modernized and arbitrary measures became more controversial for governing political classes (in the wake of the Irish Rebellion, the Canadian Rebellions, India in the 1850's and Jamaica in the 1860's) there was less reliance on military responses and more on legal ones.

Yet the consolidation of emergency statutes in the early 1800s in the form of the various *habeas corpus* suspensions, and insurrection and coercion acts in Ireland, as well as the British *Defence of the Realm Act* and Canada's *War Measures Act* in 1914, still provided the effective executive measures, similar to martial law, for suppressing perceived uprisings and responding to wartime threats. In the Canadian context, the *War Measures Act* remained in place after the First World War, was used widely during World War Two and was resorted to in peacetime during the October Crisis, 1970. Moreover, emergency measures continued in the aftermath of both wars in the form of post war orders-in-council, notably the Gouzenko Affair and the 1970 *Public Order (Temporary Measures) Act* which criminalized membership to the alleged terrorist organization the *Front de Libération du Québec* (FLQ).

⁵ Steven Greer, *Supergrasses: A Study of Anti-terrorism Law Enforcement in Northern Ireland*. Oxford: Clarendon Press, 1995, p. 28. [Hereafter: Greer, *Anti-terrorism Law Enforcement*]

In all of the examples of executive responses to national security threats, whether through enabling martial law or by way of legislatively entrenching special powers, judicial responses have varied. In some cases, judges who attempted to resist executive authority by granting writs of *habeas corpus* during the 1837 Lower Canada Rebellions were silenced and even temporarily removed from the bench. While there are notable exceptions, judicial responses to more recent political and security crises in Canada and Ireland have often been stifled by political pressure and powers of judicial review have tended to defer to governing authorities.⁶

However, these patterns of resistance and deference go further back in our system of law, to Tudor and Stuart times, when questions of judicial independence were debated by British jurists Sir Francis Bacon and Sir Edward Coke. Bacon, at least early in his career, “favoured the executive power despite the law”; while on the other hand, a ‘Cokean’ interpretation of judicial behaviour favoured upholding “the law despite governmental desires.”⁷ Murray Greenwood coined the term ‘Baconian judiciary’ to describe judicial tendencies to defer to the crown or executive government authority. Numerous colonial examples have demonstrated that in times of emergency, treason and sedition trials in Quebec or Lower Canada during the French Revolution these tendencies persisted as the dominant judicial attitude in the 19th century.⁸

⁶ For a short discussion of how such deference may be qualified as a matter of judicial spinelessness and prudence to the rule of law see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*. Cambridge University Press, 2006, p. 17-8. [Hereafter: Dyzenhaus, *Constitution of Law*]

⁷ F. Murray Greenwood, “Judges and Treason Law in Lower Canada, England, and the United States during the French Revolution, 1794-1800” in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials I: Law, Politics, and Security Measures, 1608-1837*. University of Toronto Press: The Osgoode Society, 1996, p. 242. [Hereafter: Greenwood, ‘Judges and Treason Law’]

⁸ F. Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution*. University of Toronto Press, 1993, p. 256-7. [Hereafter: Greenwood, *Legacies of Fear*]

A brief comment is warranted here on the existing literature relevant to the case studies examined in this thesis. There is extensive scholarly literature on the Quebec and Irish crises in the 1970's. While some of this scholarship provides broader historical context, some is concerned with legal issues, and there has been some comparative work, however none really pulls all these themes together.⁹ Broadly speaking, in the scholarship on Quebec and Ireland three basic themes seem to predominate: (1) resistance-centred comparisons of FLQ and Irish Republican Army (IRA) concerning whether or not violent resistance was justified; (2) state-centred assessments of the nature and efficacy of terrorism and counter-terrorism measures that troubles issues of legality and legitimacy of state action; and (3) conceptual work on international and domestic nationalist movements, which more pointedly focuses upon questions of national identity and sovereignty.¹⁰ However, while this dissertation is informed by these themes, it also draws on an historical and comparative approach that emphasizes the legal dimensions of these

⁹ A Ph.D. thesis by Birthe Jorgenson takes on a rigorous and comprehensive comparative assessment of emergency powers in Canada and Ireland, but this work uses the First World War as a starting point and does not draw on the robust history and relevant themes in both jurisdictions through the 18th and 19th centuries. Also, since it was published in 1984, it does not account for the more recent theoretical debates about the rule of law in the post-Charter and post-9/11 eras. See generally, Birthe Jorgenson, (1984) *Emergency Powers in Canada and Northern Ireland*. Ph.D. Thesis at Cambridge University. [Hereafter: Jorgenson, *Emergency Powers*]; also see generally, Fernando Mignone, (1978) *Emergency Power in the United Kingdom, Canada and Argentina*. M.C.L. Thesis, McGill University, pp. 1-245.

¹⁰ For examples of well outlined resistance-centred comparatives of the FLQ and IRA see William McAndrew, (1987) *Determinants and Justifications for the Use of Terrorist Violence in Separatist Situation*. M.A. Thesis, Rice University, Houston; and Christopher Hewitt, (1994) "The Dog that Didn't Bark: The Political Consequences of Separatist Violence in Quebec, 1963-1970", *Conflict Quarterly*, winter, pp. 9-29; for a succinct comparative example of domestic state and military-centered assessment of the 'October Crisis' and 'The Troubles' see Timothy W. Thurston II (2007) *The Military's Role in Domestic Terrorism*. M.A. Thesis, Naval Postgraduate School, Monterey, California; and Wayne G. Reilly, (1994) "The management of political violence in Quebec and Northern Ireland: A Comparison." 6.1 *Terrorism and Political Violence*, pp. 44 – 61; and for a well-developed comparison of nationalist and legal histories see Garth Stevenson *Parallel Paths: The Development of Nationalism in Ireland and Quebec*. Montreal: McGill-Queen's University Press, 2006; as well as F. Murray Greenwood, "The General Court Martial at Montreal, 1838-9: Operation and Irish Comparison" in F. Murray Greenwood and Barry Wright, eds. *Canadian State Trials II: Rebellion and Invasions in the Canadas, 1837-1839*. University of Toronto Press: The Osgoode Society, 2002, pp. 279-324. [Hereafter: Greenwood, "Court Martial"]

crises and examines how legislative frameworks and case law shed light on judicial struggles with applying traditional common law principles during times of crisis in the Northern Ireland and Quebec. In this manner, it seeks to make an original contribution to the existing scholarship on the Quebec and Northern Irish crises and provide historical grounding to current debates about emergency powers and the rule of law.

The following project is divided into three major chapters. In chapter two, I further explore the theoretical debates concerning the legal dimensions of emergency powers, the tensions between sovereignty and the rule of law, and between national security and civil liberties. In Canada this includes the recent work by David Dyzenhaus and Kent Roach¹¹, and in the Northern Ireland, scholars such as Fionnuala Ní Aoláin, Laura K. Donohue, Ita Connolly and Colm Campbell.¹² In particular, I draw from aspects of the increasingly popular debate between legal theorists Oren Gross and Dyzenhaus, which examines state responses to emergencies both within and without the confines of a legal constitutional structure. As well, I consider the impacts and continuities of temporary emergency laws—a problem that some scholars have referred to as the ‘permanency of the temporary’—as the codification and constitutional entrenchment of

¹¹ For example, see generally, David Dyzenhaus, “The Permanence of the Temporary: Can Emergency Powers be Normalized?” in Kent Roach et. al., eds. *The Security of Freedom: Essays on Canada’s Anti-Terrorist Bill*. University of Toronto Press, 2001 [Hereafter: Dyzenhaus, “Permanence of the Temporary”]; and Roach, “Did September 11 Change Everything?” *supra* note 1, pp. 895-947.

¹² See generally, Laura K. Donohue, *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922-2000*. Dublin: Irish Academic Press, 2001. [Hereafter: Donohue, *Counter-Terrorist Law*]; Laura K. Donohue, (1999) “Temporary Permanence: The Constitutional Entrenchment of Emergency Legislation.” 1.1 *Stanford Journal of Legal Studies*, pp. 35-71 [Hereafter: Donohue, ‘Temporary Permanence’]; Colm Campbell and Ita Connolly, (2007) “A Deadly Complexity: Law, Social Movements and Political Violence” 16 *Minnesota Journal of International Law*, pp. 265-310; and Fionnuala Ní Aoláin, (1996) “Legal Developments: The Fortification of an Emergency Regime” 59 *Albany Law Review*, pp. 1353-87.

emergency laws has, in some contexts, become a reality in the modern state security context.¹³

In chapter three, I investigate the transition of the Irish political and legal landscape from the 1798 Irish Rebellions through to the consequences of the extraordinary Diplock Court system. From moments of early revolution in the late eighteenth century to militarized responses to political dissent by the British colonial government in the nineteenth century, part one of this survey suggests how the struggle for ‘Home Rule’ and the partition of Northern Ireland in 1921 set the tone for the troubled legal history that followed. And in part two, I address executive and judicial responses to the political violence of the 1970s, notably the impact of the Diplock Report on the reconstitution of the judicial role in Northern Ireland. In emphasizing the Irish judges’ struggles with interpreting the newly constituted rules of evidence and applications of the traditional common law principles, I draw parallels with the political nature of the legal proceedings in Canada, particularly Quebec.

And in chapter four, I situate the Quebec Court of Appeal’s response to the 1970 October Crisis within a broader historical context, which includes the Lower Canada Rebellions, the Gouzenko Affair and the Quiet Revolution. I pull from case law to illuminate the judicial struggle and emphasize the highly politicized criminal law in times of real or perceived emergency. These moments of domestic crises in Canadian history illustrate how enabling martial law eventually transitioned to statutorily entrenched

¹³ See John Finn, (2010) “Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation.” 48 *Columbia Journal of Transnational Law*, pp. 442-502 [Hereafter: Finn, “Sunset Clauses”]; Jacob Gersen, (2007) “Temporary Legislation” 74 *University of Chicago Law Review*, pp. 247-98 [Hereafter: Gersen, “Temporary Legislation”]; Donohue, ‘Temporary Permanence,’ *supra* note 11.

emergency powers and how judges have typically deferred their power to intervene in times of crisis to the governing authorities.

Finally, it is through an examination of modern theoretical debates concerning emergency powers and the historical trends of judicial deference (and resistance) to executive authorities that this thesis underlines the importance of an independent judiciary. That being said, I highlight the extent to which legal controls of emergency power including the separation of powers, judicial discretion and rule of law, while there are notable and interesting exceptions, display tendencies of insufficiency. This comparative examination, therefore, adds to the scholarly discussions concerning perceived security threats in Quebec and Northern Ireland by examining recent crises within their respective historical contexts, and, in particular, emphasizing the legal, and more specifically, the judicial dimensions (rather than those of a more social and political nature) of the 1970 October Crisis.

Chapter 2 - Theorizing Modern Security Crises and the Law: A Framework of Legalities, Temporary Legislation and the Judiciary

“[W]hat was temporary becomes definitive, what was provisional constant and what was exceptional permanent, which means that the exception becomes the rule.”¹⁴

Some theoretical reflection about the legal dimensions of emergency and the relationship between law and politics has come out of research on Northern Ireland and, to a lesser extent Quebec. However, it has been the more recent, globalized legal responses to September 11th and terrorist bombings in Madrid, London, Bali and elsewhere that has prompted renewed and sustained theoretical debate on these matters.

Scholarship dedicated to the analysis of modern emergencies focuses largely upon the complex relations between theories of sovereignty, legality and the constitutionality of emergency powers. This debate forms a useful conceptual context to understanding emergencies in the Irish and Canadian case studies. My particular interests here are understandings of the rule of law and the place of the courts, and how these shed light upon questions about the judicial role and its independence in times of emergency.

But what is an emergency? Kim Lane Scheppele’s genealogy of emergency power draws from historical example to describe the ‘emergency’ as a mortal threat to which the necessary response would not be justified in normal times.¹⁵ The elasticity of the concept of emergency, describes Mark Neocleous, is pointedly demonstrated by the fact that almost every constitution in the world contains provisions relating to emergency

¹⁴ Leandro Despouy, “Commission on Human Rights, Administration of Justice: Questions of Human Rights Detainees: Questions of Human Rights and States of Emergency”, *Tenth Annual Report and List of States*, U.N. Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, paragraph 129.

¹⁵ Kim Lane Scheppele, (2004) “Law in a Time of Emergency: States of Exception and the Temptations of 9/11” 6.5 *Journal of Constitutional Law*, p. 4.

powers.¹⁶ The early work of German jurist Carl Schmitt emphasized the uncertainty of emergencies, noting that an “emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated.”¹⁷ While themes of expediency and necessity provide the political determination of state responses to emergency, questions about legality and the judicial function, and their relation to the nexus between normalcy and emergency are the central concern in this chapter. Before we turn to these questions the broader political debates may be briefly sketched out.

Thomas Hobbes and Edmund Burke are early theorists of sovereignty and exceptional powers, and the matter became a concern for 19th century theorists such as John Stuart Mill, for whom the values of liberal legality should always be maintained as a check on the powers of the state and its reactive impulses stemming from concerns about sovereignty.¹⁸ Recently, some scholars have turned to the controversial scholarship of Carl Schmitt and his work in *Dictatorship* (1921) and *Political Theology* (1922) as tools of analytical reflection and assessment of contemporary responses to crisis. Schmitt theorized the traditional understanding of the relationship between normalcy and emergency, the notion that once the emergency situation no longer existed, emergency powers would cease to exist and normalcy would return. This model, captured in his 1921 publication is known as the ‘commissarial dictatorship’ model and is grounded upon an ancient Roman legal framework. Clinton Rossiter revisited this model in his book

¹⁶ Mark Neocleous, (2006) “The Problem with Normality: Taking Exception to ‘Permanent Emergency’” 31 *Alternatives*, p. 194.

¹⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Chicago: University of Chicago Press, 2005, p. 6-7.

¹⁸ See generally, Rande W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law*. Oxford University Press, 2008.

Constitutional Dictatorship (1948) and reached the problematic conclusion that “[n]o sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.”¹⁹

The Italian philosopher Giorgio Agamben takes a more critical approach informed by the work of Schmitt, to emphasize the persistence of the modern ‘state of exception’.²⁰ Such an argument about the persistent or permanent nature of emergency has been developed by other scholars such as Oren Gross. Exceptional measures and their persistence are antithetical to liberal conceptions of the rule of law. For Schmitt, however, political power ultimately trumps legality—the idea that legality can check sovereignty is a liberal conceit (a notion associated with figures such as J.S. Mill). This, along with Schmitt’s prominence as a legal theorist in the Nazi regime, explains, in part, the controversial nature of his thought, although his descriptive analytical categories are useful for some theorists concerned with relationships between norms and exceptions, and law and emergency.

Gross, for example, employs this analytical framework and distinguishes between normalcy and emergency. On one hand, normalcy is the ordinary, the general rule to which we must return; while on the other, emergency is the exception to that rule, although it is to be only temporary and bare no permanent effects.²¹ Gross describes this binary as the ‘normalcy-rule, emergency-exception’ paradigm, or the ‘assumption of separation’, but concedes that such a two-fold approach does not necessarily account for

¹⁹ Clinton Rossiter, *Constitutional Dictatorship*. New Jersey: Princeton University Press, 1948, p. 314.

²⁰ See generally, Giorgio Agamben, *State of Exception*. Chicago: University of Chicago Press, 2005.

²¹ Oren Gross, (2000) “The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the ‘Norm-Exception’ Dichotomy.” 21 *Cardozo Law Review*, p. 1833-4. [Hereafter: Gross, ‘Norm-Exception’]

tendencies of emergency powers to generate permanent exceptions.²² This ‘assumption’ presumes a distinction between the rule and exception, and as I show using David Dyzenhaus’s sophisticated critique, it is a distinction that is much more problematic than Gross would have us believe.

A. Emergencies, Rule of Law and the Gross-Dyzenhaus Debate

In the Canadian context, early November of 1970 witnessed the invocation of the *Public Order (Temporary Measures) Act* as a state response to an apprehended insurrection resulting from the October kidnappings of Pierre Laporte and James Cross and then the subsequent death of Laporte. In a response to the application of emergency powers, Alan Borovoy, then General Counsel to the Canadian Civil Liberties Association questioned the potentiality of permanency. He was critical of the ‘wholesale suspension’ of civil liberties that were traditionally protected as a matter of law within Canada, and posed the question: “To what extent will we and should we suffer permanent invasions of our traditional freedoms?”²³ In essence, it was these very freedoms that the rule of law was to guard from such political shifts that undermine fundamental rights.

How, then, in the contexts of Quebec and Northern Ireland, does a liberal rights-based democracy account for the rule of law in times of emergency? Are rights protected as a matter of law or expectations of the polity? Such questions provide the impetus of my analysis, and urge further inquiry into how temporary emergency legislation tends to seep into the ordinary law as we shall see with my historical examples. As noted in the introduction, I subscribe to a liberal account of the rule of law, which in a broad sense,

²² Gross, ‘Norm-Exception’, *supra* note 21, p. 1856.

²³ Alfred Alan Borovoy, “Rebuilding a Free Society” in Abraham Rotstein, ed. *Power Corrupted: The October Crisis and the Repression of Quebec*. Toronto: Canadian Forum Ltd., 1971, p. 99.

aspires to check political power. Here the point of the rule of law is to guard against shifts that undermine fundamental rights. However, such principle has proven difficult to maintain, despite formal gestures of the courts towards legality. While there are notable exceptions involving judges who resist executive authority, and simple generalizations about judicial deference must be nuanced, the historical record of the role and function of courts in times of crises shows a distinct pattern of judicial deference.

To better illuminate the interplay between the judicial role in general, emergency powers and the rule of law, I survey recent theoretical literature concerning these three issues with a predominate focus on the Gross-Dyzenhaus debate. In brief, Oren Gross argues that governments may set aside the rule of law and respond extra-constitutionally to security threats in an effort to preserve the legal order, while David Dyzenhaus contends that responses to emergency can be effectively contained by the rule of law.

In 2003, Oren Gross published 'Chaos and Rules', seen by some as a key intervention on theoretical debates about legal and extra-legal responses to crises in modern liberal democracies. Gross articulates two traditional constitutional responses to emergencies: (1) the 'Business as Usual' model – within which the ordinary legal structure and rules are substance enough to respond to an emergency situation; and (2) the 'Accommodation' model - which holds a degree of flexibility in a response to crisis, insofar as certain exceptional modifications may be introduced to accommodate the state's response to an emergency situation.²⁴ However, he acknowledges the weaknesses of these frameworks conceding the naivety of the 'Business as Usual' model as it does

²⁴ Oren Gross, (2003) "Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?" 112.5 *Yale Law Journal*, p. 1021. [Hereafter: Gross, "Chaos and Rules"]

not account for the reality of governmental engagement with emergency measures, and alternatively, while the ‘Accommodation’ model does accommodate, the question is: to what extent?

Both models, Gross notes, operate upon two main assumptions. First, the ‘assumption of separation’, the assumption here is that the rule and the exception are separable. It is this assumption that feeds the belief that a return back to the norm once the emergency situation has ended is possible, it also fuels other binary distinctions such as emergency measures are to protect ‘us’ from ‘them’.²⁵ Second, the ‘assumption of constitutionality’, the assumption that since terrorist operate lawlessly, liberal democratic government must respond within the confines of a legal constitutional structure.²⁶ These assumptions, however, are central to the critique launched against Gross, as William Scheuerman puts it: Gross accepts Schmitt’s idea of the proliferation of emergency power, meaning that “executive discretion has expanded dramatically and civil liberties have consequently suffered,” and that through such an acceptance he embraces Schmitt’s scepticism that no legal norm can constrain political power in times of emergency.²⁷ This acceptance is the bedrock of Dyzenhaus’s critique of Gross’s third model.

As an alternative to the two abovementioned models, Gross proposes the ‘Extra-Legal Measures’ model. An extra-constitutional response that challenges other approaches on normative grounds arguing that in certain cases going outside of the

²⁵ Gross, “Chaos and Rules”, *supra* note 24, p. 1022; and see David Dyzenhaus, “The State of Emergency in Legal Theory” in Victor Ramraj, Michael Hor and Kent Roach, eds., *Global Anti-Terrorism Law and Policy*. Cambridge University Press, 2005, p. 67-8. [Hereafter: Dyzenhaus, “The State of Emergency in Legal Theory”]

²⁶ *Ibid.*, p. 1023.

²⁷ William E. Scheuerman, (2006) “Survey Article: Emergency Powers and the Rule of Law after 9/11” 14.1 *Journal of Political Philosophy*, p. 70-1.

constitutional and legal order is permissible and desirable. However, this model is still premised upon the theory of separating the norm from the exception. But Gross argues that it is a more refined separation, as the model holds that in an emergency situation public officials have the option to act external to the existing legal order so long as they openly acknowledge their actions and their extra-constitutional nature—with the aim of attaining after-the-fact public approval—and accept any possible consequences.²⁸ As such, the extra-legal framework is premised on three assumptions:

- (1) Emergencies call for extraordinary governmental responses;
- (2) constitutional arguments have not greatly constrained any government faced with the need to respond to such emergencies; and
- (3) there is a strong probability that measures used by the government in emergencies will eventually seep into the legal system even after the crisis has ended.²⁹

Again, robust criticism of Gross's position has been developed in recent literature. I draw from the work of Roach and Dyzenhaus to outline two main issues with the extra-legal approach.

First, in an effort to address the tendency of emergency measures to 'seep' into the ordinary legal order or 'to normalize', Gross maintains that temporarily suspending the legal order and acting extra-legally to return to the normal legal order, "preserves, rather than undermines, the rule of law in a way that bending the law to accommodate for catastrophes does not."³⁰ While this is a contentious claim, Canadian constitutional theorist Kent Roach agrees with Gross that the seepage of emergency jurisprudence into ordinary law is a real problem. That being said, he makes two arguments which attempt

²⁸ Oren Gross, "Extra-legality and the ethic or political responsibility" in Victor Ramraj, ed., *Emergencies and the Limits of Legality*, Cambridge University Press, 2008, p. 60.

²⁹ Gross, "Chaos and Rules", *supra* note 24, p. 1097.

³⁰ Oren Gross, "The Prohibition on Torture and the Limits of Law" in Sanford Levinson, ed., *Torture: A Collection*. Oxford, UK: Oxford University Press, 2004, p. 240.

to address such seepage. First, that the government may draft responsive legislation in advance, which requires legislative reaffirmation, and second, empower courts to require what Roach calls ‘explicit democratic authorisation of derogations from rights’. In this manner, state responses to emergencies which appropriately provide for the collective participation of judges, administrators and legislators and will better engage the institutional power of the rule of law.³¹

And second, Dyzenhaus, in writing about institutional aspects of the rule of law, is quick to point out that any acceptance of Schmitt is problematic.³² While Gross concedes that his model relies upon a nuanced ‘assumption of separation’ between the norm and the exception and that exceptional situations call for ‘extra-legal’ responses, Dyzenhaus argues that the ‘Extra-Legal Measures’ model falls into a Schmittian vein of reasoning: legal norms are not sufficient recourse in emergencies and that the norm and exception are indistinguishable.³³ Consequently, use of this model to respond extra-legally to an emergency situation undermines what he and others call ‘law’s claim to authority’, and further, the ratification of an illegal act after-the-fact merely forms a legal veneer over what was really an exercise of unconstrained political power.³⁴ To make such acts appear considerate of the rule of law when they are not, does not strengthen as Gross claims, but weakens the fundamental values that ground the rule of law.

In the end, to contest the ‘assumption of separation’ means to also contest how Gross thinks the executive may depart from the rule of law to respond to emergencies:

³¹ Kent Roach, “Ordinary Laws for Emergencies and Democratic Derogations from Rights” in Victor Ramraj, ed., *Emergencies and the Limits of Legality*. Cambridge University Press, 2008, p. 231.

³² Dyzenhaus, “The State of Emergency in Legal Theory”, *supra* note 25, p. 70.

³³ *Ibid.*, p. 73.

³⁴ David Dyzenhaus, “The compulsion of legality” in Victor Ramraj, ed., *Emergencies and the Limits of Legality*. Cambridge University Press, 2008, p. 33.

the ‘assumption of constitutionality’. Therefore, Dyzenhaus proposes that state responses to emergency situations must be wholly contained within the legal and constitutional order and fully consistent with the rule of law—a ‘Legality’ model.³⁵ As Nomi Lazar puts it, Dyzenhaus’s legality model “presupposes a commitment to the principles that underlie the rule of law,” and therefore, continues Lazar, this requires that institutions including the executive, legislature and courts must be designed in a manner that maintain a substantive rule of law and that may address security concerns even in times of crisis.³⁶

For Dyzenhaus the rule of law is substantive. It is the fundamental constitutional principles that protect individuals and individual rights from discretionary and arbitrary state action. In his recent book, *The Constitution of Law*, Dyzenhaus contrasts procedural and substantive conceptions of the rule of law noting that while the former regards how decisions are made, the latter is concerned with what kind of decisions are being made.³⁷ This distinction becomes important in Chapter 3 when I discuss the exceptional Diplock Courts in Northern Ireland. As legislators introduced emergency measures that changed the rules and processes of criminal law trials involving suspected terrorists and therefore strictly constrained how decisions were made, some judges adapted to new processes by employing a more substantive understanding of the rule of law in an attempt to uphold the rights the government was actively trying to undermine.

The ‘Legality’ model, as Dyzenhaus conceives of it, is based on substantive principles of the rule of law—it is a space for the creation of rule-of-law institutions that

³⁵ Dyzenhaus, “The State of Emergency in Legal Theory”, *supra* note 25, p. 74-5.

³⁶ Nomi Lazar, (2009) “The Everyday Problem of Emergencies” 59.2 *University of Toronto Law Journal* (Review), p. 239.

³⁷ Dyzenhaus, *Constitution of Law*, *supra* note 6, p. 2.

enable accountability. Responses to emergencies, he argues, “must start from a premise other than one that adopts the *formal* doctrine of the separation of powers.”³⁸ By way of example, he refers to the 1997 Special Immigration Appeals Committee (SIAC) in the United Kingdom, an administrative immigration tribunal, which addresses the sensitivities of security matters, holds the necessary expertise, “builds reason-giving requirements and deliberation about those requirements into the legal process” and does so in a way that makes public officials accountable to the rule of law.³⁹ However, despite this institutionally imaginative effort, SIAC met stiff criticism from generalist British judges concerned about the breadth of authority given to the tribunal in contrast to that of the courts.

What, then, is the role of the judiciary in the complex matters of national security? A primary constitutional judicial role should be the maintenance of the fundamental values of legal order such as reasonableness, fairness and equality before the law.⁴⁰ While Dyzenhaus is critical of the judicial response to the SIAC, he contends that the judges have a role to play in such matters, but envisages it in a much more collective project—the rule-of-law project. He explains that:

In a constitutional state, one that is committed to government under the rule of law, judges have to put in place three elements or constitutional fundamentals. First, they have to be committed to the view that the rule of law has content—law is not a mere instrument of the powerful. Rather it is constituted by values that make government under the rule of law something worth having. Second, judges are entitled to review both legislative and governmental decisions in order to see whether these comply

³⁸ Dyzenhaus, “The State of Emergency in Legal Theory”, *supra* note 25, p. 83. Emphasis my own.

³⁹ *Ibid.*, p. 81-3, for a more detailed discussion of the tribunal.

⁴⁰ *Ibid.*, p. 89.

with the values. Third, the onus is on both the legislature and the executive to justify their decisions by reference to these values.⁴¹

Moreover, I argue that while a strict adherence to a formal doctrine of the separation of powers as Dyzenhaus presented is problematic, it is important to emphasize the importance of judicial independence as a central proponent of legitimate government.

Judges should not be called upon to participate on inquisitorial panels or take on prosecutorial functions as this undermines their adjudicative function and in effect they become an appendage of the political power exerted by the government (see my discussion in Chapter 4 regarding the Gouzenko Affair and Kellock-Taschereau Commission). Further, they should not be consulted for extra-judicial opinions by governments (see my discussion in chapter 3 concerning the Diplock Report and its impact on the rule of law), nor should they be removed from the bench for defying government (security of tenure is another important modern protection of judicial independence in addition to separation of powers).

In sum, while judicial confrontation of executive authority, especially in the highest courts, demonstrates the importance of the separation of powers as an institutional check on political power, in practice this has not always been the case. Judicial deference to governmental pressures has, in many cases, served to uphold suspensions of civil rights and had the effect of lending troubling, yet significant formal legitimacy to exceptional measures.⁴²

⁴¹ Dyzenhaus, *Constitution of Law*, *supra* note 6, p. 139.

⁴² For an assessment of the American antebellum period judiciary and Fugitive Slave Laws, see generally, Robert Cover, *Justice Accused: Anti-Slavery and Judicial Process*. Yale University Press, 1975.

B. Temporary Emergency Law and its not so Temporary Tendencies

In times of emergencies, whether real or perceived, time-limited emergency measures are frequently renewed and extended. Often, emergency law originally legislated as temporary, remains on the books and as years pass it becomes a permanent part of the legislative body. In this section, I review recent literature concerned with the procedural and policy-based interests of temporary legislation and explore the failings of the ‘temporary’ emergency legislation within a series of examples drawn from the following case studies.

Jacob Gersen, a scholar of temporary law, argues that temporary legislation simply sets a date “on which an agency, regulation, or statutory scheme will terminate unless affirmative action satisfying the constitutional requirements of [. . .] the legislature.”⁴³ In his comprehensive history of such legislation, Gersen submits that the roots of temporary legislation may be found in the practices of colonial or unstable governments. He notes that even in the early US republic Alexander Hamilton argued for the deliberative benefits of temporary legislation as it served as a safeguard of democracy.⁴⁴ It is interesting how temporary measures, in other instances, have been the very foil of the rule of law and aided in the erosion of those very same democratic values.

Furthermore, constitutional theorist John Finn adds, in a recent article, that as well as serving a deliberative value, temporary legislation, and specifically anti-terrorism

⁴³ Gersen, “Temporary Legislation”, *supra* note 13, p. 247.

⁴⁴ *Ibid.*, p. 251; also see the Federalist alien and sedition laws in the 1790’s as examples, Barry Wright, (2002) “Migration, Radicalism and State Security: Legislative Initiatives in the Canadas and the United State c.1794-1804” 16 *Studies in American Political Development*, pp. 48-60.

related sunset clauses⁴⁵ provide important informational advantages to legislators.⁴⁶ For example, in the United States, many make the argument that the sunset clauses in the 2001 *PATRIOT Act*, now a permanent fixture of American public law, were a victory for “civil liberty interests.”⁴⁷ But, Finn also notes that many argue that such controversial legislation would not move through parliament without certain sunset clauses. The ‘spoonful of sugar effect’⁴⁸ makes swallowing provisions with higher social and liberties-based risks more tolerable knowing that future deliberation is built right into the statute.

While modern legislators now include certain sunset provisions or time-bound clauses in national security legislation that automatically initiate parliamentary review, governments and temporary emergency legislation of the past were much more unforgiving. For example, in January 1939 the British Government responded to IRA violence in Britain with the passage of the 1939 *Prevention of Violence (Temporary Provisions) Act*. On 24 July 1939, Home Secretary Hoare claimed that the temporary emergency law “. . . is a temporary measure to meet a passing emergency.”⁴⁹ Laura K. Donohue describes how while IRA violence subsided within the year, the temporary provisions did not expire until 1953 and the statute was not repealed until 1973.⁵⁰

⁴⁵ Sunset clauses are temporary measures clauses which have an expiration date. Contingent upon this expiration is always the option for extension, whether by means of executive prerogative or legislative debate.

⁴⁶ For a comprehensive overview see Finn, “Sunset Clauses”, *supra* note 12, pp. 442-502, notably, p. 451.

⁴⁷ Gersen, “Temporary Legislation”, *supra* note 13, p. 294 fn. 182; see also, John E. Finn, “Counter Terrorism Regimes and the Rule of Law: The Effects of Emergency Legislation on Separation of Powers, Civil Liberties and Other Fundamental Constitutional Norms” in Martha Crenshaw, ed., *The Consequences of Counterterrorist Policies in Democracy*. New York: Sage Russell Foundation, 2010, p. 44-5.

⁴⁸ Finn, “Sunset Clauses”, *supra* note 13, p. 455.

⁴⁹ Sir S. Hoare, Home Secretary, HC Debs, 24th July 1939, Vol. 350, col. 1054.

⁵⁰ Laura K. Donohue (2000), “Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom.” BCSIA Discussion Paper 2000-05, ESDP Discussion Paper ESDP-2000-01, John F. Kennedy School of Government, Harvard University, p. 5.

Another example of the permanent tendencies of temporary emergency legislation is captured in two parts. In 1951, British Judge, Lord Devlin, warned that “[i]t would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes.”⁵¹ However, in a critique of the oppressive government responses in Northern Ireland and Britain, Justice Devlin’s concern is mere lip service. Consider the 9 July 1974 remarks of then Northern Ireland Secretary of State Merlyn Rees, who claimed that the 1973 *Northern Ireland (Emergency Provisions) Act* made “emergency provisions and is by its nature temporary, to cover the period of an emergency. If its provisions are to be renewed, clearly it is necessary to demonstrate that the emergency continues in force.”⁵² This ‘temporary’ legislation remained in force for twenty-seven years.

Donohue describes this prolongation of temporary emergency law in Northern Ireland as the ‘temporary permanence’.⁵³ While the permanent tendencies of temporary emergency law in Northern Ireland did not suspend the legal order, it did undermine and lower the standards of particular procedural aspects of the law: notably, the common law principles of *habeas corpus* and various due process rights, notably those regarding the admissibility of evidence. Nonetheless, many of the temporary emergency bills and statutes implemented from Westminster during the mid-1970s had lasting effects. While some served to augment police power, limit civil liberties and hamper judicial

⁵¹ Oren Gross, (2006) “What ‘Emergency’ Regime?” 13.1 *Constellations*, p. 79.

⁵² Mr. Merlyn Rees, *Northern Ireland HC Debates*, 9 July 1974, Vol. 876, col. 1273. Available online: <<http://hansard.millbanksystems.com/commons/1974/jul/09/northern-ireland-emergency-provisions>>

⁵³ See Donohue, “Temporary Permanence”, *supra* note 12, pp. 35-71; and Donohue, *Counter-Terrorist Law*, *supra* note 12, Ch. 7.

intervention, others permitted arbitrary detention of ‘terrorists’, derogated of due process, unlawful searches and enforcement of curfews.

Furthermore, in 1973, Lord Diplock, chair of the Commission that examined the British government’s course of action to curtail violence in Northern Ireland, established the ‘temporary’ juryless Diplock Courts to respond to politically violent offenders. Persons charged under the various temporary emergency laws in Northern Ireland, especially if they were categorised as ‘terrorists’, were streamed into these specialized due process-less courts. Diplock Court cases, notably *R. v. McCormick* (1977), *R. v. McKearney* (1978), *R. v. Brophy* (1981)⁵⁴ and others shed light on how judges struggled in responding to the new charges under the ‘temporary measures’ order.

Such responses, however, especially in criminal law cases were prescribed by legislation and highly restrictive. Therefore, judges who attempted to resist the ‘conviction-based’ mandate given to the courts did so through substantive understandings of common law principles and the rule law. However, as is the case in many of the emergency situations that I discuss in chapters 3 and 4, judges typically deferred such opportunity to the government. It is important to note the Diplock Courts were finally dissolved in 2007; however remnants of the system still remained.

While the Canadian experience was much shorter in nature, due process was no less a casualty. Quebec, after the kidnapping of two government officials, faced emergency measures applied under the *War Measures Act* and subsequently the 1970 *Public Order (Temporary Measures) Act (POA)*. The sweeping arrests, searches and

⁵⁴ For an interesting assessment of these cases see Dermot P. J. Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland*. New York: Palgrave, 2000, p. 258-66.

internments of October 1970 in Montreal provide a chilling parallel. In the months after the crisis, the Quebec Court of Appeal heard a series of cases stemming from the Crisis, notably *Gagnon and Vallières v. The Queen* (1971) which challenged the constitutionality of the 1970 *POA*. Unfortunately, this challenge was to no avail.

In both cases, the enforcement of the temporary measures was carried out by the heavy hand of special police forces and the army, and while most charges were dropped, judges deferred many opportunities to challenge the government's suspension of civil liberties—temporary emergency measures were upheld by judges.

C. Conclusion

By framing problems about the legality of state responses to real and perceived emergencies within particular historical case studies selected here, I aim to connect evidence of past general trends of judicial deference to recent theoretical interventions about emergency and anti-terrorism laws, and in particular identify the important place of the courts in situations of real or perceived crises and the continuity of exceptional interventions.

The Gross-Dyzenhaus debate is a useful way to understand the nuances of 'temporary emergency measures,' legislation that has long-standing impacts in situations of colonial and imperial rule and intersects substantive conceptions of the rule of law in contexts of both war and peace. These themes, which hinge upon concepts such as the separation of powers, judicial independence and due process rights, are well illuminated by the case studies of Quebec and Northern Ireland that follow.

Chapter 3 - The Irish Experience: A Case Study of Extra-ordinary Courts in 'Troubled' Times

There is exhaustive scholarship focusing on Northern Ireland and 'The Troubles.'⁵⁵ It is not the aim of this study to reproduce those arguments. It simply seeks to synthesize the key points related to legal responses to domestic civil unrest and national security threats and connect them with, or to draw parallels between, the Irish context and Canada, particularly Quebec in the 1970s.

Part I - Ireland: An Historical Overview of Law, Politics and Crises, 1798-1972

To begin, I provide a brief historical survey of the development of emergency law in Northern Ireland, Ireland and more broadly, the United Kingdom, mapping out the politico-legal landscape in three parts. First, I assess legal responses to the 1798 Irish Rebellion as a formative modern imperial articulation of Irish-Anglo political and legal relationships (reflecting what historians describe as the second British Empire, an imperial reconstitution in the wake of the American and French Revolutions). Second, I evaluate the Home Rule movement from 1914 to 1921 (a belated extension of responsible government and greater autonomy through devolution), notably how the partitioning of the six northern counties by the 1914 *Government of Ireland Act*, the 1916 Easter Uprising, and subsequent 1920 *Government of Ireland Act*, 1921 *Parliament of Northern Ireland Act* and 1921 Anglo-Irish Treaty all substantially shaped relations with Britain.

Finally, I examine the political and legal responses to Irish independence which entailed partition of Ireland and retention of a British province (Northern Ireland) governed by the predominantly Protestant Unionists. In mapping out long-term effects of

⁵⁵ See generally, Chapter 1 in Kevin Boyle, et. al. *Law and State: The Case of Northern Ireland*. London: Martin Robertson and Co., 1975. [Hereafter: Boyle, et. al., *Law and State*]

a partitioned Ireland, notably the civil unrest between and within Catholic Nationalist and Protestant Unionist communities, I problematize how enacting the 1922 *Civil Authorities (Special Powers) Act* and the majority of emergency legislation thereafter, advanced policy that effectively sedimentized temporary emergency measures for decades.

A. Irish Rebellion, 1798

The 1798 Irish Rebellion was a mass uprising of Irish Republican revolutionaries. Efforts were organized primarily through the Society of United Irishmen, a coalition of Protestants and Catholics that resisted British rule in Ireland. While more radicalized elements were inspired by the French Revolution and supported by the revolutionary government there, popular elements were mobilized by Catholic emancipation.⁵⁶ Up to 100 000 Irish clashed violently with over 75 000 British soldiers throughout Ireland from May to September in 1798.⁵⁷ Martial law had been in effect since March 1797 and houses of suspected revolutionaries were searched and burned, while armed insurrectionists were summarily executed.⁵⁸

Murray Greenwood provides an in depth comparative analysis of the legal responses to the 1798 Irish Rebellion and 1837-38 Lower Canada Rebellions. He pays particular attention to the concept of martial law in the context of an insurrection, illuminating how in prevailing law, an ‘imminent danger’ situation must already exist and that existing courts are rendered incapable of regular operation for martial law to take effect, and not simply a declared proclamation or royal prerogative, as commonly

⁵⁶ Greenwood, “Court Martial”, *supra* note 9, p. 282-3.

⁵⁷ Alvin Jackson, (1999) *Ireland: 1798-1998*. Oxford: Blackwell Publishers Ltd., p. 20 [Hereafter: Jackson, *Ireland*]

⁵⁸ *Ibid.*, p. 15.

thought.⁵⁹ By codifying provisions found in martial law emergency measures appeared to be a more legitimate exercise of authority than impositions by proclamation or prerogative. Yet at the same time these legislated emergency measures were enacted by way of the imperial jurisdiction of the British Parliament rather than the Irish legislature (which was suspended because of the crisis).

The next step of this codification of martial law occurred when the British Parliament enacted the 1800 *Acts of Union*, which effectively united Great Britain and Ireland and fully dissolved local Irish legislative authority. A related key step followed from the presumed inoperability of the regular Irish courts due to the crisis, retroactive legislation authorized the trial of civilians who participated in the insurrection by courts martial. As British law and emergency measures came into full force and effect in Ireland, Greenwood highlighted their continuity by renewal and then consolidation of Irish emergency statutes in 1799, 1801 and 1802. He also pointed to the similarities between the early Irish legislation and the Lower Canada ordinances of 1838 noting that in some parts the language is nearly word-for-word.⁶⁰

As initially temporary legislation began to take a permanent tone, the British codification of emergency law into statute effectively immobilized dissent and continued to establish not only the colonial breadth of British rule in Ireland, but also the uncompromising face of the empire. For example, in 1829, Home Secretary Robert Peel chronicled, during contentious debate on Catholic emancipation and the continued suppression of Irish Catholic organizations, the notion of a ‘permanency’ of the

⁵⁹ Greenwood, “Court Martial”, *supra* note 9, p. 286.

⁶⁰ *Ibid.*, p. 284.

temporary emergency legislation, specifically focusing on the writ of *habeas corpus*. Peel recounted that:

In 1800 we find the *Habeas Corpus Act* suspended, and the Act for the suppression of the rebellion in force. In 1801 they were continued. In 1802, I believe they expired. In 1803 the insurrection in which Emmett suffered broke out, Lord Kilwarden was murdered by a savage mob, and both Acts of Parliament were renewed. In 1804 they were continued. In 1805 renewed [. . .] In 1807, in consequence chiefly of the disorders that had prevailed in 1806, the Act called the *Insurrection Act* was introduced. It gave power to the Lord-Lieutenant to place any district, by proclamation, out of the pale of ordinary law; it suspended trial by jury, and made it a transportable offence to be out of doors from sunset to sunrise. This Act continued in force in 1807, 1808, 1809, and to the close of the session of 1810. In 1814 the *Insurrection Act* was renewed. It was continued in 1815, 1816, [and] 1817. In 1822 *Habeas Corpus Act* suspended and *Insurrection Act* again revived, and continued during the years 1823, 1824, 1825. In 1825 the temporary Act intended for the suppression of dangerous associations, and especially of the Roman Catholic Association, was passed. It continued during 1826, 1827, and expired in 1828. The year 1829 brings with it the demand for a new Act to suppress the Roman Catholic Association.⁶¹

Primarily, what Peel highlighted was the legislatively mandated authorization of long-term responses to the emergency of the 1798 Irish Rebellion. In effect, British legislators opted for a sustained legislative approach, one that would have long-term systemic implications. The resulting legal framework established numerous *Insurrection Acts*, *Habeas Corpus Suspension Acts* and *Coercion Acts*; in its earliest forms in Ireland, British lawmakers effectively and permanently entrenched emergency powers into law.⁶²

⁶¹ Robert Peel, *The Speeches of the Late Right Honourable Sir Robert Peel, Bart. – Volume I. From 1810 to 1829*. London: George Routledge and Co., 1853, p. 705.

⁶² John Reynolds, (2010) “The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law” *Osgoode Hall Law School: Comparative Research in Law & Political Economy Research Paper Series*, Vol. 6 No. 5, Research Paper No. 19, p. 11.

B. Home Rule Movement, 1914-21

Resistance continued throughout the nineteenth century, notably the resurgence of nationalist Fenian movement mid-century and the beginnings of the Home Rule Movement in the 1870s. It was only by the turn of the century that the union was finally dissolved. By 1914, after protracted negotiation with the Crown, Nationalists in Dublin welcomed the newly passed third Home Rule Bill—the 1914 *Government of Ireland Act*. A self-governing Irish state was to be finally realized, but due to the outbreak of the First World War the Act was not implemented.

However, tensions over Home Rule boiled over in Ulster (the northern Unionist and Protestant stronghold) and Irish Unionist leaders Sir Edward Carson and Sir James Craig mobilised the Ulster Unionist Party with support from the Orange Order in an effort to resist the Home Rule movement. They sought legal exclusion from the Act and would ultimately be successful in partitioning the northern six counties. Arguably, this resistance was precipitated by economic fear as Ulster had quickly become an industrial trading hub with Great Britain and they feared that a centralized southern, agrarian-based and predominately Catholic government would impact trade relations.⁶³

In response, the Nationalist Irish Parliamentary Party leader John Redmond mobilised the Irish Volunteers to oppose Unionist separatism. The Irish island would quickly descend into civil war, and Nationalist leaders would tightly hold onto the message that: “Ireland is a unit [. . .] the two-nation theory is to us an abomination and a

⁶³ M. E. Collins, (2007) *Sovereignty and Partition, 1912-1949*. Ireland: Educational Company of Ireland, Ltd., p.4-6.

blasphemy.”⁶⁴ Conflict continued throughout the Great War, with the heights of the civil war on 24 April 1916—the Easter Uprising in Dublin. Republican militias once again challenged British rule in Ireland, and while the April campaign was the largest uprising since the 1798 Rebellion, the attempt was quashed, martial law imposed and Nationalist leaders were court martialed.⁶⁵ Despite the failed revolt, imprisoned Nationalist leaders would emerge in the following years to lead the nation.

In the end, it was not until the implementation of the 1920 *Government of Ireland Act* and 1921 *Parliament of Northern Ireland Act* that the northern six counties were formally partitioned from the southern Republic. The 1921 Anglo-Irish Treaty officially validated the Republic of Ireland’s independence.⁶⁶ Yet, despite establishing home governance in the south and autonomous government in the north, a violently embittered reality ensued. On the one hand, the Catholic Nationalist majority in the south had mobilised the Irish Republican Army (IRA) and would relentlessly press on with visions of a unified Ireland and total emancipation from British sovereignty, and on the other a Protestant Unionist majority in the north systematically regulated and firmly oppressed the Catholic Nationalist minority communities in the six counties through ‘Special Power’ legislation.⁶⁷

⁶⁴ A.T.Q. Stewart, (1967) *The Ulster Crisis, Resistance to Home Rule, 1912-14*. London: Faber and Faber, p. 82.

⁶⁵ Jackson, *Ireland*, *supra* note 57, p. 205-7.

⁶⁶ Alvin Jackson, (2003) *Home Rule: An Irish History, 1800-2000*. New York: Oxford University Press, p. 198-200. [Hereafter: Jackson, *Home Rule*]

⁶⁷ See generally, Laura K. Donohue, (1998) “Regulating Northern Ireland: The Special Powers Acts, 1922-1972” 41.4 *The Historical Journal* [Hereafter: Donohue, “Regulating Northern Ireland”]; Donohue, “Temporary Permanence”, *supra* note 12.

C. Special Powers Era, 1922-72

The oppressive 1922 *Civil Authorities (Special Power) Act* (1922 SPA) was enacted by the Unionist northern government, in part, as a response to southern independence. Political rhetoric shrouded in fears of imminent insurrection filled the House of Commons at Stormont. On 21 March 1922, Protestant MP Mr. Lynn proclaimed: “we are living not in normal, but in very abnormal times [. . .] is civilization going to be allowed to exist, or is there going to be anarchy?”⁶⁸ The abnormal times he referred to were the increasing civil unrest between Catholic Nationalist and Protestant Unionist communities in the northern six counties. Further, MP Mr. Megaw expressed that: “This is an exceptional time and requires exceptional measures. We may require stronger measures still.”⁶⁹ While the reactionary tone of this parliamentary debate must be acknowledged, the resulting legislation was nothing less than Draconian. MP Megaw continued in the same House of Commons sitting, explaining that: “All that we have got to do is to restore the supremacy of law and order within our area.”⁷⁰ This is an important distinction, as MP Megaw connected the geographic proximity of communities to the functionality of the legal system. This argument was echoed by Lord Diplock in 1973 within the Diplock Commission regarding communal fears of intimidation.

At the same 21 March meeting, MP Dr. Morrison exclaimed: “I say we cannot help ourselves. We are up against a wall, and we must make a fight for our lives.”⁷¹ However, one of the most interesting contentions about the civil unrest in the Northern

⁶⁸ MP Mr. Lynn, *HC Debs. NI*, 21 Mar. 1922, col. 91. Northern Ireland House of Commons Hansard. Available online at <<http://hansard.millbanksystems.com/commons>>.

⁶⁹ MP Mr. Megaw, *HC Debates NI*, 21 March, 1922, col. 89.

⁷⁰ MP Mr. Megaw, *HC Debates NI*, 21 March, 1922, col. 87.

⁷¹ MP Dr. Morrison, *HC Debates NI*, 21 March, 1922, col. 104.

province was made by MP Mr. Dehra Chichester on 28 March 1922, he stated: “[. . .] it is only the very strongest measures which can strike the necessary fear into the hearts of the criminals.”⁷² As the line between extra-ordinary terrorist and ordinary criminal are blurred, so too are the conceptualizations of extra-ordinary and ordinary law.

In effect, the 1922 *SPA* was annually renewed until 1928, upon which it was renewed for five years.⁷³ This rationale is described by Laura K. Donohue, who argues that the Northern Ireland government shifted the motivation of the Act: while it initially was a tool of re-establishing civil order; it soon became a mechanism of muzzling Southern resistance in the partitioned North.⁷⁴ As political motivations changed so did justifications: the discourse of necessity was replaced with how emergency law was “critical to maintaining Northern Ireland’s political structure.”⁷⁵

The first indication of this structural shift came in 1933, when James Craig, Prime Minister of Northern Ireland, announced in the Senate that despite indications of a growing peace, it is “desirable to avoid as far as possible the yearly debates which have taken place on this particular measure during recent year.”⁷⁶ Craig argued that in order to combat the Nationalist threat the permanent extension of emergency power by the government was imperative. But, in 1938, the Northern Ireland Ministry of Home Affairs offered this justification grounded upon the fears of the looming danger of a Republican insurgency and the deterrent value of the legislation:

⁷² MP Mr. Dehra Chichester, *HC Debates NI*, 28 March, 1922, col. 270.

⁷³ Fionnuala Ni Aoláin and Oren Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge University Press, 2006, p. 177. [Hereafter: Gross and Ni Aolain, *Law in Times of Crisis*]

⁷⁴ Donohue, “Regulating Northern Ireland”, *supra* note 67, p. 1090.

⁷⁵ *Id.*

⁷⁶ *Ibid.*, 1092-3.

The reason[s] for the continuance of the *Civil Authorities Act* [. . . are] first, [. . .] the existence of the Statute has undoubtedly proved that the powers under it which are reposed in the Authorities, act as a valuable deterrent on those who would otherwise be prepared to resort to any measures of violence to subvert the Constitution [. . .] second [. . .] the Authorities are only too well aware that the various disloyal and illegal organisations which were responsible for such a holocaust of murder and outrage still exist.⁷⁷

Through the 1930s and 1940s the continuity of emergency legislation became a matter of suppressing Nationalist political mobility. For example, besides from banning various Nationalist Republican organizations and clubs and even one Unionist Loyalist organization,⁷⁸ the emergency law banned politicised Easter and St. Patrick's Day parades and celebrations under Regulation 4 of the 1922-1943 *Civil Authorities (Special Powers) Acts*. Even more alarming than the holiday bans were that even once the 1922-1943 *SPAs* were repealed, the majority of the Acts' powers, including provisions such as Regulation 4, were codified into ordinary law under the authority of the 1951 *Public Order Act*. This Act was subsequently amended and further empowered by the 1970 *Public Order (Amendment) Act (Northern Ireland)*.⁷⁹

The ensuing years between 1966 and 1972 erupted with civil rights campaigns, which similarly to the FLQ in Quebec or the African Americans in the United States in the late 1960s would spark violent demonstration. In August 1969, the British Army arrived in the capacity of peacekeepers between the North and the South, and although

⁷⁷ Donohue, "Regulating Northern Ireland", *supra* note 67, p. 1093.

⁷⁸ By 1966, codified emergency bans on nine (9) Nationalist Republican organizations included: the Cumann Poblachta na h'Éireann, Saor Éire, the Irish Republican Brotherhood, the Irish Republican Army (IRA), the Irish Volunteers, Cumann na mBan, Fianna na h'Éireann, Sinn Féin, and Fianna Uladh, while a single Unionist Loyalist organization the Ulster Volunteer Force (UVF) was banned for its part in the Shankill Road bombing—targeted a Catholic pub. The sole non-Nationalist-Unionist organization was a fascist group—the National Guard. *Ibid.*, p. 1112-3.

⁷⁹ *Ibid.*, p. 1101 and 1109.

initially welcomed by the Catholic Nationalist communities as refuge from Protestant Unionist aggression, the position of the British Army fell quickly into disrepute as they clashed with protesters and enforced emergency laws with arbitrary discretion.

D. Conclusion

By August 1971, with the introduction of internment camps, the situation in Northern Ireland had devolved into guerrilla warfare.⁸⁰ Fatalities of British soldiers in Belfast and Londonderry hardened the conflict. On 29 January 1972, the shooting of 13 unarmed and peacefully demonstrating civilians by the British army in Londonderry (Bloody Sunday) would ignite international concern, and most importantly lead to the devolution of the Northern Ireland parliament. In March 1972, Westminster took 'Direct Rule' of Northern Ireland's affairs.⁸¹

The political and legal impacts of British 'Direct Rule' were extensive; therefore I limit the following part of my case study to the period between 1972 and 1986. I show how government and judicial responses to the civil unrest were shaped by augmented police and military powers, internment policies and temporary emergency power. As well, the juryless Diplock Courts, a recommendation of the 1973 Diplock Report, provide this study with a body of case law from which I outline the judicial struggle with common law principles such as *habeas corpus* and admissibility of evidence. The historical comparison between the domestic security narratives in Northern Ireland and Quebec offers nuanced insight into the deferential and confrontational judicial responses to executive authority in times of crisis.

⁸⁰ Boyle, et. al., *Law and State*, *supra* note 55, p. 27.

⁸¹ *Ibid.*, p. 32; and further for a discussion of the devolution of Stormont to Westminster 'Direct Rule' see Jackson, *Home Rule*, *supra* note 66, p. 260-70.

Part II - Northern Ireland: Emergency Power, Common Law and the Diplock Courts, 1972-86

“The rule of law has broken down in Northern Ireland.”⁸²

Nineteen seventy-two marked a pivotal year in terms of the development of British security policy and, in part, a reconstitution of the judicial role in Northern Ireland. The continuation of political violence resulted in the dissolution of the local parliament at Stormont by the U.K. government who then assumed direct rule over Northern Ireland (a move reminiscent of responses to Ireland in 1800). The goal of direct rule was to efficiently and expediently reduce the political violence and civil unrest.

Accordingly, the Diplock Commission, chaired by Lord Kenneth Diplock in 1972, was developed and recommended a conviction-oriented strategy to support better maintenance of public order. The result, the Diplock Report, established the foundation upon which much of the subsequent reform of criminal and judicial procedure was based. In effect, the Commission reconstituted a series of traditional common law principles and procedural rights. For example, it reframed the admissibility of statements and trial by a jury as ‘technical rules’.⁸³ The particular role judges played in the ‘technocratization’ of the legal process, notably how emergency laws were interpreted and applied in criminal law cases that dealt with terrorist activities, raised questions about judicial independence.

The rupture or ‘break’ in the rule of law to which Northern Ireland Minister of Parliament Stanley McMaster referred to in the above epigraph speaks to the political,

⁸² Mr. Stanley McMaster (Belfast East, MP) HC Debates Northern Ireland, 17 April 1973, vol. 855, c 310. Available online: <<http://hansard.millbanksystems.com/commons/1973/apr/17/northern-ireland-emergency-provisions>>

⁸³ Paddy Hillyard, “The Normalization of Special Powers: from Northern Ireland to Britain” in Phil Scraton, ed., *Law, Order and the Authoritarian State*. Milton Keynes: Open University Press, 1987, p. 285. [Hereafter: Hillyard, ‘Normalisation of Special Powers’]

social and legal deterioration of Northern Ireland, arguably since its partition, but more notably since 9 August 1971 with the British government's initial policy of internment and detention without trial—an attempt to suspend *habeas corpus*. This policy originally targeted the IRA, Nationalist sympathizers and more generally Catholics, but by February 1973 the British army also began detaining Unionist sympathizers and Protestants.⁸⁴ However, in an effort to quell violence and destabilize IRA operations, the opposite resulted as internment centres became recruitment hubs.

In terms of British security resources, internment centres served to facilitate interrogation and collect information, but due to fears of intimidation of juries and witnesses by various Republican and Unionist paramilitary factions those charged would inevitably escape prosecution. Therefore, in an attempt to effectively secure conviction, the Diplock Report and the subsequent emergency legislation which it informed, the 1973 *Northern Ireland (Emergency Provisions) Act*, reconstituted parts of the judicial system and criminal law procedure to accommodate those detained under the net of terrorist activities. As such, the formation of the juryless Diplock Courts provided the legal mechanism to convict suspected politically violent persons without the arguably restrictive rules of ordinary criminal law and due process.

As discussed in chapter 2, Oren Gross and Fionnuala Ní Aoláin explain that such accommodation and modification (what they have called the 'Business as Usual' and 'Accommodation' models) in response to real or perceived crises, as was the case in Northern Ireland, "insert[s] emergency-driven legal provisions into existing ordinary rules and [institutional] structures," which, as many commentators argue, may very well

⁸⁴ Hillyard, 'Normalisation of Special Powers', *supra* note 83, p. 284.

result in such provisions sedimentizing or normalizing in the ordinary legal system (i.e. the Diplock Courts).⁸⁵ Gross and Ní Aoláin, as well as Nomi Lazar, have articulated that systems which accommodate emergency measures are particularly prone to normalization.⁸⁶

For example, Irish human rights scholars Brice Dickson and Jean Allain write that emergency powers were ‘normalized’ because they were applied at times in which ordinary criminal law would have sufficed. They continue by characterizing normalization in Northern Ireland: the government, in a legislated state of emergency, “accommodated and encouraged lower standards of policing by the Royal Ulster Constabulary (RUC) [. . .] leading to the mistreatment of people in custody [. . .] and inadequate investigations into deaths resulting from such practices.”⁸⁷ In such a legal system, as I will show in the following chapter, the rule of law did not underpin the legislative accommodations enacted by the executive, but became merely part of the judicial struggle.

I divide this examination of the role and function of the judiciary within the transition of criminal justice procedure into three periods: (1) the Internment Period: I examine the legal framework of arrest and detention, and in particular, how judges responded to petitions for *habeas corpus*; (2) the Diplock Report: I investigate how the proposed changes to evidentiary rules concerning due process, the admissibility of confessions and the structure of the criminal trial process reconstituted the role and

⁸⁵ Gross and Ní Aoláin, *Law in Times of Crisis*, *supra* note 73, p. 66-7.

⁸⁶ Scholars such as Dyzenhaus, Roach and Gross have framed this matter as seepage of emergency law into the ordinary law system. Lazar, “Everyday Problem of Emergencies”, *supra* note 36, p. 244.

⁸⁷ Brice Dickson and Jean Allain, (2008) “War on Terror: Lessons from Northern Ireland”, Written Testimony to the Panel of Eminent Jurists Panel, *Committee on the Administration of Justice*, pp. 49-50.

function of the judge in Northern Ireland; (3) the Diplock Regime: I explore the extent to which the prolongation of emergency power in Northern Ireland entrenched into the legal framework a multiplicity of long-term and permanent exceptions, most notably ‘supergrass trials’ and juryless courts.

In sum, although constituted as temporary emergency legislation, much of the emergency law implemented over the course of the ‘Troubles’ in the 1970s and 80s had arguably permanent impacts, and while British authorities had shifted their focus from executive-led internment to judge-directed inquest, it was a shift that called into question aspects of the separation of powers and rule of law.

A. Internment Period: Arrest, Detention and Legal Challenges in Times of Emergency

In the late 1960s, major civil rights campaigns, centralized in Catholic communities, mainly in Belfast and Londonderry, protested for the end of Protestant Unionist oppression. Civil rights demonstration by Catholics prompted counter-demonstrations by Protestants. In 1969, violence and civil unrest pressured military mobilisation in Londonderry, and by 1970 the IRA had stepped up its bombing campaigns and had claimed the lives of 23 civilians and two police officers in that year alone.⁸⁸ The increasing hostility of Nationalist (IRA) and Unionist (UVF) aggression, compounded with the voice of an aggravated public criticized the government in Northern Ireland for not doing enough to curb the civil unrest.

On 9 August 1971 the Unionist authorities acted, Operation Demetrius, a mass arrest and internment initiative focussed on Catholic communities and Nationalist

⁸⁸ *Ireland v. UK* (1978) 25 European Court of Human Rights (ser. A), para. 29. [Hereafter: *Ireland v. UK*]

supporters was launched in an attempt to destabilise IRA mobilisation. Years later, in *Ireland v. UK* (1978), the European Court of Human Rights detailed the rationale of the Northern Ireland government's decision to introduce internment. The government submitted three reasons: (1) it had been determined that ordinary criminal law and due process were inadequate to restore peace and order; (2) beyond the enveloping culture of intimidation in some communities, police were increasingly unable to conduct enquiries in IRA strongholds, deemed 'no-go' areas; (3) the difficulties of controlling IRA movement through the territorial border between Northern Ireland and the Republic of Ireland.⁸⁹ Despite this rationale, I argue that prior to 1973, courts showed a higher capacity to resist executive authority and served, although in a limited number of cases, as a forum for the defence of *habeas corpus* and due process of arrest.

Internment, under the authority granted by the *Special Powers Act*, held that police officers or military personnel or anyone else authorised by the Minister for Home Affairs could, without warrant, arrest a person "whom he or she suspected of acting, or of having acted, or of being about to act, in a manner prejudicial to the preservation of the peace or maintenance of order . . . [and] be detained indefinitely without trial."⁹⁰ What was especially problematic for those who were interned was that years earlier, on 27 June 1957, the United Kingdom had validly derogated from Article 5(1)(c) of the *European Convention of Human Rights* (ECHR), which held that detention "effected for the purpose of bringing [the person] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary

⁸⁹ *Ireland v. UK*, *supra* note 88, para. 36.

⁹⁰ *Civil Authorities (Special Powers) Act (Northern Ireland)*, 1956, S.R. & O. 1956/191, Sec.11(1) and 11(2).

to prevent [the person from] committing an offence”⁹¹ was lawful under the pretence of a ‘public emergency’.⁹² This derogation was never rescinded, and therefore, even in 1971 those who were interned under the *Special Powers Act*, largely lacked practical legal recourse to challenge their own detention or the internment policies at large.

Moreover, Robert Sharpe argued that the modern notion of *habeas corpus* was legislated in the 1679 *Habeas Corpus Act*.⁹³ In that context, since this right was legislated beyond the common law procedural writ and because by the late 17th century England parliament was held as the supreme lawmaker, *habeas corpus* could not be suspended through common law or by royal prerogative. However, the 1679 *Act* was often overridden by another Act of parliament—a temporary emergency law—usually in cases of real or perceived crisis; the precise “times when the writ was most urgently needed to prevent abuse.”⁹⁴ While the right to *habeas corpus* could be constitutionally suspended by emergency legislation, the common law writ of *habeas corpus* was still theoretically available to those interned under the new security measures.

Therefore, internees in Northern Ireland, who lacked the sufficient legal resources to challenge their detention *per se*, employed existing common law principles of *habeas corpus* to challenge the means by which they were arrested. Put simply, under the

⁹¹ Brice Dickson, (2009) “The Detention of Suspected Terrorists in Northern Ireland and Great Britain,” 43 *University of Richmond Law Review*, p. 933. [Hereafter: Dickson, ‘Detention of Suspected Terrorists’]

⁹² European Court reviewed derogation notices and ensured that they are within the purview of a justifiable derogation as established by Article 15(1), “strictly required by the exigencies of the situation” and “not inconsistent with [the state’s] other obligations under international law.” See section 15(1) on derogations in the European Convention of Human Rights.

⁹³ Robert J. Sharpe, *The Law of Habeas Corpus*, 2nd ed. Oxford: Clarendon Press, 1989, p. 18-19.

⁹⁴ F. Murray Greenwood and Barry Wright, “Introduction: State Trials, the Rule of Law, and Executive Powers in Early Canada” in Greenwood, F. Murray and Barry Wright, eds., *Canadian State Trials I: Law, Politics, and Security Measures, 1608-1837*. University of Toronto Press: The Osgoode Society, 1996, p. 32.

common law an arresting authority must have reasonable grounds for arrest—suspicion upon which an arrest is grounded must be a reasonable suspicion. For example, in the case *In re McElduff* (1971), James McElduff, one of the few successful appellants for a writ of *habeas corpus* in the early 1970s, was swept up during a mass arrest on 9 August 1971. The Crown, in this case, argued that the 1922 *Special Powers Act* was drafted and legislated as emergency legislation; therefore, any power conferred by the Act “should not be subject to the tests usually imposed by common law or by any requirement of reasonableness which has been considered to be a necessary requirement in construing other statutes.”⁹⁵ The question, then, was did the common law ‘reasonableness’ principle apply to arrest if under the authority granted by emergency law?

Pursuant to the 1922 *SPA* (repealed in 1972), arrest regulations 7, 10 or 11 applied different standards of how a court may review an application for *habeas corpus*. While regulation 7 was predicated on ordinary arrest procedure leading to a trial, regulations 10 and 11 dealt with interrogation and indefinite detention in emergency situations. I focus my attention on regulation 11, as it was the regulation under which McElduff was arrested. In the first appeal case, the Court of Appeal in London found in favour of the Crown and denied the petition of *habeas corpus* on the grounds of inappropriate jurisdiction, Judge Ackner argued that since the petition was filed in London and not Belfast (the location of the arrest) it was not jurisdictionally permissible.⁹⁶

⁹⁵ Judge McGonigal, Northern Ireland Law Reports Q.B.D.J., *In re McElduff*, p. 7, para. 10. Available online: <http://report.bloody-sunday-inquiry.org/evidence/LAW/LAW_0010.pdf> [Hereafter: *In re McElduff*]

⁹⁶ Kevin Boyle, “Internment and Natural Justice: Casenote,” 23.3 *Northern Ireland Legal Quarterly*, p. 335 fn. 6. If the English High Court allowed this petition in London it would have opened up a floodgate of petitions, which should be heard by courts in Northern Ireland. [Hereafter: Boyle, ‘Casenote’]

However, on appeal in the English High Court, Judge McGonigal, looked further than matters of jurisdictions, he problematized what it meant to arrest persons under the authority of special powers. In rejecting the Crown's argument that due to the emergency character of the powers granted any arrest "was unfettered by any requirement that it be a reasonable suspicion, and that a court could inquire no further in a habeas corpus application," Judge McGonigal argued that while a reasonableness standard applied explicitly to regulation 7 in terms of an ordinary procedural arrest, the concern with extra-ordinary arrest, regulation 11, rested upon not necessarily the reasonableness of that suspicion, but that the arrestor's suspicion in fact existed.

McElduff, for example, was not informed of why he was arrested, the police officer who arrested him simply stated: "I arrest you under the *Special Powers Act*."⁹⁷ Therefore, in a controversial opinion, which attempted to limit the scope of the *SPA*, Judge McGonigal confronted popular authority and granted a writ of *habeas corpus*. The learned judge contended that:

The existence of multiple powers of arrest under the Act made the principle [a reasonableness of suspicion] all the more important, because different consequences followed from the different powers of arrest. He thought it to be a fundamental right of any arrested person to be informed as to which power of arrest was being exercised against him, in order that he may know what rights, if any, he had, and what opportunity, if any, to challenge the arrest.⁹⁸

This was one of only a few rare instances that courts granted a writ of *habeas corpus* within the period of mass arrest and internment.

⁹⁷ Boyle, 'Casenote', *supra* note 96, p. 338.

⁹⁸ *In re McElduff*, *supra* note 95, p. 23.

Another example of similar reasoning was captured in *Kelly v. Faulkner* (1973). The plaintiff, who was arrested during Operation Demetrius, was interned under the *SPA*. Again, however, at issue was the nature of unlawful arrest under regulation 11. Judge Gibson of the Queen's Bench Division argued in alignment with Judge McGonigal in *In re McElduff* that "there does not seem to me to be any obvious practical reason why the civil authority or arresting officer should not have made up his mind under which regulation he proposes to arrest a person or why when he does so he should not declare his reason."⁹⁹ As Irish legal scholar Brice Dickson points out, the only way of effectively challenging arrest and detention in a court was to show that the arrests were made in bad faith.¹⁰⁰ In essence, emergency or no emergency, a general standard must apply: civil authorities must be able to inform a person of why they are being arrested.

Ultimately, internment, for the purposes outlined by the government, was highly ineffective as the numbers of bombings, shootings and deaths from August 1971 to December 1971 (the internment campaign) far exceeded those recorded from January to July of that year.¹⁰¹ In a time of crisis, a time in which judicial deference to executive authorities was the popular culture, Judges McGonigal and Gibson demonstrated an appetite to confront the ambiguities of the active emergency legislation.

B. Diplock Report: Intimidation, Juryless Courts and the Abrogation of Due Process

On 30 March 1972, Northern Ireland, now under direct rule from Westminster, decided to disband internment without trial. This shift, suggested Allen Feldman,

⁹⁹ *Kelly v. Faulkner and Others* (1973) NI 31, p. 4.

¹⁰⁰ Dickson, 'Detention of Suspected Terrorists', *supra* note 91, p. 933.

¹⁰¹ *Ireland v. UK*, *supra* note 89, para. 44.

constituted the “reorganization of the judicial system into a counter-insurgency apparatus.”¹⁰² With the aim to curb violent civil unrest and restore peace and order, the 1972 Diplock Report explained the political and legal motivations for adopting a new legal framework:

We are thus driven inescapably to the conclusion that until the current terrorism by the extremist organisations of both factions in Northern Ireland can be eradicated, there will continue to be some dangerous terrorists against whom it will not be possible to obtain convictions by any form of criminal trial which we regard as appropriate to a court of law [. . .] We are also driven inescapably to the conclusion that so long as these remain at liberty to operate in Northern Ireland, it will not be possible to find witnesses prepared to testify against them in the criminal courts, except those serving in the army or the police, for whom effective protection can be provided [. . .] The only hope of restoring the efficiency of criminal courts of law in Northern Ireland to deal with terrorist crimes is by using an extra-judicial process to deprive of their ability to operate in Northern Ireland, those terrorists whose activities result in the intimidation of witnesses [and jurors].¹⁰³

The government’s response to the national security crisis was to change the basic legal rules and establish new rules that favourably regulated the administration of the criminal justice system for the purposes of the government. Put simply, the conclusions drawn by the judge-led Commission implied that concerns about the effectiveness of arrest, detention and conviction prevailed over concerns about the rule of law.

In this next section, I explore first the extent to which anxieties about intimidation and fear impacted the Diplock Commission and led to the structural shift in how the government responded to terrorist activities. And second, I examine how the

¹⁰² Allen Feldman, *Formations of Violence: The Narrative of the Body and Political Terror in Northern Ireland*. University of Chicago Press, 1991, p. 86-87.

¹⁰³ Lord Kenneth Diplock, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*. Cmnd. 5185 (1972), London: HMSO, para. 27. [Thereafter: ‘The Diplock Report’]

reconstitution of the judicial function, in the wake of the Report's recommendation to abolish juries caused significant challenges to the rules of due process of evidence concerning the vetting and admissibility of confessions. I argue that the fallibility of the trial judges contributed to the further erosion of the rule of law, and entrenched a sense of uncertainty into an already turbulent criminal justice system.

As we have seen, such intimidation in Ireland long preceded the 'Troubles.' In the late 19th century an Irish American newspaper entitled *Irish World* published an article that challenged the traditional judicial process: "I dare them to convict."¹⁰⁴ By the 1970s, these words strongly resonated with the volatile political and legal context of the day. The implications of merely participating in a terrorism-based criminal trial jury had grave consequences. In an attempt to address this problem, Lord Kenneth Diplock, in 1973, proposed the Northern Ireland Emergency Provisions Bill and explained that "people in Northern Ireland [. . .] live in close-knit communities [. . . some] are dominated by members of paramilitary organisations. This increases the risk of intimidation. It also creates a fear of intimidation that can be just as damaging."¹⁰⁵ Due to geographical locale and proximity of suspecting neighbours, the people of Northern Ireland, especially, were susceptible to the threat of violence. The reality was jurors were being intimidated, jurors and potential jurors were prone to communal prejudices resulting in convictions—and even more problematic—acquittals.¹⁰⁶

¹⁰⁴ Laura K. Donohue, (2007) "Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law," 59 *Stanford Law Review*, p. 1324. [Hereafter: Donohue, "Terrorism and Trial by Jury"]

¹⁰⁵ *Ibid.*, p. 1328.

¹⁰⁶ D. S. Greer, (1980) "The Admissibility of Confessions under the Northern Ireland (Emergency Provisions) Act," 31.3 *Northern Ireland Legal Quarterly*, p. 207.

Lord Diplock's Bill stemmed from the Diplock Commission and subsequent report. The Commission was appointed to consider legal procedures to deal with terrorist activities in Northern Ireland without the use of internment. The Diplock Report was an assessment of the legal situation and a series of recommendation detailing reforms to legal procedure, courts, the administration of criminal justice, due process and emergency law. Among the new recommendations were changes to the standards of the admissibility of confessions, police detention powers, and most notably the Report recommended that the "trials of [certain] scheduled offences should be by a Judge of the High Court, or a County Court Judge, sitting alone with no jury, with the usual rights of appeal."¹⁰⁷ The Bill was quickly vetted by Parliament and soon after the majority of the recommendations were legislated into full force and effect in the 1973 *Northern Ireland (Emergency Provisions) Act (1973 EPA)*.

While the Act presented many controversial legal challenges to due process, the most significant, I argue, was the reconstitution of the role and function of the court. In abolishing the jury trial in terrorism cases, British authorities charged judges with the sole responsibility of determining the admissibility and then probative value of evidence. In essence, government appropriated the independence and autonomy of the judicial function. The rationale that grounded the Commission's interest in reforming standards of admissibility was that the rules and practices, the common law principles, inherent in the 'admissibility of inculpatory statements' as they were applied prior to the Diplock Court's introduction, "hamper[ed] the course of justice in the case of terrorist crimes and compel[ed] . . . authorities responsible for public order and safety to resort to detention in

¹⁰⁷ The Diplock Report, *supra* note 103, para. 7g.

a significant number of cases which could otherwise be dealt with both effectively and fairly by trial in a court of law.”¹⁰⁸

Moreover, while the Diplock Report recommendations centralized judicial power by eliminating juries, it also effectively limited the potency of the rules of evidence established to protect those accused in of terrorist activities. Diplock trial experts, Sean Doran and John Jackson, explain the difficult position of judges in the newly constituted Diplock Courts contending that:

[T]he absence of the jury, for example, arguably blurs the distinction between the admissibility of a confession heard in the *voir dire* and its weight in the trial proper because the same tribunal, the trial judge, determines both issues, with the consequent danger that the judge's consideration of the first issue will prejudice his or her views on the second.¹⁰⁹

In essence, the trier of law was the trier of fact. I examine the Northern Ireland Court of Appeal and House of Lords case *R. v. Brophy* (1981)¹¹⁰ to determine the extent to which this notion was problematic under the new emergency legislation.

Just as Judges McGonigal and Gibson pulled on the threads of common law principles on questions of arrest under special powers, the learned judge Lord Fraser of Tullybelton relied on common law principles that confessions must be first voluntary, and that second, the accused is not obliged to incriminate oneself.¹¹¹ In the context of the case, Brophy was indicted for murder and membership to the IRA. The only evidence

¹⁰⁸ J. J. Eisenhower, (1985) “Interrogation and the Admissibility of Confessions in Northern Ireland,” 1 *Temple International and Comparative Law Journal*, p. 20 fn. 142. [Hereafter: ‘Eisenhower, Admissibility of Confessions’]

¹⁰⁹ Doran, Sean and John Jackson, (1993) “Conventional Trials in Unconventional Times: The Diplock Court Experience,” 4.3 *Criminal Law Forum*, p. 508. [Hereafter: Doran and Jackson, ‘Conventional Trials’]

¹¹⁰ NI 79 (House of Lords)

¹¹¹ Doran, Sean and John Jackson, *Judge without Jury: Diplock Trials in the Adversary System*. Oxford: Clarendon Press, 1995, p. 73.

was a confession deemed inadmissible by the trial judge. However, through *voir dire* Brophy admitted to his membership in the IRA. In lieu of the inadmissible confession, his membership was admitted into evidence by the trial judge and he was convicted on that fact. On appeal, the House of Lords ruled that the trial judge erred and that common law principles of confession must be applied.

This case demonstrated that if the trial judge was the trier of law and fact, what resulted was the inability of the judge to ignore statements in *voir dire* that contravened the common law principles of confessions, and therefore exemplified the fallibility of the trial judge.¹¹² The Lord Chief Justice of the Criminal Court of Appeal addressed these difficulties in *R. v. Foxford* (1974); he explained the problematic tendency of judge's inability to ignore facts:

[if] inadmissible evidence is given and has to be ignored, the trained mind of a judge is less vulnerable to its harmful effects than that of a juror. This may not always be true when one considers that, if there is a jury, the judge assumes the duty of warning them as to what they may take into account, and that the content and significance of an irregularity may fade from the lay mind when it had ceased to be part of the case but stick firmly in the mind of the judge, who is trained to marshal and evaluate evidence.¹¹³

While the reconstitution of the judicial role and newly watered-down rules of evidence, especially in how they were interpreted in *voir dire*, presented difficulties when suspects voluntarily implicated themselves, the learned judges attempted to hold on to the fraying threads of the common law. However, in cases in which confessions were obtained through interrogation, the nature of the judicial response provided what was understood as significant latitude.

¹¹² John D. Jackson, *Northern Ireland Supplement to Cross on Evidence*. Belfast: SLS, 1983, p. 13.

¹¹³ *R. v. Foxford* (1974) NI 181 (Court of Criminal Appeal)

The aim here is not to problematize interrogation or its methods, but to highlight how judges exhibited deferential attitudes to the Crown when applying a common law standard in cases that clearly demonstrated breaches of human rights. In *R. v. McCormick* (1977), Judge McGonigal determined that the ‘torture, inhuman and degrading treatment’ threshold precluded ‘physical violence’ but that it did permit ‘moderate physical maltreatment for the purpose of inducing a person to make a confession’.¹¹⁴

The ambiguity of this judgement quickly provided for the reasoning applied in *R. v. McKearney* (1978), a case in which McKearney had been arrested and then interrogated 33 times in seven days. While confessions obtained over the course of the first 13 interrogations were held as inadmissible due to physical maltreatment, a confession obtained during interrogations 14 through 16, in which no maltreatment was alleged, was admitted into evidence.¹¹⁵ Despite a the pattern of abusive interrogation, the trial judge, Justice Murray argued that: “[E]ven if any conduct on the part of the detectives at any of the earlier interviews had created in the mind of the accused a fear or a sense of oppression, the time that had passed since those interviews [. . .] had completely dispatched any such fear or sense of oppression.”¹¹⁶

This was in stark contrast to the judicial practices regarding the admission of confessions in to evidence just a few years earlier, before the Diplock Report. In *R. v. Flynn and Leonard* (1972), the judge disregarded confessions made over a period of extended interrogation. The learned judge argued that the confession was the result of an “interrogation set up, officially organised and designed to get information from those

¹¹⁴ Walsh, *Bloody Sunday*, *supra* note 54, p. 259.

¹¹⁵ *Ibid.*, p. 260-61.

¹¹⁶ *Ibid.*, p. 261.

who would otherwise have been less willing to give it.”¹¹⁷ As a consequence of the reforms to due process, it seemed that the leeway afforded to police to obtain confessions by judges, who clearly breached the reasonable thresholds of ‘torture, inhuman and degrading treatment’ was evidence again of judicial deference to the government.

In sum, while internment policies were officially repealed in 1975, an increased pressure now rested upon police to obtain convictions through the new exceptional legal framework.¹¹⁸ However, the judicial response to the actions of the Royal Ulster Constabulary and military arguably legitimated practices of interrogation as the resulting confessions often held up in court. Judges became complicit in the sedimentizing of emergency power—the rule of law, as MP McMaster claimed, had broken down.¹¹⁹

C. The Diplock Regime: Rules of Evidence, Supergrass Trials and Judicial Uncertainty

Steven Greer has described the dilemmas of British judges during the ‘Troubles’ as a matter of choice: “between uncritical loyalty to counter-insurgency policy as conceived by the executive and loyalty to the Rule of Law.”¹²⁰ Despite the inherent difficulties of that choice, he also explained that, “opting for the latter was ultimately deemed to be necessary in order to limit the damage to the legal system and to reassert a much-compromised judicial independence.”¹²¹ In this final section, I examine the ‘supergrass’ trials as yet another example of how state security policy usurped traditional

¹¹⁷ Steven Greer, (1973) “Admissibility of Confessions and the Common Law in Times of Emergency,” 24 *Northern Ireland Legal Quarterly*, p. 202; and David Bonner, (1988) “Combating Terrorism: Supergrass Trials in Northern Ireland” 51.1 *The Modern Law Review*, p. 26 fn. 19. [Hereafter: Bonner, ‘Supergrass Trials’]

¹¹⁸ Eisenhower, Admissibility of Confessions’, *supra* note 108, p. 21.

¹¹⁹ MP McMaster, *supra* note 82.

¹²⁰ Steven Greer, “The Supergrass System” in A. Jennings, ed. *Justice under Fire: the Abuse of Civil Liberties in Northern Ireland*. London: Pluto, 1990, p. 93-4. [Hereafter: Greer, “The Supergrass System”]

¹²¹ *Ibid.*, p. 93-4.

common law principles of due process, and how while some judges struggled, others towed the line and convicted on the basis of uncorroborated evidence. As Paddy Hillyard argued in 1980, Diplock judges became acclimatized to the Diplock trials and conveyed an “increase[ed] readiness to accept the evidence of the police and security forces,” and in the ‘supergrass’ trials, any evidence that would assure a conviction, “in preference to that of the defendant.”¹²² The continuity of security legislation stemming from the Diplock Report including the 1973 *EPA* (updated and renewed in 1978), 1974 *Prevention of Terrorism (Temporary Provisions) Act* (1974 *PTA*) and the perpetually modified Police and Criminal Evidence Orders provided the exceptional legal framework of the supergrass trials.

The term ‘supergrass’ means someone who has participated in criminal activity, and agrees to both give information to the police and then testify against a number of alleged accomplices on a grand scale.¹²³ While it is not the aim of this section to trouble why these informants inform, it is the objective to examine the judicial interpretation of and response to the uncorroborated evidence presented by supergrasses in court. However, before the evidence is received in court it is first scrutinized by the Attorney-General to a standard which held: “where evidence of an accomplice appears to be credible and cogent and relates to serious terrorist crime, there is an overriding public interest in having charges brought before the court.”¹²⁴ Of course, in light of exceptional

¹²² Kevin Boyle, Tom Hadden and Paddy Boyle, *Ten Years On in Northern Ireland: The Legal Control of Political Violence*. London: Cobden Trust, 1980, p. 98; see also Doran and Jackson, ‘Conventional Trials’, *supra* note 109, p. 506.

¹²³ Bonner, ‘Supergrass Trials’, *supra* note 117, p. 23; and see generally, Greer, *Anti-terrorism Law Enforcement*, *supra* note 5.

¹²⁴ Bonner, ‘Supergrass Trials’, *supra* note 117, p. 37.

criminal law procedures of the day, this standard was more based a balance of probabilities than scrutinized for reasonable doubt.

In English law, the uncorroborated evidence of the supergrass was admissible in law. Therefore, it was the duty of the judge to warn and advise a jury about the dangers of uncorroborated evidence. In terms of due process, this was the guiding principle that protected defendants. In the Diplock Courts, however, the judge was without a jury, and had to warn himself of the dangers of uncorroborated evidence; the absurdity of this is captured by Hillyard and Percy-Smith: “. . . what sort of schizophrenia is required to argue with yourself on the basis of a self-inflicted warning.”¹²⁵ In attempting to uphold a threshold to which uncorroborated evidence could have been held, judges floundered.

For example, Lord Chief Justice Lowry, in *R. v. Gibney and Others* (1986)¹²⁶, a case concerning a range of serious charges, described supergrass witness McGrady and his evidence as “contradictory, bizarre and in some respects incredible . . . His manner of giving it was devious and deliberately vague.”¹²⁷ Yet, Justice Lowry accepted the evidence and convicted the defendant. In another case, Justice Murray rationalized his acceptance of one Bennett’s evidence, by first warning the court, that it must be careful of the *prima facie* acceptance of uncorroborated testimony from a witness subjected to extensive cross-examination, despite the fact that most interrogations in Northern Ireland

¹²⁵ Paddy Hillyard and Janie Percy-Smith, (1984) “Converting Terrorists: The Use of Supergrasses in Northern Ireland,” 11.3 *Journal of Law and Society*, p. 350. [Hereafter: Hillyard and Percy-Smith, ‘Converting Terrorists’]

¹²⁶ 4 N.I.J.B. 1 (N.I.C.A)

¹²⁷ Hillyard and Percy-Smith, ‘Converting Terrorists,’ *supra* note 125, p. 350

are for the same extensive period of time, and that almost always everything that is said is admissible.¹²⁸

Steven Greer argued that the initial success, notably the conviction rates, of the supergrass system were “underwritten by an uncritical judiciary,” but due largely to the legal mobilisation of appeals and anti-supergrass campaigns, a sweeping sense of judicial awareness arose about their complicity in the abuses.¹²⁹ By 1986, the supergrass system was disbanded. Its absence paved the way for new conviction-based policies such as drawing adverse inferences from an accused person’s silence.¹³⁰

In the end, while some judges attempted to apply common law principles to special powers and emergency law provisions, others argued for the right of *habeas corpus*, yet to the dismay of many, the House of Lords’ judges often deferred their authority to review to the executive and therefore frequently overturned the arguably more liberal judgments handed down in the Northern Ireland Court of Appeal.¹³¹

D. Conclusion: Legacies of Emergency Power and the Entrenchment of Temporary Measures

In a recent article, Thomas Poole suggests a very important and yet troubling question regarding the role of the judge in times of crisis. He asked: “what standard of deference—or ‘discretionary area of judgement’—ought to be accorded to the executive?”¹³² If judges *ought* to be deferential to government, then, the next pragmatic

¹²⁸ Hillyard and Percy-Smith, ‘Converting Terrorists,’ *supra* note 125, p. 351.

¹²⁹ Greer, “The Supergrass System”, *supra* note 120, p. 93-4; and see Richard Devlin, (1993) “The Rule of Law and the Politics of Fear: Reflections on Northern Ireland.” 4.2 *Law and Critique*, p. 162.

¹³⁰ K. A. Cavanaugh, (2002) “Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom,” 35 *Cornell International Law Journal*, p. 506-508.

¹³¹ Tom Hadden, (1991) “Judges’ Reputation in the Balance” 300 *Fortnight*, p. 6.

¹³² Thomas Poole, (2007) “Courts and Conditions of Uncertainty in ‘Times of Crisis’” LSE Law, Society and Economy Working Papers #7, London School of Economics, p. 3.

questions would be ‘to what extent?’ and ‘how is this standard of deference to be determined?’ While this vein of reasoning is subject to its criticism and certainly the subject of future research, it emphasizes the extent to which problematizing the role of the judge in times in crisis, both in historical and contemporary contexts, remains at the forefront of studies on legality, sovereignty and emergency.

The legacy of the Diplock Courts is significant. The juryless Courts were legislated into force in 1973, but not formally abolished until 2007.¹³³ And as Lisa Miriam Jacobs points out, the 2007 *Justice and Security (Northern Ireland) Act* still held the nuanced power to try cases in non-jury courts from July 2007 to July 2009 (during which time forty-one cases were tried under the Act).¹³⁴ The remnants of the Diplock regime are a lucid reminder of how emergency laws seeps into the ordinary legal system.

Finally, Laura K. Donohue, in her exhaustive study of emergency power and the rule of law in Northern Ireland, captures the reflective words of former U.K. Home Secretary Roy Jenkins in 1991 on the nature of ‘temporary emergency measures’:

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 [. . .] it should teach one to be careful about justifying something on the ground that it is only for a short time.¹³⁵

The Terrorism Act to which Jenkins refers to nearly twenty years later was the 1974 *PTA*, an Act which he reintroduced as a response to continued political violence in Northern Ireland.

¹³³ Donohue, “Terrorism and Trial by Jury”, *supra* note 104, p. 1328.

¹³⁴ Lisa Miriam Jacobs, (2010) “It’s Time to Leave the Troubles Behind: Northern Ireland Must Try Paramilitary Suspects by Jury Rather than in Diplock-type Courts.” 45 *Texas International Law Journal*, p. 661.

¹³⁵ Donohue, “Temporary Permanence”, *supra* note 12, p. 38.

Chapter 4 - The Canadian Experience: A Case Study of Judicial Tensions in Times of 'Apprehended' Security Threats

This chapter will map out a brief history of the legal and political dimensions of pre- and post-confederation peacetime security crises in Canada focusing on Quebec. The aim is to identify the extent to which temporary emergency measures have the tendency in this context to take on permanent characteristics within the Canadian legal system.

Part I - Canada: A Survey of Law, Politics and Crises in Quebec, 1837-1969

This survey addresses three illustrative crises. First, I will evaluate the legal and judicial responses to emergency powers during and after the 1837-8 Lower Canada Rebellions. These were informed in significant respect by responses to the 1798 Irish crisis. The peacetime imposition of martial law in Lower Canada presented a significant challenge to claims about the rule of law, accepted pre-confederation legal norms, colonial legislative autonomy and the emergence of responsible government.

Second, I will examine the 1945-6 Gouzenko Affair. This perceived crisis was the first peacetime enactment of the *War Measures Act*, legislation that granted far-reaching extra-ordinary powers to the executive. I submit that the Gouzenko Affair was a potent illustration of the dangers of extending and subsequently entrenching emergency power into a legal framework. And finally, I explore how the 1960s Quiet Revolution established a more politically sympathetic and socially responsive public in Quebec, a public which would engage the message of the *Front de Libération du Québec* (FLQ) to be active in the labour protests, resist classist oppression and engage in the struggle of the working class Quebecois. The political climate and social momentum of the 1960s in Quebec set the stage for the events of October 1970.

A. Lower Canada Rebellions, 1837-38

Franco-Anglo relations in pre-confederation Canada became similarly tumultuous to Ireland although there were also many differences between the two colonies. This relationship was characterized not only by a different language and religious conflict, but also differences in pre-constitutional legal system, notably the earlier termination of Catholic disabilities in Quebec. After 1774 francophone Catholics could hold office and government appointments. *The Quebec Act* established a legislative assembly, retained French civil law, and promised religious and language rights. In 1791 the *Constitutional Act* divided the former colony of Quebec into Upper and Lower Canada, but following the lead of the Catholic Church, there was little support for the French Revolution. Nonetheless, British fears of revolutionary conspiracies led to temporary suspensions of *habeas corpus* and other laws.¹³⁶ The growing disconnect between the *Canadien* Lower Canada society and emerging Anglophone political and economic dominance in the early nineteenth century played a significant part in mobilizing the *patriote* movement that fuelled the 1837-38 Lower Canada Rebellions.

The rebellions in Lower Canada are significant historical moments in the colonial legacy of French-English relations in the pre-confederation period. Pre-emptive martial law was enacted to suppress the first rebellion in 1837, while in 1838 during the second rebellion the Lower Canadian legislature and eventually the courts were suspended. As a

¹³⁶ Greenwood, 'Judges and Treason Law', *supra* note 6, p. 242-3; Jean-Marie Fecteau and Douglas Hay, "'Government by Will and Pleasure Instead of Law': Military Justice and the Legal System in Quebec, 1775-83," p. 146-8; Fecteau, Greenwood and Jean- Pierre Wallot, "Sir James Craig's 'Reign of Terror' and Its Impact on Emergency Powers in Lower Canada, 1810-13," p. 333-5, in Greenwood and Wright, eds., *Canadian State Trials I: Law, Politics, and Security Measures, 1608-1837*. University of Toronto Press: The Osgoode Society, 1996; also see generally Greenwood, *Legacies of Fear*, *supra* note 7.

result, rebels of the 1838 rebellion were tried by special courts martial and Quebec was governed by an appointed special council for an extended period after the crisis.

Jean-Marie Fecteau describes the nature of the government response to the uprisings in Lower Canada: “To a great extent, martial law was not a response to a real military threat. Rather, it proved a convenient means of dealing with political deadlock in the short term.”¹³⁷ Fecteau illustrates how the government intended to expediently abuse arbitrary political power. Furthermore, he describes the events leading up to the imposition of martial law explaining that the *patriotes* began mobilizing peasants in the summer of 1837, in certain areas the *patriotes* replaced the governing political and judicial influences with those more sympathetic to the movement.¹³⁸

The destabilized political and juridical control in those rural regions prompted Governor Gosford to believe in an impending uprising and therefore imposed martial law. Gosford was concerned with the “superseding of the ordinary administration of justice” and argued, albeit with some reluctance, as Fecteau pointed out, that “the tide of sedition cannot be stemmed but by resort to active military operations.”¹³⁹ In the end, the rebellion was not of any great threat to the landed gentry or political institutions in Lower Canada, but unfortunately it resulted in a series of repressive pre-emptive military actions and abuses of arbitrary power directed at quashing the “anticipated insurrection.”¹⁴⁰

¹³⁷ Jean-Marie Fecteau, “The Ultimate Resource: Martial Law and State Repression in Lower Canada, 1837-8” in F. Murray Greenwood and Barry Wright, eds. (2002) *Canadian State Trials II: Rebellion and Invasions in the Canadas, 1837-1839*. University of Toronto Press: The Osgoode Society, p. 216. [Hereafter: Fecteau, “The Ultimate Resource”]

¹³⁸ *Ibid.*, p. 215-21.

¹³⁹ *Ibid.*, p. 216-17.

¹⁴⁰ *Ibid.*, p. 216.

However, it is the aftermath of the 1837 rebellion that is significant, specifically the legal quagmire of how the government would establish a recognisable legal due process and then carry out the trials of all of the imprisoned *patriotes*, imprisoned under the authority of Governor Gosford's declaration of martial law. This question sparked a response from the British Parliament. The House of Lords dispatched Lord Durham to untangle the political and legal deadlock in Lower Canada. Fecteau argued that Lord Durham's time in Lower Canada between the rebellions proved to be more of the same; a continuation of arbitrary power. Lord Durham acted in the capacity of the most senior magistrate in Lower Canada. He issued a series of ordinances of exile to prisoners (known as the Bermuda Ordinance), but "even in openly dispensing clemency . . . [Lord Durham] resort[ed] to exceptional and arbitrary measures."¹⁴¹ Effectively, Durham had avoided regular legal procedure and exiled prisoners to a colony over which he had no jurisdiction.

Between the punitive ordinances and the generally exceptional breadth of Lord Durham's power, the bench, for the most part, remained quiet. One member of the bench, however, Judge Elzéar Bédard of the Court of King's Bench of Quebec confronted Lord Durham's ordinances in the case of a young imprisoned *patriote* named Firmin Moreau.¹⁴² In his dissenting opinion, Judge Bédard argued that the ordinances were invalid. He reasoned that "since [the ordinances] modified the British law on vagabonds, while the law creating the Special Council prohibited it from modifying laws passed by

¹⁴¹ Fecteau, "The Ultimate Resource", *supra* note 137, p. 223.

¹⁴² *Ibid.*, p. 226.

the British Parliament.”¹⁴³ This was a rare example of pre-confederation judicial confrontation with British imperial power in Lower Canada, an exception to the usual deferential judicial response to executive powers in Canadian history. It demonstrated a moment of resistance to the arbitrary ordinances of acting-magistrates, although the judge was eventually punished for his actions.

Lord Durham strongly criticised Bédard’s minority opinion, noting that to dissent from legislative authority narrowly limited effective legal process. The letter continued:

Mr. Bédard was fortunately overruled by the other judges, and no mischief resulted in the particular case before the courts; but that mischief has been done, which must result from the public declaration of the illegality of the acts of the only legislative authority in the country, on the part of one of the judges of the highest courts; whilst still greater mischief must result from this opinion being grounded on a view which restricts the legislative authority of the province within limits so absurdly narrow; and the greatest evil of all is, that . . . his opinion is unfortunately backed by those of many of the speakers in both Houses of Parliament, in the late debates on the ordinance.¹⁴⁴

The relationship between courts and the special legislative council during the rebellion was non-existent. It was a relationship of deference to the ruling arbitrary powers. Even more disconcerting was the consequences of Judge Bédard’s dissenting opinion, he was removed from the bench and the writs of *habeas corpus* he had granted were deemed illegal and void.¹⁴⁵ Along with Judge Bédard, two other colleagues, Justices Philippe Panet and Vallières de Saint-Réal, were also removed from the bench, although they were all eventually reinstated.¹⁴⁶

¹⁴³ Fecteau, “The Ultimate Resource”, *supra* note 137, p. 226.

¹⁴⁴ *Ibid.*, p. 227.

¹⁴⁵ Steven Watt, “Supporting Documents” in F. Murray Greenwood and Barry Wright, eds. (2002) *Canadian State Trials II: Rebellion and Invasions in the Canadas, 1837-1839*. University of Toronto Press: The Osgoode Society, p. 347-8 fn. 35 and p. 486.

¹⁴⁶ *Ibid.*, p. 486.

While the judicial consequences of dissent were notable, the rebels themselves faced more arbitrary measures similar to Ireland in the wake of the 1798 insurrection. As legislative power was consolidated in the hands of the executive, the representative branch was suspended and martial law extended the Special Council's powers to pass emergency measures and any other laws for the "peace, welfare and good government of the colony."¹⁴⁷ That being said, the second rebellion in early November 1838 was met with a swift response. An ordinance was passed to suppress the rebellion that permitted trials of civilians by court martial. Justice de Saint-Réal, a judge removed from the bench for his dissenting opinions during the 1837 rebellion, again spoke out as concerns about security seemed to blind the necessity of "respecting the law even when it runs counter to our desires and contradicts our opinion."¹⁴⁸

While a rule of law was alluded to by some judges, for the most part it was of no avail. The result of the 1838 rebellion held that civilians were to be tried by court martial, even though Justices Elzéar Bédard and Philippe Panet argued that suspending *habeas corpus* was *ultra vires* the power of the Special Council, as it was not empowered to amend criminal law.¹⁴⁹ By 1839, the initial temporary emergency powers of the Special Council were permanent.¹⁵⁰ This entrenchment emphasized the deeply rooted imperial legal culture perpetrated by British authorities in the Canadian colonies.

¹⁴⁷ Steven Watt, "State Trial by Legislature: The Special Council of Lower Canada, 1838-41" in F. Murray Greenwood and Barry Wright, eds. *Canadian State Trials II: Rebellion and Invasions in the Canadas, 1837-1839*. University of Toronto Press: The Osgoode Society, 2002, p. 252. [Hereafter: Watt, "State Trial by Legislature"]

¹⁴⁸ *Ibid.*, p. 258.

¹⁴⁹ F. Murray Greenwood, "The Montreal Court Martial, 1838-9: Legal and Constitutional Reflections" in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials II: Rebellion and Invasions in the Canadas, 1837-1839*. University of Toronto Press: The Osgoode Society, 2002, p. 326.

¹⁵⁰ Watt, "State Trial by Legislature", *supra* note 147, p. 262.

In sum, the Lower Canada rebellions are a strong example of how emergency power undermined not only judicial power, but also the more general common law principles. The initial emergency measures in 1837 set the scene for the legal responses in 1838 as the crisis continued, and eventually, as in Ireland, civilians were tried by courts martial. In Quebec, regular legislative authority was suspended, in this case, in the form of the executive Legislative Council which governed Lower Canada by executive decree until the restoration of a regular legislature in 1841.¹⁵¹

B. From Responsible Government to the Gouzenko Affair, 1945-46

There were many important developments in Quebec in the years that followed: union with Upper Canada and responsible government, confederation and the move from colonial to dominion status with increasing self-government, accommodation as well as the disappointment of francophone aspirations. Nationalist movements were sparked by events such as the 1885 execution of Louis Riel, and the 1917 and 1944 conscription crises, but were generally absorbed by political compromises and the cultural hegemony of the Church in Quebec, until the Quiet Revolution. National security measures were expanded during the world wars and the consequences were experienced in the years that followed, long after the war-time crises ended.

The outbreak of the First World War presented conditions for very significant legal developments. The war was perceived as presenting new challenges to post-confederation Canada's emergency preparedness that demanded more than traditional political offences set out in the Criminal Code (supplemented by the *Official Secrets Act*

¹⁵¹ Watt, "State Trial by Legislature", *supra* note 147, p. 248.

enacted shortly before the war), or even the longer-standing powers regulating military aid to the civil power (e.g., riot and national defence legislation). As an example, fears of Bolshevism stemming from the 1917 revolution in Russia during the latter years of the war urged lawmakers to reconsider aspects of the Code, namely provisions regarding unlawful associations. On 28 September 1918, the government passed a wartime order in council, which effectively outlawed a group of 14 political associations and unions.¹⁵² This order lasted all but two months as the war ended in November, however, in June of 1919, in the wake of the Winnipeg General Strike, legislators permanently codified the temporary wartime order and amended section 97 of the Criminal Code (which would become section 98) dealing with unlawful associations. Desmond Brown writes that the amendment revived the earlier draconian order and expanded its breadth to include ‘any association’ that advocated violence or was critical of the government.¹⁵³

Moreover, the newly legislated 1914 *War Measures Act*, largely based on the British 1914 *Defence of the Realm Act*, empowered the cabinet to pass executive emergency measures. It can be described as executive enabling legislation, by which parliament delegated to cabinet the power to issue orders in council, that, as Greenwood put it: “legislate[d] statutorily against enemy aliens, suspend *habeas corpus*, tighten treason [or] sedition laws and ban secret societies.”¹⁵⁴ Unlike the temporary *Defence of the Realm Act*, it was not a temporary act repealed at the end of the war. Revised in 1927,

¹⁵² Desmond Brown, *The Genesis of the Canadian Criminal Code of 1892*. Toronto: University of Toronto Press, 1989, p. 152-3.

¹⁵³ *Id.*

¹⁵⁴ F. Murray Greenwood, “The Drafting and Passage of the War Measures Act in 1914 and 1927: Object Lessons in the Need for Vigilance” in W. Wesley Pue and Barry Wright, eds. *Canadian Perspectives in Law and Society: Issues in Legal History*. Ottawa: Carleton University Press, 1988, p. 291-92. [Hereafter: Greenwood, “Drafting and Passage”]

to have potential peace-time application with the addition of a new category of emergencies called ‘apprehended insurrection,’ the *War Measures Act* was implemented again 1939 at the beginning of the Second World War, its most infamous impact being the indefinite detention of over 20,000 persons of Japanese ancestry. When the war ended in late summer of 1945, emergency executive orders issued as wartime emergency measures under the Act were scheduled to end.

However, before the *War Measures Act* ceased operation in late 1945, the Canadian Parliament passed the *National Emergency Transitional Powers Act (NETPA)*, which came into force on 1 January 1946. This Act continued some of the exceptional war-time measures under the *War Measures Act*, and justified doing so on the grounds that it would ensure an orderly transition from war to peace.¹⁵⁵ In legally constituting these wartime powers, the transitional legislation entrenched into the Canadian legal framework the powers that enabled the injustices of the Gouzenko Affair.

The context of the perceived crisis—the Gouzenko Affair and subsequent Taschereau-Kellock Royal Commission—was the politically tense post-war period. In early September of 1945, Igor Gouzenko, a cipher clerk at the Soviet embassy in Ottawa, provided the Canadian government and RCMP with information regarding a secret Soviet spy network in Canada.¹⁵⁶ Prime Minister King responded to this perceived crisis and on 6 October 1945, after consultations with Minister of Justice Louis St. Laurent and two other senior officials, he passed PC 6444 under the authority of the *War Measures Act*.¹⁵⁷

¹⁵⁵ Reference: *As To the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124, p. 133.

¹⁵⁶ Amy Knight, *How the Cold War Began*, Toronto: McClelland & Stewart Ltd., 2006, p. 11-12.

¹⁵⁷ Dominique Clément, (2000) “Spies, Lies, and a Commission: A Case Study in the mobilization of the Canadian Civil Liberties” 7:2 *Left History*, p. 54. [Hereafter: Clément, “Spies, Lies and a Commission”]

This order-in-council outlined that, “it is deemed necessary for the security, defence, peace, order and welfare of Canada that the Acting Prime Minister or the Minister of Justice should be authorized to order the detention of such persons . . . [and have them] deemed to be in legal custody.”¹⁵⁸ The order-in-council also suspended *habeas corpus* and provided a legal framework for indefinite detention.

As Canadian human rights historian Dominique Clément explains, “no judge in Canada or Britain had the authority to release a person detained under this order and the Minister was not required to explain or justify the detention of a suspect to anyone.”¹⁵⁹ Judges, interestingly, did not resist and in fact two senior judges of the Supreme Court of Canada abandoned any pretence of the separation of powers to collaborate in investigations under the *Official Secrets Act*. On 5 February 1946, Mackenzie-King’s government passed a second order-in-council, PC 411, establishing the Taschereau-Kellock Commission (The Espionage Commission). Further to my discussion about the nuances of the separation of powers in chapter 2, the appointment of Judges Taschereau and Kellock as commissioners disparaged notions of judicial independence as they participated as part of the prosecutorial investigations of the inquiry and then provided legal advice directly to the government.

While the Commission did not hold the authority to charge suspected persons, it solicited (under duress and threat of imprisonment) confessions from the persons of interest. This testimony, Clément explains, was then used to prosecute these suspects

¹⁵⁸ Order-in-Council PC 6444, 6 October 1945. National Archives of Canada. Available on Dominique Clément’s website at <<http://www.historyofrights.com/PDF/pc6444.pdf>>.

¹⁵⁹ Clément, “Spies, Lies and a Commission”, *supra* note 157, p. 54.

under the *Official Secrets Act*.¹⁶⁰ It included numerous espionage related offences and had a chilling effect on both government employees and the press on matters of sensitive government information. The *Official Secrets Act* (now called the *Security of Information Act* since the 2001 *Anti-Terrorism Act* amendments) has enormous potential for abuse of civil rights; yet at the time of the Gouzenko Affair only a lone Senator raised questions of abuses.¹⁶¹

Furthermore, Taschereau-Kellock Commission flagrantly neglected the 1927 *Canadian Evidence Act*, and held that evidence disclosed throughout the Commission (an inquiry panel outside of the jurisdiction of the criminal law, which therefore allowed the commissioner judges to interrogate suspected spies without any legal rights) did not require that there be any traditional legal protections including rights to counsel, against self-incrimination or due process of evidence. Further, persons of interest were threatened with contempt of court charges and jail terms of up to six months if they did not comply with testifying before the Commission.¹⁶²

Wilfrid Eggleston criticized how King's government handled the Gouzenko Affair highlighting a memorandum from the Emergency Committee for Civil Rights in Toronto that launched a substantive critique of the Taschereau-Kellock Commission. This memorandum challenged the process and result of the Commission. Specifically, I draw attention to the criticisms of the role and unilateral function of Supreme Court judges acting as commissioners throughout the Gouzenko Affair:

¹⁶⁰ Clément, "Spies, Lies and a Commission", *supra* note 157, p. 57 and 66; also see generally Professor Clément's website: <historyofrights.com>, it was a valuable archival sources on the Gouzenko Affair.

¹⁶¹ Wilfrid Eggleston, (1946) "The Report for the Royal Commission on Espionage" 53.3 *Queen's Quarterly*, p. 377. [Hereafter: Eggleston, "Royal Commission on Espionage"]

¹⁶² Dominique Clément, *Canadian Rights Revolution: Social Movements and Social Change, 1937-82*, Vancouver: UBC Press, 2009, p. 44. [Hereafter: Clément, *Canadian Rights Revolution*]

The commissioners and their council say in the Report that their findings remain valid no matter what any court says about them, *that the Report is not subject to review or appeal by any court, and that they are not subordinate to anybody!* By their failure to maintain a judicial point of view, their assumptions of infallibility, and their display of political prejudice, the Commissioners have brought into disrepute the Supreme Court of Canada.¹⁶³

Ultimately, as Professor Clément points out, “judicial decisions in the spy trials reflected a clear deference to Parliament and the inherent limitations of the courts to act as a forum for the defence of individual rights.”¹⁶⁴ The Gouzenko Affair illustrated how an extension of temporary emergency powers coupled with a passive judiciary results in a circumvention of the rule of law.

C. Quiet Revolution, 1963-69

The narrative of government responses to domestic crisis in Canada is punctuated by three distinguishable time frames: (1) pre-confederation (focusing predominantly on martial law); (2) post-confederation but pre-1960 civil rights movement (direct government action to suppress dissent); and (3) the post-1960 era of social mobility and civil liberties movements. The context of the latter time frame is central to a discussion of the event of October 1970. By placing these events into the broader social and political milieu of Quebec in the 1960s, including the formation of the *Front de Libération du Québec* (FLQ), civil and labour rights demonstrations and the socioeconomic struggle of the Quebecois, I engage with the rich history of a concerted nationalist movement in a province immersed and divided along language, social and cultural lines.

¹⁶³ Eggleston, “Royal Commission on Espionage”, *supra* note 161, p. 377. Emphasis my own.

¹⁶⁴ Clément, *Canadian Rights Revolution*, *supra* note 162, p. 46.

In the summer election of 1960, Jean Lesage and the Quebec Liberals defeated the long reigning Union Nationale. This election victory marked a shift in the social, political and economic climate of Quebec. A socio-economic awakening was catalyzed by the downfall of the Catholic Church and the Duplessis government, as Quebecers benefitted from the nationalizing of Quebec Hydro and the emergence of publicly operated education and healthcare system. Through the 1960s, in what became known as the Quiet Revolution in Quebec, a mobilised working class became a visible symbol of an engaged nationalist Francophone population. Dominique Clément describes the Quiet Revolution as a time of flourishing mobility and organization. Radicals, religious minorities, women, gays, lesbians, students, unions, aboriginal and others came together in social movements in unprecedented numbers.¹⁶⁵

However, between 1963 and 1965, smaller more politically concentrated nationalist and insurrectionist groups such as the *Front de Libération du Québec*, *Rassemblement pour L'Indépendance Nationale*, *L'Armée Révolutionnaire du Québec* and the *Réseau de Resistance* emerged and violently marked their resistance. By 1965, political organizers Pierre Vallières and Charles Gagnon amalgamated their own Popular Liberation Movement with *Front de Libération du Québec*, thus consolidating efforts of violent resistance directed at objects of British imperial oppression including the bombing of post boxes.

In 1966 Vallières was imprisoned for manslaughter stemming from the death of Theresa Morin during a bombing at a shoe factory, while in prison he wrote a manifesto

¹⁶⁵ Dominique Clément, (2008) "The October Crisis of 1970: Human Rights Abuses under the War Measures Act," 42.2 *Journal of Canadian Studies*, p. 162. [Hereafter: Clément, 'The October Crisis of 1970']

of the movement—*Nègres Blancs d'Amérique* (1968). This study of the ethnic, cultural and social plight of the Quebecois developed an anti-colonial 'call to arms' comparing Quebec with the struggles of African Americans south of the border.

FLQ violence escalated to include bank robberies, weapon theft, and bombing campaigns directed at Federal government building using dynamite stolen from construction sites. At its height in 1969, before the October Crisis, a young FLQ member bombed the Montreal Stock Exchange injuring twenty people. Pierre-Paul Geoffroy was sentenced by Judge André Fabien to 124 life sentences—the longest prison sentence in the history of the Commonwealth.¹⁶⁶

Finally, I point to historian William Tetley's reflections on a series of significant socio-political demonstrations that symbolized the frustrations of a divided province. In response to the 1966 make-an-example jailing of Vallières, 2 000 people marched in protest; this demonstration ended in violence and vandalism.¹⁶⁷ The taxi strike of 1968, organized by the *Mouvement de Liberation du Taxi* (MLT) resulted in violence and vandalism, while another taxi strike a year later resulted in the army being dispatched and the death of a police officer. As widespread protest erupted in response to new Union Nationale language laws, the Anglophone French-speaking Trudeau soon became the target of Quebecers' demonstrations. The divided society in Montreal and Quebec at large in the 1960s, simply exacerbated tensions between radical groups such as the FLQ and police, and inevitably would set the tone for the events of October 1970.¹⁶⁸

¹⁶⁶ Clemént, 'The October Crisis of 1970', *supra* note 165, p. 164.

¹⁶⁷ William Tetley, *The October Crisis, 1970: An Insider's View*. Montreal: McGill-Queen's University Press, 2006, p. 68-9.

¹⁶⁸ Clemént, 'The October Crisis of 1970', *supra* note 165, p. 165.

D. Conclusion

In sum, while executive responses to perceived security threats have historically followed a pattern of decisive action resulting in the suppression of civil rights and freedoms of speech, the social and legal climate from which the October Crisis emerged demonstrated that calling executive power into account was no easy task. In an effort to illustrate the legal discussion embedded in the political and social rhetoric of the October Crisis, I analyse a series of pertinent cases including the manslaughter conviction and appeal of FLQ founder Pierre Vallières in *R. v. Vallières* (1969), the constitutional challenge of temporary emergency powers in *Gagnon and Vallières v. The Queen* (1971) and the infamous seditious conspiracy charges, which resulted in the controversy case known as the ‘Trial of the Five’.

The abovementioned case law provides a relevant entrance point into the underpinning themes of the October Crisis, and although the practice of resistance was largely met by judicial deference, this study aims to both shed light on those judges who confronted executive authority and assess the persistent patterns of judicial deference that emerges within a Canadian legal history of peacetime domestic security threats.

Part II - Quebec: The October Crisis, Emergency Measures and Legal Responses, 1969-72

“The judiciary was reduced to the role of timekeeper, keeping track of who attended what meetings and spoke or communicated what statements on behalf of an association.”¹⁶⁹

Literature on the 1970 October Crisis has emphasized many of the contested political motivations and justifications for the enabling of the *War Measures Act (WMA)*.

¹⁶⁹ J.N. Lyon, (1972) “Constitutional Validity of Section 3 and 4 of the Public Order Regulation, 1970,” 18 McGill Law Journal, p. 140. [Hereafter: Lyon, “Constitutional Validity”]

While the political and social contexts of that fateful October have received much attention, little writing, in English, is dedicated to the role and function of the Quebec judiciary during and after the crisis. The focus here is the legal response of a group of Quebec judges who presided over the majority of the case law both before and through the aftermath of the October Crisis. As a base for this case study, I begin with the 1966 death of Theresa Morin and the resulting manslaughter trial and conviction of Pierre Vallières. This case provides the legal impetus for an investigation into the judicial responses to the FLQ's political violence.

R. v. Vallières is my starting point because it represents one of the first political trials that resulted from the Quiet Revolution and early FLQ activities.¹⁷⁰ FLQ bombings had claimed earlier casualties, but the death of Ms. Morin resulting from the 5 May 1966 bombing of H.B. LaGrenade Ltd. shoe factory in Montreal was the first time in which the Crown attempted to connect an act of violence back to the organizers of the FLQ resistance group. The charge laid against Vallières was that he “unlawfully counselled, or incited, or encouraged through his attitudes, actions, writings, or otherwise, the *intent* to explo[de] a bomb . . . Pierre Vallières unlawfully, and without colour of right, caused the death of Mademoiselle Therese Morin, thereby committing murder.”¹⁷¹

¹⁷⁰ Otto Kirchheimer defines ‘political trials’ as falling into three categories: (1) the prosecution for political offences (i.e. treason); (2) for more routine offences with political purposes in mind or ‘substitute political trials’; or (3) crimes committed for political purposes. I submit that the Vallières manslaughter trial was a ‘substitute political trial’ as the Crown, determined to end the mounting FLQ violence, tried to indirectly connect the FLQ founder to the death of Ms. Morin. See Susan Binnie and Barry Wright, “Introduction: From State Trials to National Security Measures” in Barry Wright and Susan Binnie, eds. *Canadian State Trials III: Political Trials and Security Measures, 1840-1914*. University of Toronto: The Osgoode Society for Canadian Legal History, 2009, p. 27, fn. 15; and also see Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political End*. Princeton University Press, 1961, p. 46.

¹⁷¹ *R. v. Vallières* (1969) 9 C.R.N.S. 24, (1970) 4 C.C.C. 69 at 6. [Hereafter: *R. v. Vallières* (1969)]

In 1966, a jury convicted Vallières of manslaughter, however, on an appeal three years later (*R. v. Vallières*, 1969) Justice Hyde ordered a new trial. The successful appeal of the trial court judgement, beyond the doctrinal complexities of criminal counselling, evidence and instructions to the jury, ultimately rested, I argue, on an attempt to maintain at least the appearance of due process and legal order.

In the 1969 Vallières appeal case, despite major political tensions mounting over continued FLQ violence, the appeal judge emphasized the importance of maintaining the regular administration of criminal justice and adhering to due process, notably, how a judge is to inform and respond to questions from the jury. But, while this was the sentiment before the October 1970, judicial decisions made in the immediate aftermath of the Crisis were significantly different. The judicial approach to the criminal trials and constitutional challenges to the 1970 *POA* showed a much more deferential attitude to executive authorities in the subsequent trials of alleged FLQ members.

Accordingly, I divide this investigation into three parts: (1) I examine the Quebec Court of Appeal case of *R. v. Vallières* and consider how the responses to FLQ-related cases varied from before to after the October Crisis; (2) I survey the legal aftermath of the October Crisis, notably the Paul Rose murder trial and the seditious conspiracy charge against Michel Chartrand, Robert Lemieux, Pierre Vallières, Charles Gagnon and Jacques Larue-Langlois.¹⁷² The latter case became infamously known in Quebec as ‘*le Procès des Cinq*’ or the ‘Trial of the Five’¹⁷³; and (3) I assess the constitutional challenge launched in *Gagnon and Vallières v. The Queen*, a case in which the FLQ founders challenged the

¹⁷² Tetley, *The October Crisis, 1970*, *supra* note 167, Appendix E, p. 2-4. Available online: <<http://www.mcgill.ca/maritimelaw/crisis/>>.

¹⁷³ See generally, Michel Chartrand, et. al. *Le Procès des Cinq*. Ottawa: Éditions Libération, 1971.

validity and legality of the concepts such as the apprehended insurrection, and the provisions of the *WMA* and 1970 *POA*. This legal review contemplates the difficult positions of the presiding judges; I highlight the judgement of Justice Ouimet, who defied prosecutorial pressures in an effort to maintain a balanced and non-partisan trial in a climate of immense political and social pressure. The learned judge confronted executive authority and dismissed seditious conspiracy charges in the ‘Trial of the Five’.

In drawing together this body of case law in Quebec, this study identifies how common law principles such as *habeas corpus* remained, to an extent, tenable even in times of emergency. Furthermore, I emphasize parallels between the Canadian and Irish peacetime emergency experiences, particularly how judicial deference, despite notable exceptions, entrenched and in part legitimated emergency law and undermined the rule of law in Canadian legal history.

A. Before the Crisis: FLQ Violence, *R. v. Vallières* (1969) and the Quebec Court of Appeal

The October Crisis was a moment of transition in the relationship between Quebec and Canada. William Tetley contrasts the FLQ to the *patriotes* of Upper and Lower Canada Rebellions in 1837 and 1838 or Canadian activists at the time of Louis Riel in 1885. The FLQ employed guerrilla tactics, bombing mailboxes and the stock exchange, robbing banks, kidnapping and ‘executing’ a political hostage. “They rarely put themselves in physical danger.”¹⁷⁴ Tetley continues by mapping out the place of the FLQ in comparison with their revolutionary predecessors, “they had no social bill of rights for which they were fighting, unlike Papineau’s 12 Resolutions at St. Ours-Sur-

¹⁷⁴ Tetley, *The October Crisis, 1970*, *supra* note 167, Appendix Z, p. 35. Available online: <<http://www.mcgill.ca/maritimelaw/crisis/>>.

Richelieu on 7 May 1837 or Robert Nelson's Declaration of Independence of 28 February 1838 or Riel's "Revolutionary Bill of Rights" of 1885."¹⁷⁵ In sum, it was their exercise of clandestine resistance that pressed the Montreal authorities to connect the bombing of the LaGrenade shoe factory and the death of Thérèse Morin to one of the ideological theorist behind the FLQ movement—Pierre Vallières.

This section examines the case of *R. v. Vallières* (1969) as a notable example of judicial confrontation with an anxious executive authority. Most importantly, I highlight how Justice Hyde emphasized distinctions in the manner in which jurors are to be addressed, notably the implications of improper and inflammatory accusations by Crown counsel and their circumvention of the actual charges against the accused at trial. However, in the aftermath of the October Crisis, I observe, especially in the constitutional challenge in *Gagnon and Vallières v. The Queen*, a shift in the judicial attitude concerning FLQ-related cases. This shift, I contend, was a result of heavier government pressures on the judiciary prompted by emergency legislation.

The May 1966 bombing of the LaGrenade shoe factory resulted in one death and one conviction. Pierre Vallières was convicted of manslaughter 'with intent to explode' (the bomb which killed Thérèse Morin) by a jury in 1968 and consequently sentenced to life imprisonment. At trial, the Crown painted a horrific portrait of Vallières, as the terrorist mastermind who through his writing and activism was culpably connected to the death of Thérèse Morin.

¹⁷⁵ Tetley, *The October Crisis, 1970*, *supra* note 167, Appendix Z, p. 35. Available online: <<http://www.mcgill.ca/maritimelaw/crisis/>>.

The trial judge, however, attempted to distinguish for the jury who Vallières was and what he stood for from the events that happened on 5 May 1966,

[. . .] whether the accused was or is merely a theorist, a writer, a professor, a disseminator of sociological, political, or other ideas, a thinker or even an F.L.Q. or other revolutionary, whether or not he favoured or still favours violence, and even if he swore that he was ready to set fire to and to sack everything which displeased him in Quebec society, all that, in principle, and emphasize in principle, would not necessarily mean that he had participated in the placing and exploding of the terrorist bomb at the LaGrenade factory [. . .]¹⁷⁶

In briefing the criminal trial jury, the trial judge attempted to make the distinction between the facts that while in practice Pierre Vallières advocated violence, terrorism and the sabotage of the existing legal and state order, it did not necessarily mean that he was a party to this particular bombing, which resulted in a death.

This was no trivial point, to connect the two, may for some achieve a desirable outcome—that is the imprisonment of Mr. Vallières—however to proceed in such a way would have undermined the traditional common law principles of a right to a defence grounded upon the due process of evidence. Crown counsel, in an attempt to persuade the jury during his final statement made this connection at the initial trial, he stated, “. . . free Vallières and you know what to expect.”¹⁷⁷ This summed up all the trial evidence into one idea: Vallières was a terrorist and must be convicted. The jury found him guilty.

On appeal in 1969, Justice Hyde had two problems with the trial judgement: (1) he argued that Crown counsel’s final statement had misled the jury about the facts of the case; and (2) he found that the trial judge had also misled the jury with regard to the reference to the location of the bombing in the trial charge. First, Judge Hyde determined

¹⁷⁶ *R. v. Vallières* (1969), *supra* note 171 at 18.

¹⁷⁷ *Ibid.*, at 21.

that Crown counsel did not respect the distinctions regarding the evidence laid out by the trial judge nor did he respect his duties and responsibilities as a Crown counsel. With reference to the Supreme Court of Canada case *Boucher v. The Queen* (1955) concerning the common law responsibilities of a Crown prosecutor in criminal law proceedings, Justice Hyde pointed to the dissenting opinion of Justice Taschereau (the same judge who in 1946 undermined civil liberties in his role as commissioner of the Espionage Commission during the Gouzenko Affair) who held that:

The task of counsel for the Crown is not the same as the one facing counsel in civil matters. His functions are quasi-judicial. He should not be so concerned with obtaining a conviction as he should be with assisting the judge and the jury to reach a most completely just result. Moderation and impartiality must always characterize his conduct before the Court.¹⁷⁸

Put simply, the role of Crown counsel in a criminal trial is to present a balanced case that is grounded in evidence and not in emotion or shock.

Second, during the jury deliberation in the initial trial, one of the jurors asked the trial judge a question pertaining to the relevance of the location of the factory to the charges of inciting or counselling the explosion.¹⁷⁹ The trial judge replied that the location of the factory merely indicated the general geographic locale of the event. However, the appeal judges found this to be problematic as the specific location of the bombing as it pertained to the charge was quite relevant. The charge held Vallières had the ‘intent to explode’ a bomb at LaGrenade factory, *not* just generally. Thus, for the trial judge to advise the jury that location of the bombing does not particularly matter was to mislead the jury as to the connections between the language of the charge and the

¹⁷⁸ *Boucher v. The Queen*, (1955) S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263, at 6.

¹⁷⁹ *R. v. Vallières* (1969), *supra* note 171, at 22 and 23.

particularities of the evidence.¹⁸⁰ All of the appeal judges concurred with Justice Hyde and concluded that a new trial was in order.

Moreover, concurring appeal judge, Justice Montgomery, remarked that the trial judge warned the jury that “this was not a political trial but he did so in terms scarcely favourable to the accused.”¹⁸¹ Even the trial judge was barely non-partisan to the Crown’s case. Despite this effort, this case was above all a political trial. I point to Kirchheimer’s notion of the ‘substitute political trial’ and emphasize that indeed the Crown attempted to make a direct connection between Vallières and the FLQ bombings (a series of ordinary criminal offences) with only circumstantial evidence, and did so in an effort to destabilize the FLQ and quash existing radical sentiments.

In the end, the attention paid to procedural fairness by the Quebec Court of Appeal, notably to specific problems regarding evidence and the jury charge, indicated that although the climate in Montreal in the late 1960s was politically tense and pressure from the Quebec government to quash FLQ violence (for which Vallières advocated) was ever-present, the judiciary at least maintained the perception of procedural legal rights. But, as I will discuss in the following sections, while this may have been the case before the October Crisis, FLQ-related cases after the October Crisis were approached with much more apprehension and deference to the government.

B. October Crisis: Conspiracy Trials, Confrontation and the Administration of Justice

On 5 October 1970, British Trade Commissioner James Cross was kidnapped by five members of the FLQ’s Liberation Cell. Days later on 10 October 1970 Quebec’s

¹⁸⁰ *R. v. Vallières* (1969), *supra* note 171, at 26 and 27.

¹⁸¹ *Ibid.*, at 43.

Minister of Labour, Pierre Laporte, was kidnapped from his own front lawn. By October 15, Quebec Premier Robert Bourassa together with the city of Montreal, including Mayor Jean Drapeau, engaged federal assistance and called for an aid to civil power as a heightened security measure in the wake of fretful negotiations with the FLQ kidnapers. Through the authority granted by the *National Defence Act*, Trudeau deployed the Canadian military in Montreal and Ottawa to enhance security, particularly around government offices and the private residences of elected officials. However, in a response to continued pressure on the state and mounting public safety concerns, Prime Minister Trudeau on 16 October enabled the 1970 *WMA* at 4 A.M. This was the Act's first direct peacetime application in Canadian history (continuation of war-time measures in 1918-9 and 1945-6 was through separate transition legislation).

The emergency orders issued under the *WMA* under the category of 'apprehended insurrection' (added as a second category to war emergencies through revisions to the Act in 1927) gave the government special powers of arrest and internment that by-passed regular legal protections and long-standing civil liberties. These powers were applied liberally as Montreal police arrested and charged several FLQ members including Paul and Jacques Rose, Francis Simard and Bernard Lortie for the kidnapping and murder of Pierre Laporte. Others, including Michel Chartrand, Robert Lemieux, Pierre Vallières, Charles Gagnon and Jacques Larue-Langlois were arrested and charged with seditious conspiracy and membership to the FLQ under the 1970 *POA*. As such, this section analyzes judicial responses to a series of post-October Crisis criminal law cases including

the very public Paul Rose murder trial and the infamous ‘Trial of the Five’, and further provides an often overlooked intervention into the legal dimensions of the October Crisis.

On 13 March 1971, FLQ organizer Paul Rose was convicted of the murder of Quebec Labour Minister Pierre Laporte. The trial itself was a political climax for Rose, who defended himself for the better part of the proceedings. In his closing remarks, Rose simply reiterated his perceptions of the legal institution within which he was being tried, stating, “And I tell you right away that in a sense your verdict has practically no importance.”¹⁸² As well, he criticized the ‘jury of his peers’ that sat before him, he argued that his peers were the “workers, the guys from St. Henry, the guys of the Quebec people and not engineers and businessmen.”¹⁸³ This disregard for the legal system echoed the post-colonial and revolutionary FLQ rhetoric upon which the organization was founded.

However, despite the political nature of the trial, two relevant legal complications are of note. First, over the course of his own trial, Rose was charged 7 times with contempt of court and therefore spent a large part of his trial outside of the court room.¹⁸⁴ On appeal, Rose challenged the trial judge’s liberal application of the contempt of court charge on the grounds that he was unable to participate fully in his own defence, but this petition was to no effect.

Furthermore, on 8 March 1971 the Crown entered into evidence “an unsigned statement that Rose had recently made before two police officers, to the effect that Francis Simard and the Rose brothers were present during the execution of Pierre

¹⁸² Robert Comeau, D. Cooper, and P. Vallières, eds., *FLQ: A Revolutionary Project*. Translated by Mitch Abidor. Montreal: Éditeur, Montreal, 1999, p. 249.

¹⁸³ José M. Rico, (1980) “Les événements d’Octobre 1970 et l’administration de la justice pénale au Québec,” 13. 2, *Criminologie*, p. 39. [Hereafter: Rico, “Administration of Justice”]

¹⁸⁴ *Ibid.*, p. 40.

Laporte: ‘Two of us held him while the other clutched the chain he wore around his neck.’”¹⁸⁵ Without being appropriately vetted in a *voir dire* hearing this confession promulgated media frenzy and as Rose attempted to argue in his appeal case, the public knowledge of this evidence unduly influenced the jurors, who five days later convicted him of murder. Judges at the Quebec Court of Appeal, without much discussion dismissed the petition, in part, because Rose took the opportunity of his appeal trial to further expand his vision of justice in Quebecois society.¹⁸⁶ Consequently, the initial conviction and sentence of life imprisonment was upheld and in the end Paul Rose served nearly twelve years in prison.

The ‘Trial of the Five’ commenced on 1 February 1971 and was a spectacle from the beginning. Similarly to the Rose trial the defendants defended themselves, with the exception of Jacques Larue-Langlois. Early into the twelve day proceeding, Charles Gagnon and Pierre Vallières challenged the court and the judge, and asked Justice Ouimet to recuse himself on the grounds that he could not be impartial, Vallières contended, “But, Mr. J. Ouimet, the impression I have is I do not find myself before a court but before a political party and those who judge me today [are] the Liberals, Liberal Party members.”¹⁸⁷ Justice Ouimet refused to recuse himself.

Even before the trial, on 14 January 1971, ‘The Five’ applied for a writ of *habeas corpus* and petitioned that the emergency law under which they had been charged was unconstitutional, and therefore they had been illegally detained and should be

¹⁸⁵ Manon Leroux, *Les Silences D’Octobre: Les Discours Des Acteurs de la Crise de 1970*. Montreal: VLB Éditeur, 2002, p. 20. [Hereafter: Leroux, *Les Silences*]; and Tetley, *October Crisis, supra* note 167, Appendix E, p. 2. Available online: <<http://www.mcgill.ca/maritimelaw/crisis/>>.

¹⁸⁶ Leroux, *Les Silences, supra* note 185, p. 21.

¹⁸⁷ Michel Chartrand, et. al. (1971) *Le Procès des Cinq*, Ottawa: Éditions Libération, p. 49.

immediately released.¹⁸⁸ While this *habeas corpus* petition was denied, Gagnon and Vallières pursued further legal action and challenged the constitutionality of the laws at issue. I address that challenge in the third part of this section.

Moreover, as the conspiracy trial continued, ‘The Five’ maintained that: The Government of Canada had acted illegally on 16 October by enabling the *WMA*. In the end, on 12 February 1971, due to a lack of evidence and the inconsistent and ambiguous nature of the charge Judge Jean Ouimet dismissed the charge of seditious conspiracy because it was “too vague, and therefore unfair to the accused.”¹⁸⁹ With respect to this judgement, William Tetley, in an appendix of his recent book, makes only a cursory reference to Judge Ouimet’s dismissal of the conspiracy charge noting that it was dismissed on a “technicality.”¹⁹⁰ However, I contend that Tetley made light of this decision to dismiss the charge. Take into consideration the immense political pressure to prosecute after the October Crisis. This pressure was illustrated by the facts that almost immediately after the 12 February judgement, ‘The Five’, on 10 March, were again charged with conspiracy.¹⁹¹ Ultimately, ‘The Five’ were acquitted of the subsequent conspiracy charges.

In times of crisis, the usual judicial attitude, as suggested in the previous chapters and as will be shown in the response by the Quebec Court of Appeal in *Gagnon and Vallières v. The Queen* in the next section was one of deference to executive authority. However, as also suggested by other historical examples surveyed to this point, there are

¹⁸⁸ Leroux, *Les Silences*, *supra* note 185, p. 28.

¹⁸⁹ *Ibid.*, p. 29.

¹⁹⁰ Tetley, *October Crisis*, *supra* note 167, Appendix E, p. 2. Available online: <<http://www.mcgill.ca/maritimelaw/crisis/>>.

¹⁹¹ *Ibid.*, p. 3.

important exceptions to the general pattern of judicial deference. Justice Jean Ouimet, I argue, is ironically characterized as a partisan Liberal judge who derogated from the rule of law in much of the literature written and contributed by former FLQ members, sympathizers and academics such as José Rico and Simon Tessier.¹⁹² While certain aspects of this critique are perhaps well-founded, the historical narrative of the October Crisis must recognize that he confronted executive pressures and dismissed the prosecutor's charges. Just as Judge Elzéar Bédard granted writs of *habeas corpus* against the wishes of the British authorities in 1837, Quebec criminal trial judge, Justice Jean Ouimet, dismissed the ambitious seditious conspiracy charges in the 'Trial of the Five'.

Such ambiguities were also the substance of the challenges launched against the constitutionality of the emergency laws in *Gagnon and Vallières v. The Queen*; however, in that challenge case the Quebec Court of Appeal deferred their ability to judicially define or review back to the government. It is for this reason that I highlight the significance of the dismissal judgement in the 'Trial of the Five', as it reflects the propensity of judges to confront rather than defer on matters of national security, especially in times of legislated emergency.¹⁹³

C. Constitutionality and Crisis: *Public Order Act*, Insurrection and Judicial Deference

The Trudeau government, in response to the growing fear of FLQ violence, had justified enabling the *WMA* by arguing that there were no alternatives and what was

¹⁹² Rico, "Administration of Justice", *supra* note 183, p. 42-3; and Simon Tessier, (2007) "État D'Exception et Crise De Légitimité: Une Analyse Politique des Évènements D'Octobre 1970." MA Thesis, Université Du Québec à Montréal, p. 38, fn. 138.

¹⁹³ Note that Judge Ouimet's decision came on 12 February 1971, while the emergency provisions in Canada were not rescinded until 30 April 1971. The learned judge's judgement came in a time of active legislated emergency.

underway was clearly a situation of ‘apprehended insurrection’ as anticipated by the legislation. This category of emergency, added as part of the Act’s 1927 revisions, was defined in section two, which read:

The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or *insurrection, real or apprehended*, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.¹⁹⁴

Section two of the Act gave Parliament the authority to legislate a state of emergency. In this part, I focus on two problems ensuing from this legislation: (1) the political and legal implications of renewable ‘temporary emergency measures’ and the impact of this emergency legislation on the rule of law; and (2) the ambiguities of the *WMA*, particularly the term ‘apprehended insurrection’, which established the legal framework of the 1970 *POA*. This was an ambiguity that judges had the opportunity to resolve in court. With these two problems in mind, I analyze the constitutional challenge launched in *Gagnon and Vallières v. The Queen* as a reflection of how after the Crisis there lacked the judicial appetite to defy the executive on matters of national security.

An apprehended insurrection gives the government the authority to take action ‘until by the issue of a further proclamation’. For example, in 1945 that ‘further proclamation’ was the 1946 *NETPA* and the following year it was the 1947 *Continuation of Transitional Measures Act*, both continued war-like abuses of civil rights during

¹⁹⁴ *War Measures Act*, R.S.C. 1970, Section 2. Emphasis is my own, the non-definition of ‘apprehended insurrection’ resulted in difficulties both in court and Parliament, mostly in discussions of the lack of justifiable evidence and questions of constitutionality.

peacetime.¹⁹⁵ Similarly, on 2 November 1970, when Parliament tabled the *POA* for debate there was many criticisms as to the ‘temporary’ nature of the Act’s power. But, after a month of deliberation it came into force on 1 December 1970, effectively replacing the *WMA* and other public order regulations. Similarly to the legislation in the late 1940s, it would maintain emergency powers well into the next year (it was scheduled to be repealed on 31 December 1971, although it held the potential to be renewed). The new ‘temporary measures’ Act retroactively criminalized membership to the FLQ and targeted those associated with this group with other ‘seditious intentions’ offences.¹⁹⁶

This continuation of emergency powers into peacetimes by Prime Minister Trudeau’s government was comparable to Prime Minister King’s enactment of the 1946 *NETPA*. These similarities are indicative of an historical trend in executive responses to domestic security issues in Canada, but most troubling was the uncertainty in determining when the insurrection was over. In an effort to evaluate that question, Herbert Marx explained that judicial intervention on whether or not an emergency is over was difficult because the burden of proof is on the one who challenges the validity of emergency laws. “[They] will have to clearly prove that the emergency no longer exists,” Marx goes on to note that courts will not be troubled by a definition of ‘war’, but merely the vague “test [of] emergency.”¹⁹⁷ In the end, judges chose to be deferential, and as I explain in the following, did not rely upon previous confrontational precedents of earlier Privy Council decisions.

¹⁹⁵ *Reference: As To the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124, p. 124.

¹⁹⁶ Lyon, “Constitutional Validity”, *supra* note 169, p. 138-40.

¹⁹⁷ Herbert Marx, (1970) “The Emergency Power and Civil Liberties in Canada” 16 *McGill Law Journal*, p. 65. [Hereafter: Marx, “Emergency Power”]

Despite the weak judicial appetite for challenging the executive authority, the strongest opposition to the initial enabling of the *WMA* came from federal Tory MP, Mr. David MacDonald who questioned PM Trudeau: “Are these the words of a man who seeks both to resolve the differences of opinion and points of view in this country and to accept the rule of law? They are the words of a man who in fact has suspended the rule of law.”¹⁹⁸ MacDonald would vote against the Act.

Further political dissent came from the Federal NDP party who took aim at the 1970 *POA*. On 4 November 1970, then leader of the federal NDP, Tommy Douglas, articulated in the House of Commons the tenor of his opposition party’s frustration with the continuity of emergency measures:

I have no hesitation in saying that those of us who voted against that motion did so for two reasons: first, because we have not been given any evidence that there was a state of apprehended insurrection in this country and, second, because we could not approve the regulations enacted under the War Measures Act because they deprive Canadian citizens so extensively of basic civil liberties.¹⁹⁹

This vote against the *POA* was particularly important to consider because then leader of the official opposition, Robert Stanfield of the Conservative Party, voted for the measures in solidarity with Prime Minister Trudeau’s initiative to repeal the *WMA* (Stanfield was put in a difficult political position when Prime Minister Trudeau decided to enable the *WMA*. He could not denounce the *WMA* otherwise he would be seen as soft on terrorism, so he endorsed it on the condition that it would be replaced with less repressive

¹⁹⁸ David MacDonald, 17 October 1970. House of Commons Debates (Hansard). V. 1, 3rd Sess. 28th Parl., p. 249.

¹⁹⁹ Tommy Douglas, 4 November 1970. House of Commons Debates (Hansard). V. 1, 3rd Sess. 28th Parl., p. 889. This debate on the 1970 *Public Order (Temporary Measures) Act* was the voting session on the entrenchment of emergency powers for preservation of public order.

provisions; thus when Trudeau tabled the *POA*, Stanfield was compelled to support the new Act). For both Liberals and Conservatives to endorse the legislation likely made it difficult for judges who dared contravene the intentions of the government. Nonetheless, the critiques launched by MacDonald and Douglas against the new Act were central to the development of the political appetite to support civil liberties and human rights.

While the ‘temporary emergency measures’ were repealed on 30 April 1971, and not renewed, the legal implications and ambiguities stemming from the emergency legislation became the central issue in the FLQ-related case law that followed the October Crisis. As a potent example, I examine *Gagnon and Vallières v. The Queen*, a case in which the ideological founders of the FLQ Charles Gagnon and Pierre Vallières were charged, retroactively, under the authority of section 4(a) of the 1970 *POA* with unlawful membership to the outlawed FLQ. However, Gagnon and Vallières challenged the charges in the Quebec Court of Appeal. They petitioned that the 1970 *POA* was unconstitutional on a number of grounds including insufficient evidence of an ‘apprehended insurrection’, the Act’s retroactive application and that it was a usurpation of judicial power.²⁰⁰ This was the first case that challenged the emergency law in court and tested the judicial appetite to confront the Act itself; it was an opportunity to hold the government accountable for the abuses committed under the *WMA* and the 1970 *POA*.

The ambiguity of the concept ‘apprehended insurrection’ was born from a vague definition of the term and the expediency with which the legislation was drafted. This part of my analysis will show how the judges in this case neglected to consider case law that would have confronted executive authority, and that although Quebec Court of

²⁰⁰ *Gagnon and Vallières v. The Queen* (1971), 14 CRNS 321. (Quebec Court of Appeal) at 2.

Appeal judge, Justice Brossard, confirmed that indeed the relied upon case law was valid, he would rather defer the power to define the problematic term back to the government.

In an extensive review of the judicial decision-making in *Gagnon and Vallières v. The Queen*, Herbert Marx argued that Judge Brossard exercised deference to government by citing the 1946 *Japanese Reference* case, which held that “the Governor in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any Court to deem such order necessary or advisable.”²⁰¹ Marx illustrated the deeply-rooted culture of judicial deference in the post-war period. He pointed to how Judge Brossard, who again focused on a case involving wartime relations with Japanese Canadians, cited “it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation.”²⁰² Moreover, Marx continued noting that in not engaging the language of the Act, Quebec Judges effectively “sterilized the courts in their essential function of judicial review.”²⁰³

While Judge Brossard’s comments demonstrated that he lacked the conviction to consider exercising judicial jurisdiction over these claims; another judge on the Appeal bench, Justice Montgomery, weighed in on the appellant’s claim that “Parliament usurped the functions of the courts by declaring members of the FLQ guilty of the crime of being parties to a seditious conspiracy.”²⁰⁴ Judge Montgomery noted that Parliament had created a new offence, and although it aligned itself with certain criminal law

²⁰¹ Herbert Marx, (1972) “The ‘Apprehended Insurrection’ of October 1970 and the Judicial Function” 7 *University of British Columbia Law Review*, p. 57. [Hereafter: Marx, “The ‘Apprehended Insurrection’]”

²⁰² *Ibid.*, p. 57-58.

²⁰³ *Ibid.*, p. 58.

²⁰⁴ *Gagnon and Vallières v. The Queen* (1971) *supra* note 200, at 23.

offenses, it did not interfere with the independence of the judiciary.²⁰⁵ Therefore, by legislating ‘new’ offences (i.e. ‘seditious intentions’ or ‘terrorism’)—constituted beyond the scope of the Criminal Code—in order to respond to apprehended security threats, Parliament not only drives the wedge between the executive and judiciary deeper but also further blurs the boundaries between political dissent, criminality and terrorism. Why, then, from the state’s perspective does the executive not employ the legal tools (criminal law) that are at its disposal in times of crisis?

In 1971, during the Gagnon and Vallières trial, Douglas Schmeiser argued in a commentary on the trial that criminal code provisions were more than enough to respond effectively to such threats as the FLQ. An argument echoed by many contemporary theorists concerned with the legislation of various anti-terror laws.²⁰⁶ In terms of the case at hand, Gagnon and Vallières could have been charged under the Criminal Code with treason and seditious conspiracy offences. As such, the penalties would have been far more significant than the penalties established in the 1970 *POA*. Section 50(1) (b) of the Criminal Code detailed that “everyone knowing that a person is about to commit treason must, with all reasonable dispatch, inform [an authority . . . punishable] with imprisonment up to fourteen years.”²⁰⁷ As well, in section 61(c) concerning seditious conspiracy, the penalty is also imprisonment for up to fourteen years.²⁰⁸

²⁰⁵ *Gagnon and Vallières v. The Queen* (1971) *supra* note 200, at 23.

²⁰⁶ For example, see generally, Kent Roach, “Ordinary Laws for Emergencies and Democratic Derogations from Rights” in Victor Ramraj, ed., *Emergencies and the Limits of Legality*. Cambridge University Press, 2008.

²⁰⁷ Douglas Schmeiser, (1971) “Control of Apprehended Insurrection: Emergency Measures vs. The Criminal Code” 4 *Manitoba Law Journal*, p. 360.

²⁰⁸ Criminal Code (R.S., 1985, c. C-46), Sec. 61(c) <<http://laws.justice.gc.ca/eng/C-46/FullText.html>>

Yet, Judge Montgomery, rather than question the relevance of existing Criminal Code provisions, argued that *POA* offences were “akin to seditious conspiracy but less serious, the maximum penalty under s. 61 of the Criminal Code being 14 years, while under the [1970 *Public Order Act*] it is only five, with no minimum.”²⁰⁹ This argument is troublesome for two reasons: first, that varied sentencing provisions exist for similar offenses; and second, that operating external to the Criminal Code made it easier to assure convictions.

However, there existed case law that did challenge executive authority, and although not politically popular in the judicial culture of the time, this case law provided substantive challenges concerning the constitutionality of the legislated emergency law and exercising judicial jurisdiction. Herbert Marx explains two Privy Council cases that exercised a confrontational position in times of crisis. First, in *Fort Frances* (1923), “. . . it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for.”²¹⁰ And second and an alternative interpretation of *Re: Japanese Canadians* (1947), “. . . if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers.”²¹¹ Nonetheless, Judge Brossard erred on the side of deference, even though the opportunity to challenge executive authority presented itself through the Privy Council judgements.

²⁰⁹ *Gagnon and Vallières v. The Queen* (1971) *supra* note 200, at 23.

²¹⁰ Marx, “The ‘Apprehended Insurrection’, *supra* note 201, p. 59.

²¹¹ *Id.*

Finally, as Annemieke Holthuis argues, “. . . the constitutionality of applying the *War Measures Act* to peacetime emergencies, for example the 1970 October Crisis, was never seriously considered in the case law arising out of the crisis.”²¹² I would add to Holthuis’s argument by contending that deferential judicial attitudes further reflected a failure to consider the gravity of the constitutional implications (the importance of judicial independence to the rule of law), and thus paved the way for future abuses.

D. Conclusion: Legal Mobilisation and the Continuities of Temporary Emergency Powers

The case law that resulted from the October Crisis has revealed many political and legal nuances about the Quebec judiciary both before and after the Crisis. While some judges deferred their authority to review to the government, others, such as Judge Ouimet, expressed reservations about the Crown’s ambitious charges and the sweeping possibilities of the temporary emergency measures. Another interesting point is that all of the legal challenges and criminal trials from this period were only appealed and adjudicated as high as the Quebec Court of Appeal. While perhaps this was because of economic reasons, none of the FLQ-related cases were appealed to the Supreme Court of Canada. I contrast this deficit in the legal mobilisation for further appeal with the experience of the Diplock Courts in Northern Ireland, a court in which there was an automatic right to appeal, and often time cases were appealed all the way to the highest court in the UK—the House of Lords.

²¹² Annemieke Holthuis “Maxwell Cohen’s Perspective on Human Rights in Canada: The Entrenchment of the Charter and the Enactment of the Emergencies Act” in William Kaplan, Donald Malcolm McRea, eds., *Law, Policy and International Justice: Essays in Honour of Maxwell Cohen*. Montreal: McGill-Queen’s University Press, 1993, p. 238 f.n. 111.

In addition to those observations, I have identified two key historical parallels that give substance to my claim that judicial deference permitted the entrenchment of emergency power in Canada: (1) in 1945, PM King facilitated, in peacetime, through a special order-in-council, the continuation of the extra-ordinary powers granted by the *WMA* by way of the 1946 *NETPA*. Similarly, the Trudeau government facilitated in peacetime, through legislation, the continuation of the emergency powers granted by the *WMA* within the 1970 *POA*. This continuity, while not challenged constitutionally during the Gouzenko Affair, was challenged in 1971, but due to a lack of judicial appetite to confront the executive authorities, it was to no avail. In both cases, suspensions of civil rights by the executive were upheld by the courts; and (2) in 1945 and 1970 the *WMA* ceased to be in effect, yet was replaced. The replacement legislation was often framed as more sensitive to individual rights. Replacement legislation, I argue, such as the 1946 *NETPA* and the 1970 *POA*, functioned as *faux* public concessions. While perhaps they are less sweeping in the breadth of their power, the systemic implications of these legislative interventions involved significant erosion of rights and raised serious questions about the integrity of the rule of law.

As we shall see in the concluding chapter, the *WMA* was repealed and replaced by the 1988 *Emergencies Act*. Other Canadian national security laws were amended and supplemented more recently by the 2001 *Anti-Terrorism Act*. However, alongside these recent developments in our emergency and nation security laws we also see the

introduction of the *Charter of Rights* in 1982.²¹³ The *Emergencies* and *Anti-Terrorism* Acts were drafted with this significant constitutional development in mind. Yet questions about judicial review remain. And while the 1960 *Bill of Rights* had no real effect during the October Crisis,²¹⁴ would constitutionally-entrenched rights such as found in the *Charter*, empowering potentially more robust judicial review, have made more of a difference in 1970?

²¹³ Lorraine Weinrib, "Terrorism's Challenge to the Constitutional Order" in R. J. Daniels, Patrick Macklem and Kent Roach eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*. University of Toronto Press, 2001, p. 94. [Hereafter: Weinrib, 'Terrorism's Challenge']

²¹⁴ Marx, "Emergency Power", *supra* note 197, p. 71.

Chapter 5 - From Law to Politics: An Alternative Control of Emergency Powers

“It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”²¹⁵

Just months before the October Crisis, Herbert Marx published a discussion paper on emergency powers and civil liberties in Canada. Marx concluded, as have other scholars, that emergency powers as applied by the executive may be checked in one or a combination of these three ways: (1) entrenched rights (in Marx’s context, the Canadian *Bill of Rights*); (2) judicial review; or (3) parliamentary control.²¹⁶ In some respects, the replacement of the *War Measures Act*, the 1988 *Emergencies Act*, adopts these checks, with explicit reference to the *Charter*, limits on emergency orders in council, and explicit parliamentary review, although their effectiveness as limits on executive emergency powers remains much debated.²¹⁷ While conceptions of rights and, judicial and parliamentary review are central to this study, they also open up a wide array of difficult questions. I comment, therefore, on only certain aspects of these debates as they pertain to my case studies, as well as point to important future areas of consideration.

A notable point of departure from the 1970’s for parliamentary systems was the possibility of rights-based challenges to the exercise of executive authority in emergencies. These challenges raise hard questions about legislative and judicial

²¹⁵ Justice Holmes, a concluding remark from the majority opinion given in *Missouri, Kansas and Texas Railway Co. v. May* (1904) No. 185, 194 US. 267 at 270. (Supreme Court of the United States)

²¹⁶ Marx, “Emergency Power”, *supra* note 197, p. 71.

²¹⁷ Greenwood provides a short assessment of judicial attitudes and the impending 1988 *Emergencies Act*, see F. Murray Greenwood, “The General Court Martial of 1838-39 in Lower Canada: An Abuse of Justice” in W. Wesley Pue and Barry Wright, eds. *Canadian Perspectives in Law and Society: Issues in Legal History*. Ottawa: Carleton University Press, 1988, p. 274-75; and for a more substantive assessment of the transition from the *War Measures Act* to the 1988 *Emergencies Act* see generally, Peter Rosenthal, (1991) “The New *Emergencies Act*: Four Times the *War Measures Act*” 20 *Manitoba Law Journal*, pp. 563-99. [Hereafter: Rosenthal, ‘The New *Emergencies Act*’]

institutions and the inadequacy of these institutions, especially given past experiences that have been examined in the thesis. Do Charters of rights have the potential to transform judicial and parliamentary review in these situations? Perhaps the key is that those who challenge emergency powers have much more to hold on to and that courts and parliament will be forced to confront these issues directly, that it will be less easy to defer to executive authority in times of emergency.

During the October Crisis, little attention was paid by judges to the Canadian *Bill of Rights* as a means of review of executive authority or by defence counsel to challenge the exercise of emergency measures. This raises the question: Had the events of the October Crisis occurred in the post-*Charter* era would civil liberties have been better protected by the constitutionally entrenched *Charter of Rights and Freedoms*? In 1984, Birthe Jorgenson, who wrote extensively on emergency powers in Canada and Northern Ireland, speculated that because the *WMA* was not amended upon the adoption and entrenchment of the *Charter* into the *Constitution Act*, 1982, judges could arguably refuse to apply the *Charter* in wartime.²¹⁸ The replacement of the *WMA* by the *Emergencies Act* probably eliminated that remote possibility.

That being said, questions about entrenched constitutional rights and more recently international human rights raise many interesting and complicated issues. Rights may be effectively deployed to contest abuses of emergency powers, but this does not dispose of the question of whether judges will continue to defer to governments or become more vigilant guardians of the rule of law. A more expansive exploration of these issues is beyond the scope of this work and certainly warrants future study. However,

²¹⁸ Jorgenson, *Emergency Powers*, *supra* note 8, p. 163.

such speculation should also be grounded in a good grasp of historical experiences. As suggested in the introduction, the terrorist attacks in September 2001 may have marked an escalation or even a new phase in terrorism and the responses to real and perceived security threats, but it is hardly a novel, transformative event when placed in historical context. In a similar manner, enhanced rights may allow the courts to serve as a more effective check on government powers, but to suggest that they are transformative is probably an overstatement. Legal responses to emergency in the first decade of the 21st century arguably bear this out.

The historical struggle of judges interpreting and applying common law principles in emergencies demonstrates that the rule of law does, at times, outshine the dreary undertones of preserving the state at all costs. However, while I have identified some notable exception, this is not the general trend. As I have noted in chapter three, Justice Bédard and Justice de Saint-Réal dissented from Special Council ordinances during the Lower Canada Rebellions and Judge Ouimet tossed out ambitious and ambiguous seditious conspiracy charges during the October Crisis. But, there are many more examples of judges acting as mere appendages of the government, notably the Kellock-Taschereau Commission during the Gouzenko Affair and the Diplock Commission during the ‘Troubles’ in Northern Ireland.

In Canada, for example, during times of legislated emergency section 5 of the *War Measures Act* instructively limited the scope of judicial review:

No person who is held for deportation under the Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from

Canada, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice.²¹⁹

Moreover, in 1970, arrested FLQ lawyer Robert Lemieux tested Section 5 and challenged the constitutionality of the *WMA*, but the court disregarded this challenge and denied him bail.²²⁰ Judges lacked the appetite to confront the executive and therefore denied applications of *habeas corpus* under the Act. Although, a year later, the 1970 *POA* was challenged constitutionally in courts (see discussion in chapter four), but, again due to the deferential attitudes of the Quebec Court of Appeal it was to no avail.

The difficulties of judicial review, however, under the *WMA* were somewhat addressed under the 1988 *Emergencies Act*, which required that the Governor in Council must agree that on reasonable grounds an emergency exists, and that the emergency must satisfy the specific criteria outlined in the Act.²²¹ Parliamentary review of cabinet emergency orders is also enhanced. Therefore, suggests Peter Rosenthal, there exists a basis for judicial and parliamentary review of declarations of emergency under the *Emergencies Act* which was not provided by the *WMA*.²²²

Other Canadian national security laws were also updated in 2001 with the passage of the *Anti-Terrorism Act*. The wide ranging legislation stands in uncertain relation to the *Emergencies Act*²²³, but the 2001 crisis provided the opportunity to update a wide range of dated laws and added procedures thought necessary to deal with new terrorist threats (many of the changes were borrowed from the most recent version of the UK *Prevention*

²¹⁹ *War Measures Act*, R.S.C., (1970) c.W-2, s. 5.

²²⁰ Jorgenson, *Emergency Powers*, *supra* note 8, p. 162.

²²¹ Rosenthal, 'The New *Emergencies Act*', *supra* note 217, p. 591.

²²² *Ibid.*, p. 590-91.

²²³ Weinrib, 'Terrorism's Challenge', *supra* note 213, p. 97-104.

of Terrorism Act). The *Anti-Terrorism Act* added provisions to the Criminal Code, enacting terrorism-related offences and ‘special investigative measures’, as well as amendments to the *Official Secrets Act*, *National Defence Act* and the *Canada Evidence Act* with the aim of improving the protection of international relations information, national defence and security as well as introducing new procedures and the updating of laws that had previously been a low legislative priority.²²⁴ The new national security legislation has generated considerable controversy and concern about ensuring that judicial and parliamentary reviews serve as more robust checks on executive action than in the past—the same can be said in the US about judicial review of the *PATRIOT Act*.

Northern Ireland long continued to operate the Diplock Courts which functioned outside of the traditional constraints and due process rules of regular criminal law courts. However, in these juryless courts for terrorism suspects an automatic right to appeal existed as an overarching mechanism of review. Despite a compromised separation of powers, judges in the exceptional Northern Ireland courts did in rare circumstances exercise an opinion contrary to the government. For example, Justices Gibson and McGonigal spoke out against the arbitrary powers of arrest and the denial of *habeas corpus* under the *SPAs*. In testing the arbitrary and ambiguous language of the *Act*, especially during the internment campaign, the learned judges were in part influential in shifting government policy away from internment.

While rights and judicial review are central in current debates about the legal regulation of emergency power, further discussion is also warranted about parliamentary

²²⁴ Annemieke Holthuis and Mona Browne, (2007) “The Parliamentary Review of Canada’s *Anti-terrorism Act*: A case study,” A paper presented at the International Society for the Reform of the Criminal Law Conference, p. 4.

controls and legislative mechanisms such as sunset clauses which, like the most recent national security laws, are highly relevant but fall beyond the focus of this study. While Herbert Marx explained that judicial review was muffled by the *WMA*, parliamentary review of the proclamations of emergency under Section 6(3) of the *Act* provides a point of intervention into this discussion: “When an emergency is proclaimed, a motion can be made in either House by ten members asking that the proclamation be revoked and that motion is debated.”²²⁵ In Canada, under the *War Measures Act* during the Second World War, individual members of Parliament stifled overtly oppressive executive orders by “seeking liberalizations” during debate periods or by “sharply questioning the Government in the House as to the necessity of a particular measure.”²²⁶

As noted in chapter 4, when Member of Parliament David MacDonald strongly voiced his concerns during the October Crisis and sought to soften the impact of the measures, he was largely ignored. Similar concerns were discussed in Northern Ireland during the early years of the ‘Troubles’ by a committee convened before the Diplock Commission called ‘Emergency Powers: A Fresh Start’, they suggested, “that [the] introduction and continuation of emergency powers should be subject to effective and regular Parliamentary control (the principle of legislative control).”²²⁷ However, this message had to no effect on the Diplock Commission as it rewrote the existing emergency legislation and centralized authority in the executive.

²²⁵ Marx, “The Emergency Power”, *supra* note 197, p. 90.

²²⁶ *Id.*

²²⁷ W. L. Twining, (1973) “Emergency Power and Criminal Process: The Diplock Report” *The Criminal Law Review*, p. 408, and 408 fn. 6.

Finally, the question of why have discussions about the political or legislative control of emergency power recently roused the interests of scholars who are sceptical of the judiciary?²²⁸ As Dyzenhaus submits, legal rather than extra-legal responses to emergency situations that are in alignment with the rule of law are collective responses that make accountable all branches of government—legislative, executive and judicial.²²⁹ While in the same vein, Mark Tushnet contends that despite widespread criticisms of the judiciary in times of emergency, not only law holds the possibilities to normatively regulate the exercise of emergency power.²³⁰ Political control of emergency powers offer a viable alternative and even a complement to various legal controls, however it also offers its complications.²³¹ In a cursory exploration of such political controls and the separation of powers, he asks: whether there are reasons to believe that legal controls or legislative controls will produce a better balance between security and liberty than the balance struck by executive government?²³²

Tushnet explains that legislatures are central proponents in the development of security policy that the executive adopts, but they also evaluate how that policy was administered.²³³ As such, Herbert Marx suggests another option for parliamentary review that “the proclamation of the emergency should itself operate to automatically require a

²²⁸ While this is a question that I cannot sufficiently address or discuss in this thesis, I point to a few cursory observations about this topic. Nonetheless, this is a very interesting avenue of future research and consideration.

²²⁹ See generally, Dyzenhaus, *Constitution of Law*, *supra* note 6, p. 129-49.

²³⁰ Mark Tushnet, “The political constitution of emergency powers: some conceptual issues” in Victor Ramraj, ed., *Emergencies and the Limits of Legality*. Cambridge University Press, 2008, p. 145-6.

²³¹ Are there conditions under which politics in a parliamentary system can control the executive government’s exercise of emergency powers? See, Mark Tushnet, (2008) “The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation” 3, 4 *International Journal of Law in Context*, p. 281-4.

²³² *Ibid.*, p. 278.

²³³ *Ibid.*, p. 277-8.

debate in the House and ratification of the government actions.”²³⁴ As a check of executive authority, this does have some merit, especially if the proclamation was made at 4 A.M.

Parliamentary or political control of emergency power is a central intervention into the debate on the regulation of executive authority. However, due to the expansive nature of these questions and the limited scope of this thesis, this must be the subject of another project. Accordingly, this study explored specific legal dimensions of domestic emergencies in Canada and Northern Ireland, focusing on the difficulties of the judicial role. This work is by no means completed and in future projects I also intend to expand the scope of this research on the role and function of courts in times of crisis to include another example from the 1970s—West Germany.²³⁵ As well, I aim to continue research on how courts in emergency situations are often troubled “about the limits of their institutional role in the constitutional framework,”²³⁶ and how deference to authority and theoretical generalization between sovereignty and the rule of law play out in other constitutional and legal systems (non-common law jurisdictions).

In support of Roach’s claim that September 11th did not change everything, this dissertation has sought to ground current theoretical debates on emergencies, legality and sovereignty upon experiences of the relevant legal history in Canada and Northern

²³⁴ Marx, “The Emergency Power”, *supra* note 197, p. 90.

²³⁵ The Republic of Germany’s 1977 German Autumn crisis will serve as another case study of a national security threat resulting from violent campaigns against the state (1970-78) by the militant leftist group known as the Red Army Faction. While I will build on this comparative study of acute domestic security crises in the 1970s to provide insight into the historical state security narrative on notions of sovereignty and the rule of law, I consider current theoretical debates concerning emergency and legality in common law and non-common law jurisdictions.

²³⁶ Aileen Kavanagh, “Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication” in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory*, New York: CUP, 2008, p. 190.

Ireland. Such enquiry helps to enhance understanding of current legal issues and problems such as the tendency of temporary emergency laws to generate permanent exceptions. While a study in legal theory would no doubt trouble the more intricate debates about conceptions of the rule of law, this project draws from broad engagement with the relevant theoretical approaches in order to conceptualize judicial struggles with the law and legal principles in times of emergency. Of key importance here is how scholars understand the separation of powers—to have judges function insulated from grave political pressures and without fear of being removed from the bench is central, but as well to function in a manner that is institutionally collective and underpinned by principal values of the rule of law is imperative. As such, this work aims to contribute to critical efforts to contextualize and better understand notions of deference to authority, political power, rights and legal order.

In all, patterns of judicial deference, toleration for abuses of civil liberties and human rights, and the tendency for temporary emergency measures to take on permanent characteristics, the state of exception too often becoming the norm, have all historically been and seemingly continue to be problematic across common law jurisdictions. However, it is worth repeating that despite such general patterns there are many notable and interesting exceptions—judges, who in times of emergency, defended individual rights and traditional common law principles. Their robust defence of the rule of law provides the grounds for hope over cynicism.

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