

ARTICLES

Temporary Permanence:
The Constitutional Entrenchment of Emergency Legislation

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Why have anti-terrorism laws governing Northern Ireland, laws expressly claiming to be “temporary,” become permanently entrenched in the British legal system? What is it about these laws that make Parliament willing to accept a restriction of liberties and human rights for its own citizens? Laura K. Donohue argues that once anti-terrorist legislation is passed it becomes hard to rescind because to do so would create the impression of giving in to terrorists. Dr. Donohue reaches this conclusion by examining both the political and cultural history surrounding anti-terrorist legislation in Northern Ireland over the last 120 years, with a special emphasis on legislation passed within the last few decades. From there, Dr. Donohue moves on to a discussion of the uniqueness of Northern Ireland in British political history. This discussion sheds light on why England is able to accept for its own subjects in Northern Ireland the “hierarchy of rights” inherent in emergency legislation. The article concludes by framing the discussion of the restriction of liberties in Northern Ireland in terms of a broader analysis of human rights in general and as perceived, or often misperceived by international treaties and organizations.

INTRODUCTION

Throughout the nineteenth and twentieth centuries, the United Kingdom has maintained extensive emergency legislation to counter Irish and Northern Irish political violence. Early in the twentieth century, the 1914 Defence of the Realm Acts¹ and 1920

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¹ See Defence of the Realm Act, 1914, 4 & 5 Geo. 5, ch. 29 (Eng.); Defence of the Realm (No. 2) Act, 1914, 4 & 5 Geo. 6, ch. 63 (Eng.); and Defence of the Realm Consolidation Act, 1914, 4 & 5 Geo. 5, ch. 8 (1914) (Eng.).

Restoration of Order in Ireland Acts² were incorporated into the 1922–1943 Civil Authorities (Special Powers) Acts (collectively the “SPAs”)³ and later subsumed into the 1973 Northern Ireland (Emergency Provisions) Act (the “1973 EPA”)⁴ and 1974 Prevention of Terrorism (Temporary Provisions) Act (the “1974 PTA”),⁵ which continue to be in operation today.⁶ In spite of the longevity of these measures, Parliamentarians repeatedly hail these statutes as “temporary measures” designed to meet the needs of a “passing emergency.”⁷

The sweeping nature of these statutes, and the severe incursion into civil liberties that accompanies their operation give rise to serious concern. The SPAs empowered the Northern Ireland parliament to impose curfew, proscribe organizations, censor printed, audio, and visual materials, ban meetings, processions, and gatherings, and detain and intern without charge. The statutes authorized extensive powers of entry, search, and seizure, altered the court system, and empowered the Civil Authority, “[t]o take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order.”⁸ More than 100 regulations were introduced and exercised under this clause. As enforced by the Stormont government from 1922 to 1972, the 1922 SPA weighed most heavily on the Catholic population. This statute became one of the central grievances addressed by the civil rights marches of the late 1960s and ultimately led to the downfall of the Northern Ireland parliament. However the legislation was only intended to be temporary in nature. Initially unionists defended their enactment by claiming its use as a distinctly provisional measure necessary to secure law and order. Section 12 of the 1922 SPA limited the duration of the statute to one year, unless otherwise determined by the northern parliament.⁹ Within a few years however, the

² See Restoration of Order in Ireland Act, 1920, 10 & 11 Geo. 5, ch. 31 (Eng.); and Defence of the Realm (Acquisition of Land) Act, 1920, 10 & 11 Geo. 5, ch. 79 (Eng.).

³ See Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5 (N. Ir.); Civil Authorities (Special Powers) Act, 1933, 23 & 24 Geo. 5, ch. 12 (N. Ir.); and Civil Authorities (Special Powers) Act, 1943, 7 & 8 Geo. 6, ch. 2 (N. Ir.) [collectively hereinafter SPAs].

⁴ See Northern Ireland (Emergency Provisions) Act, 1973, ch. 53 (Eng.) [hereinafter 1973 EPA].

⁵ See Prevention of Terrorism (Temporary Provisions) Act, 1974, ch. 56 (Eng.) [hereinafter 1974 PTA].

⁶ The 1973 EPA was amended in 1975 via the Northern Ireland (Emergency Provisions) (Amendment) Act, 1975, ch. 62 (Eng.). These statutes were replaced by the Northern Ireland (Emergency Provisions) Act, 1978, ch. 5 (Eng.), the Northern Ireland (Emergency Provisions) Act, 1987, ch. 30 (Eng.), the Northern Ireland (Emergency Provisions) Act, ch. 24 (1991) (Eng.), and the Northern Ireland (Emergency Provisions) Act, 1996, ch. 22 (Eng.) [collectively hereinafter EPA]. The 1974 PTA was replaced by the Prevention of Terrorism (Temporary Provisions) Act, 1976, ch. 8 (Eng.), the Prevention of Terrorism (Temporary Provisions) Act, 1984, ch. 8 (Eng.), the Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4 (Eng.), and the Prevention of Terrorism (Additional Powers) Act, 1996, ch. 7 (Eng.) [collectively hereinafter PTA].

⁷ See *infra* Part I(A).

⁸ See 1922 SPA, *supra* note 3.

⁹ See *id.* §12.

government's rationale for maintaining the legislation shifted. Originally an interim means to establish peace, the statute became a necessity for maintaining Northern Ireland's constitutional status. In April 1928, the government called for its permanent entrenchment,¹⁰ and in 1933 the Northern Ireland Parliament made the statute's tenure indefinite.¹¹

Following the demise of the Northern Ireland Parliament, direct rule by Britain did little to eliminate the continued use of emergency legislation. Although the British government claimed to replace the SPAs with the 1973 EPA, the latter statute simply renamed the vast majority of the special powers regulations. The 1973 EPA retained extensive powers of detention, proscription, entry, search and seizure, vehicle restriction, the stopping of roads, the closing of licensed premises, and the collection of information by security forces. The statute established certain crimes as "scheduled" offenses, regardless of their motivation, and eliminated juries from the process of adjudicating those offenses. It also retained the powers previously allocated to the Civil Authority, authorizing the Secretary of State for Northern Ireland to make by regulations "provisions additional to the foregoing provisions of this Act for promoting the preservation of the peace and the maintenance of order."¹² At its inception, the 1973 EPA was intended as a temporary measure. In 1974, the Secretary of State for Northern Ireland claimed, "The [1973 EPA] makes emergency provisions and is by its nature temporary, to cover the period of an emergency."¹³ However, this legislation has remained in force for the past twenty-six years.¹⁴ As with the justification for the SPAs, the rationale behind the retention of the EPAs subtly changed during the period from 1973 to 1996, until the EPAs were utilized as a critical part of the ongoing fight against terrorism.

Not only did emergency legislation become a permanent feature of the Northern Irish legal system, but for fifty-seven years Westminster retained emergency provisions aimed at countering Northern Irish violence in Great Britain. The 1939 Prevention of Violence (Temporary Provisions) Act (the "1939 PVA")¹⁵ introduced powers of expulsion, prohibition, arrest and detention. It too was intended only as an interim statute. As one Member of Parliament said, "[w]e have tried to make it clear . . . that the Bill . . . is a temporary measure to meet a passing emergency. We have expressly

¹⁰ Memorandum to the Parliamentary Secretary and Minister of Home Affairs, (Feb. 7, 1928) (Ref. S. 153/26).

¹¹ See 15 SENATE DEB. 161–70 (1933) (N. Ir.).

¹² See generally 1973 EPA, *supra* note 4.

¹³ 876 PARL. DEB., H.C. (5th ser.) 1273 (1974) (statement of M.P. Merlyn Rees).

¹⁴ See, e.g., 1973 EPA, *supra* note 4; 1975 EPA, *supra* note 6; 1978 EPA, *supra* note 6; 1987 EPA, *supra* note 6; 1991 EPA, *supra* note 6; 1974 PTA *supra* note 5; 1984 PTA, *supra* note 6; 1989 PTA, *supra* note 6; 1996 PTA, *supra* note 6.

¹⁵ Prevention of Violence (Temporary Provisions) Act, 1939, 2 & 3 Geo. 4, ch. 50 (Eng.).

restricted the duration of the Bill to a period of two years.”¹⁶ Although the IRA’s mainland bombing campaign ceased within a year of the statute’s introduction, the 1939 Act was not allowed to expire until 1953, and it was not repealed until 1973. Largely in response to the Birmingham bombings, in 1974 Westminster reintroduced powers contained in the 1939 PVA, with the addition of proscription, a provision employed under the SPAs and the 1973 EPA. Again, this legislation was intended to be in place for a limited period. During his introduction of the 1974 Prevention of Terrorism Bill, Home Secretary Roy Jenkins asserted, “I do not think that anyone would wish these exceptional powers to remain in force a moment longer than is necessary.”¹⁷ Mechanisms were built into the statute to prevent it from remaining on the books simply as a result of inertia. The 1974 Prevention of Terrorism (Temporary Provisions) Act (the “1974 PTA”), however, belied its title, as not only did it reintroduce measures in place from 1939 to 1973, but it is still enforced over a quarter of a century after its initial introduction.¹⁸ Roy Jenkins later wrote:

I think that the Terrorism Act helped to both steady opinion and to provide some additional protection. I do not regret having introduced it. But I would have been horrified to have been told at the time that it would still be law nearly two decades later . . . it should teach one to be careful about justifying something on the ground that it is only for a short time.¹⁹

Why has emergency law, although consistently intended as temporary, become firmly entrenched in the British constitution? These wide-sweeping measures alienated a significant portion of the population, exacerbated the conflict, and led to the suspension of the Northern Ireland Parliament. Yet they still remain on the books. What are the lessons that can be drawn from this for other liberal, democratic countries faced by terrorist challenge? Is there something about emergency law that, once introduced, leads to its entrenchment? What role has international law played in the maintenance of such measures? This article examines these questions and proposes that a confluence of factors—many of which are common to liberal, democratic states—perpetuated twentieth century emergency measures introduced in the United Kingdom beyond their intended life. Part I examines the nature of emergency legislation, suggesting that its formal structure, duplication of existing criminal offenses, symbolic importance and perceived effectiveness contributed to the retention of the special powers. Part II highlights the persistence of the Northern Irish conflict, which is reinforced by deep divisions in the province and sporadic resurgences of paramilitary activity. Part III focuses on Britain’s previous use of emergency law in Ireland and the continued perception in Westminster of Northern Ireland as a place apart. Finally, Part IV suggests that the context within which the British state operated, while mitigating the more extreme aspects of emergency law,

¹⁶ 350 PARL. DEB., H.C. (5th ser.) 1054 (1939) (statement of M.P. Sir S. Hoare).

¹⁷ 882 PARL. DEB., H.C. (5th ser.) 642 (1974) (statement of M.P. Roy Jenkins).

¹⁸ See 1987 EPA, *supra* note 6; 1996 PTA, *supra* note 6.

¹⁹ ROY JENKINS, A LIFE AT THE CENTRE 397 (1991).

supported the establishment and operation of emergency measures. This was partly possible through a mistaken application of a “hierarchy of rights,” and partly due to confusion in the international arena, and particularly in international law, over how to handle terrorist violence.

I. EMERGENCY LEGISLATION

A. *Formal Considerations*

One factor that encouraged the continuation of the emergency measures—though it did not actively encourage the extension of them—was the formal impeccability of the legislation. Had the provisions represented a significant departure from established, accepted norms, more pressure might have existed on the government to withdraw the statutes. However, the formal consistency of the emergency statutes created a legitimacy they otherwise might have lacked and bolstered their acceptability as a means to counter Northern Irish violence.

Emergency legislation provided sets of general rules to govern affairs within the states. Instead of arising on an *ad hoc* basis, the legislation both supplied and made provision for the further introduction of legal codes. For example, the Northern Ireland government introduced numerous regulations tailored to prevent particular events from occurring,²⁰ yet once enacted they often remained “permanent” law and became a standard that the government later applied to similar cases.²¹

Both the Northern Irish and British governments ensured that all emergency measures were clearly promulgated to the affected parties. All statutory instruments introduced under the SPAs were regularly published in the *Belfast Gazette* and the four main northern newspapers. Additionally the Ministry of Home Affairs frequently directed that the information be issued to provincial radio stations. The government also issued copies of the statutory instruments to local papers in order to publicize orders relating to the prohibition of meetings or assemblies in a particular area. All regulations made under the legislation had to be laid before both Houses of Parliament soon after their creation. The publication of regulations was subject to both section 1(4) of the 1922 SPA and to section 4(1) of the 1925 Rules Publication Act (Northern Ireland).²² The northern government also periodically ordered reprints of the SPAs and all regulations issued under the Acts. Similarly, the British government ensured that emergency measures were clearly promulgated. HMSO published the acts, and the *London Gazette* carried notice of any statutory instruments introduced under their auspices.

²⁰ For instance in 1954 the Minister of Home Affairs directed that two newspapers, THE UNITED IRISHMAN and RESURGENT ULSTER be banned. In the absence of any measure specifically authorizing such prohibition, the Ministry issued Regulation 8 under the SPAs. *See* S.R. & O. 179/1954, 21.12.54.

²¹ *See* LON FULLER, THE MORALITY OF LAW 46 (1964) (explaining how these rules and regulations met the “requirement of generality”).

²² *See* 1922 SPA, *supra* note 3 §1(4); Rules Publication Act, 1925, 15 & 16 Geo. 5, ch. 6, §4(1) (N. Ir.).

Britain's efforts to publicize emergency law fell short, however, of those exerted by the unionist government. A few explanations exist. For instance, many of the regulations issued by the northern executive branch (particularly after the civil disorder had abated) were aimed at preventing specific acts from occurring. Some examples of such acts are republican assemblies, the circulation of printed material, and the construction of monuments to republican heroes or events. Since the unionist government's goal was to prevent the occurrence of the events themselves, it lay in their best interests to ensure that those involved be adequately informed of the law. In order to accomplish this, the government made use of a variety of media and official sources.²³

A second explanation revolves around the extremity of the measures themselves. As Lon Fuller suggests, the need for the publication of the laws depends in part on the degree to which the requirements of the rules depart from generally agreed perceptions of right and wrong. "[T]o the extent that law merely brings to explicit expression conceptions of right and wrong shared in the community, the need that the enacted law be publicized and clearly stated diminishes in importance."²⁴ Certainly the perception within the nationalist and republican communities regarding the moral acceptance of commemorating nationalist or republican holidays, rallying for a united Ireland and disseminating literature, radically differed from commonly held standards within the unionist block. It was not obvious that such activities should be banned. In contrast, provisions such as those in the 1973 EPA relating to murder or attempted murder would have fallen more clearly within the understood moral norms of the various communities.

A third explanation relates to the principle of marginal utility, which limited the extent to which the publicizing requirement could apply. As Fuller writes, "It would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him."²⁵ The United Kingdom's size in relation to Northern Ireland plays a role here, but the relatively marginal status of legislation relating to Northern Irish affairs in relation to the other daily concerns of individuals in Great Britain was also of relevance. Northern Irish legislation—along with the exercise of British legislation relating to Northern Irish affairs—was concentrated on a minority of the overall population in the United Kingdom. Moreover, the relative constancy of the 1973–1996 EPAs and 1974–1996 PTAs suggests that there was very little new about which the population had to be informed. Neither government made a secret of the emergency provisions adopted, as the laws were generally available to the population in both Northern Ireland and Great Britain.

Emergency legislation introduced in the Northern Ireland context avoided retroactive application. For the most part, emergency law also met the requirements of clarity by maintaining accepted norms relating to legislative drafting and language. The

²³ By ensuring that the regulations were clearly promulgated, the northern government could demonstrate its strength in contrast to the vacillation seen to characterize previous British rule of Ireland.

²⁴ FULLER, *supra* note 21, at 92.

²⁵ *Id.* at 49.

one measure that challenged this formal criterion was the 1922 SPA, which provided that an individual would violate the statute “if any person does any act of such a nature as to be calculated to be prejudicial to the preservation of peace or maintenance of order in Northern Ireland.”²⁶ This wording implied unpredictability and the possibility of inconsistent law. It failed to clearly indicate particular instances in which an individual could be found in violation of the statute. Although in this respect the provision was open to challenge under a principle of fairness, its formal qualities nevertheless met Fuller’s standards. The unionist government refrained from acting on this provision, preferring instead to issue regulations and to establish precedent through the codification and retention of statutory instruments. As a result, this clause received minimal attention and did not become a target for opponents of the statute. Instead, attention tended to be drawn towards the discretionary power of the Minister of Home Affairs to issue regulations—a power frequently employed during the tenure of the northern parliament.

Emergency measures met the criterion of non-contradictoriness. The legislation refrained from placing unreasonable demands on the population. Special powers were employed as practical means to achieve the governments’ goals, such as the defense of the Northern Irish constitutional structure and the protection of citizens and property within the United Kingdom. The specific requirements of the provisions themselves—proscription or otherwise—were not beyond reach. In addition, emergency enactments did not represent a frequent departure from the previous state of affairs. The 1920 Restoration of Order in Ireland Act, 1914–1915 Defense of the Realm Acts, and the nineteenth century Coercion Acts predated the introduction of Northern Irish emergency law.²⁷ Many of the initial regulations in the 1922 SPA were taken directly from these statutes and subsequently incorporated into the 1973 EPA. Even the 1974 PTA found precedent in the 1939 PVA, which itself had been on the statute book for thirty-four years. There was also a fairly high degree of constancy within the provisions themselves. For example, the 1922 SPA sustained very few changes to its original design, despite the fact that shortly after its enactment, numerous regulations were introduced under it. The additional measures served to clarify the original intent of the government in protecting the constitutional status of Northern Ireland. From 1972 until 1996 the amendments to the 1973 EPA and 1974 PTA largely centered on cosmetic alterations to the existing statutes, leaving the vast majority of their provisions still intact in 1996. Few new powers were introduced, and even fewer existing powers were relinquished.

Finally, discrepancies between the law as written and the law as administered were not apparent. Congruence was maintained between official action and the rules. Although the judicial procedure was altered under the measures, procedural due process and rights of appeal were followed in accordance with legislative requirements. The ability of official action to relate directly to the declared legal standard was further ensured by the enforceability of the statutes. From 1922 to 1972, the Royal Ulster Constabulary Inspector General repeatedly emphasized that regulations that could not be

²⁶ See 1922 SPA, *supra* note 3.

²⁷ See generally Restoration of Order in Ireland Act, *supra* note 2; Defence of the Realm Act, *supra* note 1.

administered by the police force should not be introduced. This rationale prevented the enactment of provisions relating to renderings of “A Soldier's Song,” wearing of the Easter Lily, and the prohibition of various meetings and assemblies. After 1972 the vast majority of rules issued by the British government were constructed to enable the police force to enforce them effectively.²⁸

In sum, the structure of emergency measures suggests that in fact the SPAs, EPAs, and PTAs demonstrated a significant degree of formal legitimacy. The extent to which these principles were satisfied by emergency law may have varied slightly, but for the most part emergency legislation met these legitimacy standards. In addition to satisfying these criteria, the procedures through which emergency measures were enacted were generally consistent with the manner in which other statutes passed into law. The powers enshrined in the legislation did deviate from other standards, however this distinguishes them as emergency law. The statutes were enacted through proper parliamentary procedure, and this adherence to legislative formality engendered a reassuring sense of legitimacy, which in turn contributed to the retention of special powers long beyond their temporary invocation. Had the emergency measures violated these principles, their acceptance within Northern Ireland and Great Britain might have come under greater scrutiny.

B. *Criminal Law and Emergency Measures*

The emergency legislation introduced in the Northern Irish context (particularly by Westminster after 1972) did violate some civil rights otherwise protected, however many of the acts prohibited by the statutes were already forbidden under criminal law. This reflected the nature of republican strategy. Acts were orchestrated to undermine law and order, thus increasing the insecurity of the citizens and moving the state towards ungovernability. As a result, offenses tended already to be covered by criminal statutes. What made these undertakings “terrorist” was the motivation and organization of entities using them for political or ideological ends. In this respect, emergency legislation was employed to reject the use of violence for political means by (a) highlighting the aims of individuals engaging in such behavior, (b) increasing the penalties associated with otherwise ordinary criminal activity, and (c) altering the manner in which the state addressed transgressions of the law. Scheduled offenses under the 1973 EPA included violations of common law, such as murder, manslaughter, arson, riot, and infringements

²⁸ *C.f.* 1996 PTA, *supra* note 6, under which the Northern Ireland (Emergency Provisions) Regulation (1975) was promulgated. It required drivers to lock and immobilize unattended vehicles. Parliament explicitly recognized that the provision would be difficult, if not impossible, to enforce. *See* 902 PARL. DEB., H.C. (5th ser.) 742–90 (1975). It was justified however, by the responsibility borne by drivers to ensure that their vehicles were not employed to the detriment of third parties. While this provision did not hold individuals accountable for conditions beyond their control, it did border on a parliamentary enactment not entirely enforceable. This regulation is as an anomaly though, since the vast majority of emergency measures could be implemented by the civil authorities. This contributed to the consistency between statutory form and official action.

of already existing criminal statutes.²⁹ What caused these acts to be incorporated into emergency legislation was the aim of the government to defeat terrorism (particularly republican terrorism), defined in the 1973 EPA as “the use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear.”³⁰ Under the 1973 EPA, summary conviction or conviction on indictment carried stiffer penalties than could otherwise be levied under ordinary law. In addition, the pursuit of charges for crimes scheduled under the 1973 EPA was conducted within a specially constructed judicial setting. Cases relating to scheduled offenses were adjudicated in special Diplock courts, and both the 1973 EPA and the 1978 EPA required that indictment trials of a scheduled offense be held only at the Belfast City Commission or the Belfast Recorder’s Court.³¹ From 1973 through 1996, the government altered provisions of the EPAs relating to scheduled offenses on only one occasion, the 1985 Northern Ireland (Emergency Provisions) Act 1978 (Amendment) Order.³² This granted the Attorney General greater discretion to exempt cases relating to kidnaping, false imprisonment, and offenses carrying less than a five year penalty. This order was subsequently incorporated into the 1987 EPA. (The government rejected Sir George Baker’s other proposals to exempt robbery or aggravated burglary, or to extend to the Director of Public Prosecutions the ability to deschedule certain cases.) Although this alteration allowed the Attorney General to exempt specific cases after the formation of the 1973 EPA, none of the scheduled offenses was actually removed from the statute.

Not only were offenses already cited in other statutes appended to emergency legislation, but some of the measures introduced under the SPAs, EPAs and PTAs gradually influenced ordinary law. For instance, Regulation 4 of the 1922 SPA empowered the civil authority to ban meetings, assemblies and processions. At its repeal in 1951, the Public Order Act was introduced and became the primary vehicle through which marches and processions were prohibited.³³ This statute, amended in 1963 and again in 1970, was employed largely in the same way in which Regulation 4 previously operated.³⁴ Regulation 24C of the SPAs prohibited the display of the Tricolour. Responding to widespread support from the unionist population, in 1954 the government

²⁹ See, e.g., the Malicious Damage Act, 1861, 24 & 25 Vict., ch. 97 (Eng.), the Prison Act, 1953, 2 Eliz. 2, ch. 18 (N. Ir.); Firearms Act, 1969, 2. Eliz. 18, ch. 12 (N. Ir.), the Theft Act, 1969, 2. Eliz. 18, ch. 16 (N. Ir.), and the Protection of the Person and Property Act, 1969, 2. Eliz. 18, ch. 29 (N. Ir.).

³⁰ 1973 EPA, *supra* note 4, at Part IV, para. 28.

³¹ In accordance with Sir George Baker’s recommendations, in 1987 section 6 of the 1978 EPA was amended to allow scheduled offenses to be tried at Crown courts outside of Belfast. See 1987 EPA, *supra* note 6, §6.

³² See generally Northern Ireland (Emergency Provisions) Act 1978 (Amendment) Order, 1985 (N.Ir.).

³³ See Public Order Act, 14 & 15 Geo. 6, ch. 19 (1951) (N. Ir.).

³⁴ See Public Order Act, 2. Eliz. 2, ch. 52 (1963) (N. Ir.); and Public Order Act, 2. Eliz. 2, ch. 4 (1970) (N. Ir.).

incorporated the measure into the Flags and Emblems (Display) Act (Northern Ireland).³⁵ As the Republic of Ireland had been recognized in the interim, the new statute did not follow Regulation 24C in banning the Tricolour outright. Instead, it forbade interference with the flying of the Union Jack and empowered the security forces to ban any flags or emblems likely to lead to a breach of the peace.³⁶ More recently the Criminal Evidence (Northern Ireland) Order 1988 limited an individual's right to silence.³⁷ "The Order was prompted primarily by the need to encourage those who were suspected of terrorist activity to answer questions when there was not enough evidence to convict them,"³⁸ and it reflected the widespread belief among the security forces that maintaining silence was evidence of training in "anti-interrogation techniques."³⁹ The provision was aimed at individuals suspected of involvement in terrorist activity or paramilitary financial affairs.⁴⁰ It was enacted through the Order in Council procedure, and applied to all criminal suspects in Northern Ireland. The impact of emergency measures can also be seen in the powers incorporated into the 1984 Police and Criminal Evidence Act.⁴¹ Reflecting on steps taken by Westminster to counter republican violence in Great Britain, Joe Sim and Phillip Thomas observed in 1983 that "[t]he widely increased police powers within the police and Criminal Evidence Bill suggest that the emergency nature of the [PTA] will to an even greater extent be subsumed within everyday police practice." As a result, "what was abnormal in 1982 becomes normal in 1983; likewise emergency measures become standard and unexceptional."⁴² In Northern Ireland the norms shifted so as to incorporate into ordinary law what had hitherto been emergency measures.

In brief, the gradual impact of emergency measures on ordinary legislation was accentuated by the incorporation of already existing statutes into emergency measures. Because many of the crimes cited in the 1973 and subsequent EPAs were permanent

³⁵ See Flags and Emblems (Display) Act, 2 & 3 Eliz. 2, ch. 10 (1953) (N. Ir.).

³⁶ See Public Order Act, *supra* note 34.

³⁷ See *Id.* For background on the introduction of the order, see generally J. D. Jackson, *Recent Developments in Criminal Evidence*, 40 N. IR. LEGAL Q. 105 (1989), and J. D. JACKSON, DEVELOPMENTS IN NORTHERN IRELAND: THE RIGHT OF SILENCE DEBATE (1990). For criticism of the statutory instrument see generally STANDING ADVISORY COMMITTEE ON HUMAN RIGHTS, FOURTEENTH REPORT, H.C. 394 (1988/89) and A. ASHWORTH & P. CREIGHTON, THE RIGHT OF SILENCE IN NORTHERN IRELAND: LESSONS FROM NORTHERN IRELAND (1990).

³⁸ See J. D. Jackson, *Curtailing the Right of Silence: Lessons from Northern Ireland*, CRIM. L. REV. 404, 413 (1991).

³⁹ Home Office Circular, para. 41, cited in CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW 74, n. 30 (2nd ed., 1992).

⁴⁰ 140 PARL. DEB., H.C. (5th ser.) 183–87 (1988) (statement of M. P. Tom King).

⁴¹ See Police and Criminal Evidence Act, ch. 60 (1984) (Eng.).

⁴² Joe Sim and Philip Thomas, *The Prevention of Terrorism Act: Normalising the Politics of Repression*, 10 J. OF L. AND SOC'Y 75 (1983). See also M. O'Boyle, *Emergency Situations and the Protection of Human Rights*, 28 N. IR. LEGAL Q. 160 (1977).

features of ordinary criminal legislation, their inclusion did not represent a significant point of departure. What was unusual about their appearance was: (a) the focus of the measures on the political intent behind the actions themselves, (b) the alteration in penalties associated with engaging in such activities with terrorist intent, and (c) the court system within which such offenses were tried.⁴³ These elements recognized the unique nature of the challenge being mounted against the state, indicated a rejection of the use of violence for political ends, and served to entrench the emergency measures.

C. *Import of Emergency Legislation*

As disorder increased in the period after 1972, broad support within Britain for more stringent measures grew. Terrorist legislation became a statement that violence would not be tolerated. In urging fellow Members to pass the 1974 Prevention of Terrorism Bill Lord Hailsham stated:

Apart from [the Bill's] practical value, . . . its moral impact is hardly less important and would, I fear, be considerably blunted if we did not accede to the Government's request to enable the Bill to receive the Royal Assent so as to place it on the Statute Book tomorrow [I] would suggest . . . to pass it without amendment."⁴⁴

He later added, "If one yields to terrorism of this kind other terrorists in Britain will draw the obvious moral that the gun and the bomb pay off because the British do not have the courage to resist them."⁴⁵ Statements supporting the use of emergency measures to demonstrate Britain's rejection of terrorism were frequently voiced in both Houses of Parliament. Against this backdrop, any repeal or repudiation of the measures enacted assumed new import; in the absence of a cessation in terrorist activity repeal might have indicated a level of acceptance either of some degree of violence or of the use of violence for political ends. Furthermore, no real indication was given in any of the statutes as to what circumstances would have to change in order to justify their repeal. This made it unclear as to when the legislation could be rescinded without altering the initial connotation entailed in its enactment. The Birmingham bombings provided the main impetus behind the enactment of the 1974 PTA.⁴⁶ The need to appear to respond to this event—and indeed, to the slew of terrorist incidents in Britain immediately preceding Birmingham—was as important as the specific aspects of the statute itself. The government's first duty was to protect the life and property of its citizens; it had to be

⁴³ See generally P. HILLYARD, *POWER AND POLITICS* 88 (1981); D. Walsh, *Arrest and Interrogation: Northern Ireland 1981*, 9 J.L. & SOC'Y 37, 53–57 (1982); and D. Bonner, *Combating Terrorism in the 1990s: the Role of the Prevention of Terrorism (Temporary Provisions) Act 1989*, PUB. L. 473–74 (1992).

⁴⁴ 354 PARL. DEB., H.L. (5th ser.) 1508 (1974).

⁴⁵ 354 PARL. DEB., H.L. (5th ser.) 1517 (1974).

⁴⁶ See also 882 PARL. DEB., H.C. (5th ser.) 634–944 (1974), and 882 PARL. DEB., H.C. (5th ser.) 29–45 (1974).

seen as acting in accordance with this aim. Under the 1974 PTA, proscription served mainly in this capacity.

The primary purpose underlying the introduction of proscription in Great Britain was to reduce the affront caused to the public by seeing overt support for republican organizations.⁴⁷ The Jellicoe Report emphasized this point, noting that proscription bore both a practical and presentational value: “At the least practical level it enshrines in legislation public aversion to organizations which use, and espouse, violence as a means to a political end.”⁴⁸ If public displays in support of proscribed organizations were prohibited, public outrage and disorder might likewise be avoided. Commenting on the PTA, Lord Shackleton juxtaposed considerations of civil liberties with the moral disapprobation assigned republican paramilitary activity. While freedoms should not be lightly infringed, the great offense caused by seeing support for the IRA outweighed other considerations. Similar sentiments were also expressed in examinations of the EPAs. For instance Earl Jellicoe stated: “Proscription is an expression of the outrage of the ordinary citizen, who comprise the overwhelming majority, at the barbarous acts of these organizations, and at the revolting glee with which they claim responsibility for the organization, usually with personal anonymity, together with their public displays in particular areas.”⁴⁹ From 1974 to 1996, only ten charges were brought under the provisions of the PTAs governing proscription. This contrasts sharply with the number of similar charges brought during this period in Northern Ireland under the EPAs.⁵⁰ The variance can be understood more clearly in the context of the Northern Irish government’s goals. From 1922 to 1972 any expression of republicanism represented an attack on the constitutional position of Northern Ireland. In defense of this position, a significant number of charges were brought for violations of the provisions related to proscription. In Britain, by contrast, proscription was used sparingly, serving instead as an indicator of public outrage and a possible inhibitor of civil disorder stemming from the outrage. Because of the moral aversion demonstrated in Britain by the use of such measures, once in place they became difficult to rescind. Although Colville noted the limited use made of the measure within the bounds of the legal system, he recoiled from recommending its repeal. He was afraid that it would be perceived as “a recognition . . . that the leading merchants of Irish terrorism were no longer disapproved.”⁵¹

⁴⁷ See 882 PARL. DEB., H.C. (5th ser.) 636 (1974) (statement of M.P. Roy Jenkins).

⁴⁸ REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1976, 1983, Cmnd. 8803, para. 207 (conducted by Rt. Hon. Earl Jellicoe, DSO, MC) [hereinafter JELICOE REPORT].

⁴⁹ REVIEW OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978, 1984, Cmnd. 9222, para. 414 (conducted by the Rt. Hon. Sir George Baker, OBE) [hereinafter BAKER REPORT].

⁵⁰ See *id.*, para. 412 (stating that between June 1978 and the end of 1983, some 537 charges were brought under section 21 of the 1978 EPA).

⁵¹ REVIEW OF THE OPERATION IN 1986 OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT, 1984, 1986, Cmnd. 264, para. 13.1.6 (conducted by the Viscount Colville of Culross, QC).

Britain's failure to include loyalist paramilitaries in provisions relating to proscription further emphasized that the primary function of the provision was to express public outrage at republican terrorism, and also to avoid civil disorder caused by it. Numerous cases of loyalist paramilitary activity occurred in Britain from 1972 through 1996.⁵² Their existence challenged Shackleton's insistence that, "the Protestant extremist groups are not engaged in violence against the community in Great Britain and . . . their activities are not in any way comparable to those of the IRA."⁵³ Clive Walker noted in 1992 the dubious basis of this reasoning and concluded that:

The true basis for proscription under Part I is the prevention of public offense and disorder. Thus, it is not the paramilitary activity in Britain *simpliciter* which justifies listing but the degree of resultant public outrage. In fact, loyalist criminality in Britain has not provoked public condemnation to the same degree as republican misdeeds.⁵⁴

The inability to rescind emergency measures once enacted was tied to the moral import assumed in their enactment. Withdrawing it would have been akin to surrendering to terrorism. As Ian Paisley declared, "I welcome the legislation because it is a signal to the men of violence that the Government will not weaken in their fight."⁵⁵ From "emergency provisions" the statutes became "anti-terrorist legislation."⁵⁶ This verbiage demonstrated a rejection of terrorism, which became inextricably linked to the renewal of emergency measures. In the annual debates on the Prevention of Terrorism Act, the opposition went out of its way to indicate that by opposing the legislation, it was by no means going soft on terrorism.⁵⁷ Likewise any demand for an inquiry into the operation

⁵² Loyalist cases in Britain during that time included: *Hamilton v. H.M. Advocate*, 1980, S.C. 66 (UDA activities in Dumfries); *Sayers v. H.M. Advocate*, 1982, J.C. 17 (UVF unit in Glasgow); *Walker, Edgar and Others v. H.M. Advocate, Prison for Glasgow UVF Pair*, *TIMES* (London), Mar. 14, 1986, at 2 (gun-running funds in Glasgow for the UVF); *H.M. Advocate v. Copeland, Robertson and Others*, 1987, S.C.C.R. 232 (UDA activity in Glasgow); and *Forbes v. H.M. Advocate*, 1990, S.C.C.R. 69, and *Reid v. H.M. Advocate*, 1990, S.C.C.R. 83 (UDA members in Perth), *cited in* WALKER, *supra* note 39, at 57.

⁵³ See REVIEW OF THE OPERATION OF THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACTS OF 1974 AND 1976, 1978, Cmnd. 7324, at para. 110 (conducted by the Rt. Hon. Lord Shackleton, KG, OBE) [hereinafter SHACKLETON REPORT].

⁵⁴ WALKER, *supra* note 39, at 57–58.

⁵⁵ 272 PARL. DEB., H.C. (5th ser.) 104 (1996) (statement of M.P. Ian Paisley).

⁵⁶ Compare 855 PARL. DEB., H.C. (5th ser.) 275–392 (1973) with 269 PARL. DEB., H.C. (5th ser.) 31–115 (1996) and 272 PARL. DEB., H.C. (5th ser.) 41–108 (1996).

⁵⁷ See 38 PARL. DEB., H.C. (5th ser.) 569 (1983):

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

of the emergency measures risked being viewed as retreating from the fight against terrorism. In suggesting that the government institute a review of the emergency measures, the opposition stated:

My right hon. and hon. Friends [*sic*] supported the motion calling for an inquiry, but there should be no misunderstanding about our reasons. We do not believe that there should be any lowering of our guards against terrorist activity and the continuing threat of it. Our vote did not signify any complacency or moral weakness, faced as we are by deadly, clandestine groups in our midst.⁵⁸

Britain's Labour Party's later decision in 1996 not to oppose the renewal of the Prevention of Terrorism Act primarily rested on the party's decision that it could not be seen as tolerant of terrorism. During discussions of the 1996 EPA, Labour announced that primarily due to the retention of provisions relating to internment, it would oppose the Bill on the second reading but would not divide the House on the third reading, as some sort of emergency legislation was necessary. The implication of this position was immediately made clear by Barry Porter, "I do not believe that many people in Northern Ireland, certainly in terrorist organizations, will read the details of the opposition's reasoned amendment . . . the headline will be, 'Labour Party votes against anti-terrorist legislation.'" ⁵⁹ Nick Hawkins put the point in an even more partisan fashion:

Unless and until [the Labour Party] support the Government on every piece of anti-terrorist legislation, the voters of Britain will never take seriously any of the weasel words of Labour spokesmen from the leader downwards on the strength of the Labour Party's policy on crime. If the Opposition will not support us on measures against terrorism, they cannot be taken seriously.⁶⁰

With the import carried by the enactment of emergency measures, their repeal might have been interpreted as meaning either that rejection of paramilitary violence had altered, or that the threat was no longer relevant.⁶¹ From 1973 to 1996 however, there were no sustained breaks in paramilitary activity in either Northern Ireland or Great Britain. Punishment beatings, arms' movements and racketeering continued even after

38 PARL. DEB., H.C. (5th ser.) 569 (1983) (statement of M.P. Roy Hattersley). *See also* 269 PARL. DEB., H.C. (5th ser.) 94 (1996).

⁵⁸ 1 PARL. DEB., H.C. (5th ser.) 379 (1981) (statement by M.P. Neville Sandelson).

⁵⁹ 269 PARL. DEB., H.C. (5th ser.) 43 (1996).

⁶⁰ 269 PARL. DEB., (5th ser.) 75 (1996).

⁶¹ Fear that paramilitary interpretation of the withdrawal of emergency legislation would be to see it as a concession or as an "invitation" to intensify the armed struggle further discouraged the relaxation of the statutes. *See* Bruce Dickson, *Northern Ireland's Emergency Legislation—The Wrong Medicine?*, PUB. L. 594, 597 (1992).

the 1994 cease-fires, which suggests that paramilitary activity was not so much ended as funneled into other channels. Either violence still existed within society (in which case the moral import of the enactment of emergency measures proved a stumbling block to removing them) or a cessation in violence had occurred. In the latter case the onus was on those opposing emergency legislation to demonstrate that the threat no longer remained. This transferred the burden of responsibility from those seeking to extend anti-terrorist law to those seeking to repeal it.

This transfer guaranteed the survival of emergency measures beyond their temporary intent. The situation was reinforced by the fact that the British government made the repeal of the Prevention of Terrorism Act dependent on a solution to the Northern Irish political situation; as one Member of Parliament asserted: “Until it is resolved and until there is an end to the threat, we must be able to look for the protection that the [PTA] provides.”⁶² Indeed Members of Parliament repeatedly cited this principle as a reason for voting for renewal of emergency legislation. For instance, one Member stated during consideration of the 1996 EPA: “I [support the Bill] for one clear and simple reason—the conditions that originally made the emergency powers necessary have still not gone away . . . [I]n Northern Ireland, there is still no universal renouncement of violence for political ends.”⁶³ The cease-fires during the 1994–1996 period did not diminish this threat; as one Member of Parliament declared: “The PTA will remain necessary even if the temporary cease-fire is reinstated.”⁶⁴ Similarly others stated that “[e]ven if the cease-fire were continuing, we would have to keep in place some emergency measures for quite some time,”⁶⁵ and that “[i]t is important that we do not lose the protection that the Prevention of Terrorism Act and the Northern Ireland (Emergency Provisions) Act provide with regard to terrorist acts. It is not wise to leave the United Kingdom without some permanent protection.”⁶⁶ Why? Because, “[t]here is always a need to be cautious when dealing with terrorism . . . it is, to a great extent, unpredictable. There is always a danger of resurgence.”⁶⁷ Not only did the danger exist, but no politician would want to be seen as responsible for any violence that might occur after the statute had been repealed.

The extension of the 1984 Prevention of Terrorism Act to international terrorism made the statute’s repeal even more remote. Between 1984 and 1996 more than twenty-one percent of those detained under either the 1984 or the 1989 PTA and subsequently

⁶² 1 PARL. DEB., H.C. (5th ser.) 351 (1981) (statement of M.P. Gardner).

⁶³ 269 PARL. DEB., H.C. (5th ser.) 54 (1996) (statement of M.P. David Wilshire).

⁶⁴ 273 PARL. DEB., H.C. (5th ser.) 1147 (1996) (statement of M.P. David Wilshire).

⁶⁵ 273 PARL. DEB., H.C. (5th ser.) 1149 (1996) (statement of M.P. A.J. Beith).

⁶⁶ 256 PARL. DEB., H.C. (5th ser.) 379–380 (1995) (statement of M.P. David Trimble).

⁶⁷ 269 PARL. DEB., H.C. (5th ser.) 90 (1996) (statement of M.P. Piers Merchant). As long as this threat remained, “[i]t would be criminally irresponsible to foreswear the use of the power of internment.” PARL. DEB., H.C. (5th ser.) 96 (1996) (statement of M.P. David Trimble).

charged with an offense were involved in international terrorism. In 1995 the number rose to fifty percent. This led one Member of Parliament to comment that it was vital for Britain to “continue to have on the statute book legislation which will enable a democratic society to respond to the ever-present threat of international terrorism, regardless of the situation in Northern Ireland.”⁶⁸ During his introduction in the renewal debates in 1996 the Home Secretary agreed that, “there is always likely to be terrorism of an international kind . . . the manifestations of it are increasing; and . . . the need for the [PTA] in order to counter them therefore remains.”⁶⁹ Basing the withdrawal of a temporary statute on the cessation of international terrorism undermined the Act's claim to transient status and placed repeal even further beyond reach. As long as violence continued, either in relation to Northern Ireland or to international disputes, the use of emergency legislation as a condemnation of terrorist techniques added to the propensity of such legislation to remain in force.

D. *Impact on Violence*

Not only did emergency legislation carry with it a moral import, but the partial effectiveness of the measures also lent itself to encouraging the continued use of the legislation. The 1922 SPA, 1973 EPA and 1974 PTA were immediately followed by declining levels of violence: a high of 80 murders and 58 attempted murders in April 1922 plummeted to 1 murder and 11 attempted murders by September of that year. These numbers continued to fall throughout the balance of 1922 and into 1923.⁷⁰ Similarly, immediately following the introduction of the 1973 EPA the number of deaths and injuries in Northern Ireland decreased. From a high of 467 deaths in 1972, the number dropped to 250 in 1973, and 216 in 1974; injuries correspondingly decreased from 4876 in 1972 to 2651 in 1973 and 2398 in 1974.⁷¹ In 1974 there was a similar drop in terrorist incidents in Great Britain.

There is some question as to what degree special powers were responsible for these decreases. All of the following may have played significant roles in helping to reduce and focus the violence under direct rule by Britain: (a) increased effectiveness of the security forces, (b) improved intelligence, (c) growing rejection by the communities in Northern Ireland of the use of violence for political ends, (d) the 1974 IRA cease-fire, (e) the drying up of IRA funding from the United States, (f) greater selectivity of terrorists in choosing targets, (g) greater cross-border cooperation with the Republic, and (h) increased media attention. However, statistics available on the operation of the 1973 EPA and 1974 PTA do suggest that wide use was made of provisions relating to the

⁶⁸ 273 PARL. DEB., H.C. (5th ser.) 1143 (1996) (statement of M.P. Andrew Hunter).

⁶⁹ 273 PARL. DEB., H.C. (5th ser.) 1129 (1996) (statement of M.P. Howard).

⁷⁰ See Letter from the Imperial Secretary to the Under Secretary of State, Home Affairs, June 21, 1923, PRO HA 267/362.

⁷¹ See generally NORTHERN IRELAND ANNUAL ABSTRACT OF STATISTICS *and* IRISH INFORMATION PARTNERSHIP.

collection of information during the first few years of the statutes' operation. Under the 1973 EPA 4141 people were arrested in 1975, 8321 in 1976, and 5878 in 1977.⁷² *Pari passu*, the armed forces utilized the 1974 PTA to detain 1067 people in 1975, 1066 in 1976, and 853 in 1977.⁷³ This brought to well over 21,000 the number of people held for questioning over the three-year period under powers provided by emergency legislation. From its introduction in 1974 until its renewal in 1996, more than 27,000 people were detained under the PTA alone. Although less than fifteen percent of these detainees were subsequently charged with a crime,⁷⁴ the information gathered from such techniques most likely had a significant impact on levels of violence in both Northern Ireland and Great Britain.

Northern Ireland suffered significantly less in terms of statistical eruptions of violence under the SPAs, which were considerably more far-reaching than their post-1972 counterparts. This fact was highlighted in Westminster;⁷⁵ indeed, the effectiveness of the SPAs from 1922-1943 became the basis for the shift in the justification of the measures. They came to be defended as a means of maintaining the *status quo* rather than as a means to establish law and order. This same alteration marked British defense of emergency measures—their efficaciousness became a reason for their retention. The security forces also tended to support the extension of such measures as part of their arsenal in the fight against terrorism. Once the powers had been gained, those wielding them were unwilling to see them diminished. This was picked up in Parliament during the 1981 renewal of the PTA. One Member of Parliament said: "It is my impression that once a government have these powers in their control they are very reluctant to give them up."⁷⁶ As time passed and security forces became more familiar with the operation of the statute, significant alterations might have been viewed as inconvenient.

In summary, a number of Northern Ireland emergency legislation characteristics likely contributed to the longevity of the measures. First, emergency legislation was formally consistent with other types of legislation. Second, many of the offenses introduced under the statutes were already in place under ordinary law. Third, in light of the moral disgust articulated through the enactment of emergency laws, it became politically undesirable (against a background of continuing violence) to repeal them. Fourth, the perceived effectiveness of the legislation lent itself to justification for the

⁷² See *Statistics on the Operation of the Northern Ireland (Emergency Provisions) Act 1991 for 1993*. 1 N. IR. OFF. STAT. AND RES. BULL. 1, 9 (Table 7a) (1994).

⁷³ See *Statistics on the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976—First Quarter 1980*. 7 HOME OFF. STAT. BULL. 1, Table 1, 5 (1980).

⁷⁴ See 273 PARL. DEB., H.C. (5th ser.) 1162 (1996) (statement of M.P. Canavan).

⁷⁵ See 940 PARL. DEB., H.C. (5th ser.) 1736 (1977). For an examination of the SPAs as breeding subsequent violence, see 1 PARL. DEB., H.C. (5th ser.) 382 (1981) (statement of M.P. Gerry Fitt) and DISTURBANCES IN NORTHERN IRELAND: REPORT OF THE COMMISSION APPOINTED BY THE GOVERNOR OF NORTHERN IRELAND, 1969, Cmnd. 532, para. 229(a).

⁷⁶ See 1 PARL. DEB., H.C. (5th ser.) 382 (1981) (statement of M.P. Gerry Fitts).

entrenchment of emergency measures in the Northern Irish and British constitutions. Finally, whenever a lull in violence occurred, opponents of the legislation had to prove that a threat no longer existed. As discussed below, both the nature of the Northern Irish situation and the nature of terrorism made it difficult to demonstrate the absence of a threat.

II. INTERNAL DIVISIONS AND THE PHYSICAL FORCE TRADITION

Was there something about the nature of the Northern Ireland conflict—the contrary demands of the two dominant ethnic groups and the intractable nature of the violence—that created a situation leading to the permanence of emergency legislation? While this paper focuses on the underlying legal elements contributing to the retention of emergency law, the political situation into which the legislation was introduced is quite relevant. Certainly Northern Irish politics from 1922 through the present have been built around deep ethnic divisions and divergent political aspirations. Housing distribution, employment patterns, education, inter-personal relationships and social activities all cut along ethnic lines.⁷⁷ Divergent constitutional aspirations further underlay the Catholic-Protestant divide. In this context historical events have served to legitimize one side against the other. For instance, the twelfth century Norman invasions, sixteenth century surrender and re-grant treaties and Nine Years' War, as well as the seventeenth and eighteenth century plantations and penal laws provided grounds for the republican struggle. The sixteenth century uprisings by the Irish Catholics, the 1689 Siege of Derry, the 1690 Battle of the Boyne, as well as the agrarian uprisings throughout the eighteenth century provided the basis for loyalist claims. Repeated reference to past events served to justify not just the republican view of the British government as an outside force, but physical force organizations as a “legitimate” means to rid the country of British presence. From Theobald Wolfe Tone and the 1791 Society of United Irishmen to the Young Ireland movement, Fenian Brotherhood, Irish Republican Brotherhood and the Defenders, republican violence was directed against the state and its institutions. In turn, the counter-revolutionary tradition sought to uphold the authority of the state. The Planters' home guards in the 1780s, the Rifle clubs and Young Ulster at the end of the nineteenth century professed devotion to the British Crown. These physical force organizations both emphasized and further entrenched divisions between the communities. By the time of partition and throughout the unionist government of the North two very different histories had been constructed, further reinforcing divisions within the province.

The entrenched ideologies of the two dominant ethnic groups, and in particular the two extremes, lent its own dynamic to the maintenance of emergency law from 1922 through 1972. Because the central issue at stake rested on the constitutional status of the

⁷⁷ See generally DAVID BOULTON, *THE UVF 1966–1973: AN ANATOMY OF LOYALIST REBELLION* (1973); *INTEGRATION AND DIVISION: GEOGRAPHICAL PERSPECTIVES ON THE NORTHERN IRELAND PROBLEM* (Frederic W. Boal & J. Neville Douglas eds.) (1982); F. Boal, and A. Robinson, *Close Together and Far Apart: Religious and Class Divisions in Northern Ireland*, 3 *COMMUNITY FORUM* (1972); FRANK BURTON, *THE POLITICS OF LEGITIMACY* (1978); JOHN DARBY, *NORTHERN IRELAND: BACKGROUND TO THE CONFLICT* (1983).

North, minority aspirations threatened the foundation of the state. Any attempt on the part of nationalists or republicans to gain power or to garner support for a united Ireland was perceived as an attack on the Northern Irish constitution. As defenders of the state, unionists immediately exercised their authority to secure the northern government. They hailed emergency legislation as a critical to maintaining control of the province. To lose control, particularly at the time of partition, would have meant not just civil disorder, but a change in the government's structure. Because of the political aspirations of both nationalism and republicanism, the threat to the constitutional position of the North remained long after the violence had subsided. Unionists were reminded of the threat in their midst by the protracted history of the physical force tradition, and the possibility of its return (which was openly advocated by republicanism). The occasional, actual revival of violent attacks, put even greater pressure on unionists to maintain the emergency measures.

Following World War II the unionist government slightly relaxed provisions introduced under the SPAs. This was the first and only time that the government withdrew emergency powers, and they were swiftly re-enacted.⁷⁸ Prior to this time unionists perceived the North to be under siege, and following partition, violence erupted both north and south. Even after unionists restored civil order in the province, there were sporadic outbreaks of republican violence. Just over the border a distinctively Irish, Catholic state was being formed. In the 1932 Free State general election, Eamonn deValera and Fianna Fáil gained control of the southern parliament. The northern executive branch maintained and expanded its emergency powers between 1922 and 1949 by issuing statutory instruments which adjusted more than 50 regulations.

Even when Britain assumed direct rule in the 1970s the conflicting aims of nationalists, republicans, unionists and loyalists continued to influence the existence of emergency law. Just as a threat had existed during the operation of the Northern Irish Parliament, Britain now faced violent opposition. While Westminster did not share unionists' immediacy in terms of the impact on the survival of the British (versus Northern Irish) state, Britain too became caught in the deep provincial divisions. The long history of republicanism and loyalism and their surrounding ideologies made it difficult for Westminster to address the situation via ordinary legislation. The Diplock

⁷⁸ See S.R. & O. 147/1949 and S.R. & O. 187/1951 (repealing a number of regulations under the SPAs). Although many of these were re-introduced by S.R. & O. 176/1955 and S.R. & O. 199/1956, and others incorporated into more mainstream statutes, what was significant was the overall (temporary) repeal of these measures. One explanation for this lay in the impact of World War II: having demonstrated loyalty in contrast to the South's neutrality, northern unionists could look upon their continued links with Britain with increased confidence. With Winston Churchill in power their position was even more secure. Moreover, the 1949 Ireland Act reaffirmed that Northern Ireland would remain part of the United Kingdom until a majority in the northern parliament decreed otherwise. Unionists had established such a clear hold on the political machinery that the possibility of losing a majority in parliament looked further off than ever. The newly found confidence gained by these circumstances, together with the relative calm in Northern Ireland and the lack of immediate threat from the IRA, contributed to the repeal of emergency provisions. So while divisions were still present in the Northern Irish society, unionists felt more secure with respect to the constitutional threat wielded by nationalism and republicanism. However the advent of the 1956–1962 IRA campaign swiftly resulted in the reenactment of emergency measures.

courts, the withdrawal of special category status, the advent of supergrass trials, and the media ban were all attempts to isolate “terrorists,” to remove them from communities steeped in a history of conflict. Attempts to bridge the ideological divide met with little success. Emergency legislation became hailed as a necessity in the distinctively Northern Irish context.

III. EMERGENCY PRECEDENT AND BRITISH PERCEPTIONS

A. *Prior Emergency Measures*

Not only was there a history of division and a physical force tradition, but there was also a long history of Britain enacting emergency measures in Ireland. On the state side this precedent played a role in influencing the acceptability of employing emergency legislation in Northern Irish affairs. Between 1800 and 1921 more than 100 Coercion Acts were deployed in Ireland.⁷⁹ These were designed to minimize violence and to establish law and order. For instance, “An Act for the Suppression of the Rebellion which still unhappily exists within this Kingdom, and for the Protection of the Persons and Properties of His Majesty’s faithful subjects within the same,”⁸⁰ was followed in 1803 by “An Act for the Suppression of Rebellion in Ireland, and for the Protection of the Persons and Property of His Majesty’s Faithful Subjects there.”⁸¹ These were succeeded by “An Act for the More Effectual Suppression of Local Disturbances and Dangerous Associations in Ireland,”⁸² and “The Protection of Life and Property in Certain Parts of Ireland Act.”⁸³

In response to the land war agitation of the late nineteenth century, the British government enacted the Protection of Person and Property (Ireland) Act in 1881,⁸⁴ and in the following year the Prevention of Crime (Ireland) Act.⁸⁵ The preamble of the latter

⁷⁹ See Michael Farrell, EMERGENCY LEGISLATION: THE APPARATUS OF REPRESSION (A Field Day Pamphlet No. 11, 1986). For other accounts of emergency legislation in Ireland and Great Britain prior to 1921, see COLM CAMPBELL, EMERGENCY LAW IN IRELAND 1918–1925 (1994); W.N. Osborough, *Law in Ireland 1916–26*, 23 N. IR. LEGAL Q. 48 (1972); and Eanna Mulloy, EMERGENCY LEGISLATION: DYNASTICS OF COERCION (A Field Day Pamphlet No. 10, 1986).

⁸⁰ See An Act for the Suppression of the Rebellion which still unhappily exists within this Kingdom, and for the Protection of the Persons and Properties of His Majesty’s faithful subjects within the same, 1799, 39 Geo. 3, ch. 11 (Eng.).

⁸¹ See Act for the Suppression of the Rebellion in Ireland, and for the Protection of the Person and Property of His Majesty’s Faithful Subjects there, 1803, 43 Geo. 3, ch. 117 (Eng.).

⁸² See An Act for the more effectual Suppression of local Disturbances and dangerous Associations in Ireland, 1833, 3 Will. 4, ch. 4 (Eng.).

⁸³ See Protection of Life and Property in certain Parts of Ireland Act, 1871, 34 & 35 Vict., ch. 25 (Eng.).

⁸⁴ See Protection of Person and Property Act, 1881, 44 & 45 Vict., ch. 4 (Eng.).

⁸⁵ See Prevention of Crime Act, 1882, 45 & 46 Vict., ch. 25 (Ir.).

statute highlighted the purpose of emergency measures in the Irish context. It read: “Whereas by reason of the action of secret societies and combinations for illegal purposes in Ireland the operation of the ordinary law has become insufficient for the repression and prevention of crime, and it is expedient to make further provision for that purpose, [this statute is now] enacted.”⁸⁶ Like the 1973 EPA, this legislation permitted the suspension of trial by jury in cases of treason, murder, attempted murder, manslaughter, aggravated crimes of violence against the person, arson and attacks against the dwelling-home.⁸⁷ The statute was the first to make intimidation an offense. Similar to the SPAs from 1922 through 1943, it included powers against rioting, unlawful associations, curfew, freedom of movement, and newspapers advocating offenses against the Prevention of Crime (Ireland) Act, as well as empowering security forces to search for illegal documents and arms. Privilege against self-incrimination was withdrawn from witnesses, with magistrates enabled to summon witnesses and compel them to answer questions under oath.

The 1887 Criminal Law and Procedure (Ireland) Act (the “1887 Act”),⁸⁸ which drew on previous coercion measures, granted powers of inquisition to magistrates, and empowered the Attorney General to conduct interrogation in private. Stating in relevant part: “Whereas it is expedient to amend the law relating to the place of trial of offenses committed in Ireland, for securing more fair and impartial trials, and for relieving jurors from danger to their lives, property, and business,” trials could be transferred to different counties where a “more fair and impartial trial” could be held with or without a special jury.⁸⁹ The same concerns addressed by Lord Diplock in 1972 were at issue in the nineteenth century. The 1887 Act also allowed the Lord Lieutenant and Privy Council to proscribe organizations. Various Peace Preservation (Ireland) Acts were passed throughout the nineteenth century,⁹⁰ as were adjustments to the judicial procedure and tightening of explosives and firearms measures. In sum, the unrest punctuating rule of Ireland was addressed historically through the introduction of special powers. This created an internal legitimacy in the continued use of similar measures immediately following partition and through direct rule. Britain’s application of similar measures from 1972 through 1996 was further bolstered by the perception in Westminster of Ireland as a place apart.

⁸⁶ *See id.* at Preamble.

⁸⁷ *See id.* *See also* 1973 EPA, *supra* note 6.

⁸⁸ *See* Criminal Law and Procedure Act, 1887, 50 & 51 Vict., ch. 20 (Ir.). This statute was not repealed until the 1973 EPA.

⁸⁹ *See id.*

⁹⁰ *See, e.g.,* the Peace Preservation Act, 33 & 34 Vict., ch. 9 (1870) (Ir.); the Peace Preservation Acts Continuance Act, 1873, 36 & 37 Vict., ch. 24 (Ir.); the Peace Preservation Act, 1875, 38 & 39 Vict., ch. 14 (Ir.); the Peace Preservation Act, 1881, 44 & 45 Vict., ch. 5 (Ir.); *and* the Peace Preservation Continuance Act, 1886, 49 & 50 Vict., ch. 24 (Ir.).

B. *Perceptions from Westminster*

The view that Northern Ireland bears a unique history within which special powers are acceptable or even necessary played a role in annual consideration of emergency legislation. In 1972 one Member of Parliament commented: “I have great sympathy with those who have protested in this debate that the order provides for internment in another and more sophisticated form. But internment has been one of the facts of Irish history and one of the means for securing the State in Ireland, north or south.”⁹¹ Another Member asserted: “We have never been able to maintain a Northern Ireland state, since its very inception, without some kind of repressive law.”⁹²

Northern Ireland was different from the rest of the United Kingdom. It was a place apart. In 1979, the Secretary of State for Northern Ireland stated: “Northern Ireland, for reasons that cannot be undone, is not like any other part of the United Kingdom. New structures of government must be based on a recognition of that fact.”⁹³ Humphrey Atkins later added: “I hope that it will be clear to the House that the Government are, and will continue to be, sensitive to the special problems of Northern Ireland.”⁹⁴ In response to protestations that the powers in the 1975 EPA would not be accepted in England, the Minister of State for Northern Ireland replied, “[o]f course, but the same situation does not apply in England.”⁹⁵ During the committee stage of the 1973 EPA Bill one Member asserted that “the . . . impression I got . . . was that [the elimination of juries] would never be taken here but that it was good enough for Northern Ireland.”⁹⁶ More than two decades later similar sentiments were still being voiced.⁹⁷ Commenting later about the government’s decision to introduce the Prevention of Terrorism (Temporary Provisions) Bill, Roy Jenkins wrote:

I always believed in keeping as much as possible of the contagion of Northern Irish terrorism out of Great Britain. I thought we had responsibilities in Northern Ireland, both to uphold security and to assuage the conflict, but I did not think they extended to absorbing any more than we had to of the results of many generations of mutual intolerance.⁹⁸

⁹¹ 848 PARL. DEB., H.C. (5th ser.) 80 (1972).

⁹² 987 PARL. DEB., H.C. (5th ser.) 987 (1979) (statement by M.P. J. Maynard).

⁹³ 969 PARL. DEB., H.C. (5th ser.) 928 (1979) (statement by M.P. Humphrey Atkins).

⁹⁴ *Id.* at 930.

⁹⁵ 959 PARL. DEB., H.C. (5th ser.) 1580 (1978) (statement by M.P. J. D. Concannon).

⁹⁶ 2 PARL. DEB., H.C. (Standing Committee B) 52 (1972–73) (statement on the Northern Ireland Emergency Provisions Bill by M.P. A.W. Stallard).

⁹⁷ *See* 272 PARL. DEB., H.C. (5th ser.) 61 (1996) (statement of M.P. Kevin McNamara) (stating that “no one in Britain will undergo the [EPA] procedures that apply in Northern Ireland.”).

⁹⁸ JENKINS, *supra*, note 19, at 377.

Member of Parliament Tom Litterick commented: “I view with trepidation the prospect of discussing the internal affairs of a foreign country. Ulster is a foreign country. I have been there and it is, in every sense, unmistakably a foreign country.”⁹⁹ Northern Ireland was alien territory with its own ingrained history. “We should remember that we cannot allow ourselves to be swayed too much by our sometimes frantic considerations of present events because, as the House should know, present events are very similar in Ireland to what has gone on before. There is nothing exceptional about them.”¹⁰⁰

Reflecting the perception of emergency legislation as somehow acceptable in the Northern Irish context were the brevity and perfunctoriness of the renewal procedure. In the House of Commons, debates tended to be held late at night, rarely lasting more than ninety minutes. In Lords they were even shorter and less detailed.¹⁰¹ Not only was the time allocated to the consideration of emergency legislation limited, but after the introduction of the 1973 EPA Parliament appended the renewal of other statutes to the debates surrounding emergency measures. Within a few years their renewal, the 1974 Northern Ireland (Young Persons) Act and the 1974 Northern Ireland Act were being considered concurrently with retention of the EPAs from 1973 through 1975.¹⁰² This allowed for even less direct discussion of the emergency measures at hand. In addition attendance at the annual renewals steadily eroded in the years following the introduction of emergency law. The form and manner of debate on the EPA and PTA, combined with the substance of their provisions reflected the generally held view in Westminster that applying emergency law to Northern Ireland was acceptable.

IV. CONTEXT OF THE BRITISH STATE

A. *Limitations and Dilution*

Although arising from disparate modes of justification, to some extent the types of emergency measures introduced by the unionist government and by Westminster overlapped. This may have been due to the common origins of the measures. For example, the 1922 SPA was drawn directly from British legislation previously employed in Ireland. Immediately following partition, with a civil war just over the border, it was unlikely that Westminster would censure unionist imitation of previous British policy. The introduction of the 1972 Detention of Terrorists Order immediately following imposition of direct rule confirmed that Britain was still ready and willing to employ such measures with regard to Northern Ireland. Why did Britain continue to support this legislation after 1972? Aside from the formal consistency and moral import borne by

⁹⁹ 940 PARL. DEB., H.C. (5th ser.) 1710 (1977) (statement by M.P. Tom Litterick).

¹⁰⁰ 952 PARL. DEB., H.C. (5th ser.) 1784 (1978) (statement by M.P. Tom Litterick).

¹⁰¹ See JELICOE REPORT, *supra* note 48, para. 14.

¹⁰² See Northern Ireland (Young Persons) Act, ch. 33 (1974) (Eng.); Northern Ireland Act (1974) (Eng.). See also 894 PARL. DEB., H.C. (5th ser.) 814 (1975) and 934 PARL. DEB., H.C. (5th ser.) 633 (1977).

emergency law and considerations relating to the Northern Irish political situation, as discussed above, was there something about the structure of the British state which lent itself to entrenching emergency law?

The options available to the northern government and to Westminster were more limited within the United Kingdom than they might have been in totalitarian regimes. To whatever degree the minority community was isolated from the nucleus of political power, the structure of the northern parliament still reflected that of a democratic state. The majority community had to be satisfied, and this limited what the Northern Irish and British governments could do. Parliament recognized that the Northern Irish conflict was “an extremely difficult war for a democracy such as [Britain] to fight.”¹⁰³ What separated acts of terrorism from those of mere criminality was that the former were distinguished precisely by the political or ideological motivation of those engaging in the acts. Terrorist motivation, unlike other criminal motivations, led to acts challenging the state itself. In attempting to meet the challenge, the northern government enacted broad, sweeping legislation. While Britain sought to demonstrate that the government would not tolerate terrorist acts, it walked a fine line between allowing what it saw as too much leeway for subversive organizations and violating rights otherwise protected in a liberal, democratic state.

Largely as a result of the lack of clarity between acceptable measures and unacceptable provisions, Britain’s use of emergency law after 1972 underwent some alteration. Thus while the basic measures remained the same, the specific provisions metamorphosed in response to internal demands, internal reviews and international attention. For instance, the interrogation techniques introduced in the early 1970s were drawn directly from British operations in Palestine, Malaya, Kenya, Cyprus, and elsewhere. However it was not until they were employed within the United Kingdom that they received widespread attention and condemnation. After the international attention, they were dropped. Such techniques proved unacceptable within the democratic structure of the United Kingdom. By contrast, seven-day detention and its disparate application to the minority community in Northern Ireland continued well into the next decade. Even though interrogation and detention were challenged, these techniques achieved a borderline acceptability, possibly due to the mitigating measures already in place.

Exclusion also underwent dilution after 1972 throughout the tenure of direct rule. In response to unionist agitation, Britain included the principle of reciprocity via the 1974 Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order. This instrument was incorporated with some alterations into the 1976 PTA.¹⁰⁴ Two years

¹⁰³ 969 PARL. DEB., H.C. (5th ser.) 1005 (1979) (statement by M.P. W. Benyon).

¹⁰⁴ See 1976 EPA, *supra* note 6. The time limit for making representations against an exclusion order after being served with notice was increased from 48 hours to 96 hours, and in the event that the individual had not already been consensually removed from the United Kingdom, the right to a meeting with an advisor was made absolute, rather than being dependent on whether the Secretary of State determined the request to be “frivolous.”

later, in response to Lord Shackleton's recommendation that a survey of exclusion orders be conducted to determine possible revocation, Westminster announced that it would implement a standard review of exclusion orders to be instituted three years after the making of the initial order. In 1982 Lord Jellicoe proposed that exclusion orders be retained with some modifications.¹⁰⁵ The government accepted his findings and altered the appropriate provisions in the 1984 Prevention of Terrorism (Temporary Provisions) Act.¹⁰⁶ Exclusion was limited to a period of three years, after which time the Secretary of State could renew the order. Any British citizen resident in Great Britain three or more years prior to consideration of exclusion was exempted from the 1984 Prevention of Terrorism (Temporary Provisions) Act.¹⁰⁷ Westminster's later introduction of the 1996 Draft Prevention of Terrorism (Temporary Provisions) Regulations further modified the provisions in accordance with the European Covenant on Human Rights.¹⁰⁸

These changes gradually reduced the more severe effects of exclusion, making the presence of the measure, while still exceptional, more palatable than before. Other alterations, such as the extension of the requirement of reasonable suspicion for the exercise of various powers, and the extension to detainees of certain rights they otherwise would hold under the Police and Criminal Evidence Act, demonstrated the "normalization" of emergency law. These alterations brought the formal statutes and regulations of Northern Ireland closer to England's perception of liberal democratic law, thereby reducing the persuasiveness of any dissent. Similar dilution of emergency measures contributed to the entrenchment of the legislation.¹⁰⁹ This normalization, along with the growing acceptance of emergency legislation throughout the 1980s and into the 1990s is clear in parliamentary scrutiny of the measures. Following the 1976 general review of the PTA, the terms of reference for these measures in independent reports consistently included "the continuing need for legislation against terrorism."¹¹⁰ The government analyzed the functional operation of the statute, but did not examine whether the legislation itself was necessary or appropriate. By the mid-1970s, the framework within which only minor, technical adjustments would be made had been established.

B. *International Attention to Domestic Concerns of United Kingdom*

¹⁰⁵ See JELICOE REPORT, *supra* note 48, at para. 188.

¹⁰⁶ See generally Prevention of Terrorism (Temporary Provisions) Act (1984) (Eng.).

¹⁰⁷ See *id.* at ch. 8. Similarly, an individual resident in Northern Ireland three or more years could not be excluded from the province. Clause 7 created an absolute right of appeal for individuals to meet with an adviser to make representations protesting the issuance of exclusion orders. The length of time within which such meetings were arranged was extended from 96 hours to 7 days after the initial order was made.

¹⁰⁸ See *id.*

¹⁰⁹ While many of the measures were diluted, others, such as those relating to financial support of proscribed organizations, grew more strict.

¹¹⁰ See generally SHACKLETON REPORT, *supra* note 53.

The British state operated not only within certain limitations imposed by its governmental structure (which resulted in the dilution of some of the more extreme measures), but also within the expectations and allowances of the international community. These international pressures influenced Britain's alteration—and retention—of emergency law. As a result of Northern Ireland's structural subservience to Westminster, measures enacted by the unionist government from 1922 to 1972 were largely considered internal to the United Kingdom. Certainly during the post-World War I rebuilding period, World War II, and the immediate aftermath of the World War II, minimal attention was drawn to the operation of the SPAs. With the advent of the civil rights marches in the 1960s, however, and the increased international attention placed on civil rights issues, the Northern Ireland situation gained prominence. Aided by the rapidly expanding media industry and highlighted by Westminster's assumption of direct rule, more attention was placed on Northern Ireland and Britain's response to events there. The Republic became increasingly involved via the Anglo-Irish intergovernmental talks. These changes brought into sharp relief the international agreements into which the United Kingdom had entered, and the related issues arising under the introduction and operation of emergency measures in Northern Ireland.

C. *Various Treaties Protecting Ability of Contracting States to Introduce Emergency Legislation*

Various treaties to which the United Kingdom was a signatory protected the ability of contracting states to introduce emergency measures in times of need. For instance, Article 4 of the International Covenant on Civil and Political Rights (“International Covenant”) allowed for derogation from obligations under the treaty in times of public emergency.¹¹¹ Upon ratification of the covenant in 1976, the British government reserved derogation in respect to Northern Ireland. Britain withdrew the derogation in 1984 only to reinstate it in 1988.¹¹² Like Article 4 of the International Covenant, Article 15 of the European Convention on Human Rights (the “European Convention”) allowed that:

[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.¹¹³

¹¹¹ See *International Covenant on Civil and Political Rights 1966*, reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 127 (Ian Brownlie ed., 3rd ed. 1994). Although some articles were exempted from derogations, such as those relating to the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and the right not to be enslaved or held in servitude, a general derogation could be established.

¹¹² For the text of this subsequent derogation see <<http://www.law.qub.ac.uk>> (visited Nov. 25, 1999).

¹¹³ See European Convention on Human Rights and Its Five Protocols, November 4, 1950, 213 U.N.T.S. 221. For a complete text, see <<http://www.hri.org/docs/ECHR50.html>> (visited Nov. 25, 1999). Britain withdrew its derogation under Article 15 in 1984 as part of its criminalization of terrorist violence. See JACKSON, *supra* note 37, at 235.

During the introduction of emergency measures, Members of Parliament appealed to the derogations provided by these agreements. One Member of Parliament stated, “We know that even the human rights convention admits of some circumstances in which ordinary principles may be set aside . . . the principle [of derogation from the normally accepted principles of the judicial process] is well recognized in the European Convention of Human Rights.”¹¹⁴ In its exercise of emergency powers after 1972, the United Kingdom government chose to avail itself of the right to derogate from the standards when it was brought before the European Court for violations of the covenant.¹¹⁵ In *Brogan and Others v. United Kingdom*, four people, detained between four and seven days under the PTA on suspicion of involvement in Northern Irish terrorism, submitted complaints to the European Commission on Human Rights that the United Kingdom’s actions had violated the European Convention.¹¹⁶ Article 5, paragraph 3 of the European Convention demanded that anyone arrested “be brought promptly before a judge or other officer authorized by law to exercise judicial power and . . . be entitled to trial within a reasonable time or to release pending trial.”¹¹⁷ In November 1988 the European Court ruled that even the shortest period for which one of the four individuals had been held (four days and six hours) violated the convention.¹¹⁸ Because no provisions existed in the United Kingdom by which the government could compensate the individuals, the country was also found in violation of Article 5, paragraph 5, which stipulated that anyone who had been the victim of arrest or detention should have an enforceable right to compensation.¹¹⁹ The British government insisted that seven-day detention was required and examined two possible courses of action.¹²⁰ Either a judicial element could be inserted into the procedure through which the seven-day detention was extended, or else the United Kingdom could derogate under Article 15.¹²¹ In December 1988, Britain announced that it would pursue the latter route, and a year later it

¹¹⁴ 859 PARL. DEB., H.C. (5th ser.) 812 and 843 (1973). See also PARL. DEB., H.C. (5th ser.) 298 (1973) (acknowledging the United Kingdom’s right under the European Convention on Human Rights, to intern those who shoot and kill but still seeking external investigation of the established tribunal system to ensure compliance with the protections guaranteed under the Convention).

¹¹⁵ See JACKSON, *supra* note 37, at 507–35 (discussing multiple cases under consideration by the European court of Human Rights).

¹¹⁶ See *Brogan and Others v. United Kingdom*, App. Nos. 11209/84; 11234/84; 11266/84; 11386/85, 11 Eur. H.R. Rep. 117; 145–B Eur. Ct. H.R., (ser. A) (1988).

¹¹⁷ See European Convention on Human Rights and Its Five Protocols, *supra* note 113, at 329.

¹¹⁸ See *Brogan and Others v. United Kingdom*, App. Nos. 11209/84; 11234/84; 11266/84; 11386/85, 11 Eur. H.R. Rep. 117; 145–B Eur. Ct. H.R., (ser. A) (1988).

¹¹⁹ See *id.*

¹²⁰ 143 PARL. DEB., H.C. (5th ser.) 843 (1988) (statement of M.P. Douglas Hurd).

¹²¹ The derogation was an option in *Brogan and Others v. UK*; derogation had not been possible in the first case to come before the court, *Ireland v. UK* (1978) 2 Eur. H.R. Rep. 25, because the breach established in that case was non-derogable under Article 3.

reaffirmed the derogation, stating that it would be maintained as long as deemed necessary.¹²² Although *Brannigan & McBride v. United Kingdom* subsequently challenged the validity of this derogation, once again in the context of detention, the court found in the United Kingdom's favor.¹²³ According to the preconditions for derogation there must be a "war or other public emergency threatening the life of the nation," the derogation must be "strictly required by the exigencies of the situation," and that measures must be consistent with the state's other international obligations. These conditions were satisfied and the court held that the derogation was valid.¹²⁴ Simultaneously, the court noted its concern about the long-term, apparently unexceptional character of the "emergency" in Northern Ireland.¹²⁵

These international agreements became a yardstick by which Britain could measure its incursions into civil rights.¹²⁶ In 1972 Lord Diplock sought to adjust existing

¹²² See 160 PARL. DEB., H.C. (5th ser.) 209–10 (1989), reprinted in S. Marks, *Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights*, (1995) OXFORD J. LEGAL STUD. 71, n.1 (1995).

¹²³ See *Brannigan & McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993). For other applications challenging the validity of the derogation see Application Nos. 14672/89, 14705/89, 14780/89, 14880/89, 18317-320/91, 18414/91, 18627-628/91, 19431/92, 19504/92, and 20440/92, reprinted in S. Marks, *supra* note 122 at 69, 71, n.18 (1995).

¹²⁴ See *Brannigan & McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993).

The Jurisprudence of the Commission and Court of Human Rights has established the following characteristics of an emergency where article 15 of the Convention is invoked: (i) the emergency must be actual or imminent; (ii) its effects must involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; and (iv) the crisis or danger must be exceptional in that the normal measures or restrictions, permitted by the convention for the maintenance of public safety, health, and order, are plainly inadequate.

K. Boyle, *Human Rights and Political Resolution in Northern Ireland*, 9 YALE J. WORLD PUB. ORD. 156, 159 (1982). See also C. Feingold, *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, 53 NOTRE DAME LAWYER, 90 (1977) (discussing the margin of appreciation granted in emergency circumstances); *Lawless v. Ireland*, 1 Eur. H.R. Rep. 15 (1961); see, e.g., A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 51–53, 111–14, 212–21 (2d ed. 1977) (analyzing *Lawless v. Ireland*).

¹²⁵ Only four states of emergency were declared in Northern Ireland between 1972 and 1980 under the Emergency Powers Act, 1926, 16 & 17 Geo. 5, ch. 5 (N. Ir.); and the Emergency Powers (Amendment) Act, 1964, 12 & 13, ch. 34 (N. Ir.): (i) issued: February 10, 1972, withdrawn: November 16, 1973; (ii) issued: November 16, 1973, withdrawn: May 19, 1974; (iii) issued: May 19, 1974, withdrawn: September 19, 1974; (iv) issued: January 11, 1979, withdrawn: January 14, 1979. See <<http://www.law.qub.ac.uk>> (visited Nov. 25, 1999).

¹²⁶ Following *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25 and *Brogan and Others v. United Kingdom*, 11 Eur. H.R. Rep. 117, *Fox, Campbell and Hartley v. United Kingdom*, 13 Eur. Ct. H.R. Rep. 157 (1991) was the third finding by the European Court of Human Rights that Britain's counter-terrorist legislation violated the European Covenant. This case focused on requirements of "suspicion" versus "reasonable suspicion" and the use of arrest to gather information. For analysis of this case see Wilson Finnie, *Anti-Terrorist Legislation and the European Convention on Human Rights*, 54 MOD. L. REV. 288 (1991).

criminal procedures in a manner consistent with Article 6 of the European Convention. In his 1975 review of the 1973 EPA Lord Gardiner wrote: “The British Government has acted legitimately, and consistently with the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in restricting certain fundamental liberties in Northern Ireland.”¹²⁷ These findings followed on concerns voiced in the House of Commons that emergency measures introduced by Westminster, and particularly with respect to the Diplock Court system, would lower the United Kingdom’s standing in the international arena.¹²⁸ Powers under the EPAs and PTAs frequently were examined against findings by the European Court.¹²⁹ Colville’s 1987 review cited the damaging effects of these exclusionary measures on the British government’s civil rights reputation in the eyes of the international community. This provision’s presence prevented the United Kingdom from ratifying protocol four of the European convention on Human Rights which declared the right to move freely and to choose where to live within one’s own country. The international community’s allowance of the United Kingdom’s derogation led the United Kingdom to dilute, rather than eliminate, these emergency measures, creating an “acceptable level” of suspension of human rights.

The international arena also had influence over Britain’s counter-terrorist legislation via the European Convention for the Suppression of Terrorism. In May 1973 the Consultative Assembly of the Council of Europe adopted Recommendation 703, which condemned international terrorist attacks. It invited governments of member states “to establish a common definition for the notion of ‘political offense’ in order to be able to refute any ‘political’ justification whenever an act of terrorism endanger[ed] the life of innocent persons.”¹³⁰ The underlying rationale was that some crimes were so odious in terms of the methods adopted to obtain certain results, that they should no longer be classified as political offenses, and thus exempted from extradition.¹³¹ Upon recommendation of the ministers of justice of its member states, the Council of Europe drafted the European Convention on the Suppression of Terrorism. This document

¹²⁷ REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, 1975, Cmnd. 5847, ch. 7, n. 4.

¹²⁸ See 855 PARL. DEB., H.C. (5th ser.) 315 (1973) (“When we sit in and observe trials in [other] countries, our position and the respect in which British law is held in those countries will be severely diminished and hampered.”).

¹²⁹ See, e.g., 272 PARL. DEB., H.C. (5th ser.) 42–44, 81–84, 89–90 (1996); 272 PARL. DEB., H.C. (5th ser.) 1160 (1996).

¹³⁰ See European Convention on the Suppression of Terrorism, Explanatory Note, Jan. 27, 1977, Cmnd. 7031, at 11 [Hereinafter Explanatory Note].

¹³¹ See European Convention on Extradition Dec. 13, 1957, art. 3, para. 1, 359 U.N.T.S. 273 (providing that extradition shall not be granted in respect of a political offense). For discussion of extradition concerns between the United Kingdom and the Republic of Ireland, see Margaret McGrath, *Extradition: Another Irish Problem*, 34 N. IR. LEGAL. Q. 292 (1983).

removed certain offenses from consideration as political offenses.¹³² Others listed in article 2 could be removed from classification as political offenses, notwithstanding their political content or motivation.¹³³ In expediting extradition, member states relied on the operation of mechanisms that already had been established. This reliance overtly supported member states' measures, and depended on the mechanisms of the European Commission on Human Rights and Fundamental Freedoms to address any deviation. This allowed politically motivated terrorism to be made subject to ordinary rules governing extradition until and unless the European Commission ruled otherwise.

The United Kingdom ratified the European Convention on the Suppression of Terrorism on July 24, 1978, and installed it as domestic law on June 30, 1978.¹³⁴ Although the first article technically eliminated the possibility for a requested state to invoke the political nature of a terrorist offense in order to oppose an extradition request,¹³⁵ article 13 allowed contracting states to make exceptions with regard to the application of article 1.¹³⁶ Seven of the eighteen initial signatories (Denmark, France, Germany, Italy, Norway, Portugal, and Sweden) chose to avail themselves of this option. However, in its derogation France asserted the need to tighten legislation to combat terrorism: "This signature is the logical consequence of the action we have been taking for several years and which has caused us on several occasions to strengthen our internal legislation"¹³⁷ At the time the statement was made, Britain was implementing its policy of Ulsterization and criminalization. Both the international support for the criminalization of terrorist acts, such as that signified by the European Convention on the Suppression of Terrorism, and the concurrent tightening of counter-terrorist measures within other member states, created a context within which the adoption of emergency law reflected an accepted, international norm.

¹³² See European Convention on the Suppression of Terrorism, *supra* note 130. This included any offenses under the Convention for the Suppression of Unlawful Seizure of Aircraft, 1972 Gr. Brit. T.S. No. 39 (Cmnd. 4956), or the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1974 Gr. Brit. T.S. No. 10 (Cmnd. 5524), any serious offense against internationally protected persons, kidnapping, the taking of hostages, or serious unlawful detention, an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if individuals are so endangered, or acting as an accomplice in any of the above offenses.

¹³³ See European Convention on the Suppression of Terrorism, *supra* note 130, at art. 2. These offenses included acts of violence not covered by article 1, such as acts against property, offenses creating a collective danger to persons, or accomplices in the aforementioned acts.

¹³⁴ See Suppression of Terrorism Act, 1978, ch. 26 (Eng.).

¹³⁵ See Explanatory Note, *supra* note 130, at para. 31.

¹³⁶ See *id.*

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

Id., at art. 13.

¹³⁷ See *id.*, at 8.

D. *Contradictions in International Law Regarding Counter-Terrorist Provisions*

Aside from general curtailment of some of the worst human rights' abuses employed by states, general support in the international arena for the introduction of some sort of domestic counter-terrorist legislation, and overall acknowledgment of the right of states to derogate from their responsibilities in times of "great need," the international community said very little about the specific issue of counter-terrorist law. In part this silence stems from the failure of the international community to agree to a common definition of "terrorism."¹³⁸ The aims, structures, targets, strategies and tactics of terrorist organizations vary widely. Cultural and historical considerations may provide a certain amount of concurrence within a particular region, such as Western Europe or South America, as to the elements of a terrorist act; however cultural, ethnic, or religious connections between nation-states and sub-national movements often blur the distinction between "terrorism" and "liberation."

The very characterization of terrorist acts as "grave breaches" or war crimes assumes that acts of terrorism during liberation struggles can be distinguished from individual acts of international terrorism, yet the success of attempting to make such a distinction is not apparent. Failure to grasp a common definition of terrorism limits the international community's ability to direct the scope and direction of counter-terrorist statutes. The lack of clarity in determining what constitutes a terrorist act also reflects jurisprudential disputes over whether terrorism constitutes its own formal branch of international law, or whether it is simply a manifestation of acts conducted within the auspices of other areas: the Law of the Seas, Air and Space Law, etc. It is not the intent of this article to delve into these and other factors influencing international treatment of terrorism and counter-terrorist domestic and international law.¹³⁹ Some aspects of the principles which underlie the structure of the United Nations and the international community do bear mention however, as their resulting lack of guidance on domestic counter-terrorist law has to some extent perpetuated the use of emergency measures in the United Kingdom.

The principle of equal rights and the self-determination of a "people" are at the heart of the United Nations' Charter.¹⁴⁰ This document presupposes a vision of state sovereignty, territorial integrity, and political independence. As the scope of "self-determination" has expanded—particularly in the post-1945 period—these principles

¹³⁸ See INTERNATIONAL TERRORISM: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES, (Yonah Alexander ed., 1976): In 1937 the world community agreed in principle as to what constitutes international terrorism. Since then however, states have failed to accept a common definition.

¹³⁹ See generally LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION (1997); TERRORISM AND INTERNATIONAL LAW (Rosalyn Higgins & Maurice Flory eds., 1997).

¹⁴⁰ See generally ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT (1996) (discussing the definition of a "peoples" and the conflict between self-determination and state sovereignty).

have come into frequent conflict concurrent within a nation-state. A “people” often exhibits a transboundary or transborder existence, but the context of ethnic nationality must operate through traditional mechanisms of sovereign state administration. Thus while most states in the world agree with the principle of self-determination, the exercise of the right to self-determination is seen as being subject to participation in democratic processes.¹⁴¹ Yet the majority/minority mechanisms present in liberal democratic states often reduce the possibility of minority self-determination. Furthermore, it has never been made clear exactly what rights entitlements are involved in self-determination. How can international law determine which “peoples” can exercise these entitlements? How can self-determination be achieved? The concept of a “people” was originally tied to ethnically and/or culturally distinct groups within a particular territory. Stemming in large part from the successful use of armed conflict by various “peoples” after 1945, the concept of a “people” has gradually been expanded to include certain minorities who lack self-determination within recognized geopolitical boundaries. It is now understood to include groups living in a situation of colonial domination, alien occupation and/or under a racist regime.¹⁴² It is unclear, however, how far the concept of a “people” can be applied, or what should occur if claims of competing peoples come into conflict.

In addition to the vagueness and contradiction inherent in the right to self-determination of a people, the principle of self-determination, if enforced at an international level, contradicts the principles of state sovereignty and territorial integrity for the existing state. The principle of non-intervention both encourages and recognizes the rights of states to handle domestic disputes independent of any international customary law. Yet self-determination suggests that nationalist movements are themselves legitimate actors in the international arena, and thus subject to protection under international norms. To address this issue, the 1977 Protocol to the Geneva Conventions of August 1949 addressed the Protection of Victims of International Armed Conflicts, while the International Humanitarian Law of Armed Conflict extended protection to wards of self-determination.¹⁴³ The 1977 extensions of international humanitarian law suggest that the actions of the states when dealing with domestic armed conflicts may no longer be beyond the scope of international inquiry. Further, acts of terrorism perpetuated by or on behalf of people struggling for their rights to self-determination present a potentially separable and different phenomenon subject to prosecution under international humanitarian law. However the United Nations only regulates states in their use of force.

¹⁴¹ *Id.* at 3.

¹⁴² *See id.* at 17, n. 9 (discussing the Protocol additional to the four Geneva Conventions of Aug. 12, 1949, 75 U.N.T.S. 31, and relating to the protection of victims of international armed conflicts (Protocol 1) Article 1(4). June 8, 1977). This new scope evolved after the United Nations admitted various new states that formerly were colonial territories that had been subjected to human right abuses.

¹⁴³ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12 1977, 1125 U.N.T.S. 609.

International humanitarian law generally applies between signatory states. For example, the 1949 Geneva Conventions could apply to domestic liberation conflict. Reflecting the aim of states to deny any challenge to state political legitimacy posed by nationalist terrorist movements, ruling governments have stopped short of advocating the application of international humanitarian law to subnational terrorist organizations. Governments prefer to deal with terrorism as a criminal activity and to prosecute it within a sovereign, domestic framework of penal law. Certainly in the case of the United Kingdom, the government made every effort to address the violence through domestic statutes. It repeatedly denied the Republic or the international arena any role in what it claimed were the “internal workings” of the United Kingdom. It was not until the mid-1980s, with the signing of the Anglo-Irish Agreement, that the United Kingdom recognized any role an external party might have vis-à-vis Northern Ireland.¹⁴⁴ By handling the violence as a matter internal to the United Kingdom, the state sought to deny legitimacy to the terrorist organizations.

This refusal of states to “elevate” terrorist organizations to equal status in the international arena prevents international humanitarian norms relating to conduct in war from being applied to the actions of either the terrorist organizations or the states themselves. If the states were to involve international humanitarian law in wars of self-determination, it would imply that the manner in which the state ensures its own legitimacy no longer lies within domestic jurisdiction. Of course this violates the principle of state sovereignty. So while most states are prepared to allow the right to self-determination as a principle of the United Nations and of international customary law, they are not prepared to accept the practical impact of such a concession on the “internal workings” of their own nation-state. This impact could include legitimization of anti-state terrorist organizations, possible fragmentation of state territory, the erosion of state sovereignty, and limitations on the state’s right to self-defense.

E. *A Hierarchy of Rights*

The international legal system also contributed to the retention of emergency measures through the rights discourse inherent in liberal, democratic thought. The British government’s propensity to appeal to this discourse served to further entrench emergency law in the United Kingdom. A comparison of the justification of emergency law developed by the Northern Ireland Parliament with that pronounced by Westminster illustrates the efficacy, or lack thereof, of appeals to this discourse. In Northern Ireland, the justification for the 1922 SPA rested in part on the claim that such measures in no way infringed the freedom of those who did not challenge the state:

One great feature about this Act which we now propose to continue is that while it places great powers in the hands of the government in regard to

¹⁴⁴ See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland, 1985, Cmnd. 9657.

dealing with disorder and the disorderly elements in our midst, it does not tend in any way to infringe on the liberty of any law-abiding subject.¹⁴⁵

This assertion reflected the unionists' belief that the measure would not be applied to those individuals supporting the constitutional position of the northern state, and also ignored the dangers of legislation which violated, in any measure, the rights of any citizens in the state.

In contrast, Westminster recognized that both the 1973 EPA and the 1974 PTA violated the rights of the citizens. However, the government bore a justifiable duty to protect its citizens. As one Member of Parliament asserted:

If the Government are not to forfeit their right to be called a Government, if the rule of law is to be anything other than a hollow mockery, if the Government are to be entitled to the regard and obedience of their citizens, it is their solemn duty to consider how these murders can be ended.¹⁴⁶

This implied that the citizens bore a right to be protected by the government, a right that in turn placed a correlative duty on the government to create and enforce measures protecting the citizens. This right was clearly a derivative of the most fundamental right of all: the right to life—which imposed a duty on citizens to abstain from causing death. The state's obligation to enforce the duty corresponded with a separate right of the citizens of protection from the government, creating a duty for officials to pursue and effectuate individuals' rights.¹⁴⁷ Not only were the right to life and the duty of others to abstain from taking that life recognized in the international covenants to which the United Kingdom was a signatory, but the entitlement of the citizen to expect protection from the government was implicit in the articles delineating derogations. Further, the primacy of the right to life as the most fundamental right within a state, along with the ability of the state to suspend other rights in order to protect that entitlement, was widely recognized as well.

With this rationale driving Parliament, and reflected in its international agreements, a hierarchy of rights emerged in Westminster in which the government was called on to protect the most basic of individual entitlements. Those that were of lesser importance had to be sacrificed in order to protect the more basic rights of the citizenry:

Where there is a terrorist situation in any country, the rights of the individual in the community have to be surrendered to a degree in order

¹⁴⁵ See PRONI HA/32/1/619 (1928).

¹⁴⁶ See 969 PARL. DEB., H.C. (5th ser.) 948 (1979) (statement of M.P. John McQuade).

¹⁴⁷ The concurrence of these two rights was a matter of practicality and not logic, as one did not necessarily entail the other. The right of the citizen to be protected against other citizens could be simply a nominal right. However, in any operative legal system, the officials will be under a moral duty and perhaps also a legal duty to take all reasonable steps to avert and rectify violations of basic rights.

that his real rights may be defended and eventually maintained. We must keep that principle before us. We have to surrender certain rights in Northern Ireland for the greater welfare of the whole community, so that the rights of the individual may be defended.¹⁴⁸

It was again emphasized in Parliament, that “[the PTA] infringe[s] our shared concept of civil liberties. But that is the price which the House has always accepted must be paid for protecting the most fundamental liberty of all—the liberty not to be killed or maimed when going about one’s lawful business.”¹⁴⁹ The basic right to life and protection from physical harm was placed even above the right to self-determination; “[m]ore important to most people than the right of self-determination is the right to stay alive—which is why we must accept the necessity, however regretfully, of these emergency powers . . .”¹⁵⁰

In its protection of the most basic right—the right to life—the Northern Irish parliament and Westminster violated what they considered to be the lesser rights or freedoms of the citizens. To act in this manner however, was to risk further alienating the population. In the case of Northern Ireland, where the aim of republican paramilitarism was to draw an ever sharper distinction between the state and the citizens, this was a route of maximum possible risk. For instance, it was recognized in Westminster that the introduction of internment had done more harm than good. “[I] feel that the key is internment. Whoever one talks to in the minority group in Ulster, one can be in no doubt that since internment the political situation has changed radically. Internment has hardened attitudes.”¹⁵¹

Not only was this a risky approach for Westminster to adopt, but the hierarchical claim made in parliament was simply wrong. The legislation did not, in fact, establish that the right to life and property were the two most important rights and thus all lesser rights could be suspended, rather it established that the most important right that a citizen bore was the *right not to be afraid*. The actual impact that terrorism had on life and property in the United Kingdom was much less than other acts. For example, each year more people are killed in driving accidents in Northern Ireland than have been killed by terrorist violence in thirty years of the Troubles. Yet the government has not suspended all civil rights with counter-accident legislation in order to protect the life and property of citizens. The main function of counter-terrorist law is to respond to the fear engendered by terrorism. Secondly, it attempts to control the risk associated with the loss of

¹⁴⁸ 940 PARL. DEB., H.C. (5th ser.) 1737 (1977) (statement of M. P. Ian Paisley).

¹⁴⁹ 1 PARL. DEB., H.C. (5th ser.) 341 (1981) (statement of M.P. William Whitelaw).

¹⁵⁰ 940 PARL. DEB., H.C. (5th ser.) 1748 (1977) (statement of M.P. John Biggs-Davison).

¹⁵¹ 826 PARL. DEB., H.C. (5th ser.) 1661 (1971), *reprinted in* 902 PARL. DEB., H.C. (5th ser.) 762 (1975) (statement of M.P. Merlyn Rees). *See also* 855 PARL. DEB., H.C. (5th ser.) 354 (1973).

property and/or life.¹⁵² Terrorism, by its very nature, however, is not a controllable event. By introducing emergency law, some sense of control over a situation in which one would otherwise be afraid is gained. This is a very different claim than that put forth in parliament; rather than life and property as the first concerns, the right not to be afraid in fact played a central role in the adoption and maintenance of emergency legislation. It is the fear of losing life and property, and not the actual loss thereof that provided the ultimate justification for Westminster's introduction—and retention—of emergency law.

CONCLUSION

There is very little either new or temporary about emergency measures enacted to combat political violence in the United Kingdom. The SPAs from 1922 through 1943 and the EPAs from 1973 through 1996 developed out of a common history and incorporate similar measures to address the Northern Irish situation. The 1939 PVA and PTAs from 1974 through 1996 also significantly overlap in the provisions contained in the statutes and in their entrenchment in British policy towards Northern Ireland. This article suggests a number of factors which contributed to the longevity of such measures. Ultimately the use of special powers depended upon the Northern Irish and British governments' ability to justify their use. In Northern Ireland this took the form of protection of sovereignty: preventing the North from being incorporated into a united Ireland. In contrast, Westminster claimed to be protecting the lives and property of individuals within the state. In both cases, emergency measures initially intended as a temporary solutions became constitutionally entrenched, and inextricably linked to the politics of Northern Ireland.

To a great extent, the elements that contributed to the "temporary permanence" of emergency law in the United Kingdom may be at work in other liberal, democratic regimes. The formal consistency of the measures, the tendency of counter-terrorist law to replicate and influence criminal law, and the import borne by emergency legislation could all be common to other states introducing similar measures. In particular, the transfer of the burden of proof to those seeking to repeal the legislation to prove that the threat no longer exists, would be similar in any liberal state once such measures have been introduced. Although the circumstances of the Northern Ireland conflict are unique to the United Kingdom, the propensity of states to attach counter-terrorist law to international terrorism creates the opportunity for "temporary" measures to become institutionalized in other states as well. Certainly the general support within the international arena for the erection of some sort of counter-terrorist legislation, and the simultaneous lack of real direction on what form it should take, could lead other states to retain their own measures just as Britain retained its domestic legislation. Further, it is unlikely that the international arena will be able to provide more detailed guidance until such a time as fundamental principles, such as self-determination, state sovereignty, territorial integrity, and a state's right to self-defense, are reconciled. Possible

¹⁵² When an individual gets into a car, s/he perceives some sort of control over whether s/he will get into an accident and/or be hurt. S/he can wear a seat belt, drive more carefully, come to a full halt at four-way stops, and so forth. There is some sense that the risk associated with this behavior can be controlled.

application of international humanitarian law and the construction of a common definition or understanding of terrorism likewise would need to be derived. Regardless, liberal states' adherence to the discourse of rights, and the tendency of British parliamentarians in particular to view counter-terrorist legislation as reinforcing a hierarchy of rights wherein the right to life and property assume dominance, is likely to be reflected in other liberal, democratic states. The right not to be afraid deserves particular attention in the possible introduction and operation of emergency legislation in other states, as it is this entitlement which justifies the suspension of "lesser" rights and the retention of emergency law.

