THE "APPREHENDED INSURRECTION" OF OCTOBER 1970 AND THE JUDICIAL FUNCTION

HERBERT MARX†

INTRODUCTION

The "apprehended insurrection" of October 1970 caught Canadians by surprise. They were taken unawares not only by the Front de Libération du Québec but also by swift government reaction. Never before had the federal government brought the War Measures Act[1] into operation in peacetime.[2] Indeed, during the Korean War when emergency legislation was introduced, the government was specifically excluded from tampering with civil liberties.[3] The War Measures Act, of course, does not impose any such restrictions.

What perhaps most shocked Canadians was the effectiveness—or rather, the ineffectiveness—of the Canadian Bill of Rights.[4] Conditioned to believe that civil liberties were not only sacrosanct but also legally protected by the Bill of Rights, they woke up on the morning of October 16, 1970 to learn that civil liberties had been substantially suspended by regulations imposed by virtue of the War Measures Act. Perhaps most odious was the power given to the police to arrest without warrant and to detain without bail or trial for prolonged periods.[5]

Many juridical issues arose, and many have yet to surface, in the trials and appeals resulting from the October crisis.[6] This paper will

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† Herbert Marx, Assistant Professor, Faculty of Law, Université de Montréal.

1 R.S.C. 1970, c. W-2.

2 On the emergency power, see HERBERT MARX, *The Emergency Power and Civil Liberties in Canada* (1970), 16 McGILL L.J. 39.

3 THE EMERGENCY POWERS ACT, S.C. 1950-51, c. 5, prohibited the Governor in Council from interfering with civil liberties. See s. 2 (2), as well as the preamble to the Act. The validity of this Act was never challenged. However, similar Australian legislation was sustained under the defence power; see *Marcus Clark & Co. Ltd. v. The Commonwealth* (1952), 87 C.L.R. 177 (H. C.); MARX, *supra*, note 2, at 67.

4 R.S.C. 1970, Appendix III.

5 See the PUBLIC ORDER REGULATIONS, *infra*, note 35, ss. 7, 9.

6 On contempt of court, see the judgment of Malouf, J. in *R. v. Larue-Langlois* (1971), 14 C.R.N.S. 68 (QUE. SESS. P.) and *Le Procureur Général du Quebec v. Vallières*, December 18, 1970, Montreal, 70-33033, unreported (QUE. Q.B., Challies, A.C.J.). On bail applications, see *Lemieux, Vallières and Gagnon v. The Queen*, January 15, 1971, Montreal, 70/6700-6706, unreported (QUE. Q.B., Ouimet, J.). On a motion for a declaratory judgement to allow the lawyer Robert Lemieux to represent other detainees, see *Cormier et al. v. The Queen*, January 20, 1971, Montreal, 1505, unreported (QUE. C.A. Tremblay, C.J. Casey and Hyde, JJ.). The motion was dismissed. On the right of a detainee to retain and instruct counsel by virtue of the Bill of Rights—a right which was not suspended by the Regulations—see *Proulx et al. v. St.-Pierre et al.*, October 28, 1970, Montreal, 800450, unreported (QUE. S.C., Lamer, J.). On the inapplicability of the Quebec Jury Act, R.S.Q. 1964, c. 26, which excludes women from juries for trials held by virtue of a "law of Canada", see HERBERT MARX, *La déclaration canadienne des droits et l'affaire Drybones: Perspectives nouvelles?* (1970), Thémis 305, 319-21, and *Rose v. The Queen*, February 16, 1972, Montreal, 71-0066 and 71-0067, unreported, (QUE. Q.B., Marquis, J.), rejecting the argument that sections of the Quebec Jury Act are inoperative due to the Bill of Rights. For a comment on this latter case, see FRANCOIS CHEVRETTE and HERBERT MARX, *chronique*, (1972), 32 R. DU B. 303.

focus on two fundamental issues: first, the judicial function in relation to the War Measures Act, and secondly, the judicial function in relation to the separation of powers.

I. THE JUDICIAL FUNCTION AND THE WAR MEASURES ACT

What is an "apprehended insurrection"?

The non-jurist looking in his Webster's dictionary that October morning would have found at least some guidance. "Apprehended" means that one has become aware of, has perceived or anticipates something. "Insurrection" connotes a rising up against the civil or political authority of the country. Putting both these meanings together would suggest that the government became aware of, perceived or anticipated a rising up against the political or civil authority of Canada or of one of the provinces.

The jurist, however, would not have found a legal definition.[7] Does it mean that the government has become aware that two armed men will rise against the established order? Ten armed men? Twenty? One hundred? Or, can it mean that a handful of armed men have made plans and are urging others to overthrow the established government or governments? What exactly must the government "perceive" in order that an "apprehended insurrection" can be said to exist?

Section 2 of the War Measures Act states that:

> The issue of a proclamation by Her Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.[8]

Does this mean that the situation as perceived by the federal government is "conclusive evidence" that cannot be questioned by the courts?

This issue was considered in *Gagnon and Vallières v. The Queen.*[9] In that case Pierre Vallières and Charles Gagnon had been arrested the day the War Measures Act was invoked. Both were sub-

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[7] "Apprehended insurrection" does not seem to have been defined judicially. In construing an insurance policy, Chief Judge Magruder distinguished insurrection from riot as follows: ". . . to constitute an insurrection or rebellion . . . there must have been a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof": *Home Ins. Co. of New York v. Davila,* 212 F. (2d) 731, 736 (1st CIR. 1954). As to "apprehended war", the existence of a state of "apprehended war" was proclaimed in Canada on September 1, 1939 (P.C. 2477). The existence of an actual state of war was proclaimed September 10, 1939 (P.C. 2626). Undoubtedly, at the end of August, 1939 it was evident that war was imminent. As well, it is logical for a government to declare a state of "apprehended war" when it intends to declare war a few days later. See too, *Marcus Clark & Co. Ltd. v. The Commonwealth, supra,* note 3, at 218, where the High Court of Australia acknowledged that, ". . . the distinction between a period of actual hostilities and a period of apprehended danger short of war can never be disregarded."

[8] R.S.C. 1970, c. W-2.

[9] (1971), 14 C.R.N.S. 321,348; [1971] QUE. C.A. 454, 460.

sequently charged with membership in the F.L.Q. and held under detention. Their application to the Court of Queen's Bench for a writ of habeas corpus was refused by Bergeron, J., and the accused then appealed to the Quebec Court of Appeal. Their first ground of appeal was: "The Judge of first instance erred in law, by holding that the court was not competent to consider the reasons leading the Governor in Council to proclaim that a state of apprehended insurrection existed on 15th and 16th October 1970."[10] In dismissing this plea, Mr. Justice Brossard stated that the trial judge had correctly relied upon the Supreme Court of Canada decisions in *Reference Re Validity of Orders in Council in Relation to Persons of the Japanese Race*,[11] and *Reference Re Regulations in Relation to Chemicals*[12] and the Privy Council decision in *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*[13] Mr. Justice Brossard also approved of the trial judge's reliance upon two recent decisions of the Quebec Court of Queen's Bench. In the first[14] of these latter decisions MacKay, J. had based his opinion of the constitutionality of the Regulations adopted under the War Measures Act chiefly on a passage taken from the judgment of Rinfret, C.J. in the *Japanese Reference* case:

> . . . under the *War Measures Act*, the Governor in Council was empowered to adopt any legislation that Parliament could have adopted; that such legislation was, expressly and impliedly, adopted because it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; . . . the Governor in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any Court to canvass the considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth.[15]

MacKay, J. had also referred to the *Fort Frances* and *Chemicals Reference* cases. In the second[16] of the Quebec decisions, Ouimet, J. had cited passages from the *Fort Frances* case and *In re Gray*,[17] as well as the above statement by Rinfret, C.J.[18]

The thrust of the jurisprudence of the above cases is that Parliament must be left with considerable freedom to judge the interest which is to be protected during an emergency and that "it is not

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[10] *Id.*, at 348.
[11] [1946] S.C.R. 248.
[12] [1943] S.C.R. 1; 79 C.C.C. 1; [1943] 1 D.L.R. 248.
[13] [1923] A.C. 695.
[14] *Chartrand et al. v. The Queen*, December 3, 1970, Montreal 70/6700-6706, unreported (QUE. Q.B.).
[15] *Supra*, note 11, at 277.
[16] *The Queen v. Leblanc*, January 26, 1971, Montreal, 70/6712, unreported (QUE. Q.B.).
[17] (1918), 57 S.C.R. 150.
[18] In *Chartrand, Gagnon et al. v. The Queen*, January 29, 1971, Montreal, 70/6700-6706, unreported (QUE. Q.B.), Mr. Justice Bergeron also followed essentially the same approach as set out by MacKay and Ouimet, JJ.

pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation."[19]

However true this may be, it is irrelevant to the issue which faced Mr. Justice Brossard in *Gagnon and Vallières*. There the question raised was whether the proclaiming of an emergency and the bringing into force of the War Measures Act was constitutionally valid. This would depend on whether there was in fact an emergency. If the proclamation was valid the Governor in Council would unquestionably have almost unlimited powers to make regulations. By failing to distinguish between the permissible scope of regulations made under the Act, and the constitutional power to bring the Act into effect in the first place, the Quebec judges have sterilized the courts in their essential function of judicial review. And this result would seem to go squarely against pronouncements of both the Supreme Court and the Privy Council in the Canadian emerger y cases.[20]

When the War Measures Act is brought into effect, by the terms of the Act itself, the federal government can trench on matters which clearly fall within exclusive provincial jurisdiction. For example, section 3(1) paragraphs (e) and (f) permit the Governor in Council to make orders and regulations concerning trading, production and manufacture as well as the appropriation, control, forfeiture and disposition of property.[21] Consequently, the "conclusive evidence" established by one order of government that an apprehended insurrection has arisen (or has not yet ended) must be subject to judicial review. To deny this would mean that the federal government of its

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[19] *Co-operative Committee on Japanese Canadians v. A.-G. for Canada*, [1947] A.C. 87, 101-02 (P.C.).

[20] For a Supreme Court view, see, *In the matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124, at 128, 141, 151, and 156. Some Privy Council decisions are discussed in the text, *infra*. For what seems to be a misapplication by Mr. Justice Brossard of the emergency doctrine, see *Swait v. Board of Trustees of Maritime Transportation Unions* (1966), 61 D.L.R. (2d) 317; [1967] QUE. Q.B. 315 (QUE. C.A.).

[21] WAR MEASURES ACT, R.S.C. 1970, c. W-2, s. 3(1): "The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council extend to all matters coming within the classes of subjects hereinafter enumerated, namely,

(a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
(b) arrest, detention, exclusion and deportation;
(c) control of the harbours, ports and territorial waters of Canada and the movements of vessels;
(d) transportation by land, air, or water and the control of the transport of persons and things;
(e) trading, exportation, importation, production and manufacture;
(f) appropriation, control, forfeiture and disposition of property and of the use thereof."

own volition could unilaterally alter the division of powers between Parliament and the provincial legislatures, and insulate itself from judicial review. The whole of Canadian constitutional jurisprudence is contrary to such a position.[22]

In the recent Quebec cases it is not what the judges cited that is of prime importance, but rather what they failed to cite. What was not cited are the following passages from cases decided by the Privy Council.

Viscount Haldane in the *Fort Frances* case:

> It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for the distribution of powers in the ruling instrument [the B.N.A. Act] would have to be invoked. But very clear evidence that the crisis has wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite.[23]

Lord Wright in the *Japanese Canadians* case:

> Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliament of the Dominion and the Parliaments of the Provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.[24]

The passages are of course quite similar; the second one, however, also deals with an emergency that has not "arisen". What clearer language could the Privy Council have used to drive home the point that the "conclusive evidence" statement in the War Measures Act does not and never can sterilize judicial review as to whether an emergency has arisen or continues to exist.

It is astonishing that the recent judgements of the Quebec courts do not cite the above passages, although other passages are cited from the same cases. In fact, the unreported cases cited above quote extensively from the *Fort Frances* case but stop short of the quotation set out above.

It might be argued that the Regulations adopted under the War

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[22] See, *e.g.*, *British Columbia Power Corporation Ltd. v. British Columbia Electric Co. Ltd.*, [1962] S.C.R. 642.
[23] *Supra*, note 13, at 706.
[24] *Supra*, note 19, at 102.

Measures Act in October 1970 dealt solely with the criminal law, an exclusive federal power, and therefore the question as to the division of powers could not and did not arise. Although this argument may have a certain attractiveness, it is far from conclusive. Even granting that the particular regulations dealt solely with criminal matters, the power assumed by the government was in no way so limited in its potential use.

In *Ottawa Separate Schools Trustees v. Ottawa Corporation*,[25] the Ontario Legislature had provided that the Minister of Education, with the approval of the Lieutenant-Governor in Council, could suspend or withdraw all the powers and rights of the Trustees. This was held to be invalid under section 93(1) of the B.N.A. Act[26] which prevents provincial interference with denominational schools. Lord Buckmaster, L.C. stated that "[t]heir Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all."[27]

A proclamation bringing into force the War Measures Act is in effect the "creation" of a power which gives the Governor in Council authority (whether it is used or not) to trench on matters that are exclusively provincial.[28] When the courts maintain that an emergency has "arisen" or has "not ended", they sanction any potential use of the power that has been created. As the War Measures Act is now drafted, to proclaim it in force thus has an ipso facto bearing upon the division of powers. Consequently, regardless of the validity of particular regulations adopted at the time, the question of whether the Act was validly proclaimed in force or whether it can validly remain in force must always be subject to judicial review.

The wide powers accorded to the Governor in Council under section 3 of the War Measures Act operate as a transfer of power, That is, the immediate effect is to place all power in the hands of the Governor in Council—power which may concern provincial as well as federal matters. These powers that are given to the Governor in Council are so "inextricably mixed up"[29] in the Act that one cannot separate the federal from the provincial in the resulting trans-

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[25] [1917] A.C. 76 (P.C.).
[26] R.S.C. 1970, Appendix III.
[27] *Supra*, note 25, at 81.
[28] In *Bank of Toronto v. Lambe* (1887), 12 APP. CAS. 575 (P.C.) it was stated, at 587, that it would be wrong to deny the existence of a power to the provinces ". . . because by some possibility it may be abused. . . ." The *Lambe* case is of course distinguishable from the emergency cases, because in the former situation new legislation would be required, whereas in the latter the government can simply adopt regulations.
[29] *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 355, 367 (P.C.).

fer of powers. Moreover, a regulation trenching on provincial jurisdiction could be adopted at any time on very short notice.

Must the courts wait until there has actually been an infringement on provincial matters before they can decide the emergency question? Once the federal trenching power has been created, it would appear that a judicial determination that would prevent unconstitutional trenching is on the same basis as a determination for cure.

Following the October 1970 events, the courts did not question whether an emergency had or had not arisen. One possible explanation, already stated above, is that since the 1970 Regulations dealt with a purely federal power, the criminal law, there was no need to question, and in fact the courts were not competent to question the directive in the Act that the issuance of a proclamation is "conclusive evidence" that an emergency arose. However, if the Governor in Council had adopted Regulations infringing on purely provincial matters thirty days later, the courts as a practical matter would have had difficulty in proceeding to decide whether an emergency had arisen. Consequently, the Privy Council dictum as to the judicial power to inquire as to whether an emergency arose would be otiose. The point is that when the emergency question is first broached, if no inquiry is made as to the existence of an emergency, then the court has apparently given its *imprimatur* to the initial existence of the emergency.

Assuming that the above analysis is correct, what should the courts have done following the October crisis?

The courts could have taken evidence in order to judge whether an emergency had arisen, or in later weeks, when the situation had begun to stabilize, whether the emergency had ended. To prove their allegations the detainees would no doubt have subpoenaed leaders of all levels of government as well as other persons. The political aspect of such a hearing might well have embarrassed various persons as well as governments. However, an independent judiciary surely must not be concerned with the political sensibilities of those in power at any given time.

In *The Queen v. Chartrand, Vallières et al.*,[30] Mr. Justice Ouimet stated that if the government when faced by an extreme emergency had to establish to the satisfaction of the courts that an emergency existed before being able to act, then the apprehended insurrection would have time to overthrow the established order before the constitutionality of a regulation could be proved. He added

[30] February 12, 1971, Montreal, 70/6700, unreported (QUE. Q.B.).

that the courts could not, under the fallacious pretext of safeguarding the division of powers, not at all breached, refuse to act in the public interest.

This view is based on a misinterpretation of the Privy Council and Supreme Court decisions in the emergency cases. It is not up to the government to prove that there is an emergency. On the contrary, the burden is placed on whoever contests the validity of the use of emergency powers under the War Measures Act. Further, even if the courts held that there was no emergency, Parliament could adopt legislation to cope adequately with the situation—legislation that would not be invalidated so long as it respected the division of powers. As well, the government could prosecute under the existing Criminal Code, as was in fact often the case.[31] Surely the government would never be as helpless as Ouimet, J. would have us believe.

In sum, the judicial function with respect to the War Measures Act was to investigate whether or not an emergency had arisen—and if it had, to decide later whether the emergency had ended. Judicial investigation would have been useful as a method to discover what actually took place in October 1970, and a juridicial definition of "apprehended insurrection" would serve well as a guide in the future if the government decides that such a situation again exists.

II. THE JUDICIAL FUNCTION AND THE SEPARATION OF POWERS

Part VII of the B.N.A. Act entitled "Judicature" lays down the basis for a separation of powers doctrine in Canada.[32] Section 96 provides for the appointment of Superior, District and County Court judges; section 99 ensures that judges of the Superior Courts shall be removed only by the Governor General on address of the Senate and House of Commons, while section 100 provides that judges' salaries are to be fixed and provided by Parliament. These sections are ". . . three pillars in the temple of justice, and they are not to be undermined."[33]

Professor Noël Lyon prepared a brief that was presented in the *Gagnon and Vallières* case.[34] One of the arguments he made was that the Regulations under the War Measures Act, as well as the provisions in the Public Order (Temporary Measures) Act were a usurpation of the judicial function. He suggested that the section in the Regulations and the Act making membership in the F.L.Q., or assist-

[31] See, *e.g.* DOUGLAS A. SCHMEISER, *Control of Apprehended Insurrection: Emergency Measures v. The Criminal Code*, (1971), 4 MAN. L.J. 359.
[32] R.S.C. 1970, Appendix III. See generally, W. R. LEDERMAN, *The Independence of the Judiciary*, (1956), 34 CAN. BAR REV. 769 and 1139.
[33] *Toronto Corporation v. York Corporation*, [1938] A.C. 415, 426 (P.C.).
[34] The substance of Professor Lyon's brief can now be found in NOEL LYON, *Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970* (1972), 18 MCGILL L.J. 136.

ing it, a criminal conspiracy was equivalent to the crime of sedition under section 60 of the Criminal Code. In Professor Lyon's words: "What this really means is that any person who belongs to or assists the F.L.Q. is judged, by executive decree, to be a party to the seditious conspiracy the federal executive has found to exist and section 8 [of the 1970 Regulations] enables the Crown to secure convictions by proving that a person attended a meeting of the F.L.Q., advocated the F.L.Q. in public, or communicated statements for it."

Section 8 of the 1970 Regulations[35] is an almost word-for-word reproduction of section 39C(3) of the Defence of Canada Regulations.[36] However, there is one important difference between the 1940 and the 1970 Regulations. Section 39C was of a prospective nature, whereas the 1970 Regulations had retroactive features as well. In 1940, individuals were warned, for example, that attending meetings of an "illegal organization", after publication in the *Canada Gazette* of a regulation outlawing the organization, was an offense. The 1970 Regulations made attendance at an F.L.Q. meeting even before the adoption of the Regulations prima facie evidence of membership in the F.L.Q.[37] Although *ex post facto* criminal legislation is odious and pernicious, it will be applied by our courts.[38]

Professor Lyon goes on to classify the Regulations as a "criminal class action". The judiciary, he states, is reduced "to the role of timekeeper, keeping track of who attends what meetings and speaks or communicates what statements on behalf of an association". Thus

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[35] PUBLIC ORDER REGULATIONS, 1970, SOR/70-444, (1970), 104 CANADA GAZETTE (Part II) 1128, October 16, 1970.

[36] P.C. 2363, June 4, 1940, [1940] 1 PROCLAMATIONS AND ORDERS IN COUNCIL UNDER THE WAR MEASURES ACT 108. Section 39C (1)(b) provided that an illegal organization was one the Governor in Council by notice in the *Canada Gazette* declares to be an illegal organization. Sub-sections 2 and 3 provided that:

"(2) Every person who after the publication of this regulation in the *Canada Gazette* continues to be or becomes an officer or member of an illegal organization, or professes to be such, or who advocates or defends the acts, principles or policies of such illegal organization shall be guilty of an offence against this regulation.

(3) In any prosecution under this regulation, if it be proved that the person charged has

(a) attended meetings of an illegal organization; or

(b) spoken publicly in advocacy of an illegal organization; or

(c) distributed literature of an illegal organization by circulation through the Post Office mails of Canada, or otherwise;

it shall be presumed, in the absence of proof to the contrary, that he is a member of such illegal organization."

In 1970, suspected members of the F.L.Q. were detained even before the Regulations were published or made public.

[37] PUBLIC ORDER REGULATIONS, *supra*, note 35.

[38] Perhaps the only reported Canadian example is found in *R. v. Madden* (1866), 10 L.C. JURIST 342 (L.C.Q.B.). In order to combat the Fenian raids from the United States into Lower Canada the Province of Canada passed an act concerning the "Lawless invasion of the Province", 29-30 VICT., c. 2, on June 8, 1866. The Fenian raiders were Irishmen who wanted to put pressure on the British Colony in furtherance of Irish independence. Apparently, invaders who had crossed into Canada before June 8, 1866 were apprehended. On August 15, 1866, the first act was amended by 29-30 VICT., c. 3, making it an offence for anyone who "heretofore" offended against the provisions of the Act. In *R. v. Madden*, the ex post facto law was upheld. The offence carried the death penalty. See also, *Gagnon and Vallières, supra*, note 9, at 349-50.

he concludes that criminal guilt is determined not by the courts but by executive decree.[39]

Support for this argument is found in the Privy Council decision of *Liyanage v. The Queen,*[40] an appeal from the Supreme Court of Ceylon. On January 27, 1962 a coup d'état was attempted in Ceylon, which was subsequently outlined in a government White Paper. This White Paper of February 13, 1962 set out how the coup was foiled as well as the names of the conspirators. In *Liyanage* the Crown pleaded that the senior deputy police inspector and other senior police officers were planning the overthrow of the government and that consequently the investigation could not have been entrusted to the police, nor could the normal provisions of the Criminal Procedure Code be used.[41] On March 16, 1962 the Parliament of Ceylon therefore passed the Criminal Law (Special Provisions) Act (the first Act). This Act had retrospective application to January 1, 1962 and it was limited in its application to offences against the state alleged to have been committed on or about January 27, 1962. Section 440A of the Criminal Procedure Code provided that in cases of sedition the accused could be tried by three judges without a jury. Section 9 of the Criminal Law (Special Provisions) Act empowered the Minister of Justice to nominate the three judges who were to try the accused. This section was held invalid by the Supreme Court of Ceylon and it was subsequently amended (the second Act) so as to provide that the Chief Justice nominate the judges who were to try the accused. The effect of the special legislation as summarized by the accused was accepted by the Privy Council:

> The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offenses on a particular occasion. The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals. It legalized their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered ex post facto the punishment to be imposed on them.[42]

The courts would have been compelled to sentence each offender to

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[39] He finds the PUBLIC ORDER (TEMPORARY MEASURES) ACT, S.C. 1970., c. 2 to be of the same effect as ". . . a legislative adoption by Parliament of the judgment of the executive."

[40] [1967] 1 A.C. 259. For a discussion of this case, see G. N. BARRIE, *Separation of Powers Doctrine* (1967), 84 S. AFR. L.J. 94; GARTH NETTHEIM, *Legislative Interference with the Judiciary* (1966-67), 40 AUSTL. L.J. 221; S.A. DE SMITH, *The Separation of Powers in New Dress* (1966-67), 12 MCGILL L.J. 491.

[41] *Liyanage v. The Queen, supra,* note 40, at 269. The White Paper also alleged that Army Officers were involved in the plot.

[42] *Id.,* at 290.

a minimum of ten years imprisonment and to order the confiscation of his property, regardless of what may have been his involvement in the aborted coup.

As is the case in Canada, the Ceylon Constitution does not expressly vest in the judiciary the judicial power. However, the Privy Council was able to infer a separation of powers by discerning "an intention to secure in the judiciary a freedom from political, legislative and executive control".[43] Lord Pearce applied to the two Acts the words of Mr. Justice Chase of the United States Supreme Court: "These acts were legislative judgements; and an exercise of judicial power."[44]

It should be noted, however, that there is a *caveat* in the Privy Council judgment that cannot be underestimated in the future application of *Liyanage*. Although both Acts were held invalid, it was stated that:

> . . . a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction; the discretion or judgment of the judiciary in specific proceedings.[45]

Consequently, even though it may be accepted that a separation of powers exists in Canada, the Privy Council decision leaves much scope for distinguishing the particular legislation in *Liyanage* from other criminal legislation that may encroach somewhat on the judicial function. In fact, Mr. Justice Ouimet cites the above passage in his refutation of the proposition that *Liyanage* applies to the 1970 Canadian emergency legislation.[46]

It can be argued that the 1970 Regulations and the Public Order (Temporary Measures) Act encroached on the judicial function in at least two particular areas. First, the Canadian legislation was aimed at identifiable persons, or at least it may be said that some of the persons were identifiable in a similar fashion as in the Ceylon

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[43] *Id.*, at 287.
[44] *Id.*, at 291, citing *Calder v. Bull* (1799), 3 U.S. 648; 3 DALLAS 386.
[45] *Id.*, at 289-90.
[46] *The Queen v. Leblanc, supra,* note 16.

legislation.[47] The Honourable Gérard Pelletier, Secretary of State, described the membership of the F.L.Q. as follows:[48] a) 40 to 50 extremists who were prepared to throw bombs, to kidnap and even to murder persons; b) a smaller group which refrained from direct violent action and which constituted the propaganda arm of the F.L.Q.; c) 200 to 300 active sympathizers who were prepared to hide and financially support the F.L.Q. members; and, d) 2,000 to 3,000 more or less passive drawing room sympathizers. However, those most directly affected, such as Gagnon and Vallières, were undoubtedly known.[49]

If the government had a list of F.L.Q. members, it was never made public. Gérard Pelletier suggested that there was no central organization, nor any planning, nor even a strategic concentration of the F.L.Q. cells.[50] It would seem that any given group of individuals could independently constitute an F.L.Q. cell and simply attempt to carry out all or some of the aims of the F.L.Q. Consequently, although some individuals were probably identifiable as members of the F.L.Q., the vast majority were seemingly not so identifiable. For those persons who had ever identified themselves with the F.L.Q., the legislation presumed current membership, thereby facilitating conviction although not guaranteeing it.[51]

The second encroachment upon the judicial function was that it was the federal executive which decided who was to be found guilty of a seditious conspiracy. Mr. Justice Montgomery, however, held that the Public Order (Temporary Measures) Act had created a new offence, akin to seditious conspiracy but less serious—that of being a member of an unlawful association. The penalty for sedition, he noted, is a maximum of fourteen years, while under the Public Order (Temporary Measures) Act it was five years, without a minimum in both cases. Offences under the emergency legislation were also triable in a fashion similar to other indictable offenses, so that

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[47] Of the thirty persons named in the White Paper, twenty-four were tried and thirteen were acquitted in the Ceylon courts.
The following exchange during the Privy Council hearing, [1967] 1 A.C. 259, 272, is significant as to the position of the Ceylon Government.
Lord Guest: "Do you say that in a criminal case a law could say to the judges that they must find the accused guilty? Do you say that could be incorporated in a law?" The Solicitor General of Ceylon: "However shocking it might be, the answer is yes. The concept of sovereignty was so wide. In fact it was called an awful power and no doubt it must be exercised with responsibility".

[48] G. PELLETIER, LA CRISE D'OCTOBRE (1971) 55-57.

[49] For example, in *Lemieux, Vallières and Gagnon v. The Queen, supra,* note 6, the Crown produced a letter, dated February 10, 1969, sent by Gagnon to Mr. Justice Archambault in which Gagnon admitted he was a member of the F.L.Q.

[50] *Supra,* note 48, at 57.

[51] A rebuttable presumption of membership is found in s. 8 of the PUBLIC ORDER REGULATIONS, *supra,* note 35; and in s. 8 of the PUBLIC ORDER (TEMPORARY MEASURES) ACT, *supra,* note 39. It would seem that even the admission of F.L.Q. membership in 1969 could be rebutted in 1970 or 1971. See *Lemieux, Vallières and Gagnon v. The Queen, supra,* note 6.

essentially the legislation did not interfere with judicial independence.[52] I woud argue that essentially the government laid down in the emergency legislation the test for the seditious conspiracy.

The *Liyanage* decision suggests that there must be a collection of odious and pernicious features in the criminal legislation before one can decide that the legislature has infringed on the judicial function. What is suggested is that there is some overlapping, so that the legislature can at times make a determination that is normally left to the judiciary. Montgomery, J. found that the Canadian emergency legislation did not "in its essence" interfere with the independence of the judiciary.[53]

I would suggest that even one feature in the legislation may be sufficient, if heinous enough, to destroy the essence of the judicial function. The feature could even be of a procedural nature. For example, if a confession were made admissible as evidence, regardless of how obtained, and if it were directed that such evidence would be sufficient to convict, the judicial function would become otiose. Trying persons on evidence obtained on the rack in Star Chamber proceedings would obviously leave the judges with the sole function of meting out sentences.

Professor Lyon's reasoning is based on the principle that the judicial power is vested exclusively in the judiciary. It is the judicial function to determine criminal guilt. Having found that the principle was infringed, he suggests that the emergency legislation is invalid.

On balance I would argue that the recent Canadian emergency legislation did not usurp the judicial function. There was still room for judicial interpretation. Unquestionably the government had facilitated the conviction of some persons but such convictions were not guaranteed by the legislation. The government reached the Rubicon but did not actually cross it.

Mr. Justice Montgomery, the only appeal court judge in the *Gagnon and Vallières* case to comment on the *Liyanage*-inspired argument, stated: "I doubt whether the Privy Council would have found it [the Ceylon legislation] invalid had it not been for the provisions requiring the courts to impose minimum sentences and confiscation of property."[54] In the light of the other provisions of the Ceylon legislation, it would be somewhat distressing if that is the consensus of our judiciary. Surely legislation need not go to such an

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[52] *Supra*, note 9, at 329.
[53] *Gagnon and Vallières v. The Queen*, *supra*, note 9, at 329.
[54] *Ibid.*

extreme before the judiciary will assert its function and independence.[55]

CONCLUSION

It is our judiciary that is on the first line of defense protecting the "temple of justice". They have a constitutional responsibility to check legislative excesses of power that may bring down the "pillars". However, when this protection is needed most, as in times of emergency, it is least likely to be available.[56]

Liyanage was decided by a court that was emotionally and geographically remote from the events.[57] During World War II the majority of the House of Lords, in *Liversidge v. Anderson,*[58] endorsed a subjective test for the detention of persons in the United Kingdom.[59] Although the historic dissent by Lord Atkin has since been endorsed[60] and *Liversidge* has been called a "very peculiar case",[61] it is only peculiar in that it is "to be confined, apparently, to a wartime context. . . ."[62] How would the House of Lords interpret legislation today in a case emanating from strife-torn Ulster?

Canadian courts appear quite bold when it is a question of checking provincial excesses of power,[63] but quite timid when the

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[55] In the *Haughey* case (as reported in the Irish Times of June 25, 1971) the Supreme Court of Ireland held a sub-section of the Committtee of Public Accounts of Dail Eiream (Privilege and Procedure) Act, 1970 to be unconstitutional. The provision in question had made refusal to testify or produce documents before the Committee an offence amounting to contempt of court. Haughey had been sentenced to six months by the High Court for failing to answer questions.

Section 38 of the Irish Constitution provides, *inter alia,* that all criminal offences be tried before a jury except minor offences. The Supreme Court found that the offence in question was not a contempt of course case but an ordinary criminal prosecution. It was also held that the trial of a criminal offence was a judicial power and only exerciseable by the judiciary.

[56] U.S. Supreme Court Justice Jackson stated: The war power in the United States is usually invoked ". . . in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fever that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures." *Woods v. Cloyd W. Miller Co.* (1948), 333 U.S. 138, 146.

[57] For an interesting discussion of the judicial function, specifically in relation to recent events in Southern Rhodesia, see H. R. HAHLO, *The Privy Council and the 'Gentle Revolution'* (1969), 86 S. AFR. L.J. 419; and R. S. WELSH, *The Function of the Judiciary in a Coup D'Etat* (1970), 87 S. AFR. L.J. 168.

[58] [1942] A.C. 206 (H.L.).

[59] Under Regulation 18B of the World War II DEFENSE (GENERAL) REGULATIONS, 1939, the Secretary of State could detain any person who he had "reasonable cause" to believe was a person of hostile origins or associations; or who had recently been concerned in acts prejudicial to the public safety; or who was or had been a member of an organization subject to foreign influence or control or whose leaders were sympathetic with the system of government of an enemy power. "Reasonable cause" was determined to mean what the Secretary of State thought was reasonable.

[60] "According to the *English and Empire Digest* [Vol. 17, p. 422] the decision in *Liversidge v. Anderson* has been cited in several dozen cases up to 1968. In none of those cases has the subjective interpretation favoured by the majority of the Law Lords been approved." R. F. V. HEUSTON, *Liversidge v. Anderson in Restrospect* (1970), 86 L.Q. REV. 33, 67. For a continuation of the discussion of this case see too, R. F. V. HEUSTON, *Liversidge v. Anderson: Two Footnotes* (1971), 87 L.Q. REV. 161.

[61] *Ridge v. Baldwin,* [1964] A.C. 40 (H.L.) per Lord Reid at 73.

[62] HEUSTON, *Liversidge v. Anderson in Retrospect, supra,* note 60, at 67. Professor Heuston went on to state that "this remark fairly reflects the attitude of other authorities."

[63] See, *e.g., British Columbia Power* case, *supra,* note 22; and *Switzman v. Elbing,* [1957] S.C.R. 285.

excess has arisen on the federal level.[64] Yet, there is an historic and constitutional basis for the separation of powers theory and a strong independent judiciary.

Perhaps the attitude of a good part of our judiciary was best expressed by Mr. Justice Brossard in *Gagnon and Vallières.* In commenting on Professor Lyon's brief he stated: "In my humble opinion, apart from any intellectual value such a paper might have, the fact remains that, between commentators on the law and the judges charged with applying it, there is often a lack of pragmatism and realism distinguishing theoreticians from practitioners."[65] Surely, such "pragmatism and realism" dictates that the function of the judiciary is to safeguard the separation of powers and its own independence.

[64] *See, e.g., Re Criminal Law Amendment Act, 1968-69, s. 16* (The Breathalyser case) (1970), 10 D.L.R. (3d) 699 (S.C.C.); and MARX, *supra,* note 2, at 72, for a comparison of emergency decisions in Australia, Canada and the United States.

[65] *Supra,* note 9, at 350.