CONTROL OF APPREHENDED INSURRECTION: EMERGENCY MEASURES vs. THE CRIMINAL CODE

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On October 16th, 1970, the Federal Cabinet (in constitutional terms, the Governor-in-Council) issued a proclamation that "apprehended insurrection exists and has existed as and from the fifteenth day of October, one thousand nine hundred and seventy." Pursuant to that proclamation, the Cabinet also issued emergency regulations which outlawed the F.L.Q., created certain offences, and made specific provisions concerning arrest, bail, and search and seizure. On December 1, 1970, the emergency regulations were replaced by a statute in very similar terms, the Public Order (Temporary Measures) Act, 1970, which is to expire on April 30th, 1971.

Since October 16th, 1970, many anxious questions have been raised about the adoption of these measures. Could one reasonably say that a state of apprehended insurrection really existed? How many revolutionaries are required for an apprehended insurrection? Is sixty-two, the number subsequently charged, sufficient? Can the police be trusted with the powers given them under these provisions? Why were so many people arrested, and yet so few charged? Was the federal government motivated solely by security reasons, or was it influenced to act by other reasons? Would public reaction have been the same if the apprehended insurrection had been alleged to exist in the province of Ontario rather than in the province of Quebec? Finally, were the regulations necessary at all? Would not the usual procedures of the Criminal Law have been sufficient to deal with the apprehended insurrection, assuming that there was one? It is the last of these issues that I propose to discuss this afternoon. Does not the Criminal Code protect society against revolutionaries? What is the difference, if any, between the offences and police powers contained in the Criminal Code and those contained in the emergency provisions? Why are most of the alleged revolutionaries now being charged under the Criminal Code rather than under the emergency provisions?

In order to have a meaningful discussion, it is necessary to outline the provisions of the Criminal Code which could be utilized against F.L.Q. members. The proclamation invoking the War Measures Act, the emergency regulations issued thereunder, and the Public Order (Temporary Measures) Act, 1970, all refer to the resorting of F.L.Q. members to murder, threats of murder, and kidnapping. Obviously, these are all serious criminal offences, and there are many other serious offences which cover the conduct of real revolutionaries, such as arson,

malicious destruction of property, possession of explosives, possession of offensive weapons and firearms, threatening to injure or to destroy property, obstructing justice, resisting or obstructing a police officer, and the like. Violence in all of its manifestations, and whether directed against the person or against property, is well and adequately covered under the criminal law.

If the assertion is then made that we are dealing here not with physical violence, but with mental violence, with attacks on loyalty and patriotism in the nature of treason and sedition, then the fact is that the Criminal Code abounds with offences against such conduct. Section 46(1)(d) provides that everyone commits treason who uses force or violence for the purpose of overthrowing the government of Canada or a province. Under Sections 46(1)(f) and (g), it is also treason to conspire with any person to so use force or violence, or to form an intention to do so and to manifest that intention by an overt act. The wording of the last two provisions is extremely significant because it is so sweeping. The word "conspire" means to agree, and merely agreeing to use force or violence for the purpose stated, whether or not any force or violence is in fact used, constitutes treason. Similarly, merely forming an intention to do so, and telling someone else about it, constitutes treason. The punishment for these offences can be death.

The obligation on a citizen with respect to treason is also quite unique. Generally speaking, there is no obligation on a citizen to inform the police that a crime has been, or is about to be, committed, but under Section 50(1)(b) of the Criminal Code, everyone knowing that a person is about to commit treason must, with all reasonable dispatch, inform a justice of the peace or peace officer, or make other reasonable efforts to prevent that person from committing treason. Failure to do so constitutes an indictable offence with imprisonment up to fourteen years.

Succeeding provisions of the Code create more specific offences of a treasonous nature, punishable by long imprisonment terms. Section 51 prohibits acts of violence in order to intimidate the Parliament of Canada or the legislature of a province. Section 52 prohibits sabotage, which includes losing, damaging, or destroying property for a purpose prejudicial to the safety, security, or defence of Canada. Section 53 prohibits an attempt to seduce a member of the Canadian Forces from his duty or an attempt to incite him to commit a traitorous or mutinous act. Sections 64 to 70 deal with unlawful assemblies and riots, which are defined in a wide manner. Section 71 provides that the Governor-in-Council may prohibit assemblies of persons for the purpose of training or drilling themselves, including the use of arms, or of practicing military exercises.

Finally, there are very wide offences concerning sedition found in Sections 60 to 62 of the Code. It is a serious offence to speak seditious words, publish a seditious libel, or be a party to a seditious conspiracy. The Code only partly defines sedition; it states that everyone shall be presumed to have a seditious intention who teaches or advocates, or publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada. The leading common law definition of sedition, which is still applicable under our law, is that found in *A Digest of the Criminal Law* by Sir James Stephen:

> A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

The Supreme Court of Canada, in *R.* v. *Boucher,* has held that the prosecution must also prove an intent on the part of the accused to produce disturbance of or resistance to established authority, but even this restriction still leaves the definition of sedition very wide.

In assessing the significance and sweep of the offences discussed above, it is important to understand the criminal law notion of a party to an offence. Under the criminal law, it is not only the person who actually commits an offence who is a party to it. Under Section 21 of the Code, a person is equally a party to an offence if he aids a person to commit an offence, or encourages him to do so. Under Section 22, it is an offence to counsel or procure another to be a party to an offence. Under Section 23, it is an offence for a person who, knowing that another has been a party to an offence, to receive, comfort or assist that other person for the purpose of enabling him to escape. Such a person is called an accessory after the fact. Under Section 24, it is an offence to attempt to commit any offence. The notion of conspiracy, which has been alluded to earlier, also extends the sweep of these offences. A conspiracy is constituted by a mere agreement, whether or not the agreement is carried out and whether or not any act is done pursuant to the agreement. It is a serious offence to agree to commit any criminal offence, or even to agree to effect an unlawful purpose, even though the unlawful purpose is not criminal. It is accordingly suggested that the sweeping provisions of the offences discussed above, coupled with the sweeping notions about parties to offences, would

adequately cover any overt conduct on the part of an insurgent or revolutionary.

Next it is necessary to discuss the powers of arrest and seizure by the police, because here there is a significant difference between the Criminal Code provisions and the provisions of the temporary regulations and statute. Criminal Code offences are divided into two categories, indictable offences, being the serious offences, and summary conviction offences, being the minor offences. Any person may arrest without warrant another whom he finds committing an indictable offence, and a police officer may also arrest someone whom he finds committing a summary conviction offence. A police officer, however, may also arrest without warrant a person who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence. The latter words, which are found in Section 435 of the Code, should be stressed. A police officer does not have to be right. He must simply act on reasonable and probable grounds. Furthermore, a police officer has the right to arrest someone who has not committed any criminal offence, but who he believes on reasonable and probable grounds is about to commit an indictable offence. Accordingly, if any reasonable and probable grounds existed for belief that insurgents or revolutionaries were about to commit any act of violence, then arrest would be justified under the regular provisions of the Code.

The provisions of the Public Order (Temporary Measures) Act, 1970, which replaced the emergency regulations, and are almost identical to them, must now be examined. Section 3 of the Act declares to be an unlawful association the F.L.Q., or any group advocating the use of force or the commission of crime as a means of accomplishing governmental change within Canada with respect to the province of Quebec. Section 4 makes it an offence to be a member or officer of an unlawful association or to support it in any way. The maximum punishment provided is five years, which is the same as the maximum term of punishment provided for in the War Measures Act. Section 5 of the Act creates the offence of being an accessory after the fact by assisting a person guilty of an offence under the Act.

From a practical point of view, it can be suggested that anyone guilty of a violation of Section 4 of the Act would also be guilty of a violation of the provisions of the Criminal Code dealing with treason, sedition, and criminal conspiracy. The position of an accessory after the fact would be covered by Section 23 of the Code. The ironic aspect of the matter is that the punishment provided by the Criminal Code is far more severe than the punishment provided by the new legislation.

Accordingly, in my view, there cannot be much practical effect to the new offences contained in the emergency legislation.

The Public Order (Temporary Measures) Act, 1970, goes on to provide for detention without bail in certain circumstances. This constitutes a change from the regular criminal procedure, but it should be noted that as a matter of practice a court would refuse bail to a revolutionary charged with a serious criminal offence if the Crown strenuously objected to his being granted bail. Here too, then, there is no substantial change.

The key distinctions, I would suggest, are found in the provisions dealing with arrest and with search and seizure. You will recall that under the Criminal Code a police officer can arrest only on reasonable and probable grounds. Under Section 9 of the new Act, a police officer may arrest without warrant a person who "he has reason to suspect" is a member of the unlawful association, or who "he has reason to suspect" has committed or is about to commit any of the actions proscribed by Section 4 of the Act. The significant phrase, "reason to suspect," is a peculiar one, and is difficult to interpret. Does it mean, for example, that the suspicion must be reasonable? I do not know how the courts will interpret the phrase, but it is different from the requirement of a belief based on reasonable and probable grounds. Certainly the police have interpreted the phrase as justifying arrest for any reason, whether or not the police were acting on reasonable and probable grounds.

The same phrase, "reason to suspect," is found in the provisions relating to entry of premises, search, and seizure. Ordinarily, a police officer can enter premises only when acting under a search warrant issued by a court. Under the Act, however, a police officer may enter and search without warrant any premises, or seize any property, if he has "reason to suspect" that the search or property will provide evidence of a violation of the Act.

If one turns next to the actual prosecution of an offender under the emergency regulations or under the temporary statute, it is difficult to see how such a prosecution could be successfully conducted. It would appear that in the haste of proclaiming the War Measures Act, the federal government forgot about the provisions of Section 6 of the Regulations Act, providing as follows:

> (1) Every regulation shall be published in English and in French in the *Canada Gazette* within thirty days after it is made.
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> (3) No regulation is invalid by reason only that it was not published in the *Canada Gazette* but no person shall be convicted for an offence consisting of a contravention of any regulation that was not published in the *Canada Gazette* unless

> (a) the regulation was, pursuant to section 9, exempted from the operation of subsection (1), or the regulation expressly provides that it shall operate according to its terms prior to publication in the *Canada Gazette,* and
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> (b) it is proved that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public, or the persons likely to be affected by it, or of the person charged.

The emergency regulations were not exempted from the operation of the Regulations Act, and there certainly is no doubt that at the date of the alleged contravention reasonable steps had not been taken to bring the proclamation to the attention of the persons charged, – in fact, the original arrests were shrouded in secrecy.

If one, however, attempts to prosecute under the Public Order (Temporary Measures) Act, 1970, another problem emerges. It is a cardinal principle of the criminal law that a penal statute does not apply retroactively, i.e., an act must be an offence at the time it is committed before it is punishable. The prosecutions under the new Act, however, would normally relate to conduct prior to its enactment. The Act makes it an offence to be a member of an unlawful association, but it does not make it an offence to have been a member. It is true that section 8 of the Act provides that evidence that a person before the coming into force of the Act participated in or was present at meetings of the unlawful association, or spoke in favour of the association, is proof that the accused is a member of the unlawful association. However, this is only a presumption applying in the absence of evidence to the contrary, and the relevant issue still is the membership of the accused in the unlawful association after October 16th, 1970. Because of the general approach of the Criminal Law, and because of the reversion of jurors against ex post facto laws, successful prosecutions would be very difficult, if not impossible. It is noteworthy that the most widely publicized charges to date against persons arrested under the regulations have in fact been laid under the Criminal Code.

One further aspect of the invocation of the War Measures Act should be considered. Under the British North America Act, the administration of justice is a matter coming under provincial jurisdiction. Accordingly, although it is Parliament that enacts the criminal law, it is the provincial governments which enforce that law. One interesting aspect of the adoption of the War Measures Act, a federal statute, was that the federal government assumed partial control for the administration of justice in the Province of Quebec, particularly by the inclusion of members of the Canadian Armed Forces within the definition of a "peace officer" found in the emergency legislation. In this manner, the

federal government moved into an area ordinarily handled by provincial governments. However, it must be noted that Parliament does have the constitutional power to establish its own courts and police agencies for the enforcement of federal laws, although generally speaking, Parliament has not seen fit to do so.

Let me summarize my conclusions. The ordinary criminal law adequately covers dangerous conduct by insurgents. Prosecutions of arrested persons, to be successful, must be conducted under the Criminal Code. The most legally-significant effect of the emergency legislation is to take away the requirement that police officers act reasonably. Do we want that kind of a law in Canada? Was it necessary to have such a terrifying social upheaval to achieve this result? I leave that very limited, but very significant, policy issue for each one of you to decide for yourself.

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A COMMON SENSE INQUIRY INTO THE PROBLEM OF THE INTOXICATED OFFENDER—PROPOSED AMENDMENTS TO THE CRIMINAL CODE OF CANADA

Let us begin with premises which, if not universally agreed upon, are at least well settled principles of law, namely that generally the law does not punish a person for his acts *per se*, whether unlawful or otherwise, rather it is only when such act is coupled with the particular mental element that it falls within the realm of the criminal law: *actus non facit reum nisi mens sit rea.*[1] This paper considers how, because of public policy, these requirements have been eroded insofar as the intoxicated offender is concerned. Confusion has arisen on an issue that, except for intoxicated offender cases, would seem to have been well settled and, it is submitted, is in strict legal theory still valid, namely: at what point in time must the accused have had the necessary *mens rea*?

A man voluntarily consumes alcohol or drugs to excess and subsequently assaults another man. Let us suppose that there is no dispute as to the accused's state of mind and that he was intoxicated to the extent that he had lost the ability to form the intention required. Accepting the above noted principles and leaving aside for the moment the con-

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1. See e.g. **R. v. Tolson** (1889) 23 Q.B.D. 168; 37 W.R. 716 Court of Crown Cases Reserved; **Brend v. Wood** (1946) 62 T.L.R. 462; 175 L.T. 306 Divisional Court; **Watts & Gaunt v. R.** 16 C.R. 290; [1953] S.C.R. 505; **Sweet v. Parsley** [1969] 1 A.E.R. 347; [1969] 2 W.L.R. 470 House of Lords.