GlobalResearch
Center for Research on Globalization

On Liberty and Vigilance, Canada's 1970 Emergency Powers under the War Measures Act, "The Price of Freedom" in the "Era of the War on Terror'"

By Adeyinka Makinde
Global Research, December 28, 2016
adeyinkamakinde.blogspot.ca 11 November 2012

Region: Canada
Theme: History, Police State & Civil Rights, Terrorism

Canada, October 13th 1970. The capital city of Ottawa has awoken to find troops and armed police officers deployed around buildings which house government officials. A similar picture of martial power is on display in the major cities of the French-speaking state of Quebec where as in Ottawa, troops are milling around the streets and thoroughfares. A military coup d'etat is not taking place but there is crisis.

A seven year-long campaign of violence perpetrated by separatists from Quebec, Le Front de Liberation du Quebec; the F.L.Q., has come to a head. On the morning of the fifth, gunmen had infiltrated the home of the British Trade Commissioner, James Cross, seized him and bundled him into a car. Five days later, Pierre Laporte, the Vice Premier of Quebec and the Minister of Labour, was similarly kidnapped from his home in Saint-Lambert, Quebec.

As he ambles up the steps leading into the entrance of the gothic architecture-styled building that is the national Parliament, Pierre Trudeau, the Prime Minister of the federation encounters a group of journalists. Among their ranks, is Tim Ralfe, a correspondent of the Canadian Broadcasting Corporation with whom he proceeds to engage in an impromptu conversational sparring contest.

They explore the extent to which a society predicated on liberty is willing to go towards preserving its existence in the face of threats from a violent and radical form of opposition, and of reconciling a heavy and intrusive military presence with the ability of the ordinary citizen to conduct his or her day-to-day affairs with the relative ease as is the standard expectation in a supposedly free and democratic society.

The verbal thrust and parry develops and the issue quickly boils down to the following: **To what extent would the government be willing to go in order to achieve a victory over the terrorist group.**

Ralfe, pointedly asks Trudeau, "At any cost? How far would you go with that? How far would you extend that?" Trudeau's response is as casual as it is startling:

> "Well, just watch me."

Three days later, after a request by Robert Bourassa, the premier of Quebec, Trudeau invoked the War Measures Act, the first time in Canadian history that it had been activated in peacetime. Passed in 1914, the Act gives emergency powers to the federal government when it perceives that there is a threat of "war, invasion or insurrection."

The ramifications were profound. Trudeau's action entailed the suspension of the Canadian Bill of Rights. In other words, basic civil rights and liberties were frozen, thus allowing the police to conduct searches, seizures and arrests without warrants, as well as authorising the prolonged detention of persons without charges while leaving them without the right to consult a lawyer.

In the starkest of terms, it meant that Trudeau, the leader of one of the world's prominent democracies, had the power to arrest anyone and detain them indefinitely without charging them with a crime.

Parts of Canada were effectively under military law. And it is worth noting that as the extra-judicial arrests of between 450 to 500 people was commencing; most of who were intellectuals, artists, trade unionists, and ordinary people who sympathised with the cause of Quebec nationalism, most of English-speaking Canada supported Trudeau.

The events which came to be known as the 'October Crisis' provide one of many fascinating case studies of a perennial problem faced by democracies. It is that which relates to striking a delicate balance between the competing requirements of national security with that of personal liberty.

It is an exercise that is often fraught with a multitude of dangers no matter how well-intentioned the motives of the relevant chiefs of state when engaged in the task of protecting a society from a range of threats.

Whether it is to prevent the violent overthrow of the state, or to resist bloody attempts to weaken the resolve of the state in order for it to grant concessions of a political nature, the danger of eroding and even permanently extinguishing long accepted and cherished freedoms hovers in the air like a Damoclean sword when nations take measures aimed at their purported self-protection.

And when done with the consent of legislators and the apparent acquiescence of large segments of a population, the danger of a democracy sleepwalking into the trappings of a police state becomes all too apparent.

High notions of morality, along with the strict maintenance of constitutional propriety, must compete with the brutal pragmatism considered to be necessary in combating threats to national security.

The tension between retaining an adherence to the values of liberty, privacy, respect for human dignity and human life come sharply in to focus when certain religions or political persuasions and stances become criminalised, as indeed can certain categories of ethnic groups.

It is strongly arguable that the values inherent in the idealised concept of a functioning democratic society become ever more severely compromised in a nation in which torture and targeted assassinations become legitimised methods of protecting the state. This is not diminished even when such methods are applied hundreds or thousands of miles away from

its national borders or that they are applied in a localised or specific manner within national boundaries.

How long, it must be asked, before eavesdropping measures utilized against suspected enemies of the state or name-gathering techniques aimed at unmasking potential terrorists are allowed to impinge on the wider public? Or that the targeting for killing of nationals abroad is not re-directed to those within its borders?

These are crucial questions to ask since history has shown that extraordinary powers parcelled out to particular agencies of the executive have not necessarily been withdrawn after the relevant crisis ceased. These powers may then be used in different contexts to which they were originally intended.

For instance during World War Two, US President Franklin Roosevelt issued a secret order to Federal Bureau of Investigation (F.B.I.) director, J. Edgar Hoover expanding the powers his organisation had in regard to the surveillance of potential fifth columnists via eavesdropping and burglary.

Wily political operator that he was, Roosevelt also was not averse to using the services of the F.B.I. to get information on his political foes. Hoover, who retained the powers he had been given, continued utilising these techniques after the war had ended and in defiance of a later Supreme Court decision which outlawed wiretapping. His victims included Roosevelt's wife, suspected communist sympathisers, civil rights leaders and members of the political class including succeeding presidents who were effectively blackmailed into retaining him in his position.

By virtue of its role within the aggregate of institutions of power which constitute the organs of state, both John Locke and Comte de Montesquieu believed the executive branch to be most susceptible to authoritarian tendencies.

Much of the scrutiny of the abuse of power must necessarily focus on the executive which controls the day-to-day administrative apparatus required for enforcing the laws and policies linked to the relevant 'crisis'. The use of the police, armed militias, the military, as well as the security and intelligence services will always be vital in carrying them out.

The results have sometimes left a stain on democratic societies.

Monumental episodes of internment without trial are etched into the political-legal history of the United States, the avowed 'land of the free', as is the case with the United Kingdom, the putative 'mother of democracies'. And just as the British employed a 'shoot-to-kill' policy during 'the Troubles' in Northern Ireland, so today there exists a policy of officially sanctioned 'targeted assassinations' of Islamic fundamentalist suspects in the Middle East and Asia by the American government.

There are many who will argue that the responses in the aftermath of the events of September 11th 2001, which inaugurated the 'War on Terror', have inextricably had the effect of undermining and rolling back the sum rights and freedoms of the citizenry of the Western democracies.

In the United States, the creation of the Homeland Security framework has seen the passage of the Uniting (and) Strengthening America (by) Providing Appropriate Tools Required (to)

Intercept (and) Obstruct Terrorism Act (2001), better known by the backronym, 'USA Patriot Act' and the National Defense Authorization Act (2012), while in the United Kingdom and Canada anti-terrorist legislation, as with the case of the Americans, have effectively chipped away at fundamental precepts of the rule of law.

In the United States, this has included aspects of due process such as granting immunity from judicial review, searches without warrants, indefinite detentions, the use of secret evidence, the practice of 'extraordinary rendition' and the assassination of American citizens.

It has also affected other citizens' rights such as the ability of the government to conduct continuous surveillance of individuals without the permission and monitoring of the courts.

Immunities are also conferred on those who transgress while executing the orders of the state with the result that C.I.A. officials involved in torture or war crimes are exempted from prosecution.

A disturbing continuum of an expansion of the security state from the administration of President George W. Bush to that presided over by Barack Obama is clear. For instance, Obama ordered the assassinations of two American citizens in 2011 on the grounds of 'imminent threat', a form of anticipatory self-defence under international law and based also, perhaps, on the notion of an inherent presidential power. It is a right which Bush had claimed to possess.

Apart from claiming the right to sanction what are arguably extra-judicial killings, both presidents have also affronted the rule of law by reserving the power to determine who would be tried either by a military tribunal or federal court.

This all stems from the American predicament on how to process those Al Quaeda suspects it had rounded up after its invasion of Afghanistan and their interment at Guantanamo. Since it had declared a 'War on Terror', it stood to reason that those self-proclaimed Jihadists would be treated as soldier-prisoners of war with entitlements to the protections available under the Geneva Convention.

The American government disagreed, claiming that they were not 'lawful combatants' and could not be treated as prisoners of war. The response to this was that if these Islamist irregulars were not soldiers and were common criminals, they should have been handed over to the federal courts. This, of course, the Americans were not prepared to do; at least not at the onset. It has made up the rules as time has passed.

What is clear however, is whether judged by the standards of international law or municipal law, the detainees have been held in circumstances which have been universally condemned as inhumane, and subjected to a detention regime which has included what is legally defined as torture.

The United Kingdom, with a recent history of dealing with the problem of Northern Ireland entered the 2000s with enactments geared towards the prevention of terrorism. 'The Troubles' formed the backdrop of the interment of Irish Republican 'combatants' and sympathisers in the 1970s as well as the introduction of the system of 'Diplock Courts' (non-jury criminal trials presided over by a single judge) in that part of the realm.

Over the past decade, Britain has been bedevilled by a number of legislative provisions which have raised concerns about maintaining key precepts of the rule of law while seeking to combat terrorism. These included the powers of search and arrest, indefinite detention and the morality of utilising evidence which is obtained by torture.

One source of controversy and contention by civil libertarians concerned section 44 of the Terrorism Act (2000) which provided the Home Secretary and the police with the power to designate specific areas within which they could stop and search any vehicle or person and seize "articles of a kind which could be used in connection with terrorism."

Further, this power could be exercised without the usual requirement that the police should have a "reasonable suspicion" that an offence has been committed or is about to be committed.

Another severely criticised measure formed part of the Anti-Terrorism, Crime and Security Act (2001) which unlike the aforementioned Terrorism Act was passed in response to the atrocity in New York in circumstances which many would regard as rushed. It was designed to deal with those suspected of planning or assisting in terrorist attacks on British soil.

Section 23 of that Act resuscitated the idea of internment; in this case permitting the indefinite detention of a suspected "international terrorist" whose removal from the United Kingdom could not be facilitated due either to a matter of law arising from international obligations or a "practical" consideration. The latter usually means that the individual could not be deported because he would be at risk of being subjected to torture or other inhumane treatment including the death penalty.

It should be noted that although the section provided for review and appeal procedures to be conducted under the auspices of the Special Immigration Appeals Commission, this did not detract from what for all intents and purposes was indefinite detention.

Rather disturbingly, the United Kingdom government announced plans in September of 2012 to extend the system of 'secret courts', which are known as 'closed material procedures', to civil proceedings. Closed material procedures allow the authorities to present sensitive information to a trial which can only be seen by a judge and specially vetted "special advocates" who represent the complainant who is only given a loose summary of the evidence arrayed against him by his advocate.

The result of an enacted Justice and Security bill would arguably be to tilt the balance of the trial process in the government's favour; a state of affairs which would suit the needs of a government potentially burdened by civil liability claims based on the torture of terrorist suspects by government agencies or the agencies of those nations allied to the United Kingdom.

This is not to say that the government has had its way in all its anti-terrorist measures and initiatives. Far from it. There have been legal challenges and rebellions by legislators which have succeeded in repealing certain provisions and modifying others.

For instance, in January of 2010, the aforementioned section 44 of the Terrorism Act (2000) was ruled to be illegal by the Strasbourg-based European Court of Human Rights which held that the right of two claimants to respect for a private and family life under article 8 had been violated. The powers granted to the police were, the court ruled, "not sufficiently

circumscribed" and there were not "adequate legal safeguards against abuse".

The indefinite detention allowed by section 23 of the Anti-Terrorism, Crime and Security Act (2001) was subjected to a judicial review in the United Kingdom's highest court of appeal in A and Others v Secretary of State for the Home Department (2004). The case concerned foreign prisoners being held indefinitely at the Belmarsh high security prison in London.

The Judicial Committee of House of Lords (known now as the Supreme Court of the United Kingdom), owing to the constitutional doctrine of Parliamentary Sovereignty could not strike down the Act and made what is termed a 'Declaration of Incompatibility' under the terms of the Human Rights Act (1998) which incorporated the Human Rights Convention into U.K. law.

The court made it clear that indefinite detention could not be applied to U.K. citizens and that there was nothing to prevent the government from releasing the suspect to a country in which he would not be at risk from torture.

The subsequent repeal of part IV of the Anti-Terrorism, Crime and Security Act (2001) which contained section 23 led to the passage of the Prevention of Terrorism Act (2005) which introduced the power of the Home Secretary to issue an order against an individual "that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism".

These so-called control orders enable a government minister to sign an order to place a terrorism suspect under close supervision in circumstances which are similar to a house arrest.

There are two forms of control orders. The first which is of one year's duration allows for strict restrictions such as home curfews, electronic tagging and limits on who the subject can meet, while the second, which lasts for six months, involves opting out of some human rights provisions in a public emergency situation.

The control order laws were passed in the wake of compromises been made by government and opposition parties, but there are those who feel nonetheless that the existence of such a law goes against the principle of *habeas corpus*.

Other cases challenged government powers such as A v Home Department (No2) (2005) which ruled that evidence obtained by torture is inadmissible in a court of law.

Segments within the political class have also played a part in contesting perceived excesses in the potential granting of additional powers to the executive. For instance in 2008, a plan by the Labour administration of Gordon Brown under a Counter Terrorism bill to extend the period of time in which a suspect could be held without charge from 28 days to 42, was heavily defeated in the second chamber of Parliament, the House of Lords.

Described by some as "the biggest defeat in the Lords in living memory," it was seen as a victory of commonsense by civil libertarians who felt that the government had other options at its disposal without the need to have recourse to an extension.

It must also be said that the aforementioned government proposal to extend the mechanism of 'secret court's which is currently being processed through the United Kingdom legislature has been subject to criticism by a range of Parliamentarians; from the opposition Labour

party, as well as within the ruling coalition.

Such an extension is seen as an affront to the principle of 'open justice'; a key tenet of the operation of the rule of law as indeed the potential bias in favour of prosecutors tends to denude the spirit of 'natural justice.'

This initiative is rooted in the defeat suffered by the government in 2010 when judges in a civil case brought by British detainees at Guantanamo Bay alleging 'wrongful imprisonment' and 'abuse', ruled against an attempt by the Attorney General to suppress evidence of the British security services complicity in torture.

The court of appeal ruled that to render an alternative verdict would amount to "undermining one of (the common law's) most fundamental principles" which was that "trials should be conducted in public and judgements should be given in public".

In the United States too, measures put in place by both Bush and Obama administrations have come under heavy scrutiny and challenge.

As with the case in Britain, the rather troubling issue of indefinite detention has formed a critical form of contention. Section 1021 b of the National Defense Authorization Act contains detention policies relating to persons who the government suspect are involved in terrorism which are variously described as "broad" and "vague".

Again the perennial fear of abuse of power by executive authority dominates the arguments of those against the measure who also see at a fundamental level, an attempt to abrogate the right of *habeas corpus*. The measures, which give the US military powers of arrest and detention, could conceivably be used against American citizens who could find themselves detained indefinitely without trial on suspicion of involvement in terrorism.

There are of course arguments that the relevant section does not allow for indefinite detention. This view is based on a distinction between detentions that are pursuant to the laws of war and those within the domestic sphere of criminal law. The latter would be processed in the conventional way while in the former situation, authority to detain would end upon the ceasing of hostilities.

A permanent injunction on the indefinite detention provisions issued in September 2012 was overturned on appeal by the Obama administration and will continue to be the subject of legal contention.

The other major source of legal challenge concerns the use of electronic surveillance aimed at keeping pace with potential threats to national security. The Foreign Intelligence Surveillance Act and subsequent amending legislation (including the USA PATRIOT Act), sets out procedures for monitoring the activities of foreign nationals as well as American citizens and permanent residents who may be engaged in espionage activities on behalf of a foreign power.

There are several issues linked to such concerns which have been or are being challenged in court. One angle, for instance, relates to privacy violations by certain telecommunications organisations which assist the government with the provision of information vital in the government's estimation for national security purposes. The previous requirement that a federal judge sign a warrant authorising the interception of e-mails and telephone calls only after a justification supplied by the government was suspended by a secret order of

President Bush.

Successive petitions have been rejected by US judges.

The 'War on Terrorism' was launched with much determination and unity of purpose in the United States, and as has been documented, the subsequent legislation to support this 'war' was passed with great haste and in an atmosphere of such emotional intensity that many legislators arguably failed to fulfil their duty of thoroughly scrutinising the PATRIOT Act before its enactment.

Some have argued that they were complicit in signing away many of the cherished rights and freedoms on which their nation was built.

But the massacre of September 11th demanded some form of action including what could be termed 'defensive' measures to counteract the possibility of future outrages. The nation was forewarned that such measures would have an unavoidable impact on personal liberties.

The question of balancing individual rights with national security pits opposing beliefs on how this can be calibrated. There are those who insist that any curtailment in rights and freedoms is only relative and that the law abiding citizen has nothing to fear. Others are not so easy to mollify. They insist that government is quick to assert ownership of newer, ever increasing powers many of which are unjustified even with due regard to the potential threats faced by society.

Put another way, the question to be asked is to what degree can the threat of terrorism be combated with the minimum of interference in the rights and freedoms of the general public?

America is not the first democracy to face such a threat and it is instructive to consider whether lessons can be learnt by casting an eye back in time at how the Italian state battled with the *Brigate Rosse* (Red Brigades), a Marxist revolutionary group, or how the West German authorities sought to defeat the Red Army Faction, also an extreme left-wing group, more popularly known as the Baader-Meinhoff Group.

The Italian government introduced stern measures related to the stopping, searching and detaining of terrorist suspects. Investigative powers were also increased through a relaxation of the rules governing wire-tapping. One particularly successful strategy employed was a policy of offering reduced sentences to those who would turn evidence against their colleagues.

By the middle of the 1980s, the government had succeeded in purging the Red Brigades at arguably a small cost to the civil liberties of the general populace.

In West Germany, the police were granted extraordinary powers -subject to the approval of a judge- to search entire buildings for suspects. They could establish checkpoints on motorways to inspect the identification of travellers. The intelligence gathering capabilities of the security services were increased as well as the proficiency of armed response units who could be deployed at short notice to deal with kidnapping and hostage-taking incidents.

By the early 1980s, most of the Baader-Meinhoff group were either dead or incarcerated; and like the aforementioned situation in Italy, this was achieved without an overly negative

cost to civil liberties.

But these case studies only go so far. The 1970s were a different time in terms of the technology available to terrorists and the methods of organisation. The membership of these groups was largely confined to one country.

The so-called 'War on Terror' is international in dimension and crucially is of an indeterminate period. There are politicians and security officials who have estimated that it could last for decades and may never be won, unless of course some sort of wider political settlement is achieved primarily in the Middle East.

The frequently expressed view that it is a perpetual 'war' marks it out as of a different breed of war compared to wars waged for territorial conquest. Its global dimension as well as it being waged against an acephalous foe complicates matters and arguably bolsters the case of those in power who appear to be willing to chip away at centuries-long principles and processes that have been the foundation of free societies.

How far should a country go when 'defending' itself against internal threats as well as the more amorphous threats of Al Quaeda? Pierre Trudeau was categorical in announcing that a society "must take every means at its disposal to defend itself against the emergence of a parallel power which defies the elected power."

And while, as mentioned, his measures had the support of most of the population, particularly among the majority English-speaking segment, doubts, misgivings and then outright opposition would later materialise. A prominent Canadian trade unionist would accuse Trudeau of "cracking a nut with a sledgehammer".

The admirable Tommy Douglas vociferously voiced his opposition to the invoking of the War Measures Act when there was little opposition against it. He warned in a television interview:

"Every country that has had its freedoms and liberties curtailed has been told in advance that this was being done for their protection and it was only on a temporary basis."

It is worth noting that both Pierre Trudeau and Barack Obama were professors of constitutional law. Yet, when confronted with the security versus liberty dilemma as chiefs of state, both opted to pursue draconian options at the expense of prudent alternatives: Trudeau with the wholesale abrogation of civil liberties and Obama, famously reneging on an election promise to dismantle the Guantanamo security regime.

In truth, it is possible that the burdens placed on those in leadership; a dose of reality some would argue, can impose on even the most idealistic among them, an altogether different perception of how to approach this matter. Trudeau, who prior to his political career was a prominent advocate of individual rights, was fairly blasé when referring to the "bleeding hearts" who he chided "just don't like to see people with helmets and guns".

It is impossible to calibrate a definitively 'right' balance since the circumstances of conflicts differ. But there are arguably clear boundaries which some have been able to ascertain. Tommy Douglas for one related that the most severe restrictions on personal liberties, such as invoked by Trudeau, can only be accepted in conditions of total war; in other words, where the very existence of the nation is threatened.

This was enunciated by Lord Leonard Hoffman in his judgement in the aforementioned A and Others versus Secretary of State for the Home Department (2004) in which he poured scorn on the government's argument that the derogation of the rights of the indefinitely detained foreign prisoners was due to the existing "national emergency".

While the survival of Britain in a war against the might of Adolf Hitler's armed forces hung in the balance, the capacity of terrorist groups such as Al-Quaeda to murder and inflict carnage; painful to bear as they would be, did not threaten "our institutions of government or our existence as a civil community."

In fact, he argued that the danger to the community or as he put it, "the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."

The task in the midst of the current threat of terrorism is therefore to ensure that the efforts geared towards the purported preservation of society do not end up destroying the society it seeks to protect.

Powers which undermine the rule of law or which attempt to constrict the ability of an independent judiciary to review the actions and decisions of the executive branch of government must be subject to forensic scrutiny by non-governmental interest groups, members of the legal profession, the legislators and by a concerned citizenry lest the exercise of untrammelled executive power lead professed democratic societies into an Orwellian abyss. They must indeed "watch" the government, but not in the passive sense as Pierre Trudeau implied.

"Eternal vigilance," as Thomas Jefferson once wrote, "is the price of liberty."

Adeyinka Makinde *lectures in Public Law at a London University.*
