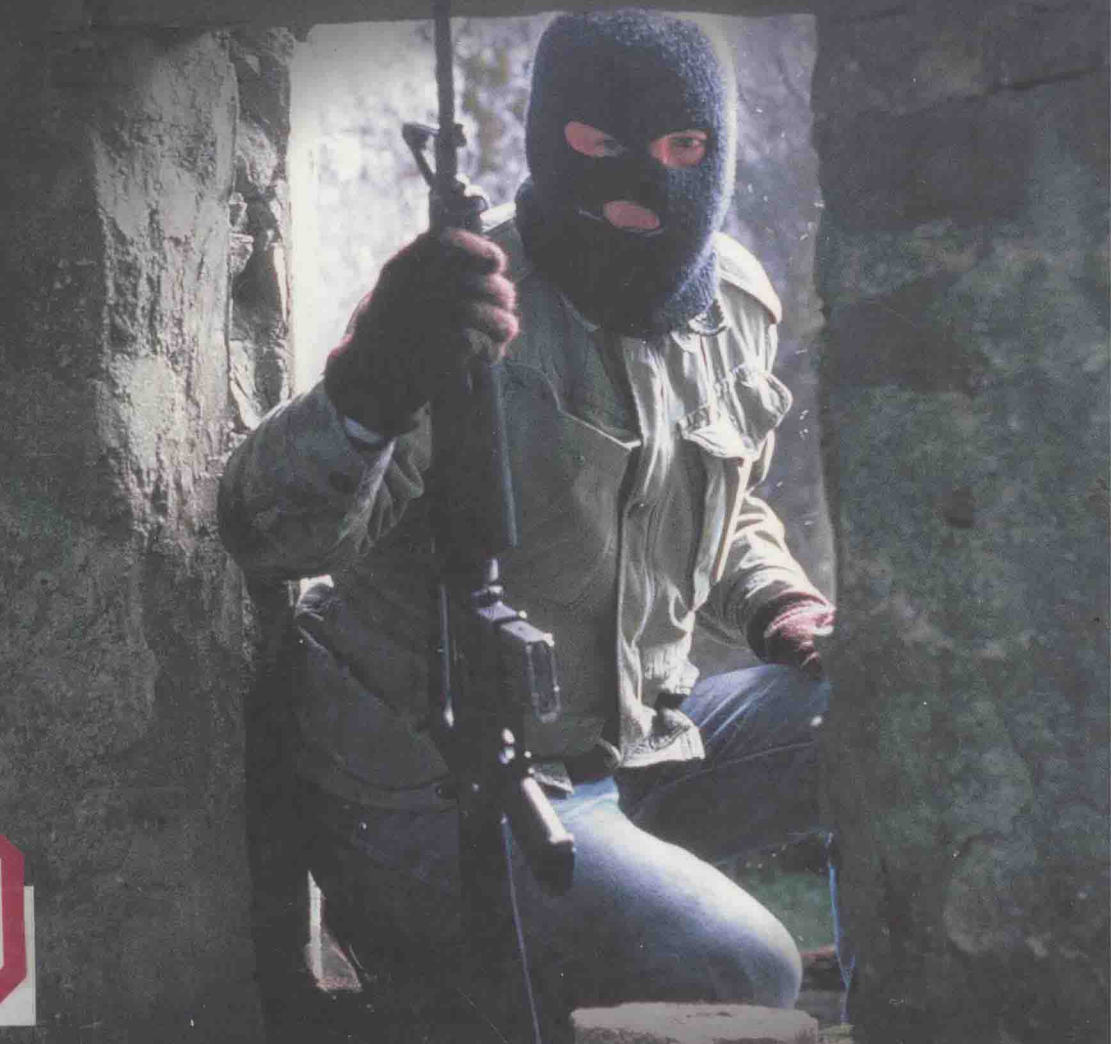
Terrorism, Rights and the Rule of Law

Negotiating justice in Ireland



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Published by

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e-mail: info@willanpublishing.co.uk
website: www.willanpublishing.co.uk

Published simultaneously in the USA and Canada by

Willan Publishing
c/o ISBS, 920 NE 58th Ave, Suite 300
Portland, Oregon 97213-3786, USA
Tel: +001(0)503 287 3093
Fax: +001(0)503 280 8832
e-mail: info@isbs.com
website: www.isbs.com

First published 2008

Hardback
ISBN 978-1-84392-265-0

Paperback
ISBN 978-1-84392-264-3

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

Project management by Deer Park Productions, Tavistock, Devon
Typeset by PDQ Typesetting, Newcastle-under-Lyme, Staffordshire
Printed by T. J. International Ltd, Padstow, Cornwall

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Introduction

> I have been restless at the curious blankness with which men from other social disciplines face any legal matter or any talk of law. Of all the social disciplines it stands most isolated. My own guess is that that [sic] is because the law-men mainly think doctrine and talk a language which runs in terms largely of correct doctrine – which is to exclude communication and contact with any premises except the premises of correct doctrine. But underneath all doctrines there lie problems, and those problems seem to me a proper study for all men of the social disciplines, and an illuminating one ... For the store of record, of knowledge, and of light which the law-men have heaped up has no business to be kept locked away from the other social disciplines. Traffic in ideas, like traffic in goods, runs best when there are return-loadings ... The social disciplines are due to discover that modern work in the legal field is not only a market for their product but a rich productive area. One thinks of ancient mines, once worked and valued, since lost, now relocated – and waiting. (Llewellyn 1940: 1357)

Commentary on our times suggests that we live in a uniquely insecure age, beset by terror at a global level through the actions of Al Qaeda and their associates and at a local level where anti-social behaviour of some diminishes the quality of life of many citizens. Responses vary but many comprise strategies that restrict the freedoms of those suspected of such actions in a way that cuts against the grain of normal protections.

The two disciplines that may be most profoundly affected by these

developments and that have most to offer in terms of reasoned commentary upon them are those of criminology and law. Criminology teaches us especially about how the coercive arm of the state can be used to incapacitate those deemed suspect; law tells us about the legal mechanisms through which this social paralysis of opponents can be achieved. These are useful lessons but taught separately can lead us astray. Criminology's emphasis on how state powers can be turned against suspects can too easily lead to predictions of a maximum security society in which individual liberty is curtailed. Law's analysis of legal frameworks and decisions can omit the wider social importance of such activities, content to establish that decisions accord with precedent and process.

As a criminologist and lawyer, we believe that combining insights from both disciplines helps to avoid these errors. Criminology can learn from law by attending to individual case law through which judges can resist the machinations of governments intent on increasing the reach of the state. The specificities of legal reasoning and the process of judicial interpretation continues to be influenced by assumptions and values – which are entrenched in various constitutional and human rights provisions – that emphasise the primacy of the individual often over broader collective goals or policies. Such decisions can preserve the rule of law and prevent state rule descending into rule by law, legislation that has been faithful to democratic process but nullifies many rights. The internal logic of law must therefore remain an important consideration when contemplating broader socio-political forces. But law too can learn from criminology by thinking critically about the wider social significance of judicial decisions, acts of parliaments or delegated powers granted to organisations or individuals.

Trading ideas across disciplines, we argue that the future is neither as bleak as criminologists are inclined to think nor is it as simple as attesting to the growth of more laws. Judges do resist the siren-call of counter-terrorism by insisting that due process must be followed and that a certain level of equality is maintained between citizen and state; of course, due process is often relaxed precisely to defend the state against terrorism and judges have been complicit in this. Many criminologists and lawyers are inclined to put due process on a pedestal and refuse to countenance any change to it; criminologists do so because of their perennial suspicion of the state and lawyers because of their ahistorical approach to legal systems. We try to be more nuanced, arguing that due process has suffered as counter-terrorism strategies have permeated the 'ordinary' criminal justice system yet it also has been justly amended to include identities and interests that have been unfairly glided over. Law's importance in regulating lives is increasing yet the social and

political implications of this and its impacts on people's rights are rarely debated. The rule of law is threatened not only by terrorism but also by law enforcement through regulatory agencies which threatens to wrench law away from public accountability. We hope that this book makes some effort in broaching these matters for public debate.

Although this book is the culmination of a dialogue between law and criminology, its emergence depends on broader social influences. We are grateful for the valuable suggestions provided by colleagues, especially Andrew Ashworth, Caroline Fennell, David Gwynn Morgan, Siobhan Mullally, and Dermot Walsh. Barry would like to thank his wife Olga for all her assistance. His first book coincided with the birth of their first son, Conor, and this volume has been entwined with the birth of their second, Darragh. Newborns are no longer a prerequisite for the appearance of any future volumes. Shane would like to thank Maria, Kate and Jack for providing ample distraction in the writing of this book.

Chapter 1

Ending or extending the long nineteenth century of criminal justice?

The history of events: surface disturbances, crests of foam that the tides of history carry on their strong backs. A history of brief, rapid, nervous fluctuations, by definition ultra-sensitive; the least tremor sets all its antennae quivering. But as such it is the most exciting of all, the richest in human interest, and also the most dangerous. We must learn to distrust this history with its still burning passions, as it was felt, described, and lived by contemporaries whose lives were as short and as short-sighted as ours. It has the dimensions of their anger, dreams, or illusions ... a world of strong passions certainly, blind like any other living world, our own included, and unconscious of the deeper realities of history, of the running waters on which our frail barks are tossed like cockleshells. A dangerous world, but one whose spells and enchantments we shall have exorcised by making sure first to chart those underlying currents, often noiseless, whose direction can only be discerned by watching them over long periods of time. Resounding events are often only momentary outbursts, surface manifestations of these larger movements and explicable only in terms of them. (Braudel 1973: Preface)

Understanding the present

It is a common conceit of the current era to believe that we are living in unique times, that present circumstances have thrust us away from previous habits and towards practices that are foreign to us. Currently, politicians are telling the public in many countries that the new forms of

terrorism that have arisen since 9/11 demand responses that may cut into previously untouched freedoms. Furthermore the relationship between citizen and state may have to be reordered to cope with the risks to security that this new terrorism poses. And states may have to impose unusual restrictions on citizens' movements and routines and dissolve some of the protections that have previously been afforded to suspects.

Many criminologists are somewhat jaundiced about these claims, not because they disagree with the notion that there has been a break with the past, but because they locate it elsewhere. Many of the techniques now being utilised against terrorist suspects – racial profiling, scrutiny of financial records, extended periods of detention – have previously been used against criminal suspects so it has proven quite easy to redeploy them in a different direction. For criminologists, the great transformation has been the onset of an overt punitiveness directed against offenders that is barely concerned with the rights of convicted criminals and insouciant about the protections afforded to suspects. Rehabilitation of offenders and respect for due process values seem like archaic sentiments that have little purchase upon the contemporary predicaments troubling the public. Once the political centrality of addressing people's concerns by governing through crime (Simon 2007) has been established, the idea of 'governing through terrorism' (Mythen and Walklate 2006) meets little resistance since people have become used to governments capitalising on their public anxieties.

These two accounts, which might respectively be characterised as a war on terror and a war against crime, share several similarities. They emphasise the need for governments to take decisive action against those suspected of committing prohibited actions and are sceptical about the legitimacy of the protections afforded to these suspects. Instead, greater powers should be granted to investigative agencies to determine whether suspects have actually committed alleged actions, and these agencies should face fewer constraints on their powers. To adapt Herbert Packer's famous couplet, the values of crime/terror control are stamping that of due process into the ground. Packer likened the operation of the first value to an assembly line that produces guilty pleas as expeditiously as possible; due process is more like an obstacle course that sets up many barriers and obstacles for law enforcement officials to overcome before a conviction can be secured. The increasing primacy granted to crime/terror control means that governments are more willing to infringe supposedly inviolable rights in the pursuit of some supposed greater good like public security and bend the activities of customarily autonomous actors, like the police and courts, towards the ends of terror or crime control.

The impact of the war on crime that has been going on for some time (Garland 2001; Simon 2007) and the predicted long war on terror (Rogers 2006) seems to be squashing the values of due process in many western democracies. It does not seem too fanciful to enquire if their character as liberal jurisdictions is being radically transformed. The United States has been trying to create a 'new legal regime' with respect to the Guantanamo Bay detainees that 'renders quaint' international rules such as the Geneva Convention (Sands 2005). The British government has introduced detention without charge for 28 days, a doubling of the previous period (although senior police figures were clamouring for 90 days). Alarm has been pronounced over the departure from the rule of law that anti-terrorist measures like this represent (Blick and Weir 2005) but as John Lea (2005) points out, this departure from due process has been prefigured by advances made against those suspected of organising the drugs trade. Both sets of measures are a response to the perceived difficulties of obtaining information about either terrorist or serious criminal activity and react by revoking vital aspects of procedural justice.

If we are to come to some understanding of the significance of executive encroachment upon the rule of law, then we require an account of the development of what has quaintly come to be called the rule of law that is associated with the development of modern states: publicly promulgated and enforced law that circumscribes the arbitrary power of the executive and state and affirms the equality of every citizen within that state. Stating matters in so cursory a fashion risks obscuring how some of the key features of the rule of law – non-arbitrariness, publicity, etc. – only developed gradually. Moreover, it might seem to efface how this notion was realised differently in particular national contexts or, more radically, ignore claims that arbitrariness is at the heart of state power through the power to invoke exceptions. These counter-arguments shall be considered but, for now, we think it sufficient to highlight the prominence given to the rule of law within contemporary jurisdictions so that it can help decipher some of the most momentous changes affecting modern states.

The rule of law

Although the emergence of the notion of the rule of law and, more importantly, the practices associated with it shall be dealt with more extensively in Chapter 3, it is important to outline its precept and influence. Although it has a long lineage, it is still worth considering A. V. Dicey's account in *Law of the Constitution* (1959), not only because he

popularised the notion but also because he is thought to have illustrated the vulnerability of the rule of law to governmental decree.

Dicey outlined three main facets of the rule of law. He outlined the first through the principle that:

> no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. (Dicey 1959: 188)

It is easy to forget just what a revolution in justice this entailed. Requiring that people only be punishable via courts and through clearly enunciated offences presupposes some system of due process that was inconsistent not only with the arbitrariness of the sovereign but also with how communities would dispense justice. Rejecting a presumption of innocence, local communities often put the onus upon suspects to refute the charges laid against them. Wresting control of justice away from communities required the state to establish some kind of monopoly of justice via the deployment of state-employed justice personnel.

Besides due process, one of the other noted features of the rule of law is the idea of legal equality (Allan 2001), Dicey's second characteristic of the rule of law. We ordinarily associate the rule of law 'not only with predictability but also with a roughly equal treatment of social groups' (Holmes 2003: 21). Agents of the state should not be exempt from the kind of justice that keeps the ordinary citizen within its reach: 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals' (Dicey 1959: 193). Law enforcement officials have often displayed a tendency to elevate themselves above the rule of law, often for the sake of a supposedly 'noble cause' such as catching criminals. Arrogating to themselves such power is partly explicable by their perception that they are above or beyond the rule of law themselves, even though they maintain they are in service to it. The effectiveness of the rule of law is judged not only by the extent to which arbitrary state power is hemmed in but also the frequency with which it is investigated when it breaks free from these procedural confines. For the rule of law to function, it must be capable of calling justice to account. Supporting the rule of law may mean the criminal justice system is itself overseen and regulated. The extension of the rule of law is one aspect of a process of democratisation that entails 'increases in the breadth and equality of relations between

governmental agents and members of the government's subject population' constituted through '*protected consultation*' (Tilly 2004: 13–14, italics in original). Citizens should be able to indicate when the state has exceeded its powers and expect effective review and redress.

Extending the rule of law beyond mere predictability to encompass equality may have important ramifications for the machinery of justice that the state sets up. Establishing some system of procedural fairness meant that the state largely took control of the investigation of crime and the adjudication of punishment away from local communities. A criminal justice system may extend its reach as events that were once viewed as harms become labelled as crimes and susceptible to investigation and prosecution by the state. Although this is often portrayed as an effort to reassure an anxious public that the state retains its capacity to protect, it may be the case that the state is responding to pleas from people to take action against the ills that afflict them. Dicey believed that legal equality had been pushed to its 'utmost limit' (1959: 193) in the England of his day.

Michel Foucault had a more nuanced view. In describing the departure from arbitrary sovereignty as a form of government, he spoke of how this movement was challenged by 'tolerated illegalities', defined as 'the non-observance of the rule' (1991: 82), in which both upper and lower strata of society indulged. Groups defended their own interests and often the state was not concerned to intervene even though these groups were breaching the rule of law. The extent to which illegalities are now tolerated may be constricting in contemporary societies. There has been a noticeable growth in the regulation of contemporary capitalist societies (Moran 2003; Braithwaite 2005) and it is a mistake to view this effort at control as being restricted to a 'punishment of the poor' project (Braithwaite 2003). Instead, the state is intruding upon areas where regulation was provided by organisations producing the good in question or else was largely absent. Examples in Ireland of the state establishing agencies to deal with these areas would include the Competition Authority and Environmental Protection Agency, among others. Both of these organisations, like many other recently established regulatory agencies, have been set up, either directly or indirectly, as the result of deepening European integration.

As a result, regulation as a kind of self-provided 'club-government' (Moran 2003) has been in comparative decline as the state has demanded that organisations submit themselves to external review and audit. But when we talk of the state, it is important that we do not present it as some sort of monolithic entity. Proceeding in this way gives us too unilateral a view of control or regulation, leading us to believe that we can chart its ascendancy or fall in some clear linear fashion and causing

us to overlook the variety of ways in which it can be undertaken and the diversity of organisations that are controlled. The state may become both the recipient of regulation and its initiator. It might be better to speak of a 'disaggregated' state (Slaughter 2004) whose actions, in the pursuit of justice, are irreducible to a single modality of control or a single form of production, however loosely combined, as with the traditional criminal justice system of police-courts-corrections. Some organisations may seek to negotiate or institute a process of dialogue with those whose actions they oversee, the so-called 'responsive regulation' paradigm. The outcome is a form of disaggregated justice as many organisations are free to prosecute cases as they see fit without any reference to a central decision-maker, such as a chief prosecution service. In fact, while the traditional agencies of the criminal justice system are subject to increasing forms of control and oversight, newer forms of policing may slip free from these bonds.

If acknowledging the onset of a disaggregated state helps us to chart a route beyond dystopian visions of control, it casts up some significant impediments in the path of democratisation to which the rule of law contributes. Construing this path as a deepening process of protected consultation jars with the state maintaining minimal public involvement in the process of criminal justice. Considering that the state felt it necessary to move away from a system of localised justice in establishing general rule, this initial stance was not surprising. But it should make us wonder whether this 'hands-off' strategy is now appropriate. Welcoming the prospect of greater public involvement should not mean conceding the last word to the general populace in matters of justice. The rule of law has to mean a protection from arbitrary action from both the state and the general populace. Similar issues about the inadequacy of consultation arise when we consider the emergence of disaggregated justice, since it is commonly acknowledged that these kinds of non-elected regulators suffer from problems of legitimacy and accountability (Maher 2006). Although they often justify themselves in terms of effectiveness or output legitimacy (Majone 1998) – they get the job done – their lack of national public or political input lends them an apparent air of a democratic deficit. In some respects, we need to rethink the relationship of the rule of law with national sovereignty given that we can no longer endorse, as did Dicey, the notion of parliamentary sovereignty.

Qualifying Dicey in this respect does not negate the relevance of parliament for promulgating or weakening the rule of law (and given we are speaking of Westminster-style systems of government that has characterised state rule in Britain and Ireland, in effect this means the executive). Dicey is often construed as proposing that parliament has

absolute sovereignty so that 'no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament' (1959: 40). Not only does Dicey seem to elaborate some version of parliamentary supremacy, he also admitted that 'there are times of tumult or invasion when for the sake of legality itself the rule of law must be broken' (1959: 412). Yet this bleak interpretation cannot be supported as Dicey did not believe government had complete freedom to legislate as it wished. He counselled that 'Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges' (1959: 413–14).

What we might call the judicial *habitus* (Hutton 2006) holds executive power in check especially since it is the product of thousands of individual decisions and built up over many generations. Dicey did not believe rights were bestowed or abrogated as a result of legislation passed by parliament thanks to the third distinctive feature of the rule of law. Instead, he argued that 'the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us as the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts' (1959: 195). Since rights, for Dicey, grew in a common-law fashion as accretions on previous decisions, they and their form of redress became implanted in the minds of people and judges: even though the 'Habeas *Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty' (1959: 199). Dworkin (1982) makes a similar point about judicial decision-making being indebted to and constrained by the past. Every judge regards himself as 'a partner in a complex chain enterprise' in which the conventions of the past structure the practice of judicial decisions. Ireland differs from Britain as it is governed through a written constitution, which although still dependent for their interpretation on the kind of incremental decision-making that Dicey described, gives rights a surer foothold.

Some contemporary theorists like Agamben (2005) take the opposite view and claim that in the present age of terror law has been suspended and replaced by a juridical void, a black hole from which all pretensions to legality are expelled. Alternatively, accounts derived from the work of Carl Schmitt (1985) emphasise that in time of emergency, the sovereign sheds any pretence of being constrained by law and instead deploys it against designated enemies. The sovereign's acts may be legal in a thin sense in that they have been ratified by a political process. In these circumstances, 'rule by law' has subjugated the 'rule of law', a strategy

that may thrust people into a legal grey zone with few rights of redress. Yet this very much depends on the judicial *habitus* and whether judges are emboldened to challenge the executive in its attempts to rule by law. We wish to show that the notion of the rule of law, which contains within it the 'compulsion to legality' (Dyzenhaus 2006a), offers sufficient resources to contest the executive yet is also ambiguous enough to offer the executive a legal veneer for its actions.

The present influence of the long nineteenth century

This kind of double-edged narrative can only be understood from within a historical narrative as the rule of law orientates judicial decision-making but is also constituted and developed by it. To paraphrase the historian Eric Hobsbawm, we need to understand the long nineteenth century of criminal justice as exemplified through the rule of law. Hobsbawm (1962, 1975, 1987) coined the phrase to designate the epoch 1789–1914, during which the capitalist system reached its potential. Similarly, we believe that our analysis has to trace the development of the rule of law over a similar period of time so that we can draw out its present configuration and assess what protections are being weakened as well as fortified.

Once we admit that the rule of law has grown as a result of a myriad of small accretions of judicial decisions and case law then this indicates a problem of writing a coherent history. Like many other criminologists, we are concerned to comprehend the most significant contemporary changes occurring in law and criminal justice. This so-called 'history of the present' devotes itself to explaining these changes rather than offer an exhaustive portrayal of the past through some sort of all-encompassing historical narrative (Garland 2001). And yet these changes can only be properly assessed by an understanding of the forces of history that block them, in this instance the judicially embedded rule of law. So our narrative has to include both coherence and possible discontinuity and this is difficult to achieve. It is common to write a criminological history segmented into relatively coherent eras – classic liberalism, penal-welfarism, punitiveness, etc. – each of which enjoys a rise and decline as one succeeds another. This kind of history discounts the messiness of the present by neglecting how the influence of the past persists. It focuses on contemporary events that pulse away in the media and drive political responses of expediency. In so doing, two kinds of methodological error are committed. There is too much emphasis given to short-term events with an accompanying neglect of, adapting Braudel (1973), *la longue durée* of legal time as revealed by judicial commitment to the rule of law as it

unfolds across several generations. And the second oversight is to privilege the talk and policy discourse of self-styled political actors who seek to change the criminal justice system and to neglect those who pitch their decision-making in a lower key or else refer mainly to the individual case before them rather than make pronouncements to society.

We do not pretend that the judiciary represents some kind of impregnable redoubt in which civil liberties are always secure. Judges can and do defer to the executive, often on the positivistic grounds that the law is simply legislation that the government has succeeded in having enacted. But not only do judges exhibit a capacity to establish due process principles, they also resist their attempted attenuation by government. We will try to show this dual process at work, deference to and rejection of government initiatives, mainly with reference to developments in Ireland. The legal history and practice of Ireland is of more than parochial interest since it has seen continuous struggle between the rule of law and states of exception, beginning with the period under the colonial power of Britain up to contemporary times as it struggled with paramilitary groups that originated in the Northern Ireland conflict. We hope to show how the colonial past might prefigure what is currently happening in the present, as John Braithwaite (2003: 9) has suggested.

Focusing on the perpetual dissonance between the administration of justice based on the rule of law and responding to the turbulence of colonial rule by the invocation of emergency powers avoids the problem of positing one dominant penal paradigm that squashes resistance. Instead, there is essential opposition within the dispensation of justice because of the contested nature of the nation-state. The defence of the state seemed to demand special powers to defend it, under both British colonial rule and Irish self-government. Even after Ireland gained its independence from Britain, the disputed nature of the settlement meant that many disaffected people questioned the legitimacy of what they called a 'partitionist' state (since the Irish government accepted that the six counties in Northern Ireland would remain part of Britain) and tried to overthrow it. But even while Ireland relied on emergency powers to suppress paramilitary activities, it also developed its own written constitution in 1937 that guaranteed certain rights for Irish citizens. Although the Irish judiciary only began to explore the implications of these rights for the criminal process in the 1960s, they further strengthened the rule of law in Ireland by curtailing some of the questionable discretionary practices of the police. The dialectic between the rule of law and emergency powers pulsed again with the onset of paramilitary-related violence in Northern Ireland and its overspill into

the Republic of Ireland. The Irish police became more results-oriented yet this created scandals that pulled the government into reforming control of the police and checking their behaviour.

This process has been augmented by the increasing influence of supra-national conventions and norms such as the European Convention on Human Rights (ECHR). This cosmopolitan discourse of rights provides a resource for agitating for greater oversight and regulation of state agents. Their deployment makes it more difficult for the state to resist these overtures but the implantation of cosmopolitan rights often depends on a change in a national setting, in this instance a gradual cessation of paramilitary conflict in Northern Ireland. Consequently, the trump card of state security was diminished and the protection of human rights as a primary rationale for policing was elevated in both parts of the island of Ireland. The Irish state has established an ombudsman commission for the state police as well as an inspectorate and other review units (Vaughan 2005). In so doing the Irish state has acknowledged the validity of a cosmopolitan discourse of rights and confirmed Braithwaite and Drahos' view (2000: 3–4) of states as rule-takers rather than solely as rule-makers.

Parallel with these developments, a range of legislation has been passed granting more power to Gardaí [police] to detain suspects for longer periods of time and prescribing mandatory sentences for particular offences. Walsh (2007: 58) suggests that these novel powers 'are eating away at the due process foundations which have secured a reasonable balance between the state and the individual in criminal justice matters for generations'. In a Diceyean vein, Walsh (2007: 58) suggests that this damage is being 'inflicted in a piecemeal fashion through a rapid succession of separate enactments'. But this staccato style of law-making issues, in part, from the executive's exasperation with the judiciary as they frustrate the government's designs, such as refusing to impose mandatory sentences. There is a legal dialectic at work which is often overlooked when commentators talk of the suspension of law (Agamben 2005). They neglect how the judicial *habitus*, in its constant re-articulation of the rule of law via individual cases, affirms due process values and continues to provide some protection from arbitrary state power.

If the development of the rule of law, or what we call the long nineteenth century of criminal justice, continues, despite the apocalyptic premonitions of many criminologists, it may still be undergoing fundamental alterations. Rooted in the development of sovereign nation-states, the rule of law is being challenged by developments above and below this level. We saw how it is being extended through the