# Chasing Shadows:

A legal examination of the plans for governance in a post-nuclear-attack Britain.

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# Contents

# Chapter 1 - Introduction and Terms of Reference

Succeeding paragraphs describe how, once the Central Government capability in its customary locations ceases to operate in wartime, then a new form of regional government for domestic and internal affairs immediately assumes control.

- Machinery of Government in War. Planning assumptions and General Guidance[1]

[1] Annex Home Office Circular ES 7/1973, Durham County Record Office (DRO), Londonderry Estate Archives, D/X 1063/19 para 2.

The Cold War was a defining era in world history. Unlike previous eras the great powers of this era were armed with weapons which could not just cause damage, death and destruction on a previously unknown scale, but also leave areas uninhabitable. Needless to say, nuclear war would prevent the operation of normal government. All over the globe, governments put in place contingency plans to attempt to keep control and provide some form of governance in the aftermath, whilst honouring the rule of law.

This dissertation will examine part of how the United Kingdom Government prepared to face this challenge; specifically it will focus the alternative alternative form of government that was ready to sweep into place if required. It will come to a view whether the imposition government would be in line with the government's stated goal of constitutional continuity[2], or whether or not this would have been the creation of a new constitutional order. We will then look at post Cold War constitutional and legislative changes and examine whether or not these changes would affect our view.

**Defining "constitutional continuity" (terms of reference)**

Constitutional continuity is by no means unique to a post apocalyptic situation. We can see this throughout the ages in both Britain and elsewhere. As Cromwell established the English Commonwealth it was the existing Parliament that legislated to confirm the transition[3], and upon the restoration it was the same Parliament who recognised the King's right to rule[4]. In more modern times, when Egypt was returning to Democracy in 2011 rather than create something new entirely,

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[2] Peter Harvey in undated Correspondence to Mr Howard included in The National Archives (TNA) HO 322/1095

[3] May 1649: An Act Declaring and Constituting the People of England to be a Commonwealth and Free-State.', in *Acts and Ordinances of the Interregnum, 1642-1660*, ed. C H Firth and R S Rait (London, 1911), p. 122. *British History Online* http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/p122, accessed 16 March 2017

[4] 'House of Commons Journal Volume 8: 8 May 1660', in *Journal of the House of Commons: Volume 8, 1660-1667* (London, 1802), pp. 16-18. *British History Online* http://www.british-history.ac.uk/commons-jrnl/vol8/pp16-18, accessed 16 March 2017

it was seen as essential that the outgoing president (Mubarak) use the powers of the office of president to make changes to allow for the transition to happen[5]. The examples are endless.

Inspired by this, one of the criteria we will look for constitutional continuity is to examine whether there is a legal basis for the appointment of decision makers, and a legal basis for their decisions. This does not mean their authority must come direct from statute, it can include tracing such an authority through statutory instruments and other authorities back to constitutional source of law.

The other principle we will examine is democracy. Of course democratic principles cannot be thought of in its usual sense in this situation - rather drastic decisions are going to have to be made by an appointed decision maker without recourse to an election or referendum. We can however examine what role our democratic institutions have had in creating the system, whether or not designated decision makers have a democratic mandate of their own, and whether or not their authority comes from a source that survivors would recognise.

We draw inspiration for this from Parliament itself; the House of Commons is the dominant house as it is the democratically elected house[6]. Whilst Prime Minister of the day is theoretically selected by the Queen, convention leads the Queen to select the Prime Minister based on the makeup of the House of Commons[7]. Furthermore, to quote the Universal Declaration of Human Rights "the will of the people shall be the basis of the authority of government"[8].

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[5] Rana, Aziz, "Freedom Struggles and the Limits of Constitutional continuity" (2012). Cornell Law Faculty Publications. Paper 1071. http://scholarship.law.cornell.edu/facpub/1071, , accessed 16 March 2017

[6] Politics.co.uk, "House of Commons", http://www.politics.co.uk/reference/house-of-commons-guide-and-information-on-the-house-of-commo, Accessed on 16 March 2017

[7] Politics.co.uk, "Prime Minister", http://www.politics.co.uk/reference/prime-minister, Accessed on 16 March 2017

[8] Universal Declaration of Human Rights 1948, Article 21(3).

Although we can give countless examples of what this dissertation is not, we will highlight here just two. We will not recount the potential damage a nuclear war would cause; even the most casual reader will be aware that a nuclear war would have apocalyptic results that would prevent the continuation of normal life or government[9]. Similarly, this dissertation will also not concern itself with the viability of these plans; despite skepticism even within government ranks that all preparations could be put into place in time[10].

**Arrangement of examinations.**

In the next section we will examine the birth of these arrangements. As we'll explore these owe their existence not to the Cold War, but the two World Wars that preceded it. Well examine these against our criteria of both legal continuity and whether or not it is in line with democratic principles and expectations.

Following that we'll look at the Cold War period, where the plans previously made were developed further and expanded. We'll look at how this the new levels of government interplay with Central Government and then local government, and examine whether or not this would be a new order, or merely an extension to the own.

In the penultimate section we'll move our examination to the constitutional developments following the Cold War. The UK's constitutional arrangements have changed to include putting human rights on a legislative basis as well as devolution to Scotland and Wales; As such it is worth looking again to see if our answer would change if implemented in the present situation rather than the Cold War. The final section will summarise the previous sections, and include a few concluding remarks.

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[9] If readers need a refresher, Green et al, London After the Bomb (Oxford, 1982), provides a detailed an account of the effect an attack would have on London.

[10] Hennessy, Peter, The Secret State, 2010 edition (London, 2010), p 255

**A note on sources**

Where possible primary sources of law (or potential sources of law for those that were prepared for future use) have been identified and made references to. However, these plans being both secret and (for the most part) unimplemented; meaning that sometimes these primary (or would-be primary) sources are either no longer or were never publicly available. Freedom of Information requests to gain these from government departments have been unsuccessful[11].

As such, In some cases it has been necessary to extrapolate from other documents what the governments intentions were. Where using a specific legal source (or proposed legal source) isn't available we will turn to other government documents, such as inter and intra and inter department communications (such as letters between drafters), and communications to Local Authorities; the author is thankful for the assistance of the National Archives, and the County Durham Archives for providing copies of documents entrusted to their care.

Only when either of these is not possible this dissertation will draw upon other books written about government during this time. Although these books are not written from a legal perspective they do

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[11] Request 41239 was submitted to the Home Office on 29/09/2016. This was rejected on 26/10/2016 as being vexatious as per Section 14(1) of the Freedom of Information Act 2000. Helpfully in their reply the Home Office provided the names of four files where information related to the request might be sought, but it was unclear from their reply where the name of one file ended and the next began. Clarification on this point was requested on 26/10/2016, and their reply was received on 16/11/2016. An updated series of three requests (all assigned reference 41238) was sent on 12/12/2016; The Home Office indicated on 13/01/2017 that this request was being considered under Section 24 of the Act as a qualified exemption on national security grounds, with a target date of 10/02/2017. A chase email was sent to the Home office on 13/02/2017 with no reply. A further chase was sent 19/02/2017; the Home office replied the next day indicating that further time was required and no target date was provided. A further chase was sent on 15/02/2017 with no reply. The request remains open at the time of submission.

Request FOI323658 was sent to the Cabinet Office on 5/10/2017; this was rejected on 1/11/2016 with them stating that files containing information on the 1980's draft wartime powers legislation were not being held by the Cabinet Office (despite documents held in The National Archives showing communication from them during the drafting process).

often include copies and quotation from source materials we have been unsuccessful in obtaining; where these have been used it is indicated in the footnotes.

# Chapter 2 - The birth of a shadow constitutional order

"Every man thinks he has a right to live, and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self defence. So every government when driven to the wall by a rebellion will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is a fact."[12]

- Abraham Lincoln

[12] Cited in Bonner, D, Emergency powers in peacetime, First Edition (London, 1985), p 2

The genesis of the regime that would eventually serve as the foundation for the UK's regional government system is not a consequence of the Cold War, but of the two very hot wars that preceded it and the interwar period that separated them. Not only would this period give us the legislation that would underpin emergency powers legislation in Great Britain right up into the 21st century, it would also be the period that came closest to the regional government system being activated; and thus can provide an insight to whether this would result in constitutional continuity.

Due to the specific security and political issues in Ireland during this time, Northern Ireland was subject to its own similar, but separate legislative regime; this section will focus on the situation as it was in England, Wales and Scotland as not to complicate the core issue.

**The World War One experience**

The first modern piece of legislation to claim special wartime emergency powers and fixate how these should be used arose during the first world war, with the passage of the Defence of the Realm Acts starting in 1914[13], which would see multiple revisions and amendments throughout the war. This legislation would give the king the ability to create certain "Regulations" as he saw fit, in order to conduct the war at home[14].

The legislation itself was automatically repealed following the end of the War (and thus its contents are beyond the scope of this document, however it is clear that the need to legislate for emergency powers caught the government unprepared - Cotter in the Standard Law Review[15] indicates the then Home Secretary came to the house on August 7 1914 without a draft bill - only rough notes but was yet tasked with getting the legislation passed. It is difficult to imagine how Parliament could

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[13] For example see the Defence of the Realm Consolidation Act 1914 c. 8 (Which replaced Defence of the Realm Act 1914 c. 29 and Defence of the Realm. (No. 2) Act, 1914 c. 63)

[14] Defence of the Realm Consolidation Act 1914 c. 8, s1

[15] Cotter, C, Constitutionalizing Emergency Powers: The British Experience (1953), *Stanford Law Review*, Vol. 5, No. 3 (Apr., 1953), pp. 382-417

have offered any meaningful scrutiny when they do not even have a draft to debate, and cannot be said to meet the democratic expectations we have of Parliamentary government.

**Emergency Powers Act 1920**

Following the war, although the Soviet Union would not exist until 1922, the fear of the "reds" which would become familiar during the Cold War was already in the minds of Parliamentarians by 1920. Bolshevism was on the rise in many parts of Europe, and the domination of key sectors of the economy by unions, such as transport, mining and manufacturing begun to be increasingly seen as a risk to the state; as unions were often aligned to socialist and communist groups, the fear was a strike could bring the country to its knees and force political change[16]. In order to be ready for such an event, Parliament passed the Emergency Powers Act 1920 ch 55. This was intended to put powers like those in the Defence of the Realm Acts on a permanent basis[17].

The Bill is a very short act, but its constitutional impact exceeds its word count, and it is on this bedrock that future legislation, and other proposed acts of the executive, would rest. The Act survived much constitutional change within the UK, and only saw its repeal in 2004. The act conferred upon the Monarch to declare a state of emergency[18]. This declaration would need to be confirmed by Parliament within 5 sitting days (with Parliament recalled if at recess)[19].

When a state of emergency was in place, the Monarch would have a near unfettered right to "make regulation for securing the essentials of life"[20]; these regulations may "confer or impose"[21] on oth-

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[16]Laurie, Peter, Beneath City Streets (1980, St Albans), p 18.

[17] Cotter, C, Constitutionalizing Emergency Powers: The British Experience (1953), *Stanford Law Review*, Vol. 5, No. 3 (Apr., 1953), p 296

[18] Emergency Powers Act 1920 ch 55 s 1(1)

[19] Ibid. s 1(2)

[20] Ibid. s 2(1)

[21] Ibid.

ers (including ministers and “other persons in his Majesty’s service”) similar powers[22] . Powers to be used by other officials were specifically directed at “preservation of the peace”[23], “securing and regulating the supply and distribution of Food, Water, Light and other necessities; maintaining the means of locomotion”[24] and “Public safety and life of the community”[25].

That the powers were wide ranging, this should not be taken as thinking that these powers were without legislative scrutiny. Any such regulation that was not laid down in, and agreed by both houses within 7 days would lapse. These powers were not left on the shelf; they were used during strikes that included the miners strike of 1921 and the general strike of 1926[26]; We must however note that these powers were restricted from “mak[ing] it an offence…to take part in a strike”[27].

The intention soon grew to use these powers to create secondary legislation to go well beyond what the text of the document supported. In 1925 the Ministry of Health issued a circular describing a shadow governmental regime ready to take over in the event of an emergency[28]. This revolved around a series of “Regional Commissioners”, which were described as “empowered, if necessary to give decisions on behalf of the government”[29]. These commissioners would be appointed and given their power through a such an Emergency Regulation. This is the seed from which the system of regional government would eventually grow.

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[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Cotter, C, Constitutionalizing Emergency Powers: The British Experience (1953), *Stanford Law Review*, Vol. 5, No. 3 (Apr., 1953), p 296

[27] Emergency Powers Act 1920 ch 55 s 2(1)

[28] Campbell, D, War Plan UK, (Paladin, 1983) , p55

[29] Ibid.

How this legislation was expected to be used to create this shadow government system seemingly defies the text of the legislation itself. The legislation clearly sets a time limit for decisions made by the king, and are automatically repealed without Parliamentary consent[30]. No plain reading of the act shows any intention for this to enable a second decision maker to make equivalent decisions. Although Parliament would have some opportunity to scrutinise the regulation allowing such appointment, by time they did the Regional Commissioner could already in place and making decisions. Additionally the nature of the emergency may mean any aggressive or lengthy scrutiny by Parliament would be unfeasible.

**World War Two**

As the political situation in Europe turned evermore grim, the government began to revise and expand these powers ready for wartime use. It is in this period that the Regional Commissioner system began to receive some scrutiny from the public at large. On February 3 1939 then Home Secretary Sir John Anderson publicly revealed a dual-use regional government scheme[31], much of which was already in place. In peacetime Thirty Eight regional officers would act as a coordinator to help prepare for war; when this occurred these regional officers would report to one of Twelve chief regional officers whom would be empowered to assume the supreme authority of government if the situation so required. Ten areas within England, whilst Wales and Scotland were each considered their own area[32]. Anderson gave the reasoning for these regulations as follows:

> *"We have to envisage the possibility of a region being cut off and detached from the centre of government, and in that event it will be necessary for the regional commissioner to exercise the full authority of His Majesty's government"*[33]

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[30] Emergency Powers Act 1920 ch 55 2(1)

[31] Regional Defence in Peace and War - The Governments two plans, Manchester Guardian, Feb 3 1939

[32] Ibid.

[33] Ibid.

The Manchester Guardian characterised the roles as regional dictators[34]; however they cite in the same article Anderson's defence on the scheme: "We are simply forging another link in the chain of preparations we are making to meet any emergency that might arise"[35].

The powers that the King could give to others were clarified in this act, specifically stating that "Defence Regulations may provide for empowering such authorities, persons, classes of persons…to make order, rules and bylaws for any purposes for which regulations are authorised by this act"[36]), those purposes being "Defence of the realm, maintenance of public order, and the efficient prosecution of war… and for maintaining supplies and services essential supplies and services"[37]. Perhaps critically, the one safeguard that would ensure at least some scrutiny was watered down, instead of Parliament being required to assent to a regulation, those made by the Monarch under the 1939 Act would now stand unless annulled by Parliament within twenty eight days[38].

Critically even this safeguard was easily overcome. The legislation requires only Orders In Council containing Defence Regulations to be laid before parliament[39], there is no mention of those made by others empowered to do so[40], yet they would still have the same wide ranging powers.

Although these powers do appear to be drastic, even more drastic would be the situation Anderson envisages where the powers would be used. He speaks of areas "raided", all communication cut off to the rest of the country, and many pressing needs that would not be able to wait the days or

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[34] The Regional Dictators: A Necessary Step with nothing sinister behind it - Sir J Anderson's Defence, Manchester Guardian, Published Feb 15 1939

[35]Ibid.

[36] 1939 Emergency Powers (Defence) Act 1939 c. 62 s 1(3)

[37] Ibid., S 1(1)

[38] Ibid. S 8(2)

[39] Ibid. S 8(1)

[40] Ibid., S 1(3) Provides authority for others to be empowered to make defence regulations

weeks it might take to seek a decision from Central Government[41] . In such a situation without these powers, the normal peacetime constitutional arrangements would clearly be unable to function. Anything that might arise to fill the power vacuum would be a break from the past and thus a new order.

However, that the existing constitution has authorised this does not disqualify it from being a new order. Decisions in this environment would be taken in a way that would be unthinkable in peacetime and may be made by a person whom has not been elected to any post. Although the intention is certainly to keep the same legal order (as much as is possible), a new, shadow, constitutional order has ultimately been created, ready to swoop in at the failure of Central Government.

Over time, it may be possible that although these regional commissioners could trace their powers to Parliament over time, the lack of supervision from Central Government would result in these commissioners acting as if they operated under nobody's authority but their own; not unlike how Parliament before them had moved from being a creature the will of a king to being an authority in its own right. As the feared German invasion never occurred, the regional commissioners therefore never had to take their full powers; so we can never know for sure.

[41] Regional Defence in Peace and War - The Governments two plans, Manchester Guardian, Feb 3 1939

# Chapter 3 - Examining the shadow: nuclear war and governance

"A shadow has fallen upon the scenes so lately light by the Allied victory. Nobody knows what Soviet Russia and its Communist international organisation intends to do in the immediate future, or what are the limits, if any, to their expansive and proselytising tendencies"[42]

- Winston Churchill

[42] "Iron Curtain" Speech, 5 March 1946, as retrieved from https://www.thoughtco.com/winston-churchills-iron-curtain-speech-1779492 on 16 March 2016

As the country moved into the Cold War, the government faced the need to update preparations to deal with a potential war with a hostile superpower equipped with nuclear weapons. Included in these preparations would be a system of governance to be implemented if Central Government and Parliament were no longer able to function. In this section we shall outline the shape of this proposed system of governance and how the various levels of government interact, and consider whether these elements meet our criteria for constitutional continuity.

In this section we shall not consider the role of European Economic Community (now European Union) law. Legal advice received at the time noted that the EEC treaties did not apply in national security situations[43], and there is no apparent reason to challenge that view. We do acknowledge however the government did intend to follow advice to exclude these provisions from the view of the European Communities Act 1972 with an "avoidance of doubt" clause to prevent EEC arguments being used in domestic courts[44].

We will also not consider the role of the Queen, beyond the application of the Royal Prerogative. The constitutional role of the Queen herself would have been more or less unchanged. The Queen would have been secured with enough members of the Privy Council so that the Privy Council could continue to issue Orders-In-Council and perform its other functions[45]. Other functions, such as the ability to appoint a Prime Minister or call a Parliament would be exercised broadly as before (with the note that the Queen could suspend calling elections and by-elections until it was feasible to call one[46]).

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[43] Letter from Karl Newman (Office of the Legal Adviser, Cabinet Office (European Section)) to Peter Graham, dated 8 May 1981. TNA HO 322/1110

[44] Ibid.

[45] Hennessy, Peter, The Secret state, 2010 edition (London, 2010), Footnote on p 295

[46] 1974 draft Emergency Powers (Defence) Bill, s6, TNA CAB 134/5011

**The Remains of Central Government**

Early Cold War planning would prepared for the core of what remains of Central Government to be housed at an underground facility in Corsham in South West England[47]. As the Cold War continued it was felt that this facility would have inadequate protection from a direct nuclear attack so a "backup" site was considered; however this backup was abandoned before it could be completed[48].

Instead, enhanced redundancy at the top level would be created by dispersing series of government ministers across the nation in groups (a system initially known as ACID, and later PYTHON)[49]. Each of these groups in noted as being in a specific priority order. In the event of activation, the group with the highest priority that survived would assume control as the continuing Central Government[50].

Directly underneath Central Government in the new hierarchy would sit a new layer of government called "Regional Government", headed in turn by a Regional Commissioner[51]. Nine regions would be created in England, with Wales, Scotland and Northern Ireland each forming their own region[52]. Below Regional Government would sit 3-4 Sub-Regional Governments per region[53], with their own commissioner.

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[47] McCamely, Nick, Cold War Secret Nuclear Bunkers, (Barnsley, 2016), p 260

[48] Hennessy, Peter, The Secret state, 2010 edition (London, 2010), p 298

[49] Ibid. p 300-301 and p 304

[50] Ibid.

[51] Annex Home Office Circular ES 7/1973, DRO D/X 1063/19

[52] Ibid.

[53] "Notes of Guidance for Regional Commissioners", reproduced in: Hennessy, Peter, The Secret state, 2010 edition (London, 2010) p 304-307

The government expected that initially that Sub-Regional Government would be the first to emerge and take initial control, with these then deferring to Regional Government when this became established[54]. Commissioners have powers that even Civil Service drafters would describe as "dictatorial" within their region[55]. The extensive powers and region based chain of command evokes a neo-feudalistic feeling, rather than the unitary state which existed in Peacetime.

Early in the Cold War, special underground facilities were put aside for Regional Commissioners and their staff to ride out the strike period, and immediate aftermath[56], however, these facilities were abandoned in the 1960s[57]. Special facilities were instead provided for the Sub-Regional level of government with the Regional Commissioner expected to base themselves at one of the sub regional facilities in their region[58].

We will explore the roles of these commissioners, as well as what would become of local government later in this chapter.

**Enabling Legislation for the new order.**

The 1920's Emergency Powers Act would remain in force (and would continue to be used to deal with other emergencies, such as strikes) with occasional reviews[59]. However, in the event of in-

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[54] Ibid.

[55] War Emergency Legislation: Philosophy of requirements for Regulations Followed in Drafting Instructions, para 17; attached to a letter from Ben Ferguson dated 10 Feb 1984. TNA HO 322/1095

[56] Hennessy, Peter, The Secret state, 2010 edition (London, 2010) p 108-109

[57] Ibid. p 210

[58] Annex Home Office Circular ES 7/1973, DRO D/X 1063/19

[59] The act was amended by the Emergency Powers Act 1964 (c. 38) and further amendments were proposed in 1982; this draft is attached to a letter by George Engle, Office of Parliamentary Counsel, 18 November 1982

ternational tensions increasing the likelihood of war, then just as in the previous conflict, the government was prepared to put to Parliament emergency legislation to take further extensive powers.

To ensure that there would not be a repeat of previous failings, these drafts would be revised and updated throughout the decades. Earlier on in the Cold War (1970's and earlier), drafters like in World War 2 based this on a single Bill, titled "Emergency Powers (Defence) Bill[60]". Just as in the previous war, this bill would allow the government to issue new defence regulations by proclamation[61].

Citing changes in political outlook (and particularly in the light of actions taken during the Falklands war[62]), drafters in the 1980's replaced the single bill approach, with a series of three escalating bills each of which would progressively take further power[63]. Again, these bills would allow for the government to issue defence regulations for permitted purposes, with draft regulations prepared alongside the bill to allow for rapid deployment if required. Contemplated in line with the third bill (earlier referred to as Emergency Powers Bill[64], but in later years Emergency Powers (Defence) Bill (no 2)[65]) are regulations that pave way for, and ultimately activate the Regional Government system.

In the "ideal" scenario, Parliament would pass the required bill, then with the bills in place "Defence Regulations" would be presented to Parliament through Orders-In-Council. Just as in World War 2 this would likely be again on the basis that Parliament could refuse consent, positive affirmation

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[60] 1974 draft Emergency Powers (Defence) Bill, TNA CAB 134/5011

[61] Ibid., S1(1)

[62] War Emergency Legislation:Instructions to Parliamentary Counsel, Included in TNA HO 513/4

[63] Ibid.

[64] This is the name used in the early draft and in Annex A to a Note by the Home Office for the War Legislation Working party, detailed in TNA HO 322/1095

[65] This name is used in minutes to a War Legislation Working Party meeting held 17 September 1986, detailed in TNA HO 322/1110

would not be required[66]. When Parliament became unable to function "effectively" Regional Government would activate[67] through the authority of the Defence (Machinery of Government) Regulations[68], devolving powers to pre-appointed Regional Commissioners, appointed via Royal warrant[69].

Point 8 of guidance notes to Regional Commissioners details exactly what powers the government intended to transfer to these office holders:

> *"You will exercise all the existing powers and emergency powers of Government within your region, except those reserved to the Central Government but including the control of the Armed Forces and you may, if the situation warrants it, creates new laws by ordinance. You will however take account of any directions which you receive from Central Government : in particular these will specify those matters which will be reserved to the Central Government"*[70]

The document indicates that Foreign (and Commonwealth) relations, offensive prosecution of the war, shipping (including procuring overseas supplies) would all fall within reserved matters as well as regional ports and shipping. Additionally it suggests that use of Strategic stocks of Food, Fuel, and Medical supplies may fall within reserved matters as well.[71]

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[66] 1974 draft Emergency Powers (Defence) Bill, s9(1), TNA CAB 134/5011

[67] Letter from J Packenham-Walsh, Home Office Legal Adviser's Branch to Geoffrey Bowman dated 14 February, detailed in HO 513/4

[68] 1981 Royal Warrant to appoint Regional Commissioner, reproduced in reproduced in: Hennessy, Peter, The Secret state, 2010 edition (London, 2010) p 303-4

[69] Ibid.

[70] Ibid. p 304-307

[71] Ibid.

The concept of creating an intermediary level of government limited by a list of “reserved matters” was not new at the time, and had been implemented in the (since repealed) Government of Ireland Act 1920[72]. The term “reserved matters” would again be used when assigning powers to Scottish[73] and Welsh[74] Governments as a part of the devolution process started in the late 20th century.

In this “ideal” scenario, the transfer of powers follows a well established path that can be easily followed. Although putting all of these powers into one person is unusual, it was by that time an established part of emergency planning (as we saw in the last section). On a pure legal basis this is a straight transfer of power, which Parliament has the clear legal authority to do.

**Beyond the ideal scenario - non legislative implementation**

An Ideal situation where Government and Parliament will have the time they need to put these actions into force cannot be presumed in a nuclear war scenario. There does appear to be however some willingness for the Government to act without clear Parliamentary consent, if necessary.

Ben Ferguson, during his work as part of the War Legislation Working Party in 1982 advises those working on the regulations that would pair with the first bill “The regulations… may have to be brought into effect under the Royal Prerogative” rather than an Order-In-Council[75].

Although it is not clear from Mr Ferguson’s notes whether this would apply to all regulations, or just some, answers to the House of Commons by Prime Minister MacMillan on the subject of Wartime Regional Government would seem to confirm the government’s willingness to act without Parliamentary authority to implement this scheme:

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[72] Government of Ireland Act 1920 (10 & 11 Geo. 5. 67)

[73] Scotland Act 1998 Schedule 5

[74] Government of Wales Act 2006 Schedule 7A (as amended by the Wales Act 2017 c4)

[75] Annex A to a Note by the Home Office for the War Legislation Working party, detailed in TNA HO 322/1095

*"If the situation seemed to require it, it would, of course, be right to introduce an Emergency Powers (Defence) Bill under which these regulations could be made, But if something had to be done unexpectedly and in a hurry, it would be done and the Government would seek the support of the house subsequently."*[76]

This is legally troubling. In the Case of Proclamations (1610)[77], Cooke ruled the following:

*"The King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm".*[78]

This principle as been affirmed time and time again. Both the Bill of Rights[79] and the Scottish Claim of Right[80] disclaim any regal authority to make or unmake law; Miller v Secretary of State for Leaving the European Union confirmed that the Proclamations case was still binding as far as the powers of the Executive in the absence of legislative authority[81].

Such a drastic change of the way the UK is governed clearly would result in "the customs of the realm" being changed. This is without mentioning the changes in statute and common law that would follow. With no legal basis or even an attempt at democratic scrutiny for the transfer of power, this would be a coup d'état by the executive against Parliament. Constitutional continuity at a legal level would be broken.

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[76] Hansard, HC Deb 02 May 1963 Vol 676 cc1308-10

[77] Case of Proclamations (1611) 12 Co Rep 74

[78] Ibid, Para 75

[79] Bill of Rights [1688] c. 2 (1 Will and Mar Sess 2) Suspending and Late dispensing powers

[80] Claim of Right Act 1989 c. 28

[81] R (on the application of Miller and another) (Respondents) v Secretary of state for Exiting the European Union (Appellant) [2017] UKSC 5 at para 44.

Whilst it is true that Parliament can pass legislation with retrospective effect[82], recognising the actions taken by the executive in what undoubtedly would be a time of crisis, until this was done this would leave the Regional Commissioner acting without a clear legal basis for his authority for an indefinite period.

**Parliamentary scrutiny of the Regional Government Scheme**

Even if we presume that Parliament has passed the required legislation, we still cannot say with confidence that these measures would not result in a break in constitutional order. Although Parliament can certainly legislate to delegate its powers, if Parliament hasn't understood that this delegation would result further delegation to regional commissioners, then can we truly say that these measures are truly authorised by Parliament?

Although using acts to enable secondary legislations not controversial in of itself, Parliament usually still can, in normal times, take its time to contemplate how a government might use the enabled powers, and consider appropriate amendments. In a situation where the Emergency Powers (Defence) Bill might be laid before Parliament it is unlikely however to have much time to properly scrutinise and understand the implications of the bill it is being asked to pass.

**Accountability and democratic principles in the Regional Government scheme**

[82]Library of the House of Commons Standard Note SN/PC/06454, "Retrospective Legislation", 14 June 2013

Defence regulations issued under an Emergency Powers (Defence) Bill would be by necessity be "draconian in both powers and enforcement"[83]. Common rights, such as those to make representations or appeal against a decision were considered "frills"[84] and not to be included. Whilst this is to an extent understandable, this would be very different from what people had become to expect with government services.

This said, Mr Ferguson's analysis suggests that the Regional Commissioner's authority may not be completely unfettered, and that some form of judicial review may be available to hypothetical survivors.

> *"There should, for example, even in the worst foreseeable situation, be an independent system of justice to offset any tyrannical or dictatorial tendencies in local or regional government. While regional commissioners would be able to make laws, they should not also be able to dictate how justice is provided"*[85]

The practicalities of bringing a court case in this scenario aside, the continued affirmation of the independence of the Judiciary is a welcome relief; although we caution to note that Mr Ferguson does not expand on this further. It is not clear from his statement whether he expects the decisions of Regional Commissioners to meet the Wednesbury reasonableness standard[86], or whether judicial scrutiny would be limited to how others implement those decisions.

To examine our democratic criteria, we need to consider who would become a Regional Commissioner and whether they have a democratic mandate of their own. Regional Commissioners and

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[83] War Emergency Legislation: Philosophy of requirements for Regulations Followed in Drafting Instructions, para 11; attached to a letter from Ben Ferguson dated 10 Feb 1984. TNA HO 322/1095

[84] Ibid.

[85] Ibid. Para 18

[86] Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223

their deputies would of course not be elected into that role, but looking at the Wilson Government's prepared list from 1966 we can see that these would be typically be drawn from the Prime Minister's ministry[87]. Their authority thus comes from the fact that the government that they were members of was elected, and that they have been appointed to their new role as a part of being members of that government.

Although the Scottish and Welsh regions would be lead by the Secretary of State for those regions[88], the majority of these roles would be for lower level cabinet members[89]. The presence of Cabinet Members doesn't appear to be a legal requirement as Scottish deputies would include the Lord Advocate and Solicitor General for Scotland. The choice to have Regional Government members familiar with the legal and political environments of Wales and Scotland shows an ongoing intention to recognise their special roles within the United Kingdom.

Similarly although these commissioners and their deputies were generally based in regions which include their constituency; this was not always the case (eg - John Mackie was assigned as deputy to the North Midland region, but had his constituency in Middlesex). The choice to have a regional commissioner from the region may be a political choice to shore up their legitimacy; a low level cabinet minister will not have the level of media exposure as their more senior counterparts, so they cannot rely on a national media presence to help carry their commands; a local minister would be at least be known as the local member. This would help strengthen the argument that the Commissioner's authority comes from a democratic source, rather than an appointee with no democratic mandate.

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[87] The list of wartime appointments is reproduced in: Hennessy, Peter, The Secret state, 2010 edition (London, 2010) p 293-296

[88] Ibid.

[89] Ibid.

As we've explored, Central Government would still continue to have a role, particularly within reserved matters[90]. Regional Commissioners expected to follow directives from the remains of Central Government[91]. This would mean that (remains of) the elected government of the day would still have a supervisory role, just as it supervises those appointed to make decisions on its behalf in the civil service. A regional commissioner who'd acted contrary to the governments wishes could be countermanded and if necessary removed from their position. They remain accountable to the elected government of the day.

**Regional Government and Local Authorities**

In peacetime the local authorities were responsible for civil defence, amongst their other day to day functions. As such, we should be able to expect that there would be some role for Local government in this situation, to ensure that the resources that local residents have paid for would be used in the best interest of their residents.

However, local government in this scenario is effectively sidelined. The peacetime Chief Executive of each county and district, would become a "County Controller" (or "District Controller") whom would be empowered to take the full functions of that authority[92]. Although the Chief Executive works for the local authority (usually as its most senior employee), the controllers are members of the Regional Government, outside of the control of the local authority[93].

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[90] Ibid.

[91] "Notes of Guidance for Regional Commissioners", reproduced in: Hennessy, Peter, The Secret state, 2010 edition (London, 2010) p 304-307

[92] Annex Home Office Circular ES 7/1973, DRO D/X 1063/19 ; County level para 8, District level para 18

[93] Ibid., Para 8; see also organisation structure in Ibid., Appendix B

The council itself would be reduced to an Emergency Committee "of about three elected members"[94]. Although the controller is expected to consult with the emergency committee and inform them of actions the Regional Commissioner was taking ("as circumstances permitted")[95], with its assets and authority effectively transferred to regional government, it would simply be a vestigial level of government. There is nothing in this model stopping the one time Chief Executive from taking action that the council would never accept, or ignoring the Emergency Committee entirely.

When we consider this in the whole, this break in democratic expectations between the electors and management of their council cannot be considered in any way to be a continuation of what had gone on before. As far as the role of local government is concerned, this is a new constitutional model where Local Government can be barely said to exist, if at all. Local Authorities (and their ratepayers) could see their resources stripped away by regional government without consultation or compensation. Those making the decisions would "embrace matters going beyond the Committee's knowledge and responsibility"[96], raising the question of how effective the recommended consultations would be even if they did take place.

A further constitutional concern is reflected in the instructions given to local authorities in the event that contact with a higher level of government cannot be established:

> "*It is envisaged that, if communications to sub-region could not be stablished, the County Controller would be expected by the Sub-Regional Commissioner to exercise the full powers of internal government within the county until further notice. If necessary, Regional Commissioners would, by ordinance, sanction post-facto the actions of the County Controller in this short term situation*"[97]

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[94] Wording as per Ibid., Para 7 for Counties. Similar wording for districts at Para 18.

[95] Ibid. Para 8

[96] Ibid.

[97] Ibid. Para 9

The County Controller would be expected to use take and use all governmental powers with no specific authority or democratic mandate to do so. This cannot be reconciled either with legal authority nor with democratic expectation. The Controller would be operating ultra-vires, in the hope that his actions may be retrospectively accepted in the future.

**Concluding thoughts**

Although the Government had an extensive legislative regime ready to implement a form of Regional Government, this form of government would only meet the requirements of legal constitutional continuation in the most ideal of circumstances; where Parliament has passed clear authority for the relevant regulations to be implemented and where Parliament has though its silence assented to this activation.

In less than ideal situations, decisions would be made with no legal authority to do so, in the hope that retrospective assent would eventually provide a suitable constitutional coverage for these decisions. Its also possible that these decisions without legal authority would in some cases be made by persons whom have never appeared on a ballot paper, particularly in relation to Local Authority resources which are removed from the control of the remains of these authorities.

When this is all considered together we cannot conclude that the goal of constitutional continuity would be met through the application of this system. There would be clear breaks with democratic expectations as well as likely breaks in legal authority.

# Chapter 4 - The modern context - does the shadow remain?

...It is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.[98]

- Scotland Act 1998

[98] Scotland Act 1998, Section 28 (8)

The geo-political situation has changed so much that the threat of nuclear annihilation has diminished. Those secret facilities designed to protect the post-nuclear regime have either been sold off, turned into tourist attractions, or just left to rot. Although researchers such as Hennessy suspect that the PYTHON/ACID system still continues in some modified form[99], we cannot know for sure if the Government still has plans ready for such a cataclysmic event.

What we do know however is in 2004 the Civil Contingencies Act was passed and Part 2 of this Act replaced the Emergency Powers Act 1920. Although the previous Act had been written broadly, it was felt that it wasn't equipped to deal with "21st Century Risks"[100].

Additionally, since the Cold War the constitutional order of the United Kingdom has changed. Scotland and Wales both now have their own Parliaments and Executives, and the Human Rights Act 1998 made changes in the legislative and judicial process, as well as the powers of the executive, neither of which is specifically dealt with in the 1920's Act.

In this section we shall consider these changes, and consider if the proposed plans for Regional Government could still be implemented whilst maintaining constitutional continuity. Although this section will focus on the application to Scotland for devolution issues, the principles remain broadly the same among all devolved regions.

**The Civil Contingencies Act 2004**

Broadly speaking, part 2 of the 2004 Act is an update to the 1920's act by being focused on Civil Emergencies rather than wartime emergencies. Unlike the 1920's Act, the 2004 Act anticipates

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[99] Hennessy, Peter, The Secret state, 2010 edition (London, 2010), p300

[100] Cabinet Office Civil Contingencies Secretariat, Civil Contingencies Act 2004: A Short Guide (revised), https://www.essex.gov.uk/Your-Council/Local-Government-Essex/Documents/15-mayshortguide.pdf, Accessed 14 March 2017

situations of war[101] and contamination of radioactive matter[102], meaning this Act could be used in situations where use of the Emergency Powers (Defence) Bills would have been contemplated.

In some ways the 2004 Act offers more resilience than the Emergency Powers bills ever contemplated. Draft of the 1980s regime and the 1920's Act require declaration that a particular state exists[103] before the powers can be used. Unlike the 1920's Emergency Powers Act, these powers do not devolve in the declaration of an emergency, instead the emergency must exist at the time each regulation is put into force (the 1970's bill is drafted similarly to the 2004 Act[104]); this can be seen as a safeguard against a protracted situation and usurpation of powers. Additionally, regulations must be related to mitigating, preventing or controlling the emergency[105]

Although the 2004 Act does preserve the role of the Queen[106] to issue Emergency Regulations, power is also given to senior Ministers of the Crown[107] to make these regulations if this would be throught to cause "serious delay". The Act helpfully defines serious delay "as one that might cause serious damage, or obstruct the prevention, control or mitigation of serious damage"[108].

The Bill makes no provision for the possibility that Parliament cannot sit; it instead requires that Parliament be called[109]. Emergency Regulations must be laid in Parliament as "soon as is prac-

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[101] Civil Contingencies Act 2004 S 19(1)(c)

[102] Ibid. S 19(3)(a)

[103] In the an early draft dated 18/1/1982 this is drafted as 1(1)(c). This draft can be found in TNA HO 322/1095.

[104] Emergency Powers (Defence) Bill dated 21 November 1974, Section 1(1), TNA CAB 134/5011

[105] Civil Contingencies Act 2004 S23(1)(a)

[106] Ibid. S 20(1)

[107] Ibid. S 20(2)

[108] Ibid. S 20(4)

[109] Ibid. S 28

tiable"[110] and lapse within 7 days of their presentation[111] unless approved by Parliament. Additionally even with Parliamentary authority Emergency powers automatically lapse after 30 days[112] (although this would not prevent reissue[113]). Such safeguards force democratic scrutiny on these decisions, as Parliament would be required to legislate for long term implementation.

Whilst powers to create regulations vest only in the Queen and senior ministers, echoes of previous proposals do remain. The Act requires appointment of a Regional or Emergency Coordinator[114], whom must be appointed to the specific area of emergency for regulations to have effect. The guide to the act issued by the Cabinet Office goes as far to claim that "for the first time it its possible to use emergency powers on a regional and/or devolved administration basis".

This claim is dubious at best, as we know the Ministry of Health were describing a scheme ready to implement regional based emergency regulations as early as 1925; Additionally the text of the 1974 Emergency Powers (Defence) Bill also supported explicitly indicated that different regulations may apply in different regions[115].

When we examine this implementation further, we see again England is divided into 9 regions, with Wales, Scotland and Northern Ireland each being treated as essentially their own region[116]. This appears to be more or less the same regional division as was prepared for in wartime.

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[110] Ibid. S 27(1)

[111] Ibid.

[112] Ibid. S 26(1)

[113] Ibid. S 26(2)

[114] Ibid. S 24

[115] Emergency Powers (Defence) Bill dated 21 November 1974, Section 5(1), TNA CAB 134/5011

[116] Region is given the meaning that is has in Regional Development Agencies Act 1998 by Section 31 (2) of the 2004 Act; Schedule 1 of the 1998 Act defines the regions.

Unlike Regional Commissioners, the Coordinator role is instead closer to the peacetime role anticipated by Anderson as a facilitator between responders[117]. Although the powers that can be taken under regulations remain extensive: "Emergency regulations make make provision of any kind that could be made by Act of Parliament or by the exercise of Royal Prerogative"[118]; these are expressly placed into the hands of senior ministers and the Queen, rather than the Coordinator.

With that said, we should remember that neither the 1920's Act, nor the Emergency Powers (Defence) Act 1939 (nor even the 1974 draft of the Emergency Powers (Defence) Bill) made direct provision for for Regional Commissioners. Instead aa regulation issued through the relevant Act would have been used to enable the scheme.

Although the prevention of amending the act would perhaps make this more difficult as the act itself could not be amended by Emergency Regulations[119], there appears to be no impediment on extensive powers being transferred via this act to others, including legislative powers. To the contrary this use is anticipated by the Government. The Concordat between the Scottish Ministers and the UK government on the use of emergency powers[120] states the following:

> *"Regulations may confer functions on the Scottish Ministers including…a power to give directions or orders, whether written or oral. The Act provides for regulations made under Part 2 to permit further subordinate legislation to be made, and the regulations may confer the authority to the Scottish Ministers to make such legislation".*[121]

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[117] Regional Defence in Peace and War - The Governments two plans, Manchester Guardian, Feb 3 1939

[118] Civil Contingencies Act 2004 c. 36 S 22 (3)

[119] Ibid. S 23 (5) (a)

[120]Civil Contingencies Act, Concordat between the UK Government and the Scottish Ministers, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60876/civil-contingencies-act-scots-concordat.pdf, accessed 14 March 2017.

[121] Ibid. Para 14

This would appear to indicate that the government is prepared evade a safeguard that Parliament has placed into the Act, albeit an evasion that Parliament would ultimately have to sanction.

It seems clear however that the core of the regional government system outlined in 1925, defended by Anderson in 1939, and prepared for throughout the Cold War remains in place; and that little legislative change would be needed to prepare them for wartime. Although the regional scheme is now more explicit, that transfer of powers is anticipated but not expressed suggests that this is more of the same. As such, we cannot say that this Act in any way changes our view that implementation of the Regional Government Scheme would result in a break in constitutional continuity.

**Issues regarding devolution**

The Civil Contingencies Act 2004 additionally update to emergency powers to recognise the changes in the UK constitution and political reality following Devolution. The Cabinet Office guide to the legislation rightly points out that emergency powers are a reserved matter[122]. Instead of receiving powers directly, the devolved organisations are expected to petition the relevant UK government department with their requests[123].

The Concordant with Scotland's government tells us that the default Emergency Co-Ordinator for Scotland is the head of the Scottish Government's Justice Department[124]. Through this appointment we again see echoes of the Regional Government scheme. Although the Co-Ordinator is required to brief Scottish Ministers and the Scottish Parliament, this role is accountable to the UK Government rather than to the government whom he typically reports to. Like County (and District)

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[122] Cabinet Office Civil Contingencies Secretariat, Civil Contingencies Act 2004: A Short Guide (revised), https://www.essex.gov.uk/Your-Council/Local-Government-Essex/Documents/15-mayshortguide.pdf, Accessed 14 March 2017

[123] Concordat, para 11

[124] Concordat, para 19

Controllers in the wartime scheme, a member of one level of government is commandeered into another.

Equally, the devolved governments could find themselves in the same position of local authorities under the proposed wartime scheme. Although the 2004 Act does require consultation with devolved Ministers[125], this requirement can be dispensed with "if he thinks it necessary by reason of urgency"[126] and also states that "failure to satisfy a requirement to consult shall not affect the validity"[127] of the regulation in question. As such difficult to see this requirement to consult as anything more than a statement of intentions rather than a legally binding requirement.

It is understandable as to why the UK government would retain this level of control; it allows responders to do their job without becoming pawns in a political game of tug-o-war. Whilst there is no question that this would be within the letter of the law, taking the resources of a "smaller" government and using them against the will of the "smaller" government is just as offensive to democratic principles at the Devolved Government level as it was at the Local Authority level.

**Human Rights Act 1998**

During the cold war, the European Convention on Human Rights had a very different place in our constitutional order. The Convention did not create rights that could be litigated for and relied upon on UK courts. The treatment of these rights in the Regional Commissioner scheme can be described as dismissive at best. Peter Harvey offered the following advice on drafting the regulations that would be implemented:

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[125] Civil Contingencies Act 2004 S 29

[126] Ibid, S 29(4)(a)

[127] Ibid, S 29(4)(b)

*"If a local "Baron" decided to use the death penalty he would do so and it is much better that he should do so in a constitutional way. It seems to me wholly unrealistic in this context to be worrying about the European Declaration [sic] of Human Rights"*[128]

The Convention has since been placed on a legislative basis in the UK through the Human Rights Act 1998. The Civil Contingencies Act 2004 does, on the face of its text at least, protect the Human Rights Act 1998 by preventing it from being amended by Emergency Regulations[129].

As we have already explored, the Government has already indicated a possibility (if not a willingness) to use these regulations to work around the limitations of the act by considering placing the legislative (and other powers) in others. As such, it is not hard to imagine ways of evading the limitations of the Human Rights Act 1998; amending an existing act or including within a regulation "the Human Rights Act 1998 does not apply to this Act/Regulation" would not fall foul of this rule.

With this in mind, we acknowledge that the 2004 Act does require that the Human Rights Act be considered: Regulations must be prefaced with a statement saying that regulations are (amongst other things) compatible with the Human Rights Act 1998[130], much like Parliamentary legislation requires such a statement[131]. This would seemingly prevent curtailing these rights by using legislative powers to exclude acts from its purview.

However, we should bear in mind that this is a requirement to issue a statement only, and does not provide direct language affect the validity of the regulation in question. As we have seen recently in

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[128] Peter Harvey in undated Correspondence to Mr Howard included in (TNA) HO 322/1095

[129] Civil Contingencies Act 2004 S23 (5) (b)

[130] Ibid. S 20 (5) (b) (iv)

[131] Human Rights Act 1998, S 19 (1)

the Australian Capital Territory, a mere statement of compatibility with enumerated Human Rights exists[132] does not guarantee that the statement is true[133].

Without such clause invalidating incompatible regulations such as that found in the Scotland Act 1998[134], any regulation would continue to have the full force of law. This would be in defiance of Parliament's apparent intention not to these rights being curtailed. Whilst being true to the letter of the law, such a defiance of its spirit and of Parliament's intention would not be constitutionally consistent with our expectations.

**Concluding Thoughts**

The Civil Contingency Act 2004 does bring emergency powers legislation up to date with current constitutional practice, it is perhaps more notable for what it does not do. It does not break the mould that the Emergency Powers Act 1920 set, instead it overtly creates a regional structure for dealing with emergencies; although this does not contain the legislative approval to transfer wide ranging powers to a form of Regional Government, transfer is anticipated by the government without Parliaments express pre-approval. Although such a transfer would be time limited without Parliamentary retrospective approval, it appears that little has changed.

When we consider that this Act recognises the Human Rights Act and Devolution, we find further concerns that would result in us drawing the conclusion that our constitutional order would effectively be subverted and continuity broken, at least for as long as they remained in force.

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[132] ACT legislation register - Public Sector Management Amendment Bill 2016 - Compatibility statement, ACT Government and Corbell, S, 8 June 2016 http://www.legislation.act.gov.au/b/db_54053/RelatedMaterials/compatibility_statement.asp, Last accessed 18 January 2017

[133] ACT public sector gag may be incompatible with human rights law: commissioner, Knaus, C, 25 July 2016, http://www.canberratimes.com.au/act-news/public-sector-gag-may-be-incompatible-with-human-rights-law-commissioner-20160721-gqb0oe Last accessed 18 January 2017

[134] Scotland Act 1998 29(2)(d) for legislative powers and 57(2) for executive powers.

As emergency powers under the new arrangements are yet to be invoked, we will simply have to take the government at its word that the regime is not “a means for instigating martial law, undermining Parliament…or anything of that nature”[135]. However we should remember that Anderson assured us that his scheme would not involve “overriding of the democratic principles of government”[136] too, yet our analysis suggested that it would have.

[135] Wording from Civil Contingencies Act 2004: A short guide (revised)

[136]The Regional Dictators: A Necessary Step with nothing sinister behind it - Sir J Anderson’s Defence, Manchester Guardian, Published Feb 15 1939

# Conclusion

I know not with what weapons World War III will be fought, but World War IV will be fought with sticks and stones

- Albert Einstien[137]

[137] Interview with Alfred Werner, Liberal Judaism 16 (April-May 1949), Einstein Archive 30-1104

During our examination of emergency and wartime alternatives to normal government, we have seen the world change from one where city destroying weapons are the work of science fiction, to one where use in a war between superpowers seemed imminent, and then on to one where the publics fears are trained on much smaller scale threats. The UK Constitution has also seen great change, recognising rights and creating new levels of government. Thankfully it has not seen the change that cold war planners were preparing for.

To return back to our original question, as to whether or not these plans could be implemented whilst maintaining the goal of Constitutional continuity, we need to look back through both the legislative and democratic basis for the use of these powers.

That a scheme to take extensive powers on a regional basis has existed since the 1920's would ordinarily help build the argument that this scheme is part of our constitutional order. However although the scheme has publicly surfaced from time to time, that it has remained very much in the shadows and without any implemented primary legislative basis (until at least its partial appearance in 2004) would dissuade us of this view.

Further concerning is the potential that these powers might have been taken without legislative authority; either through the Royal Prerogative or in the hope of retrospective approval. This would result in a clear lack of constitutional authority an cannot be said to be constitutionally continuous with peacetime government. Even when a legislative basis would have existed (particularly in the 1980's three bill scheme) these would have been presented to Parliament at the last possible moment, hampering democratic scrutiny.

Central and Local Government as we know them would be replaced with a new level of Government assuming much of the powers and resources of the previous levels including legislative powers. What remained of Central Government would oversee these regions, whilst Local governments could have been sidelined. Although some of the members of this new level of government

may have been recognisable as Government Ministers previously (and thus have a democratic mandate of sorts), others such as County and District Controllers would not.

Even today, we see echoes of this scheme remain. Although the regions proposed before now have a legislative basis; transfer of extensive powers to persons named outside of the legislation is not just possible, but anticipated by the government. Devolved Governments are at risk of seeing their resources and powers taken and their role sidelined.

When all of this is taken together, we cannot conclude that the Regional Government scheme would result in anything other than a clear constitutional break from the past. Even if the legislative basis was present, the lack of democratic accountability and democratic involvement precludes us from coming to that determination.