I Introduction

This chapter will consider martial law in its internal manifestation. Martial law is an elusive phenomenon but, when considered as a distinct prerogative power for maintaining or restoring functional government, it does much to illustrate the potential extent of executive power which the ADF may exercise. Martial law is distinct from merely using force to suppress internal disturbances because it extends to fulfilling some functions of civilian government, even legislative and judicial functions. Australian military forces exercised extensive civilian government functions in northern Australia and the then Australian territories of New Guinea and Papua in the Second World War. Martial law is, therefore, perhaps the most extreme manifestation of executive power as exercised by a military force. As a way of finding the theoretical limits of executive power then, it may even be more useful than analysing war. War need not have much effect on the functions of civilian government at all, as has been the case with ADF warfighting in Afghanistan and Iraq in more recent years. Constitutionally, it is potentially far more significant when a military that is meant to be subordinate to the civilian government assumes some of the functions of that government.

1 National Security (Emergency Control) Regulations 1941 (Cth).
Martial law is a strange legal creature in that references to it date back centuries yet it is still far from settled as to what martial law actually is. The Petition of Right 1628 (Imp) purported to abolish the practice of martial law in England yet proclamations of martial law continued to occur thereafter in many places where English law applied. The authorities for martial law are limited and Lord Hale described martial law as ‘no Law, but something indulged rather than allowed as a Law’. Martial law is distinct from military law in that it describes a set of circumstances rather than a body of law. There is no body of martial law as such. If the imposition of martial law results in the application of military law to civilians, then this is as a means of affording some sort of due process in a way familiar to military officers. It is not because military law applies of its own force by virtue of a state of martial law.

At its highest, martial law permits the military to exercise not only the executive but also some judicial and legislative functions of government. As Sir Charles Napier, once Commander-in-Chief of the British Army in India, said: ‘[T]he union of Legislative, Judicial and Executive Power in one Person is the essence of Martial Law’.

There are arguments that martial law in fact even authorises what no civilian government could do, including acts such as summarily killing prisoners and slaughtering innocent civilians to terrorise the surviving population into submission. At its lowest, martial law is said not even to exist. It may just be the exercise of the common-law doctrine of necessity. The martial (that is to do with military forces) aspect of martial law only arises because the military may find itself relying on the doctrine but, even so, it is open to military and civilians alike to rely upon the doctrine

---

3. MARTIAL LAW

of necessity. Martial law is also relevant to conquered and occupied territories, but this is beyond the realm of discussion here and the subject of a later chapter. Given that there have been occasions when Australian forces have exercised governmental powers over civilians, it is necessary for this book to consider the extent to which the executive power has been or could be the legal basis for the exercise of these powers. Where such powers have relied upon statute this may still illustrate the extent of the executive power where it is not possible to enact legislation in an emergency. This chapter will treat the exercise of governmental powers by military forces over civilians as the exercise of martial law. In the Australian historical examples, however, the term martial law has rarely arisen. The term military control is more common. Neocleous argues that the modern equivalent of martial law is found in emergency and national security legislation. The British experience in Ireland during the First World War and into the 1920s was that the term martial law in itself tended to incite the agitation that martial law powers were meant to suppress. The use of equivalent powers under legislation through the Defence of the Realm Act 1914 (UK) achieved the same effect but without the politically unacceptable connotations of the term ‘martial law’. The development of the extraordinary powers in the National Security (Emergency Control) Act 1939 (Cth), discussed below, or in Part IIIAAA of the Defence Act 1903 (Cth) for example, would tend to bear this out for Australia. Even so, martial law as a part of prerogative power or the common law has not disappeared. The term ‘martial law’ retains pejorative connotations but is useful for this book because there is at least some case law surrounding ‘martial law’, as opposed to the more euphemistic ‘military control’.

It remains possible that there could be circumstances in which the ADF may use martial law powers not provided by statute. This book will argue that the ADF might, in a crisis in which civilian government is unable to function, lawfully assume some civilian executive and legislative functions where it is necessary to do so, usually within a limited area and only for so long as the emergency persists. Prerogative power would authorise this action until restoration of civilian government was possible or until

---

9 Ibid.
legislation authorised the action. Nothing could, however, completely remove the jurisdiction of the courts or permit an enduring change to the Constitution. This reflects the limits proposed in Chapter 1.

This chapter will not consider the exercise of disciplinary control by the military over civilians in those situations where civilians have voluntarily subjected themselves to military discipline in order to accompany a force. The Defence Force Discipline Act 1982 (Cth) now provides for such people as 'defence civilians'.10 This chapter will also not consider the defence force aid to the civil authority regime of Part IIIAAA of the Defence Act 1903 (Cth), as this contemplates military power supplementing civilian powers rather than substituting for them.

II What is Martial Law?

There is a considerable body of mainly English legal writing and to a lesser extent case law on what martial law is. It diverges widely. In feudal times the term related to the Court of the Constable and the Marshal which exercised jurisdiction over armies raised through feudal obligation for particular wars.11 The development of a standing army and the Mutiny Act 1689 eventually rendered this jurisdiction obsolete, with the last recorded case being in 1737.12 A number of 19th-century incidents, most notably the Jamaica Rebellion of 1865, later gave rise to a lively debate on what martial law is and what it authorises, and indeed whether it really exists.13 There are also some useful 20th-century cases arising from British imposition of martial law in South Africa and Ireland. This debate is almost forgotten now and there is scant literature on martial

10 Defence Force Discipline Act 1982 (Cth) s 3.
13 See generally Kostal, above n 4.
law in Australia. The most notable Australian treatment of martial law by H P Lee in *Emergency Powers* in 1984 stated that there had been no recorded instances of martial law since the promulgation of the *Australian Constitution* in 1901. Justice White and Michael Head also state this view. While there may have been virtually no instances of martial law so described—as this chapter will argue—since 1901 there have been significant Australian experiences with martial law in one form or another.

Before turning to the Australian historical examples, it is necessary to outline the debate over martial law in the legal historical literature. Martial law falls into different but at times overlapping categories.

### A Conquered and Occupied Territories

The least controversial view of martial law is that it applies to conquered or occupied foreign territory. This is on the basis that, where the previous sovereign authority has been displaced, some sort of law is better than no law. The Duke of Wellington made often-cited comments on this in the House of Lords in 1851:

> Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all, therefore the general who declares martial law, and commands that it should be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out. Now I have in another country carried out martial law; that is to say, I have governed a large proportion of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law; and I carried into this my so declared will.

---

18 Lee, *The Emergency Powers of the Commonwealth of Australia*, above n 15, 213, only cites this first half of the passage.
During the Jamaica controversy of the 1860s, the Duke’s statement was cited in support of the use of martial law for internal strife\textsuperscript{20} though the less cited latter half of his comments indicated he was referring to his own exercise of powers in foreign territories. United States Attorney-General Cushing (1853–1857) also made the distinction in stating that, ‘As exercised in any country by the commander of a foreign army, it is an element of the \textit{jus belli}. It is incidental to the solemn state of war, and appertains to the law of nations’. This was as opposed to ‘martial law in one’s own country’, which was ‘a case which the law of nations does not reach’\textsuperscript{21} ‘The distinction is important because, although the exercise of martial law may entail the exercise of many of the same governmental functions whether internally or on foreign territory, the basis for and the scope of the exercise of martial law does differ. The distinction is also important in the Australian context because of the significant Australian exercises of martial law in German New Guinea, Somalia and East Timor which will be the subject of Chapter 6.

B Common Law Doctrine of Necessity

One view sees martial law as simply a manifestation of the common-law doctrine of necessity. This view became most salient as a result of the suppression of the Jamaica Rebellion. In 1865, a number of districts in Jamaica saw an uprising by black plantation workers and other poor against white plantation owners and colonial authorities. Governor Edward Eyre (already famous as the first European to cross the Nullarbor Plain\textsuperscript{22}) authorised the suppression of the rebellion with brutal force, summary executions and floggings, as well as courts martial followed by executions.\textsuperscript{23} Much of the controversy arising from the Jamaica Rebellion turned on whether martial law authorised the court martial and execution in particular of George Gordon, a black Jamaican landowner and politician.\textsuperscript{24} On the narrower view based on the common-law doctrine of necessity, it did not.\textsuperscript{25} The Jamaica Committee, created in England in response to the events by a group of reform-minded public

\textsuperscript{20} Kostal, above n 4, 203–4.
\textsuperscript{23} Kostal, above n 4, 12–15.
\textsuperscript{24} Ibid 14–17.
\textsuperscript{25} Ibid 278–80.
figures, which included J S Mill, attempted a private prosecution of Governor Eyre. The Committee also attempted the private prosecution of a British Army officer, Brigadier Nelson, and a Royal Navy officer, Lieutenant Brand, who had been members of a court martial which had imposed death penalties. In neither case, *R v Eyre* and *R v Nelson and Brand*, would a grand jury find that the prosecutions should proceed to trial. The charges to the grand juries in each case are therefore valuable treatments of the law of martial law but did not resolve the question of whether martial law was limited to the common-law doctrine of necessity, as neither became binding precedents.

The argument for martial law being only a manifestation of the common-law doctrine of necessity is perhaps best put in the arguments of the counsel for the prosecution in *R v Nelson and Brand*, Mr Fitzjames Stephen. Stephen had initially advised the Jamaica Committee on martial law and Kostal has described his arguments in some detail. There is no later case, such as the case of *Marais* discussed below, which sets out the argument clearly. The limited view is essentially this. The *Petition of Right 1628* abolished martial law in England and, therefore, where English law applies. The Glorious Revolution of 1688 established finally that the Crown is not above the law. The power to take life must be found in law. If the military take life or engage in any other act that

26 Handford, above n 22, 836.
27 *Frederick Cockburn’s Special Report of the Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court in the Case of The Queen Against Nelson and Brand* (2nd ed, 1867) (‘*Frederick Cockburn’s Special Report*’). (This was the report of the case as such and is cited in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 555 (‘*Re Tracey*’)).
28 Being a charge to a Grand Jury and not a judicial decision as such, W F Finlason, *Report of the Case of The Queen v Edward Eyre on his Prosecution in the Court of Queen’s Bench containing the Charge of Mr Justice Blackburn* (Stevens, 1868). See Kostal, above n 4, 395–404. *R v Eyre* (1867–68) LR 3 QB 487 is a report of the earlier decision on whether this matter was triable in England, as distinct from *Phillips v Eyre* (1870) LR 6 QB 1, which was a civil proceeding against Governor Eyre arising out of the same rebellion and supported by the Jamaica Committee.
29 Being a charge to a Grand Jury and not a judicial decision as such, *Frederick Cockburn’s Special Report*, above n 27.
30 Finlason, above n 28, 102; *Frederick Cockburn’s Special Report*, above n 27, 160; Handford, above n 22, 841–3.
31 Each charge differed on this question, Cockburn LCJ in *R v Nelson and Brand* was equivocal on the issue, *Frederick Cockburn’s Special Report*, above n 27, 159, and Blackburn J focused more on Jamaican colonial statutory authority, Finlason, above n 28, 81; Kostal, above n 4, 336–41, 395–404.
32 Kostal, above n 4, 278–80. Cockburn CJ’s charge in this case curiously stopped short of endorsing the narrow view. His view was that necessity was in the minds of the officers concerned, i.e. a subjective test rather than an objective test, *Frederick Cockburn’s Special Report*, above n 27, 159.
would ordinarily be unlawful in the process of restoring order, it must be shown to be necessary under the common law. If it is not necessary to take life, or any other step purportedly authorised under martial law, then the act is unlawful and punishable as a crime. If it is not necessary to take life, or any other step purportedly authorised under martial law, then the act is unlawful and punishable as a crime. No appellate court gave an authoritative judgment on Stephen’s argument. Cockburn CJ’s subsequent charge to the Grand Jury did not support his view fully and the jury did not find that the prosecution should proceed to trial.

Dicey devoted a chapter to martial law in his book, *Introduction to the Study of the Law of the Constitution*, first published in 1885. Although he did not directly refer to the attempted Jamaica prosecutions, he was apparently close to some members of the Jamaica Committee. His view was, of course, not the law and he did not advance this argument in a court. Dicey’s work is influential though and courts and writers alike have cited him frequently. He stated that there was no such thing as martial law but did concede that the term was sometimes ‘employed as a name for the common-law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law’.

Importantly, every subject, whether uniformed or not, is a servant of the Crown for this purpose and has not only a right but a duty to put down breaches of the peace. There is no distinction between a soldier and a citizen in this regard. Each is authorised and bound to use force, up to and including lethal force, as may be necessary to put down the riot or disturbance. Both soldier and citizen are equally liable to account before a jury for the use of unnecessary force as well as a failure to act. Dicey cites the prosecution of the Mayor of Bristol in *R v Pinney* for failing

---


37 Dicey, above n 7, Chapter VIII.

38 Handford, above n 22, 836.


40 Dicey, above n 7, 288.

41 Ibid 289.

42 Ibid.

43 Ibid.

44 (1832) 5 Carrington & Payne 254.
in his duty to suppress the Featherstone riots of 1831 (although he was acquitted). 45 The significant aspect of Dicey’s view is the common-law character of the right and duty to suppress breaches of the peace, noting that he did not see prerogative power as anything more than the residue of powers left in the hands of the Crown. 46 In this sense martial law was simply another name for existing common-law rights and duties, limited by the doctrine of necessity.

Dicey saw the other form of martial law as being ‘the government of a country or a district by military tribunals, which more or less supersedes the jurisdiction of the courts’. He stated that this kind of martial law in England is ‘utterly unknown to the constitution’. 47 Dicey did not refer to martial law of conquered or occupied territories outside of England, nor indeed the British Empire outside of England and Ireland. He did discuss Wolfe Tone’s Case 48 in which a court martial in Dublin in 1798 sentenced an Irish rebel to death. The Irish Court of King’s Bench granted a writ of habeas corpus on the basis that Wolfe Tone was not a military person and therefore not subject to punishment by a court martial. Dicey’s point was that even in the midst of a revolutionary crisis martial law was not a part of the common law. 49

The view of martial law as really being a manifestation of the common-law doctrine of necessity has some appeal in that it firmly asserts the rule of law over the will of a general or the executive more broadly. It is not entirely consistent with all of the authorities however, nor with a significant amount of the practice of martial law. First of all there is the widely cited 1884 case of Dudley v Stephens 50 on necessity which stands as authority for the principle that, in criminal law, necessity is no defence for the taking of life. Any view of martial law that sees it as the common-law doctrine of necessity could not authorise the taking of life. This is a problem for Dicey’s view of the duty to repel force with force. It suggests that he is blurring concepts of self-defence and the defence of others, the suppression of riots and the suppression of insurrection. It is also

---

45 Dicey, above n 7, 288–9.
46 Ibid.
48 (1798) 27 St Tr 614.
49 Dicey, above n 7, 293–4.
important to note that, as discussed in Chapter 1, a view that assimilates the power of the Commonwealth with the powers of a natural person in Australia would not appear to have survived Williams.\footnote{Williams v Commonwealth (2012) 248 CLR 156 (‘Williams’).} There are more cases which would suggest that martial law relies upon prerogative power; it is limited by necessity but a necessity to restore governmental authority. This is not a doctrine of necessity upon which any citizen can rely. It is also not a basis to suppress a riot with the use of lethal force. Chapter 4 will explore the distinction between the suppression of riot and the suppression of insurrection further.

C Prerogative with Respect to Martial Law

A broader view of martial law is that the body of military law (that is the law applicable normally only to the military) can be asserted over the civilian population because it is necessary to restore a form of government.\footnote{This is not to say that military law is the substance of martial law, only that, in a situation of martial law, offences and procedures can be borrowed from military law and applied outside of the military.} This is still a view which relies on necessity but sees necessity in different terms because martial law is not another name for the common-law doctrine of necessity but a prerogative of the Crown.

1 During War and Insurrection

Even though martial law within the realm does not necessarily require a state of war, a discussion first of martial law during internal war, as opposed to riots or disturbances, may help to establish its basis as a prerogative of the Crown. On this view, at its highest, only the Crown can wage war.\footnote{Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject (Butterworths, 1820) 44–5.} It is lawful to wage war even to suppress an internal rebellion because it threatens the state itself and the Crown’s sovereignty over it. It is necessary to restore the functioning of the Crown’s government. This is much more than a breach of the peace or riot and it is not for the ordinary subject to exercise common-law powers in response to it.\footnote{See Lee, The Emergency Powers of the Commonwealth of Australia, above n 15, 214–17.} Chitty did not use the term martial law as such but did state:
The King may lay on a general embargo, and do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change by his prerogative of war, either the law of nations or the law of the land, by general and unlimited regulations.55

There is a surprising degree of consistency in the writers and jurists on the point that the Crown can effectively wage war against an insurrection, so that killing in combat in such situations is lawful. Coke,56 Hale,57 Clode,58 Cockburn LCJ,59 Blackburn J,60 Stephen,61 counsel for the prosecution in R v Eyre62 and R v Nelson and Brand,63 Windeyer,64 Holdsworth,65 Finlason,66 Lendrum67 and Dicey68 all maintain, effectively, that the Crown may maintain war against its own subjects where they are in open revolt.69 By way of example, the Victorian Act XII of 1854 (better identified as the Martial Law Indemnity Act) followed the famous Eureka Stockade incident. On 3 December 1854, police and soldiers had attacked a fortification built by miners protesting against government taxes and the way they were collected. Twenty-two miners and four of the troops died in the fighting.70 With respect to prerogative power, at clause II the Act stated:

55 Chitty, above n 53, 49.
57 Hale, above n 11, 121, 124–32.
59 Kostal, above n 4, 331.
60 See Handford, above n 22, n 123.
61 Kostal, above n 4, 233.
62 Finlason, Report of the Case of The Queen v Edward Eyre on his Prosecution in the Court of Queen’s Bench Containing the Charge of Mr Justice Blackburn, above n 28.
63 Frederic Cockburn’s Special Report, above n 27.
66 Letter from W F Finlason to William Gladstone, 3 February 1868 quoted in Kostal, above n 4, 230.
68 Dicey, above n 7, 288.
Nothing in this Act contained shall be construed to interfere with Her Majesty’s Royal Prerogative or to abridge the right of Her Majesty to do any act warranted by law for the suppression of treason or rebellion.

This provision does not create any prerogative power which did not otherwise exist but it does indicate that the Parliament of Victoria at the time acted as if there was prerogative power to suppress treason and rebellion. There are also references in preambles and recitals in Acts dealing with Ireland from King George III and King William IV to the Crown’s ‘undoubted prerogative in executing martial law’, although, as Cockburn CJ pointed out, a recital does not bring into law anything which was not already part of the law.

The difference in the writing appears to lie, then, in whether this power arises from the common-law doctrine of necessity or from prerogative power. Lee suggests that little turns on this as on both views necessity limits any action. ‘There is only a little authority on this point but what authority there is does seem to suggest that there is a significant difference. On one view, any person could restore the functioning of civilian government, which seems as practically implausible as it does potentially anarchic. On the other view, only the forces of the Crown can restore functioning government, which is practically far more plausible as much as it is more consistent with constitutional order.

It is important to make clear at this point that this book is not arguing that the suppression of insurrection—that is an internal war—is an exercise of the prerogative of martial law. That would be an exercise of the war prerogative. The point is that an insurrection, or invasion, could prevent or destroy the normal functioning of civilian government. As much as it is an exercise of the war prerogative to defeat the enemy, it is an exercise of the prerogative as to martial law for the military to provide a form of government in those circumstances. Despite the title of the *Martial Law Indemnity Act*, this book argues that martial law is not concerned with actions against an enemy, but rather actions to restore or maintain

---

71 As to Acts of Indemnity generally, they are not in themselves the law of martial law, but their common use after periods of martial law does indicate something of the concern of parliaments with respect to the uncertainties of martial law, *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 357 (*Shaw Savill & Albion Co Ltd*).
73 Ibid 128.
government, even if it is the presence of an enemy that creates the necessity of imposing martial law. This leads to a closer examination of the basis for martial law being a prerogative power.

Charles Clode was a legal adviser within the War Office at the time of the Jamaica controversy and indeed advised on the law of martial law in respect of it.75 His books, the two volume: *The Military Forces of the Crown: Their Administration and Government* of 1869; and *The Administration of Justice under Military and Martial Law* of 1872, in some ways respond directly to the Jamaica events and reflect the official views of the War Office at the time.76 Notably, as mentioned in Chapter 2, the High Court of Australia has cited Clode’s works several times as a persuasive guide to the law.77 Clode cites with approval the Opinions of Lords Campbell and Cranworth (both former Lords Chancellor) in relation to the Canadian Rebellion of 1837:

> We are of the opinion that the prerogative [of executing Martial Law] does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the Ordinary Tribunals, it is impossible to deal according to the regular course of Justice. Where the Courts are open, so the Criminals might be delivered to them to be dealt with according to Law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding [emphasis added].78

A more persuasive authority is the Boer War case of *Marais*.79 In this case the Privy Council gave a decision inconsistent with the common-law doctrine of necessity view of martial law. Mr Marais was in military custody after his arrest and charge for breaching martial law regulations. He had appealed to the Privy Council from a decision of the Supreme Court of the Colony of the Cape of Good Hope. Crucially this meant that the civilian courts were still open and, it was argued, the ordinary rule is that the civil courts should have jurisdiction where the civilian courts are open.80 The Privy Council held that war could still be raging even if the

75 Kostal, above n 4, 475.
79 *Marais v General Officer Commanding the Lines of Communication* [1902] AC 109 (‘Marais’).
80 Ibid 3.
military permitted some courts to remain open for business.\textsuperscript{81} The Privy Council took the affidavit evidence of Mr Marais himself as grounds for determining that war was actually raging.\textsuperscript{82} Further, where actual war is raging, the actions of the military authorities are nonjusticiable:

It may often be a question whether a mere riot or disturbance neither so serious nor so extensive as really to amount to a war at all has not been treated with an excessive severity and whether the intervention of the military force was necessary but once let the fact of actual war be established and there is an universal consensus of opinion that the Civil Courts have no jurisdiction to call in question the propriety of the action of the military authorities.\textsuperscript{83}

Effectively this must give a broader view of necessity for, if it was open to Mr Marais to have the Supreme Court hear his matter, then it was not strictly necessary for the military to have conduct of his imprisonment and charge. To then hold the matter nonjusticiable would suggest that it saw the matter as one of prerogative power and not the common-law doctrine of necessity. The Privy Council stated ‘the truth is, that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the military authorities’.\textsuperscript{84}

Starke J expressly approved this statement in \textit{Shaw Savill \& Albion Co Ltd}.\textsuperscript{85} Notably the advice of the Privy Council closed with the words ‘the framers of the \textit{Petition of Right} knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure’.\textsuperscript{86} The Councillors, therefore, directly considered the \textit{Petition of Right} and did not see it as applicable to situations of actual war, even an internal war.

The decision in \textit{Marais} met with some concern at the time in a review by Dodd. Dodd could not see the decision as consistent with the \textit{Petition of Right}. As he points out, the Privy Council did not publish any dissenting opinions, given its constitutional status as an advisory committee for the

\begin{footnotesize}
\begin{enumerate}
\item Ibid 5. The US position is apparently more rigid in that if the courts are open then military tribunals cannot operate, see Mark Stavsky, ‘The Doctrine of State Necessity in Pakistan’ (1983) 16(2) \textit{Cornell International Law Journal} 341, 350–2.
\item \textit{Marais} [1902] AC 109, 114.
\item Ibid 115.
\item Ibid.
\item (1940) 66 CLR 344, 356.
\item \textit{Marais} [1902] AC 109, 5; see also Clode, \textit{The Military Forces of the Crown}, above n 2, 157, on \textit{The Petition of Right} only applying during time of peace.
\end{enumerate}
\end{footnotesize}
King rather than being a court. It is not, therefore, possible to know what the contrary views within the Privy Council were in this case.\(^87\) Lee also expresses concern.\(^88\) On the other hand, Holdsworth stated of Marais at the time:\(^89\)

This prerogative is quite different from the power which all citizens have at common law of using the degree of force which is necessary to prevent outrage. That power merely provides the necessary means for quelling a riot. It merely allows an amount of force exactly proportioned to the necessities of the case. It does not allow, as a proclamation of martial law allows, an absolutely freehand in dealing with the enemy.\(^90\)

Subsequent decisions reinforce this view of martial law as a prerogative power. The Privy Council found, not long after in *Tilonko v Attorney-General of Natal* in 1906, that courts martial ‘are justified by necessity; by the fact of actual war’.\(^91\) Two Irish cases from the Anglo–Irish War of 1921, *R v Allen*\(^92\) and *R (Garde) v Strickland*\(^93\) were consistent with the Privy Council in that they took affidavit evidence of the existence of a state of war from Sir Nevil Macready, the General Officer Commanding-in-Chief in Ireland. Both cases found that, if the court is satisfied of the existence of a state of war which justifies the application of martial law, then it will not interfere with the actions of the military authorities *durante bello*.\(^94\) Starke J in *Shaw Savill & Albion Co Ltd* cited with approval each of these as well as other Irish cases from the same period on this point.\(^95\) All of Ireland in 1921 was still part of the United Kingdom and a common-law jurisdiction.\(^96\) The Irish courts at this time however did not hold the military to account for the use of unnecessary force, as Dicey might

\(^{87}\) Dodd, above n 35, 143–4, 149. Dodd also rejected the idea that the military could not be held liable after the war for acts which went beyond the requirements of necessity. This did not include acts against an alien enemy, 148–9.


\(^{89}\) [1902] AC 109.


\(^{91}\) [1907] AC 93, 94.

\(^{92}\) [1921] 2 IR 241.

\(^{93}\) [1921] 2 IR 317, 331.

\(^{94}\) *R v Allen* [1921] 2 IR 241, 241; *R (Garde) v Strickland* [1921] 2 IR 317, 331.

\(^{95}\) (1940) 66 CLR 344, 356.

\(^{96}\) The *Irish Free State Constitution Act 1922* (Imp) came into force the following year. In support of the existence of a prerogative for martial law and discussion of the situation in Ireland see H V Evatt, *The Royal Prerogative* (Law Book Co, first presented as a doctoral thesis 1924, with commentary by Leslie Zines, 1987) 90–1.
have had it.97 This would also suggest that martial law is an expression of prerogative power rather than the common-law doctrine of necessity. This is also consistent with Evatt’s view, who considered the similar Irish case of *R v Adjutant General of the Provisional Forces*,98 that ‘the essential nature of Prerogative … is that it confers rights on the Crown which are not and cannot be available to subjects … “Martial Law” is also a theory of necessity’.99

The Pakistani case *Reference by His Excellency the Governor-General (under s 213 of the Government of India Act, 1935)*100 distinguished necessity from state necessity, indicating that some acts justified by necessity can only be an exercise of governmental power rather than a power any citizen can exercise.101 Harrison Moore, taking *Marais*102 into consideration, was also of this view in stating:

> It is … undoubtedly true that the tradition of a prerogative to proclaim martial law – to suspend the ordinary law in times of war and rebellion – has passed down to modern times; and … the cases mentioned by the writers referred to … clearly regard that power as a function inherent in the Crown.103

The conduct of war appears to be a prerogative power of the Crown and military forces exist primarily to execute this prerogative on the sovereign’s behalf.104 It is arguable, therefore, that the exercise of martial law in the factual circumstances of a war or insurrection is an aspect of prerogative power and not the common-law doctrine of necessity available to any

97  See Dicey, above n 7. Lee discusses two cases, *Tilonko v A-G (Natal)* [1907] AC 570 and *Clifford v O’Sullivan* [1921] 2 AC 570 (an Anglo–Irish War case) for the proposition that courts martial are not courts at all but merely tribunals for advising the military commander on matters of summary justice. To summarise his view, this is so that there is some order and regularity in the repression of acts of violence (when there are no courts open to determine such matters). The decisions of courts martial are in fact the decisions of the military commander and not those of courts. They are only justified by the necessities of the war or crisis. In this respect, Lee’s view is consistent with this book but not insofar as he was equivocal on whether martial law derived from prerogative power or the common-law doctrine of necessity and appeared more inclined to the latter view, Lee, *The Emergency Powers of the Commonwealth of Australia*, above n 15, 221–3.
98  [1923] 1 IR 5 cited in Evatt, above n 96, 90–1.
99  Ibid 117.
100  PLD 1955 FC (Pak) 435.
101  Ibid 435, 485–6; see Stavsky, above n 81, 368, which discusses other martial law cases. For discussion of the line of martial law cases in Pakistan see also Imitiaz Omar, *Emergency Powers and the Courts in India and Pakistan* (Kluwer Law International 2002) 62–3; and Gross and Aolain, above n 69, 46–54.
103  Ibid 49–50.
104  See discussion in Gross and Aolain, above n 69, 32–5.
person. This is a preferable view because it is not for any person to exercise the military power of the Crown or to claim to do so on its behalf. Apart from being potentially anarchic, this would be contrary to the theory of executive power requiring unity of purpose. To repeat Blackstone’s view as quoted in Chapter 1:

[T]he executive part of government … is wisely placed in a single hand by the British constitution for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills; many wills, if disunited and drawing different ways, create weakness in a government; and to unite these several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.105

2 Outside of War

Leaving war and insurrection to one side, more recently the Fiji Court of Appeal in Republic of Fiji v Prasad (‘Prasad’)106 in 2001 provided a common-law authority for the military to impose martial law on the basis of necessity where there is no functioning civilian government. It suggests that it is the absence of functioning civilian government itself, and not necessarily the circumstances of war, which justify the exercise of the prerogative with respect to martial law. This situation arose from the actions in 2000 of civilians, George Speight and others, taking over the entire Fijian Parliament at gunpoint and most of the government ministers with it. Only the President of Fiji, the Head of State but not the Head of Government, remained outside the Parliament and was able to exercise some constitutional executive authority. The hostage situation lasted many weeks and the elected civilian government simply could not function.107 The Court described the perhaps unprecedented situation as one in which the imposition of martial law was the only reasonable option in order to avoid anarchy:

The imperative necessity for prompt action arose out of exceptional circumstances not provided for in the Constitution. These circumstances called for immediate action. There was no other course reasonably available to the President at the time the hostage crisis began. Later on,

105 Blackstone’s Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia (1803, Hein Online reproduction) 250.
106 Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001.
as the hostages continued to be confined and anarchy was developing, the Commander quite properly contemplated executive action by way of martial law to restore and/or maintain law and order. This was appropriate, so long as the extraordinary and frightening situation lasted. The crisis did not end until all the hostages had been released and some calm restored [emphasis added].

This course of action was open only to the President, through the military commander, as an exercise of executive authority. It was not something any ordinary citizen could have done. The military commander of Fiji, Commodore Bainimarama, exceeded this authority only when he abrogated the constitution and took power from the President:

The doctrine of necessity would have authorised him to have taken all necessary steps, whether authorised by the text of the 1997 Constitution or not, to have restored law and order, to have secured the release of the hostages, and then, when the emergency had abated, to have reverted to the Constitution. Had the Commander chosen this path, his actions could have been validated by the doctrine of necessity. Instead, he chose a different path, that of constitutional abrogation. The doctrine of necessity does not authorise permanent changes to a written constitution, let alone its complete abrogation.

This is consistent with the point made in Chapter 1 that the doctrine of necessity cannot effect an enduring change to the Constitution.

This case of martial law outside of war is a far more profound question than the war cases discussed above. It involved the military actually assuming authority over all of the functions of the civilian government, not just some of them or those within a limited area. Until the point of abrogating the constitution, it was not a coup but rather a military response to truly extraordinary circumstances. Even though Prasad considered a number of coup cases, a situation of the military lawfully taking over the control of government had virtually no basis in common-law case law or literature. Even so, this case is a clear and recent authority.
Commodore Bainimarama’s assumption of governmental power and his imposition of martial law also connects to the theoretical discussion in Chapter 1. Montesquieu, Hume, Machiavelli and Blackstone112 all have seen Locke’s need for the executive power to be able to ‘do public good without a rule’.113 It is from this, together with Prasad,114 that it is possible to argue that the prerogative with respect to martial law could extend to situations of the collapse of civilian government, whether within or outside of war. The principles are essentially the same as those for martial law within war in that, without martial law, in such situations there would be no law and no government. The imposition of martial law becomes essential to the continued existence of government and law.115 The fact that civilian government has ceased to function because of a terrorist act or natural disaster instead of war or insurrection should not necessarily alter when martial law could apply and what its limits might be.

This most extreme example illustrates that the prerogative of martial law could be very powerful and the necessity of the case may arguably authorise the executive through the military, but not just any citizen, to take temporary action well beyond the limits of the written constitution. As the Court stated in Prasad:

The doctrine of necessity enables those in de facto control, such as the military, to respond to and deal with a sudden and stark crisis in circumstances which had not been provided for in the written Constitution or where the emergency powers machinery in that Constitution was inadequate for the occasion. The extra-constitutional action authorised by that doctrine is essentially of a temporary character and it ceases to apply once the crisis has passed.116

112 Blackstone did not address martial law directly.
113 John Locke, Two Treatises of Government (Mobilereference.com, first published 1689, 2008) (Article 160) 142.
114 Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001.
116 Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001, 16.
Given the broad consideration in *Prasad*\(^{117}\) of common-law authorities from the Privy Council and around the Commonwealth of Nations, its reasoning is relevant to Australia.\(^ {118}\) The case is also of particular value from a regional common-law perspective as the bench comprised judges from New Zealand, Papua New Guinea, Australia and Tonga.\(^ {119}\)

Notably, the military in Fiji did not seek to interfere with the operation of the courts nor to establish military tribunals or courts martial.\(^ {120}\) This is consistent with the authorities above that martial law does not require rule by courts martial. The main limitation would still appear to be that it is not possible to effect an enduring change to the *Constitution*. All actions must be temporary and necessary. Any remaining constitutional authority, such as the Queen or Governor-General, must remain in place and any military action must be subject to that authority. This is particularly the case for Australia given that s 61 of the *Constitution* vests the executive power of the Commonwealth in the Queen and makes it exercisable by the Governor-General. Given the succession arrangements for the Queen\(^ {121}\) and the Governor-General,\(^ {122}\) or for the monarch to appoint a new Governor-General,\(^ {123}\) it is virtually inconceivable that these offices would cease to function. As proposed in Chapter 1, it is not possible to effect an enduring change to the *Constitution* and therefore remove these constitutional office holders. As much as the ADF might exercise prerogative power in this example, it would clearly do so on behalf of the Crown. As fanciful as this discussion might seem in early 21\(^{st}\)-century Australia, it does serve to illustrate the great reservoir of power potentially lying dormant in the prerogative with respect to martial law.\(^ {124}\)

---

117 Ibid.
118 *Reference by His Excellency the Governor-General (under s 213 of the Government of India Act, 1935)* PLD 1955 FC (Pak) 435 is also very relevant here.
119 George Williams, ‘Feature – Republic of Fiji v Prasad’ (2001) 2(1) *Melbourne Journal of International Law* 144, 146. For a critical perspective see Michael Head, ‘A Victory for Democracy? An Alternative Assessment of Fiji v Prasad’ (2001) 2(2) *Melbourne Journal of International Law* 535. As much as Head finds fault with the decision, he does not suggest what other decision the court should have made. This is consistent with his approach generally of providing critique but without arguing for an alternative position.
120 *Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001), 4–5.
121 *Act of Settlement 1701* (Imp).
123 Ibid.
124 Further, Australia’s federal structure diffuses power throughout the various capitals of the federation. Should the Commonwealth Government collapse, the Governor-General could appoint a new temporary civilian Commonwealth ministry from among State parliamentarians, *Constitution* s 64.
Despite concerns from Head that such power could lie dormant, the lesson from Prasad is that the alternatives would most likely either be anarchy or the assumption of power by unconstitutional means. Neither path is consistent with the rule of law or constitutional government. As Winterton stated, ‘[O]nce the realm of extra-constitutional power has been entered, there is no logical limit to its ambit’. It is more consistent with the principle of legality that there should be some authority within the law to act in such extreme situations. A return to the normal constitutional order seems more likely when the authority for action derives from within existing constitutional structures.

D Authorised State Terror

An even more extreme view is that martial law is an instrument of state terror. It knows very few bounds and authorises extreme measures of brutality against even innocent civilians in order to terrorise a subject population into submission. As Kostal quoted Finlason, ‘[T]error is of the very nature of martial law, and deterrent measures – that is measures deterrent by means of terror – are its very essence’.

The limitations are that martial law can only be for the purpose of maintaining or restoring governmental control and cannot be for wanton purposes. The procedure of courts martial must observe some sense of natural justice, although summary executions may also be permissible. The leading proponent of this view was Finlason. He wrote a number of books and letters on the subject of martial law at the time of the Jamaica controversy in the 1860s. It is tempting to dismiss such extreme views as the views of just one author, but Finlason appears to have articulated a widespread belief that this approach was necessary to maintain the

---

125 Head, Calling out the Troops, above n 17, 128–37.
CROWN AND SWORD

Empire. The use of such an approach in so many parts of the British Empire, such as in the Indian Mutiny of 1857, against Aborigines in Australia, in General Dyer’s ordering of the Amritsar Massacre in 1919, the government of the African colonies, the attempted suppression of the Irish Republic between 1916 and 1922 and in the Jamaica Rebellion itself, and with so little by way of legal consequences for these actions, would suggest that Finlason’s view reflects much of the practice of martial law in the British Empire.

Given the inextricable connection between this view of martial law and conceptions of race and empire, and that no court has explicitly supported it, it is possible to dismiss the use of martial law as an instrument of state terror as in any way an arguable view of the law. It abandons legality rather than reinforcing it. It is an exercise of virtually unrestrained power relying upon brutality and fear. It is not possible to reconcile with the firm assertions of restraint in Entick v Carrington, Shaw Savill & Albion Co Ltd nor A v Hayden as discussed in Chapter 1. It is important to recognise this view, however, because of its historical significance and because the term martial law can invoke thoughts of such extreme measures. This may explain why none of the Australian experiences of martial law discussed below use the term martial law.

E What is Martial Law then?

Martial law is, effectively, a consequence of circumstances where the usual functioning of civilian government has practically ceased, even if not altogether or only locally. The first question as to whether martial law can or should apply, then, is one of fact. The military commander can

130 Ibid 455–6 citing the British Manual of Military Law (1899) and C E Calwell, Small Wars: Their Principles and Practice (HMSO, 3rd ed 1899), as well as the sadistic slaughter of Kooka prisoners in the Punjab in 1872, 451–3; see Military Board, above n 4, 197, stating that the laws of war do not apply to ‘uncivilised states and tribes’; see also Lendrum, above n 67, 31; G J Cartledge, The Soldier’s Dilemma: When to Use Force in Australia (AGPS Press, 1992) 155–8.
132 Head, Calling out the Troops, above n 17, 43; Lendrum, above n 67, 40–2.
135 Neocleous, above n 8, 14–15.
136 (1765) 19 St Tr 1030.
137 (1940) 66 CLR 344.
exercise a degree of executive, legislative and judicial power over civilians and military alike as long and as much as necessity dictates. Martial law is distinct from military law in that it regulates all subject to it, rather than just the military. It is also a description of a state of affairs rather than being a body of law. The question of whether the courts have to be closed for there to be martial law, with courts martial taking their place, is somewhat misleading.139 Courts martial may or may not be an aspect of the application of martial law in a given situation. As seen in Marais’ case, the civilian courts may even remain open while martial law is in place. Martial law can still be in effect without the use of courts martial to try civilians. As Richards commented in 1902 in respect of the Marais case:

The necessity for taking action which infringes on the rights of property or liberty cannot depend on the fact that the courts continue or do not continue to sit: it depends on the necessity created by the presence of an enemy in the country.140

Lendrum echoed a similar view,141 Dodd goes further in saying the military should not be obliged to close the courts to make martial law effective in time of war. Citizens should not be deprived of ordinary justice where the military permits the courts to sit.142 The courts should be able to accommodate the due prosecution of the war by not exercising all of their functions in respect of the military but still hear ordinary disputes which were not ‘injurious to public safety’.143 The old rule that when the courts are open there is peace and when they are closed there is war developed in a time when warfare was limited in geographical scope. The scale and breadth of machine-age warfare meant that the rule ‘seems hardly to appeal to modern ideas’.144

139 Holdsworth, ‘Martial Law Historically Considered’, above n 11, 121.
140 Richards, above n 4, 141.
141 Lendrum, above n 67.
142 Dodd, above n 35, 146.
143 Ibid.
144 Ibid. Dodd’s main point is still that courts martial may not try civilians when the courts are open, 151.
This is an important issue in the Australian experience of martial law discussed below. Brennan and Toohey JJ in Re Tracey\textsuperscript{145} went to some length to limit any possibility of courts martial usurping the jurisdiction of the civilian courts.\textsuperscript{146} To bring this discussion into the Australian context, there are two aspects then that require further analysis: when martial law can apply and to what extent it can apply. An examination of Australian history may yield the clearest indications as to the Australian law of martial law.

### III Martial Law in Australia

In considering the need for lawful authority for executive action, as discussed in Chapter 1, it is open to suggest that the scope of Commonwealth legislative power with respect to defence is a guide to the scope of executive power on defence also. Williams\textsuperscript{147} makes clear that Commonwealth executive power does not extend as far as Commonwealth legislative power, and certainly does not go beyond it.\textsuperscript{148} Williams does leave room for prerogative power to operate;\textsuperscript{149} so, if a prerogative to exercise martial law exists in Australian law, then, arguably, the Commonwealth may exercise it in cases of necessity. In doing so though, it could not go beyond the limits of its legislative power. The executive could not change the Constitution in such a situation, particularly by removing the jurisdiction of the courts, even if necessity might demand temporary and limited displacement of State or judicial power where such powers could not operate. This will be discussed below. What necessity requires is very difficult to define. Therefore, the limits of the Commonwealth’s legislative power with respect to defence is really the only guide to the limits of the exercise of the prerogative with respect to martial law. This calls for an examination of situations where the military forces of the Commonwealth have exercised civilian governmental functions.

Historically there have been two sets of circumstances since Federation when Australia has applied martial law. The first, as mentioned, is where Australian forces have taken over territories under foreign jurisdiction, the subject of Chapter 6. The second is when parts of Australia, or areas already under its jurisdiction, such as Papua and New Guinea, have

\begin{itemize}
  \item \textsuperscript{145} (1989) 166 CLR 518.
  \item \textsuperscript{146} Ibid 554–63.
  \item \textsuperscript{147} (2012) 248 CLR 156.
  \item \textsuperscript{148} Chapter 1 nn 111–19.
  \item \textsuperscript{149} Chapter 1 nn 133–8.
\end{itemize}
been under military control. The Commonwealth Government imposed military control, as it was termed, in the territories of New Guinea and Papua, as well as the Northern Territory and the northern parts of Western Australia and Queensland in February 1942 after the effective collapse of civilian administration in these places in the face of the first Japanese military attacks (see Map 1).  

Map 1. Area of the Territories of New Guinea and Papua under Military Control pursuant to the National Security (External Territories) Regulations 1942
Source: Created by Professor Stuart Kaye. © Cameron Moore

Nauru, then an Australian territory, went immediately from Australian civilian control to Japanese military occupation in August 1942. Upon the surrender of Japanese forces to Australian forces in September 1945, there appears to have been military control of the island until it came under Australian, British and New Zealand trusteeship in 1947.

150 Discussed below.
152 Ibid 4.
153 See Nauru Act 1965 (Cth) Preamble.
Importantly, the legal authority for military control in northern Australia, Papua and New Guinea derived from the National Security (Emergency Control) Regulations 1941 and the National Security (External Territories) Regulations 1942 respectively. The National Security (Emergency Control) Act 1939 (Cth), repealed in 1946, authorised both sets of regulations.\(^{154}\)

Whilst this makes the legal basis statutory rather than prerogative power, the legislation indicates some useful points about when and why

\(^{154}\) National Security Act 1946 (Cth) s 2.
martial law may be imposed and the extent of the authority potentially available to military authorities should prerogative power be the basis instead. Perhaps more important is the point that there was a preference for statutory over prerogative authority in these cases. Was it necessary? There are a number of obvious advantages in providing for such power under statute, including the uncertainty surrounding martial law in the authorities and among the leading writers discussed above, as well as the greater clarity and authority that legislation can have. In the case of the States, particularly, as opposed to the Territories, it possibly may also have been advantageous to rely directly on the power to legislate for defence in s 51(vi) of the Constitution. The Commonwealth would then have been able to argue that the Commonwealth legislation prevailed over State legislation by virtue of s 109 of the Constitution. Moreover, as this book argues, statutory power preserves the supremacy of the legislature over the executive.

Must martial law rely upon statute though? If Parliament does have the time to act, then it would seem that martial law should rely upon statute because it is less plausible to argue that necessity would justify reliance upon prerogative power. This is more consistent with the compromise between Parliament and the Crown of 1688 and the relationship between statute and prerogative discussed in Chapter 1. Perhaps more importantly, it reinforces the principle of military subordination to the civilian government by clearly stating the extent to which military commanders could assume civilian government functions. The need for military control of certain areas was clearly anticipated in the National Security (Emergency Control) Act in 1939. The National Security (Emergency Control) Regulations 1941 and the National Security (External Territories) Regulations 1942, through gazette notices, merely specified where and when military control was to have effect. When civilian administration did become ineffective in the places under question, it was a relatively straightforward matter of statutorily imposing military control via gazette notice. This provided greater clarity to the powers in question, which is more consistent with the principle of legality as well as reducing the risk to military personnel of incurring personal liability through exceeding uncertain powers. From this example, it would seem then that martial law should only apply by force of prerogative power in a place under Australian jurisdiction where the civilian administration unexpectedly becomes ineffective, and Parliament does not have time to enact suitable legislation. This would only be as
an alternative to there being no functioning government at all, with its associated risk of anarchy. This chapter will address such a situation in Darwin in February 1942 below.

B The Extent of the Power with Respect to Martial Law in Australia

1 The National Security (Emergency Control) Regulations 1941

The National Security (Emergency Control) Regulations 1941 are remarkably brief. The relevant operative provisions are worth reproducing:

5(1) The … officer … having the operational command of the Military Forces serving in that part [of Australia to which these Regulations apply] may do, or may cause or direct to be done, or may prohibit the doing of, any act or thing, as he thinks necessary for the purpose of meeting any emergency arising in that part or area out of the war or for the purpose of providing for the defence of that part or area.

(2) Without affecting the generality of the last preceding sub-regulation, the … officer … may make orders in relation to any of the purposes mentioned in that sub-regulation.

6. A person to whom an order or direction under these Regulations applies shall not contravene or fail to comply with the order or direction.

7. The Courts which, immediately prior to the commencement of these Regulations, had jurisdiction in any part of Australia to which these Regulations apply or in any area thereof may, subject to the provisions or any order made under these Regulations, continue to exercise their civil and criminal jurisdiction and to try and punish persons in respect of any offence committed in that part or area.

These regulations applied, at various times, to the Territory of Papua, the Territory of New Guinea, Queensland north of the latitude of 12° South, and Western Australia north of the latitude of 20° South and the entire Northern Territory.155 Notably, the Minister for the Army administered the regulations and there was no sense in which the Navy or Air Force

would exercise these powers.\textsuperscript{156} The current joint command arrangements of the ADF would suggest that this particular provision is, therefore, confined to its historical circumstances.

### 2 Limitations

The powers were clearly extraordinarily broad, combining executive power with what amounted to a legislative power, but with two limitations other than the obvious geographical application. The first is that, under reg 5, the powers had to be exercised for the purpose of meeting any emergency or providing for the defence of the area. This could still be very broad but left some room open for argument that a particular measure was not for such a purpose. For example, a matter of personal conscience such as religious affiliation would probably have been outside the scope of the power noting s 116 of the \textit{Constitution}.\textsuperscript{157}

The second limitation relates to the courts. Unlike the formulation of martial law as Dicey put it, \textquoteleft[T]he government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the courts\textquoteright,\textsuperscript{158} military control did not mean subjecting the general population to the jurisdiction of courts martial. Section 7 of the \textit{National Security Act 1939} itself made clear that regulations made under it could not authorise provision for the trial by court martial of any person not already subject to naval, military or air force discipline.\textsuperscript{159} This is consistent with it being beyond Commonwealth legislative power to infringe Chapter III of the \textit{Constitution}. It is not clear what should happen if the courts in a particular area could not operate due to the military situation. It is also not clear what the consequences were of making reg 7 subject to the provisions

\textsuperscript{156} \textit{National Security (Emergency Control) Regulations 1941} reg 2.

\textsuperscript{157} Although the High Court did find that some regulation of a religious organisation under the \textit{National Security (Subversive Associations) Regulations} would not be contrary to s 116 insofar as it involved subversive activity, while at the same time invalidating other parts of such regulations as contrary to s 116 insofar as they sought to regulate the advocacy of religious doctrine, in \textit{Adelaide Company of Jehovah’s Witnesses v Commonwealth} (1943) 67 CLR 116, 144 (Latham CJ), 156–7 (McTiernan J), 150 (Rich J, who found the regulations beyond the defence power in s 51 (vi) however), 154–5 (Starke J, who found the regulations beyond the power under the \textit{National Security Act 1939} (Cth)), 160 (Williams J, who found the regulations beyond the defence power in s 51 (vi)).

\textsuperscript{158} Dicey, above n 7, 291.

\textsuperscript{159} This section also effectively prohibited the imposition of compulsory military or industrial service by way of the regulations as well. This may have reflected the controversy surrounding conscription at the time, with Prime Minister Curtin facing strong dissent within his own Australian Labor Party over whether conscripts should be liable for overseas service or whether there should be conscription at all. See Peter Dennis, Jeffrey Grey, Ewan Morris and Robin Prior, \textit{The Oxford Companion to Australian Military History} (Oxford University Press, 2\textsuperscript{nd} ed, 2008) 156–7.
of any order made under the regulations. Presumably, the local military commander could not remove the jurisdiction of the courts but may have been able to regulate where and when the courts exercised that jurisdiction in a particular area.

If these limitations applied during Australia’s most extreme threat in 1942, then presumably they could only be exceeded where a threat exceeded that which existed in 1942. This may require the seat of government itself, together with the administration of the courts, to have been overrun before the law in Australia would recognise courts martial as an acceptable temporary substitute for the civilian courts, or to accept more than limited geographical application of martial law.

3 Papua and New Guinea in the Second World War

The most extensive exercise of martial law powers in the Second World War was by the Army’s Australian New Guinea Administrative Unit, which operated in both Papua and New Guinea between 1942 and 1946, when the final handover to civil administration occurred. According to the Commonwealth’s Commission of Inquiry into the Circumstances Relating to the Suspension of Civil Administration of the Territory of Papua in February 1942 by J V Barry KC (the ‘Barry Report’):

The Commandant [gave] his direction that the Administrator and the members of the Councils and the Judge should leave the territory … On 15th February, 1942, the Administrator and members of the Councils left by flying boat for Australia. The Judge had left the previous day. On 15th February the Commandant issued an order under which he assumed all governmental powers.160

The Report found that Major General Morris gave this order lawfully under the National Security (Emergency Control) Regulations 1941, which applied to the territories from 12 February 1942.161 The Territory of Papua issued its own gazette notice indicating the cessation of civilian administration.162

162 Barry Report, above n 160, 47, 48.
The effect on the exercise of judicial power in the territory was profound, as put by Alan Powell in his history of the Australian New Guinea Administrative Unit (ANGAU):

The District Officers also bore a greater judicial responsibility than in pre-war days. Under National Security (External Territories) Regulations [1942], Major General Morris suspended the judiciary systems of both Territories in February 1942 and, under his authority as senior officer of the military forces in New Guinea, transferred the jurisdiction of the Supreme Courts to District Officers with lesser judicial/magisterial powers to ADOs [Assistant District Officers] and magisterial rights to approved POs [Patrol Officers].

The National Security (External Territories) Regulations were not gazetted until April 1942 so this was more likely an example of the military commander regulating the operation of the courts under reg 7 of the National Security (Emergency Control) Regulations 1941.

As to transferring the jurisdiction of the two Supreme Courts to the various officers mentioned, the National Security (Emergency Control) Regulations 1941 did not provide for this. It may have been possible under the National Security (External Territories) Regulations 1942 insofar as those regulations suspended all of the civil administration in Papua and New Guinea, including the judges. These regulations also gave the External Territories Minister all powers exercisable under any law of either territory, other than the civil (as opposed to criminal) jurisdiction of the two territory Supreme Courts. The Minister acted through the General Officer Commanding. Either Major General Morris’ order was unlawful in respect of his powers to transfer the jurisdiction of the Supreme Courts, or, as seems more likely, he might actually have given the various district and patrol officers criminal, as opposed to civil, jurisdiction in accordance with the powers which the regulations granted to the General Officer Commanding.

This criminal jurisdiction was not petty. In responding to one incident of intertribal violence, Major W H H Thompson convicted 43 men for murder and 19 men for rape and handed down sentences of five

165 Ibid regs 21, 22.
166 Powell, above n 163, 107.
years each. It is important to note that ‘native courts’ effectively operated separately from the rest of the judicial system. The combining of executive and judicial power in travelling Army District and Patrol officers who held court in villages to resolve disputes, reminiscent of English justice in the time of William I, continued the previous practice of the civilian administration. Often, the officers were the same people, now with Army rank and uniforms. Whatever these peculiarities of the Territories though, Army officers exercised judicial power.

ANGAU’s administrative role was also very extensive. It ran postal services, native education, plantations and agricultural services, district stores, a marine section, hospitals and wider health care as well as radio communications. There was extensive labour recruitment, much of it involuntary. It did as much as, if not more than, the previous civil administrations in terms of governing the Territories. ANGAU’s displacement of civil government functions was total.

4 The Limits of Prerogative Power?

It is very important to note that the regulations applied to areas of States as well as Commonwealth Territories. The legislative power of the Commonwealth, in this case, purported to expand to the extent of displacing State government executive and legislative functions and regulating, if not displacing, State judicial functions. There does not appear to have been any challenge to this legislation in the High Court so there may have been a degree of acceptance that Commonwealth legislative power did extend this far when the defence of the nation was at stake. Importantly, in the 1945 case quoted at the beginning of this chapter, Gratwick v Johnson, the High Court did uphold a challenge to the National Security (Land Transport) Regulations as contrary to s 92 of the Constitution requiring freedom of intercourse among the States. There were also challenges to wartime regulations as infringing Chapter III of the Constitution. For example, Silk Bros Pty Ltd v State Electricity Commission of Victoria concerned the purported vesting of Commonwealth judicial

167 Ibid 111.
168 Ibid 116.
169 At the time, it was thought that Chapter III of the Constitution, requiring the separation of judicial power, did not apply to the territories, or at least the Territory of Papua, R v Bernacconi (1915) 19 CLR 629. For a discussion of cases which have moved away from this view, see Leslie Zines, ‘The Nature of the Commonwealth’ (1998) 20 Adelaide Law Review 83, 83–8.
170 Powell, above n 163, 111–13.
171 (1945) 70 CLR 1.
power in a Fair Rent Board composed of State officials under the *National Security (Landlord and Tenant) Regulations 1941*. 172 The High Court upheld the challenge to the regulations, made under the power to legislate for defence under s 51(vi), as attempting to confer judicial power contrary to Chapter III. 173 These cases not only reflect that there were challenges to the validity of extensive wartime regulatory powers but they also indicate that the High Court would not readily displace express constitutional limitations upon the defence power of the Commonwealth.

What does this mean for prerogative power within areas under Australian jurisdiction? On the basis that the Commonwealth’s executive power includes a prerogative to apply martial law when necessity demands it, then, using wartime legislation enacted under the defence power as a guide, if Parliament is unable to act in time, the prerogative would appear to extend to the imposition of very broad powers of military control.

This appears to be what occurred in Darwin in the days after the first Japanese raid on 19 February 1942. Justice Lowe gave a secret interim *Royal Commission Report on the Air Raids on Darwin* to the Commonwealth Cabinet on 9 March 1942. 174 He stated that civil order and administration completely collapsed immediately after the raid, with widespread panic and looting. The military commandant, therefore, took complete charge of Darwin from 21 February. 175 Even by the afternoon of 19 February some police believed that they were under military control through martial law. 176 The Town Major (so described) then governed the town, as well as organising the evacuation of women (and presumably children) and the accommodation of the remaining men in camps. 177

---

172 (1943) 67 CLR 1, 9, 10, 17 (Latham CJ, with whom the other justices agreed).
173 Wheeler argues that, despite High Court justices performing significant nonjudicial roles in wartime, even by the standards of the 1940s, judicial independence was widely considered to be a valued constitutional principle, in Fiona Wheeler, ‘Parachuting In: War and Extra-Judicial Activity by High Court Judges’ (2010) 38(3) *Federal Law Review* 485, 496–500.
175 Ibid 9.
176 Ibid 9.
177 Ibid 10.
Military control under *National Security (Emergency Control) Regulations 1941* did not take effect until gazetted on 28 February 1942.\(^{178}\) The hand of *Fortuna* seems to be apparent here.

This formalisation of military control, the lack of adverse comment in Justice Lowe’s report or in Cabinet, or any related litigation all point to necessity being seen as justifying the military’s assertion of martial law in this case. It is consistent with the view of Latham CJ on the maxim *salus populi suprema lex* in *Gratwick v Johnson* in 1945, as quoted at the beginning of this chapter.\(^{179}\) It is worth noting that the *Barry Report* stated that the basis for the exercise of martial law, so described, in Papua could only have been statutory in that case, although it acknowledges the possibility of circumstances ‘sufficient to justify the exercise of the prerogative’.\(^{180}\) The assertion of martial law in Darwin was an alternative to anarchy and so upheld lawful authority. It was not a usurpation of civilian authority because, in a local sense, there was none. The very temporary duration of the period before the *National Security (Emergency Control) Regulations* came into force did not offend the relationship between Parliament and the Crown. This assertion of martial law upheld constitutionalism because, if the military had done nothing instead, there would have been no constitutional authority at all.

The main limits in that situation in Darwin, or any future situation like it, would arguably be that the exercise of martial law powers must relate to the purpose of meeting any emergency or providing for the defence of the area, and they must be geographically confined to the area where civilian government has ceased to be effective. It would also appear that as long as there is the possibility of the courts being able to exercise their jurisdiction, the military cannot displace the judicial power, although it may regulate its exercise such as determining where and when courts could sit. Were the situation truly dire and there was no prospect of the courts being able to exercise jurisdiction, then possibly military tribunals may temporarily take their place but only to preserve matters, such as through remand or injunction proceedings, where necessity required it until the courts could proceed to provide a final determination. This could only be until the functioning of judicial power was restored. This is not a case of

---

179 (1945) 70 CLR 1, 11–12.
180 *Barry Report*, 47.
the ADF breaching the Constitution but rather taking limited measures justified by necessity in response to an aspect of the Constitution, in this case judicial power, ceasing to operate. It would also not be possible to effect an enduring change to the Constitution through the prerogative for martial law.  

IV Conclusion

At the time of writing this chapter, there is only the most remote possibility that martial law would become applicable in Australia. The only conceivable scenarios would be an actual invasion or the collapse of civilian government. While much of the case law and literature concerns martial law during insurrection or war, this book argues that, noting Prasad, the ADF could also exercise the prerogative with respect to martial law where civilian government has collapsed for other reasons. Prerogative power would appear to extend to the conduct of a broad range of governmental functions where Parliament could not act in time, and where justified by necessity. Such functions may include maintaining law and order, issuing local decrees and regulating the function of the courts. At its most extreme, martial law could possibly extend to assuming control of all civilian government functions. There would seem to be an extremely high threshold to overcome though before the ADF could assume judicial functions itself in places under Australian jurisdiction. The emergency legislation applicable in northern Australia and the Territories of New Guinea and Papua is instructive in this regard. It permitted extensive military control of civilian life although it did not authorise the conduct of courts martial in the place of civilian courts (noting that ‘native courts’ in New Guinea and Papua were not courts martial even if Army officers exercised judicial power through them). If an extreme emergency made it necessary, this legislation would be a guide to the extent to which the

181 As to the requirements of necessity, it may be that some of the debate about proportionality is relevant to assessing whether action is necessary. It is worth noting that proportionality is not seen as a doctrine of constitutional law in Australia and it usually only relates to legislative action, see Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 Melbourne University Law Review 449; Christopher Michaelsen, ‘Reforming Australia’s National Security Laws: The Case for a Proportionality-based Approach’ (2010) 29(1) University of Tasmania Law Review 31. Nonetheless, it may be that necessity could be informed by the test of whether measures are ‘appropriate and adapted’ to the purpose, Justice Susan Kiefel, ‘Proportionality: A Rule of Reason’ (2012) 23 Public Law Review 85, 91, quoting Deane J in Commonwealth v Tasmania (1983) 158 CLR 1 260, 88 (‘Tasmanian Dam Case’).
ADF could perform civilian government functions until the Parliament could pass appropriate legislation, or until it could restore normal civilian government. Where martial law is an alternative to no law at all, then it upholds the values of constitutional government.