Conor Gearty

No golden age: the deep origins and current utility of Western counter-terrorism policy

Book section

NO GOLDEN AGE

The Deep Origins and Current Utility of Western Counter-Terrorism Policy

CONOR GEARTY

Abstract

From the moment of their emergence, democracies everywhere have been alive to the importance of their survival. This institutionalised anxiety has meant that radical critiques of power differentials and wealth-inequality (which survive in all democracies) have been vulnerable to being cast as challenges not to injustice but to the integrity of democracy itself. This is the deep root of counter-terrorism law today, now not applied to a plausible threat from the radical left but rather to extreme criminal acts which, however heinous these might be, do not directly challenge the state. As inequality in democracies grows and opportunities for orthodox political change are reduced by the increasing power of money, so old style anti-radical laws are increasingly combined with contemporary terrorism laws to stifle extra-parliamentary dissent. This takes place through the deployment of political and legal devices the effect of which is to allow the continued appearance of democracy while reducing its egalitarian impact in practice.

Key words: terrorism; counter-terrorism; human rights; rule of law; civil liberties

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Introduction

In this chapter I am concerned with how democratic states have responded to the supposed

challenge posed to them, both individually and collectively, by terrorism.[1] My interest lies in

exploring how and why the language of counter-terrorism has become so ingrained in such societies

despite its apparent hostility to the values that democratic societies say they uphold, a mismatch

that is evident in the sorts of things that states feel able to do in the name of counter-terrorism –

arbitrary arrest; restrictions on speech; banning associations; even on occasion the torturing and

killing opponents at home and abroad. All of these (and more) sit uneasily with the principles of

representativeness, accountability, the rule of law and human rights that are supposed to be the

ethical basis of democratic society. Explanations which point to the need to balance 'liberty' and

'security' do not get us very far;[2] they could be said merely to beg further questions about how

much liberty pre-existed the security threat, what the nature of that threat is in fact, and why it

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[1] On which see among other works R. English, *Terrorism. How to Respond* (Oxford, Oxford University

Press, 2009); L. Richardson, *What Terrorists Want. Understanding the Terrorist Threat* (London, John

Murray, 2006).

[2] J. Waldron, *Torture, Terror and Trade-Offs. Philosophy for the White House* (Oxford, Oxford

University Press, 2010) is excellent, esp. (on this point) ch. 2.

should now be so readily assumed that improvement of the latter must necessarily be at the expense of the former. Declaring that the state must be entitled to defend the freedom of its people at (nearly) all costs is likewise a lazy argument, one designed to appeal not to reason but to a low common denominator of national solidarity; one of the oddest because so self-evidently contradictory features of such an approach is how relaxed it is about giving up the basic democratic freedoms whose vital importance is so frequently stressed and whose protection therefore requires, it is said, their (temporary? selective?) disapplication.[3]

The contention developed here will be that these arguments (and others) have been mustered to defend a deeper position. Counter-terrorism law and policy of the sort identified above have been successful in democratic countries because they have gone with the grain of certain important, pre-existing features within such societies, elements that have long been inimical to what the victory of democratic forms of government has appeared to entail. On this reading, counter-terrorism law and policy have been more deep-rooted than might first appear to be the case, not compatible with the prevailing democratic ethos but rather connecting strongly with powerful pre-democratic impulses that have survived (albeit in reduced form) into the democratic era. These forces are now (not solely but not least off the back of the 'terrorist threat') enjoying a sharp revival. To put the point more aggressively, the counter-terrorist drive has succeeded to the extent that it has because it has found a weakness in the health of democratic society, inserted itself into the space left by this opening, and once safely in place has grown exponentially, to the point where it now (it will be argued) challenges the very political system into which it has insinuated itself. To say this another way using

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[3] See M. Ignatieff, *The Lesser Evil. Political Ethics in an Age of Terror* (Edinburgh, Edinburgh University Press, 2004); B. Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (New Haven and London, Yale University Press, 2006).

a familiar metaphor: the democratic body politic has had within it from its inception a virus that has impeded the growth to full health of its society of members, and now – expanding of the back of the introduction of 'counter-terrorism' – this virus has reached the point where it is threatening more and more of the vital organs of the democratic corporeality. If it is successful, the body itself will change, may already be in the process of changing, from a creature called (however imperfectly) democratic to one that is more accurately described as 'neo-democratic', a state which for present purposes we can define as one that may be wearing egalitarian clothes, embracing human rights even, but which has in fact precious little democratic substance or universal respect for human dignity within.[4] This chapter says that where this has happened or is happening, it is because fear of the terrorism threat has fed a destructive urge within democracy which may always have been there (the argument demands that it has been), but to which the useful illusions of counter-terrorism have now given a new lease of life.

As we move into the substance of the argument, a word on definitions may now be thought necessary. There is no need for a great deal of detailed precision to drive the thesis forward. We are dealing with the conduct of states not individual actors, and as the title suggests, mainly (but as we shall see not solely) those located in the Global North, or West – it has been here that the idea of terrorism has first taken hold and begun to do its destructive work.[5] What is meant by 'democratic' can also for present purposes be stated quite simply, crudely even: it is a descriptive label met by a

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[4] For an elaboration of neo-democracy and its relationship with counter-terrorism, the rule of law and human rights, see C. A. Gearty, *Liberty and Security* (Cambridge, Polity Press, 2013).

[5] See G. Duncan, O. Lynch, G. Ramsay and A. M. S. Watson (eds), *State Terrorism and Human Rights. International Responses Since the End of the Cold War* (London and New York, Routledge, 2013). Also of interest as an indicator of how this view solidified after the attacks of 11 September 2001 is P. Berman, *Terror and Liberalism* (New York and London, W. W. Norton and Company, 2003).

country which has the rudiments of representative government, a functioning rule of law (overseen by an independent judiciary) and some dimension of respect for human dignity, manifested perhaps as a protection of human rights, perhaps as an ongoing guarantee of civil liberties, or possibly in some other way entirely.[6] Perfection is not demanded: some bona fide commitment to this sort of organisation of government, underpinned by reasonably free elections, is all that is required. To be 'democratic' therefore, it is on the analysis here not enough to have such freedoms on paper – some of the worst excesses of despotism are committed on citizens who 'enjoy' the very finest protection that mere words can guarantee. Such 'pseudo-democracies'[7] do not even try to deliver the substance of what their paper constitutions suggest, in contrast to the approach to democracy adopted by those states with which we are concerned, namely those that have some sense of democratic culture as well as having a democratic constitution. It will also be obvious that such democracies exist on a spectrum with levels of popular engagement in government, accountability and rights' protection varying from state to state, across the world certainly and also within the Global North itself.

Imperfect origins

To paraphrase Rousseau, democracies are born free but are everywhere in chains. No democratic society emerges fully formed from its past, freed entirely from the circumstances to which this new governmental shape is a reaction. Even those made afresh after defeat in war (such as Germany,

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[6] D. Held, *Models of Democracy,* 3rd edn (Cambridge, Polity Press, 2006).

[7] Belarus might be thought an extreme example - see its constitution at

http://www.belarus.net/costitut/constitution_e.htm (last accessed 19 September 2014). Note

Article One: 'The Republic of Belarus is a unitary, democratic, social state based on the rule of law.'

Italy and Japan) have the baggage of a terrible past to confront and somehow to manage.[8] There are democratic states that grow out of a successful anti-imperialist revolution, but even here elements of the *ancien regime* survive into the new era: Ireland might be thought to be one of these though naturally this situation is mainly encountered among states in the Global South, the location of most of the European states' imperialist activities. Developments in new democracies after 1989 have seen the re-emergence of nationalist tropes that had been silenced by totalitarian control for generations – silenced but not obliterated.[9] In other less turbulent places freedom has been hewn out of a pre-democratic past without any fundamental breach with the old order. The United Kingdom would be one example of such a state, the United States (whose 18th century revolution was not a democratic one) another. The shift to fully representative models of government can never automatically displace the power relations that precede such a move, however this move is brought about. There is something of a 'Catch 22' about the democratisation process: a society which declares itself immune to its history (even in the name of democracy) is bound quickly to repeat it as the past rushes to fill the vacuum so ambitiously but meaninglessly declared; or the new order explicitly respects the past in which case the influence of its power-holders subsists, despite revolutionary appearances.

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[8] See M. Mandel, 'A Brief History of the New Constitutionalism, or "How We Changed Everything so that Everything Would Remain the Same"', *Israeli Law Review,* 32 (1998), 250.

[9] G. Ekiert and D. Ziblatt, 'Democracy in Central and Eastern Europe One Hundred Years On', *East European Politics and Societies and Cultures*, 27 (1), 2013, 90-107. And see the disturbing article by Jan-Werner Müller, 'Eastern Europe Goes South. Disappearing Democracy in the EU's Newest Members', *Foreign Affairs* (93(2)) (March/April 2014) accessible at
http://www.foreignaffairs.com/articles/140736/jan-werner-mueller/eastern-europe-goes-south
(last accessed 19 September 2014).

So what is the old order that lingers on in opposition to the new, the virus in the democratic child that would do its utmost to hinder its growth, and of which (on the argument here) the counter-terrorism tendency has been able to make such use? However they come about, democratic societies tend to emerge out of circumstances in which severe levels of inequality have been the norm; indeed in some cases it has been the societal anger generated by such conditions of unfairness and injustice that has been the main driver of democratic change.   These deep inequalities and injustices are reflective of the power relations that preceded the democratic shift, and neither the dynamics productive of such inequality nor their privileged defenders disappear overnight: rather this perspective on truth becomes part of what democracy is henceforth understood to mean. Of course the depth of this resistance to justice varies from place to place, but it is invariably to be found in some shape or other. The virus is there from the start.

To add detail to the argument we need to turn to the particular. There are of course many democratic states with their own separate histories, pressures and tensions. Three such states have been responsible for driving the language of counter-terrorism deep into the democratic vernacular. All three are in different ways the poster-children of 20th century democracy, the places where freedom and liberty has been understood to have thrived while all about has been disorder and chaos. The example each has set has been followed by others: they are collectively the makers of the 'counter-terrorism' weather. Yet none of the three has been able to escape the past that each has inherited, the strains of injustice and unfairness that, persisting into the new democratic order, have taken on various defensive shapes of which the most recent – and potentially most virulent – is that of counter-terrorism. These are the United Kingdom, Israel and the United States. Let us consider each in turn before returning to our central argument and its implications for how we practice democracy today.

Taming democracy

Britain's great success has been to adapt an ancient constitution to meet the demand of its people for equality and democracy. True there has been violent disorder in the past but the shift to properly representative government has been mainly trouble-free. It has also occurred in a way which has never radically challenged the pre-existing status quo.[10] The wealthy have of course had to manage the effects of democracy but it has been regulation not confiscation that has been in the air. The continued ownership of land on a vast scale, rights of inheritance; private schooling, the purchase of privileged medical services – all have survived into, indeed thrived in, the democratic era.[11] The gap between the very rich and the rest, once narrowing, has begun in recent years once again to widen.[12]

It was war that has both produced democracy and at the same time provided the tools to protect the wealthy from its effect. The sacrifices made by all classes and by men and women alike in the Great War (1914-18) made the final push for equal representation impossible to resist. At the same time, the exigencies of that war produced a model for the control of radicalism that was to persist

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[10] For the details of the relationship between democracy and the rule of law in early 20th century Britain see K. D. Ewing and C. A. Gearty, *The Struggle for Civil Liberties. Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford, Oxford University Press, 2000).

[11] B. Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London, Pluto Press, 1984).

[12] The Equality Trust, *A Divided Britain: Inequality within and between UK Regions* (August 2014): http://www.equalitytrust.org.uk/news/divided-britain-inequality-within-and-between-uk-regions (last accessed 19 September 2014). See more generally R. Wilkinson and K. Pickett, *The Spirit Level. Why Equality is Better for Everyone* (London, Allen Lane, 2009).

into the democratic era and thereafter to make impossible (or at least extremely difficult) the jolting

of the democratic sensibility thus awoken into a truly social revolutionary state-of-being. The

Defence of the Realm Act 1914 was the source for a wide range of regulatory controls on conduct

(the defence of the realm regulations) which were legislated into permanent ordinary laws in the

years following the end of the conflict. These provisions were supported by a reading of the ancient

common law by the senior judiciary which was sympathetic to executive power in its effort to

manage popular unrest. [13] It was an almost completely democratic Britain that defeated the General

Strike of 1925, and it was first a Labour and then a national government of left and right (by now

fully representative) which prevented the despair caused by economic depression in the 1930s from

spinning out of control into a more fundamental attack on privileged institutions.[14]   True the

Second World War gave further impetus to equality and social justice, but the constraints on

radicalism so carefully constructed in the Inter-War years remained firmly in place, and operated to

stifle left-based criticism of the (democratic) status quo through the entire Cold War period.[15]

Democratic Britain was born and brought up in an atmosphere of war, hot, cold and imminent.

Why did the egalitarian zeal of mass suffrage buckle before the exercise of these war-inspired state

powers? In the 19th century it was taken for granted that democracy with its equal voting rights

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[13] The details of these war-time and post 1918 legislative and judicial interventions are in Ewing and

Gearty, n. 10 above, chs 2 - 4.

[14] The story is particularly illuminating when told from the perspective of the Communist Party: see
N. Branson, *History of the Communist Party of Great Britain, 1927-1941* (London, Lawrence and
Wishart, 1985).

[15] J. Mahoney, *Civil Liberties in Britain During the Cold War* (Cambridge, Cambridge University Press,

1989).

spelt disaster for the entrenched interests of what was, after all, a tiny elite.[16] Critical to the

democratically-based defence of privilege in post-1918 Britain was the plausibility of the argument

that far from delivering truer and better governance, the radical popular movements that needed to

be clamped down on put democracy itself at risk. The Communist transformation of Russia in 1917

and the support shown by the new Soviet authorities for world-wide communist revolution meant

that those who argued for greater equality within Britain could be relatively easily characterised as

'fifth columnists' intent not on the promotion of greater democracy at home but rather on driving

forward the destructive interests of a hostile power.[17] That these radicals were often supporters of

the Soviet Union, members of the domestic Communist party and even recipients of Russian money

made the link easier to make and thereafter to sustain. Those pushing for greater social equality

who were not associated with Moscow risked condemnation as fellow-travellers or even (quoting

Lenin) as 'useful idiots' acting unwittingly for the foreign enemy.[18]

The language of counter-terrorism was not used to underpin the growth and explain the need for

draconian police powers and their extensive deployment against radical political sentiment,[19] but

these state actions against a hostile other were in the same tradition. The key to the success of this

counter-revolutionary movement ('counter-terrorism') was plausibility: there had been a Soviet

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[16] H. Cunningham, *The Challenge of Democracy: Britain 1832-1918* (London, Longman, 2001).

[17] Many of the details are in Ewing and Gearty, n. 10 above, ch. 3.

[18] For eg see Report (Political and Economic) of the Committee to Collect Information on Russia
(Cmd 1240 (1921)).

[19] But interestingly the Report cited at n. 18 above did include a full translation of chapter 8 of
Trotsky's *Terrorism and Communism*, the whole of which was said to be 'worthy of study': cited in
Ewing and Gearty, n 10 above, p. 144.

revolution; there were Soviet agents and sympathisers intent on the transformation of Britain; they were building a case by pointing to deprivation and inequality as a way of undermining a culture that was only apparently democratic. Local efforts to preserve an indigenous tradition of radical protest and to grow from it a wider movement of popular democratic renewal simply got squeezed in the middle.

If pre-existing structures of wealth and inequality were one hangover from the past that survived into the democratic era under cover of the plausible fear of subversion, then Empire was another. As early as the late middle of the 19th century, the British prime minister Benjamin Disraeli had pointed the way by showing how working class men (not then women) could be sufficiently enthused by the imperial idea to vote for those who promoted it, however privileged these leaders might be or indifferent to the material needs of those doing the voting.[20] Empire, and afterwards the colonies and then later the Commonwealth (and later still 'humanitarian intervention') have long been the Achilles heel of British democracy, driver of conduct abroad entirely inimical to the emerging self-image of fairness and equality at home.[21] This truth could be avoided by choosing to focus not on the underlying injustice in the way the colonies were administered or foreign wars waged but rather by foregrounding the violent expressions of such alienation and calling it 'terrorism'. This early illusion of counter-terrorism prevented damaging cross-over from the way Britain thought it should be governed to the way it governed other places. It is evident in much of the establishment reaction

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[20] See R. Blake, *Disraeli* (London, Faber and Faber, 2012; first published 1966).

[21] On squaring the UK's evolving commitment to human rights with its colonial activities see A. W. B. Simpson, *Human Rights and the End of Empire* (Oxford, Oxford University Press, 2001).

to India in the 1930s for example and also in Kenya in the 1950s and Malaya (as it then was) during the late 1950s and early 1960s.[22]

A version of it was also, and relatively early, to be found at home, in the 'quasi-colonial' Northern Ireland where special laws to control nationalist alienation were put in place from the start, and further legislation aimed at Irish republican violence in Britain was enacted in the weeks before the Second World War, in August 1939. This was called the Prevention of Violence (Temporary Provisions) Act 1939[23] – no mention of 'counter-terrorism' in the title, as had also been the case in the emergency powers legislation enacted specifically by the devolved Northern Ireland parliament from 1922.[24] By the time that the UK as a whole once again confronted via legislation the threat posed to the nation's integrity by Republican violence – a threat that had survived the Second World

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[22] See P. Dixon, 'Hearts and Minds'? British Counter-Insurgency from Malaya to Iraq', *Journal of Strategic Studies,* 32(3) (2009), 358-381; J. Paget, *Counter-Insurgency Campaigning* (London, Faber and Faber, 1967); R. Thompson, *Defeating Communist Insurgency* (London, Chatto and Windus, 1967). There is a superb recent study of the whole subject: D. Porch, *Counterinsurgency. Exposing the Myths of the New Way of War* (Cambridge, Cambridge University Press, 2013).

[23] See D. Bonner, *Executive Measures, Terrorism and National security: have the rules of the game changed?* (Aldershot, Ashgate, 2007). O. G. Lomas, 'The Executive and the Anti-Terrorist Legislation of 1939', *Public Law* (1980), 16.

[24] L. K. Donohue, *Counter-terrorist Law and Emergency Powers in the United Kingdom, 1922-2000* (Dublin and Portland Oregon, Irish Academic Press, 2001); C. Campbell, Emergency Law in Ireland 1918-1925 (Oxford, Clarendon Press, 1994). More general and comparative but highly detailed and therefore illuminating is L. K. Donohue, *The Cost of CounterTerrorism. Power, Politics, and Liberty* (Cambridge and New York, Cambridge University Press, 2008).

War, further clampdowns in the 1950s and had now re-emerged off the back of civil disorder at the end of the 1960s – the legitimising language of choice had become that of terrorism. The Prevention of Terrorism (Temporary Provisions) Act 1974 followed a campaign of violence in Britain which had culminated in a devastating attack by the Irish Republican Army (IRA) on Birmingham, and this law was frequently re-enacted in expanded and ever more comprehensive form as it bedded down fully into law. Eventually, the new Labour administration of Tony Blair dropped the myth of this being a temporary measure, enacted a consolidated Terrorism Act in 2000. By then, and as a result of changes that had taken place as early as the 1980s, the legislation had been extended to embrace not just Northern Ireland related political violence but all such violence wherever it occurred in the world, and the 2000 Act completed the picture by extended counter-terrorism powers to such threats emanating from within Great Britain as well as Northern Ireland.[25]

This was a huge change. Counter-terrorism laws which had previously been deliberately restricted to a specific problem of politically-based violence in a particular part of the United Kingdom had become a tool for the resistance of subversion everywhere. The language of terrorism underpinning this statutory edifice of control had become so wide that it now embraced a spectrum of non-violent as well as violent activities and motivations that went beyond the traditionally political.[26] By 1989 the Soviet-inspired danger with which we began this section had of course lost its previous plausibility, but the state machinery which had been designed to counter it was simply shifted sideways to focus on this new emerging domestic and global 'terrorist' threat. Whereas during the Cold War the response to the threat of politically-motivated violence of a sort we think of as

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[25] C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation,* 2nd edn (Oxford, Oxford University Press, 2009) is comprehensive on the law.

[26] Terrorism Act 2001 s 1. *R v Gul* [2013] UKSC 64. See A. Greene, 'The Quest for a Satisfactory Definition of Terrorism: *R v Gul*', *Modern Law Review,* 77(5) (2014), 780-807.

'terrorist' had been largely the responsibility of the police, during the 1990s (ie the years immediately following the point at which it became impossible to argue any more that there was a Communist threat) the lead role in counter-terrorism was handed to the old anti-Communist organs of state, the intelligence services, in particular MI5.[27] Of course the police had long had an intelligence arm - Special Branch had itself been largely an early response to IRA violence.[28] But whereas the police were institutionally committed to the apprehension of suspected criminals, and their prosecution through the courts, the security apparatus that had been constructed during the Cold War had no such concerns with process and open justice: the defence of the state against enemies was its main focus, the outcome (the security of the state) mattering more than how this was achieved.[29]

On the eve of 11 September 2001, therefore, we can see that the UK had fully embraced the idea of a generic problem of 'terrorism' which may have had various shapes ('Irish' foreign; domestic) but all

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[27] See Security Service Act 1989 s 1. See the statement on counter-terrorism by the then Home Secretary Kenneth Clarke at HC Deb 08 May 1992 vol 207 cc297-306: http://hansard.millbanksystems.com/commons/1992/may/08/counter-terrorism (last accessed 19 September 2014).

[28] B. Porter, *The Origins of the Vigilant State* (Martlesham, Boydell and Brewer, 1987); R. Allason, *The Branch. A History of the Metropolitan Police Special Branch, 1883*-1983 (London, Secker and Warburg, 1983). A nice summary is B. Porter, 'Terrorism and the Victorians', *History Today*, 36(12) (1986): http://www.historytoday.com/bernard-porter/terrorism-and-victorians (last accessed 19 September 2014).

[29] L. Lustgarten and I. Leigh, *In from the Cold. National Security and Parliamentary Democracy* (Oxford, Oxford University Press, 1994).

of which it was said constituted both individually and collectively a threat to the integrity of the state.   The law and the security-practice it underpinned (increasingly law-based after the end of the Cold War[30]) found itself moving easily into a territory that, having been vacated by anti-Communism, was now a fertile breeding ground for anti-terrorism. The rhetoric of defending democracy was the same. Even before but certainly after 11 September 2001, the threat was usefully easier to demonstrate than it has been when Moscow had been the enemy: the occasional killing of an agent could hardly compete with the deadly impact of a terrorist spectacular, however sporadic such atrocities might be. The previous challenge of Communist subversion might be thought to have been objectively more serious, but the high level of violence involved in 'terrorism' tends (not unnaturally) to obscure the low threat to the integrity of state institutions so far as an appalled general public is concerned. And whereas the revolutionary left had many friends (and not a few spies) in powerful places, the same could not be said for those engaged in terrorist struggles. In tandem with this internal face, 'counter-terrorism' also quickly developed an external aspect, becoming the explanation for military actions abroad which were redolent of times past, albeit now badged in a 'counter-terrorist' or 'humanitarian' vernacular. At the end of the first decade of the 21st century, with counter-terrorism clampdowns at home and wars against terrorist being fought around the globe, it was not obvious that much had changed since the mid 19th century. In the post 11 September era Britain's early forays into counter-terrorism law stopped being embarrassing and short-term and grew instead into laws to be proud of and emulated elsewhere, a fact to which contemporary comparative studies of counter-terrorism laws bear eloquent testimony.[31]

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[30] Not just the Security Service Act mentioned above but the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000.

[31] V. V. Ramraj and A. K. Thiruvengadam (eds), *Emergency Powers in Asia. Exploring the Limits of Legality* (Cambridge, Cambridge University Press, 2010); K. Roach, *The 9/11 Effect. Comparative*

How did the language of terrorism come to so permeate the legislative and political responses of a state as confidently democratic as Britain appeared to be? Its first appearance in law in 1974 and the subsequent embedding (and embracing of all local and global violent subversion) that has been briefly described above reflects a shift in the pattern of international relations which took place at the end of the 1960s and early 1970s. Understanding how this happened is central to the underlying question posed in this essay about how democratic states have come to allow the growth within them of the strong anti-democratic sentiment that we have seen recently, and which have flourished as the Cold War's traditional enemies have receded. This takes us to our second local study.

Militarised Democracy

The difficulty facing the state of Israel has always been how to reconcile its birth in violence, and the conflict in which it has ever since been submerged, with the ideal of liberal democracy to which it aspires and to which it is strongly committed.[32] The very shape of the sovereign entity depends on an expansion beyond the designated UN borders of 1948 that occurred at its inception. This was later followed by further growth, albeit this time into territories occupied by rather than annexed to

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Counter-Terrorism (Cambridge, Cambridge University Press, 2011); V. V. Ramraj, M. Hor, K. Roach and G. Williams, *Global Anti-Terrorism Law and Policy,* 2nd edn (Cambridge, Cambridge University Press, 2012).

[32] J. L. Gelvin, *The Israel-Palestine Conflict. One Hundred Years of* War, 3rd edn (Cambridge, Cambridge University Press, 2014. Compelling (albeit from the Israeli perspective strongly disputed) histories include I. Pappe, *The Ethnic Cleansing of Palestine* (Oxford, One World, 2006); N. Chomsky, *The Fateful Triangle. The United States, Israel and the Palestinians* (London and Sydney, Pluto Press, 1983). See also D. Hirst, *The Gun and the Olive Branch: The Roots of Violence in the Middle East,* 2nd edn (London, Faber and Faber, 1984).

the state. There have been wars (1948; 1967; 1973), invasions (eg into Lebanon in 1978 and again in 1982) and seemingly countless forays into the parts of Palestine seized after 1967. Civil unrest of a sort more associated with colonial rebellion than democratic disorder has regularly needed to be quelled both within and contiguously to the state. Like Northern Ireland before it, emergency laws have been part of the state's framework of legislation from the very beginning.[33] And yet Israel has been able throughout to present itself as a beacon of freedom in an illiberal region, what was earlier regarded as a 'poster-child' of democracy.[34] How has this been achieved?

Clearly Israel has always had two audiences, domestic and international. So far as the first is concerned, the story has been an easy one to tell, since only the supporters of the state within Israel are those at whom it has been directed: this is the well-known narrative of a brave small nation committed to freedom surrounded by authoritarian states dedicated to its destruction, with a suspect community within (the Palestinians) some of whom would be more than happy to play willing executioner.

The international audience has been harder to crack. Even after 1948 there was disquiet about the appropriation of territory in defiance of the relevant UN resolution. After 1967, the analogy with colonialism appeared unavoidable: here were vast tracts of land occupied by indigenous communities upon whom was imposed an Israeli military order. In due course there arrived waves

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[33] Drawing as Ireland also did on pre-existing British laws.

[34] Of the large number of books on terrorism which assume such an evaluation see as typical examples B. Netanyahu, *Fighting Terrorism. How Democracies Can Defeat Domestic and International Terrorists* (London, Allison and Busby, 1996) and B. Netanyahu (ed), *Terrorism: How the West Can Win* (London, Weidenfeld and Nicolson, 1986). Cf E. W. Said and C. Hitchens, *Blaming the Victims. Spurious Scholarship and the Palestinian Question*, 2nd edn (London, Verso, 2001).

of Jewish settlors whose quality of life has been as reminiscent of colonial settlors everywhere as it has been removed from the grim circumstances of the Palestinians around them, now either living in vastly reduced circumstances in the locality of the settlements or expelled to refugee camps further afield.[35] We should recall that in the 1950s and 1960s, and despite the best efforts of (for example) the British authorities as noted above, there was growing acceptance of the right of a people to self-determination, and by the late 1960s many leaders of new nations had achieved their peoples' right through the use of political violence – perhaps not viewed as unequivocally legitimate when it had occurred but nevertheless more often than not seen in retrospect (with the benefit of hindsight it is true) as, at the very least, excusable.[36] The Palestinian movement never quiet pulled off this transformation into a guerrilla force that the times demanded: the Israeli authorities were harsh and also effective, and the state's continuously proclaimed democratic commitments continued (even after 1967) to make it attractive to Europeans and Americans alike (even among those not committed to a Jewish homeland in principle and whatever the cost).

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[35] There is basic but useful information at the web site of the United Nations Relief and Works Agency for Palestine Refugees in the Near East: http://www.unrwa.org/palestine-refugees (last accessed 19 September 2014).

[36] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, agreed in 1966, share a first article declaring the right of peoples to self-determination: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx and http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx respectively (last accessed 19 September 2014).

At exactly this time three separate developments transformed attitudes to politically motivated subversive/insurgent political violence in the West.[37] First, there emerged from South America, the notion of the 'urban guerrilla', a fighter (for freedom; justice; liberation) who took on the state in the cities, and whose definition of the enemy (and therefore whom it was permissible to attack) expanded as time went on, beginning with the army and the police and moving swiftly on to bankers, large property-holders, and eventually all those with what was decided to be disproportionate wealth. Such thinking moved into western Europe in the late 1960s, influencing a small number of radical left-wing in, for example, Germany, Italy, Belgium and the United Kingdom,[38] and also (in due course) the United States. The violence of these groups (the Red Army Faction; the Red Brigades; the CCC; the Angry Brigade; the Weather Underground) was relatively trivial[39] but its impact on liberal democratic society was disproportionately severe: political violence was supposed to happen in other places, a thing read about in newspapers but not experienced (or potentially experienced) for oneself.

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[37] The ground is well covered in P. Wilkinson, *Terrorism and the Liberal State*, 2nd edn (Basingstoke, Macmillan, 1986). See also A. Guelke, *The New Age of Terrorism and the International Political System* (London, IB Tauris, 1995) and C. A. Gearty, *Terror* (London, Faber and Faber, 1991), chs. 3, 7 and 8.

[38] A. Vercher, *Terrorism in Europe. An International Comparative Legal Analysis* (Oxford, Clarendon Press, 1992). A. Jamieson, *The Heart Attacked. Terrorism and Conflict in the Italian State* (London, Marion Boyars, 1989)

[39] Dealing with one specific example but in some ways representative is H. J. Horchem, 'The Decline of the Red Army Faction', *Terrorism and Political Violence,* 3(2) (1991), 61-74.

The same was true of colonial violence, yet a variant of this also began to figure in western society at this time, reflected in the growing violence of ETA in Basque Spain, the IRA in Northern Ireland, the FALN in Corsica, Canada (the FLQ) among others - even the United States was not exempt with some of the more determined Puerto Ricans doing their muscular bit for a freedom it was not obvious many of their people craved.[40] Here was the second of the three developments referred to above, which together with the first put a fear of political violence onto the domestic agenda of western states for the first time. And then thirdly there was of course Palestinian violence, not explicitly the work of Yassir Arafat's mainstream Palestinian Liberation Army (PLO) but not obviously at far remove from the organisation either – the hijacking of aircraft; the gun and bomb attacks on passengers at airports; the hijacking of the Achille Lauro;[41] and (most infamously of all) the brutal assault on the Israeli team at the Munich Olympics in 1972.

In the 1970s, and assisted by this wave of often shocking activity by groups not implausibly associated with the wider Palestinian resistance, the Israeli authorities were able to recast their opponents as terrorists rather than guerrillas, as (vicious; psychopathic) murderers not (principled) freedom fighters.[42] It was out of this mix that the idea of international terrorism emerged, a contagion of irrational violence aimed at the innocent that could break out in different places and

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[40] P. Wilkinson and A. M. Stewart, *Contemporary Research on Terrorism* (Aberdeen, Aberdeen University Press, 1987) is a voluminous snapshot of the global focus of terrorism studies in the mid 1980s.

[41] A. Cassese, *Terrorism, Politics and Law. The* Achille Lauro *Affair* (Cambridge, Polity Press, 1989).

[42] See the books by Netanyahu n 34 above. Other volumes focused on particularly fanatical Palestinian or Palestinian-supporting 'terrorists', for eg Y. Melman, *The Master Terrorist. The True Story Behind Abu Nidal* (London, Sidgwick and Jackson, 1987).

change shape at will but which was at bottom all part of the same global problem and therefore (crucially) not linked to place or particular circumstances.[43] Here was the marked break with the previous, locationally-sensitive, discourse of colonialism and guerrilla resistance. The connection it made between groups across the world was largely spurious[44] but the negative effect it had on insurgents caught by the label was immense: being a terrorist was not something to be proud off; it was a description at all costs to avoid.

This new terrorism discourse proved invaluable to Israel in explaining itself not only to its own people (already, increasingly on board, particularly after the suicide bombings used in a later stage in the conflict[45]) but to the wider world as well. It resolved the liberty versus security dilemma to the satisfaction of many, not the least being those with power in Europe and the US, already sympathetic to Israel as we have seen, and now able to explain to themselves that that state's aggression was justifiable 'counter-terrorism' rather than old-fashioned colonial occupation, part of what all states had to do today rather than what colonial powers had been doing in the past in their

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[43] B. Netanyahu (ed), *International Terrorism. Challenge and Response* (Jerusalem, Transaction Publishers, 1981 and 1989); W. Gutteridge (ed), *The New Terrorism* (London, Mansell Publishing Limited, 1986); N. C. Livingstone, *The War Against Terrorism* (Lexington, Lexington, 1982).

[44] E. Herman and G. O'Sullivan, *The 'Terrorism' Industry. The Experts and Institutions that Shape our View of Terror* (New York, Pantheon Books, 1989); E. Said, 'Identity, Negation and Violence', *New Left Review,* 171 (1988), 46-60. More recent but in a similar critical tradition is R. Jackson, 'Constructing Enemies: "Islamic Terrorism" in Political and Academic Discourse', *Government and Opposition*, 42(3) (2007) 394-426. And see *Critical Studies on Terrorism* (Abingdon, Taylor and Francis) for articles that cut against the orthodox grain discussed in the text.

[45] R, Pape, *Dying to Win. The Strategic Logic of Suicide Terrorism* (New York, Random House, 2006).

failed efforts to preserve their empires. Inevitably, this new language was also useful in the (then

still continuing) Cold War, with linkages being made between the Soviet Union on the one hand and,

on the other, various of the terrorist groups to which it was alleged the Kremlin gave succour and

support.[46] This was mainly a foreign policy bonus, however.[47] While it is true that some states

caught up in counter-terrorism were able to make reasonable credible arguments that the 'enemy

within' was Communist driven – South Africa comes immediately to mind[48] – this was not plausibly

the case insofar as colonial style conflict in Ireland or Spain was concerned. Nor was it believable

that, for all their Moscow links and sympathies, the radicals behind the likes of the Red Army Faction

and the Red Brigades were fifth columnists of the dedicated quality of the local Communist parties

of the inter-war period, or that they were as supported by Moscow as these comrades had been.[49]

This takes us to an important difference in the nature of the challenges to power in the democratic

era as between, on the one hand, domestically-based resistance to inequality and injustice in the

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[46] Most notoriously C. Sterling, *The Terror Network: The Secret War of International Terrorism*
(London, Weidenfeld and Nicolson, 1981).

[47] Exemplified by US DEFENCE DEPARTMENT, *Terrorist Group Profiles* (Washington, US Government
Printing Office, 1988).

[48] And the African National Congress (ANC) in South Africa does make its appearance in *Terrorist
Group Profiles*, n. 47 above.

[49] There were clearly links but perhaps not as focused and organised as many believe, for eg the
dramatic assumptions in N. Lockwood, 'How the Soviet Union Transformed Terrorism', *The Atlantic*
23 December 2011: http://www.theatlantic.com/international/archive/2011/12/how-the-soviet-
union-transformed-terrorism/250433/ (last accessed 19 September 2014).

Inter-War and Cold War periods (already discussed in the British context) and, on the other, the various kinds of terrorist assaults that have afflicted the West from the late 1960s. These latter groups have had no seriously realisable revolutionary agenda and nor has it been possible with any conviction to describe them as supported by a foreign power intent on transforming domestic power structures in any way, and certainly not to the disadvantage of those whose wealth and privilege has survived relatively unscathed into the democratic era. It was noted earlier that a terrorist atrocity tends to crowd out any discussion of the genuine nature of the threat posed by its occurrence; being noisier than the old Communist subversion does not make it more serious, but (as we have already stated in the British context) that is a difficult position to adopt in the face of its sometimes gruesomely violent impact. The large contribution of Israel to our subject has been the generalisation of violent-based assaults on particular states by their weak opponents into a global challenge ('terrorism' and 'international terrorism' and 'state-sponsored' terrorism) to the liberal democratic order itself. The United States was a keen participant in this new discourse, particularly under the Reagan and Bush administrations in the 1980s.[50] But it was that country's reaction to the attacks on it on 11 September 2001 that gave our subject the impetus that it now has - never dormant, of the back of this reaction to Al-Qaida, the anti-democratic virus has deepened its hostile grip on the liberal democratic polity.

Imperialist Democracy

Like the United Kingdom, democracy gradually insinuated itself into the American political system in a way that did not immediately challenge pre-existing power structures. Like the UK too, support for controlling radical opposition to ongoing inequality and unfairness was secured and fuelled by fear: fear of a Soviet-inspired domestic political agenda that might have talked about greater fairness and better democracy but was intent in truth on the transformation of American society along Soviet

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[50] See nn 46 and 47 above.

lines. The Red Scare after the First World War was driven by this, as was what has come to be known as McCarthyism after the 1939-45 conflict.[51] It was not absurd for those whose disproportionate prosperity left them open to the greatest risk of revolution to argue that support for radical change and greater equality would in fact led to just such an inevitably chaotic (and for many terrifying) outcome: Russia in 1917 and Soviet aggression in 1945-8 were recent memories or current facts and Moscow's power was still many decades away from the collapse of 1989. As in Britain, radical social democratic critiques of the status quo got squeezed between these larger foes: even the US's much applauded guarantee of free speech (in its constitution's famed first amendment) could not deliver such dissidents much room to operate.[52] Unlike Britain however no trade union based political party ever secured a strong enough foothold in the body politic to protect organised labour from being swept into irrelevance under cover of this fear of the Communist threat – the closest the country came to this was the Roosevelt new deal Democratic party of the 1930s but even this was always an uneasy alliance between northern and southern states on the one hand and Tammany Hall and privilege on the other.[53]

Democracy in America has not needed the 'war on terror' to stop looking dangerous to the privileged. Narratives of freedom, liberty and opportunity for all dominate a political agenda which is in reality now almost entirely throttled by the power of money, in a way that has been sanctified by

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[51] S. Walker, *In Defence of American Liberties,* 2nd edn (Carbondale, Illinois, Southern Illinois University Press, 1999).

[52] Walker n 51 above. Perhaps the most notorious of the many cases upholding restrictions on radical speech is *Dennis v US* 341 US 494 (1951), essentially legitimising the Senator McCarthy-led assault on left wing political comment.

[53] J. E. Smith's compelling biography *FDR* (New York, Random House, 2008) has the details.

successive decisions of the country's Supreme Court.[54] Far from being threatened by the

disappearance of its enemy in 1989, America's corporate democracy has taken to the new

opportunities for aggrandisement offered by the end of the Cold War without fear or (it would

seem) even a residual sense of guilt or anxiety about those who are (increasingly) being left behind.

US commitments to counter-terrorism, therefore, have not needed to be deployed to prevent an

upsurge in mainstream political activity: its main impact domestically in the US has been as a

mechanism for aggressive action against suspect immigrants[55] and as a coercive means of

suffocating discussion of Israel's conduct in the Middle-East, punishing those who wander even a

little from 'Israel-at-all-costs' orthodoxy.[56]

We need to look elsewhere to find the more general utility of this language, and as with Britain

during the 1930s through 1950s, we find it in imperialism. US control of territory outside its

jurisdiction has only rarely been colonial in the traditional sense of occupation supported by

administration by the external power. It has generally operated by one remove, via local leaders

who are in theory free but in reality controlled by US interests. It has been a system that has worked

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[54] Most recently and damagingly *Citizens United v Federal Election Commission* 558 US - (2010)

accessible at http://www.supremecourt.gov/opinions/09pdf/08-205.pdf (last accessed 19

September 2014).

[55] M. Welch, *Scapegoats of September 11th: Hate Crimes and State Crimes in the War on Terror* (New Brunswick, New Jersey & London, Rutgers 2006).

[56] For a recent depressing example see 'Professor Fired for Israel Criticism Urges University of Illinois

to Reinstate Him' *Guardian* 9 September 2014:

http://www.theguardian.com/education/2014/sep/09/professor-israel-criticism-twitter-university-illinois (last accessed 19 September 2014). A good general treatment is I. Cram, *Terror and the War on Dissent. Freedom of Expression in the Age of Al-Qaeda* (Berlin, Springer, 2009).

well on the whole, allowing the US to believe itself the exceptional defender of democracy while its own interests have been carefully disguised (not least from itself). As with Britain when its power began to fade away after the Second World War, challenges to US authority have tended to be characterised by it as terrorist threats, and its own military action abroad explained as 'counter-terrorism'. Particularly hostile governments have found themselves being designated leaders of 'terrorist states'.[57] The main theatre has been the Levant. The defeat of American interests that occurred in the Iranian revolution of 1979 led to concerns about 'Islamic fundamentalism' which were then fuelled by Hezbollah's damaging actions in Lebanon, in particular the car bombs that drove American and French troops from Beirut in 1983.[58] As anxieties about the Cold War weakened in the late 1980s, and ended altogether in 1989, so a concern about the 'new terrorism' of radical Islam found itself drifting up the agenda of US foreign policy makers. There were occasional forays by such subversive militants into the US itself, but the issue remained largely a matter of external relations – frequently linked to Israeli interests (as described above) but also extending to descriptions of other conflicts in which the US has been either directly or indirectly involved. The attacks of 11 September 2001 brought this hitherto distant language of terrorism and counter-terrorism directly to the 'homeland', and led to a clampdown not only on the far enemy abroad but those perceived to be its supporters at home. The rhetoric of freedom and democracy was deployed to justify the 'necessary evil' required (it was said) to ensure the Republic's survival.[59] As in earlier

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[57] For more details on the argument that follows, see C. A. Gearty, 'Human Rights in an Age of Counter-Terrorism', in C. Miller (ed), '*War on Terror'* (Manchester, Manchester University Press, 2006), ch 3. There is an interesting response by Sandra Fredman at 99 - 104.

[58] M. Levitt, *Hezbollah. The Global Footprint of Lebanon's Party of God* (Washington DC, Georgetown University Press, 2013) ch 2.

[59] Ignatieff, n 3 above.

decades, though, the target here were those critical of or suspected of being estranged from the United States's foreign commitments. There was no need to redeploy to curb domestic dissent since (as already noted) this had already been largely obliterated (at least from institutional politics).

The Enemy Within

Until the attacks on Washington and New York by Al-Qaida in 2001, the 'terrorism' threat posed to liberal democratic states did not enjoy anything like the level of credibility that had accompanied the fear of Communism during the Inter-War and then the early Cold War periods. True as we have seen, the term itself had begun to be deployed in a generic way during the early 1970s, as a global rather than series of specific problems, but (Israel apart) its worst practitioners tended to be faraway, caught up in disputes about the reach of Western/US power and therefore not particularly interested in subverting the structures of power at home. The one exception to this, the violence of separatist movements like ETA and the IRA was (despite occasional suggestions otherwise) largely driven by the need to own bits of land, not transform the political structures on them. The 11 September attacks, and the reaction to them in the United Nations and across the democratic world, propelled to centre stage new frameworks of laws for the control of violent domestic dissent, focused it is true on Al-Qaida and Al-Qaida-related militancy but capable of being deployed against other groups and individuals deemed subversive as well The United States example is well known: the assertion by the President of commander-in-chief powers to wage a new 'war on terror'; the deployment of legal precedents from previous eras of war to justify indefinite detention without trial; the use of torture and other forms of degrading treatment against suspects; the covert surveillance of Americans as well as foreigners under the same supposed powers; more recently the emergence of an asserted legal right to kill citizens and non-citizens alike, usually (but from the logic

of the position not necessarily) when they are outside the jurisdiction.[60] Off the back of the same

perceived threat, the United Kingdom introduced measures such as the indefinite detention of

suspected international terrorists in 2001 and when this was challenged by its highest judicial

authority a system of coercive administrative control outside the criminal law, and also the

enactment of many new terrorism offences, the enhancing of police and security powers to deal

with the terrorism threat, and much else besides.[61] Where the US and Britain have gone, others

have tended to follow. The first decade of the 21st century saw the embedding of such legislation

and policy across not only the Global North but much of the South as well.[62]

We may note three characteristics of such laws as we move to our concluding remarks. First they

are now on the whole permanent. The old idea of terrorism producing a special challenge requiring a

draconian but time-limited response has been replaced by a new sense of counter-terrorism laws

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[60] The literature is of course vast: see J. J. Paust, *Beyond the Law. The Bush Administration's Unlawful Responses in the 'War' on Terror* (Cambridge, Cambridge University Press, 2007); D. Cole and J. Lobel, *Less Safe, Less Free. Why America is Losing the War on Terror* (New York and London, The New Press, 2007); S. Holmes, *The Matador's Cape. America's Reckless Response to Terror* (Cambridge, Cambridge University Press, 2007); M. Welch, *Crimes of Power and States of Impunity. The US Response to Terror* (New Brunswick, New Jersey and London, Rutgers University Press, 2009); J. Bravin, *The Terror Courts* (New Haven, Yale University Press, 2013). For an international perspective see the International Commission of Jurists, *Assessing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva, International Commission of Jurists, 2009).

[61] Walker, n 25 has the details.

[62] The texts at n 31 have many of the necessary details on world-wide terrorism legislation.

being available to the state to assist it in its 'war' on terror, an endless conflict not least because the enemy (not being a state) cannot surrender and even if it could new ones would be quickly found to replace it.[63] Second the definitions of 'terrorism' are generally very broad, going beyond violence potentially to embrace conduct which is at worst on the periphery of such violence, at best merely the robust exercise of our civil liberties. The UK case of *R v Gul*[64] is instructive here, with Britain's Supreme Court expressing deep misgivings about how wide the UK definition of terrorism is, and how much discretionary power this gives to the prosecuting authorities. Thirdly as the laws on terrorism have bedded down they have tended to attract arrays of procedural safeguards which may be thought beneficially to have served as compensations for the lack of the sort of safeguards against state abuse that are thought essential to the criminal process, but which have also served to embed further into legal discourse procedures which only a very few years ago would have been thought unconscionable from the liberal rule of law perspective: the exceptional does quickly become the norm.[65]

How does this all potentially affect the health of the democratic polity itself, the claim with which we commenced this discussion? True the 'terrorist threat' is rarely directed at conduct aimed at the transformation of liberal democracy into a different system, as had been the aim of communists and socialists of earlier eras: even the most robust hawks hesitate to argue that a western Caliphate is around the corner. The laws and procedures created off the back of the terrorist threat are however not only (as we have already noted) of a permanent but also of a general nature: their reach is theoretically into the whole of society, their capacity for the inhibition of political discussion

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[63] T. Becker, *Terrorism and the State. Rethinking the Rules of State Responsibility* (Oxford and Portland Oregon, 2006).

[64] See n 26 above.

[65] Gearty, n. 4 above.

potentially deep. The old laws from the anti-communist eras of the past also remain largely in place

in all Western states; their most useful work in controlling radical speech may be in the past but

their utility in curbing unacceptable political activism remains high. Following the capitalist crises

sparked off by the world-wide financial collapse of 2008, we have seen the imposition of 'austerity'

policies across Europe with a consequent plunge in the living standards of many, and in the

prospects of the young in particular. Meanwhile the wealth of the few soars: never has democracy

been more gentle or unthreatening.[66] Resistance has been intense and widespread, but it no longer

has the ideological force of the Communist alternative. It tends to be expressed through

demonstrations, sit-ins, occupations, efforts at direct democracy designed to circumvent the blocked

challenges of conventional political discourse. Such assertions of citizen-power fall foul not only of

the old laws designed to deal with past left-wing radicals but also now of the new terrorism laws.[67]

The virus is growing to such an extent that the only form of dissent permitted may soon be that

taking place in orthodox political assemblies which have already doomed themselves to irrelevance

by their submission to money and power.   If and when we get to that point, it will be time to

acknowledge that democracy, always imperfect, virus-infected from the start, has finally died. Its

successor, neo-democracy, will show all the signs and symbols of democracy – elections; human

rights protection; equality laws – but the rich will be getting richer and richer.

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[66] T. Picketty, *Capital in the Twenty-First Century* (Cambridge, Massachusetts, The Belknap Press of

Harvard University Press, 2014).

[67] C. A. Gearty, 'Terrorism and Human Rights' *Government and Opposition*, 42(3) (2007) 340-362;

Campaign against Criminalising Communities (CAMPACC), *A Permanent State of Terror* (London,

CAMPACC in association with Index on Censorship, 2003).