

Terrorism: Political, Not Legal

The introduction of a series of legislation generally known as ‘terrorism laws’ by the lawmakers of common law countries has received much critical attention in both the media and learned literature. The ostensible justification given by the partisans of these laws is the new security environment which the events of September 11, 2001 have made apparent. They stress the need to take effective measures to deal with new security risks, even if it means curtailing certain marginal freedoms. I say ‘marginal’ because the rights in question are exercised only by a small minority, comprised of community, human rights and political activists; and hence their abrogation or curtailment has a concrete bearing only on their lives. The critics of the measures, on the other hand, view the new security laws as further erosion of legal protection of political dissent. Law enforcement and security agencies already have the necessary legal tools to deal with every conceivable terrorist act, such as bombing, large-scale destruction of property, kidnapping, assassination, etc. The new laws are disproportionate to risks soberly assessed, create legal inequality, endanger civil liberties and might be used to criminalize or otherwise punish political dissent, and give judicially unreviewable and self-serving power to security agencies. In effect, they make the use of protest rights less easily available and more costly.

These legal concerns have been elaborated by legal experts in various contexts and venues. Generally speaking, what emerges from these elaborations is that terrorism laws both in spirit and in letter go against the ‘rule of law’ as understood in common law and liberal legal traditions. In these traditions, law is not a command (whatsoever) issued by a ruler who has the power to impose punitive sanctions (whatsoever) for failure to comply. The rule of law regime is not indifferent to the quality of rules or regulations issued as the law. The rule-of-law principle imposes limits on what can be enacted as law. These limits pertain, for example, to the principles of liberal justice system. Although the reference of the rule of law is wider than the justice system, the liberal administration of law constitutes the cornerstone of the rule-of-law regime. The judicial meaning of the rule of law fundamentally relates to due process procedures and protections. Among these are the ban on arbitrary search and seizure, the right to a fair trial and all this implies, and perhaps even the right to reasonably stable laws. The word ‘arbitrary’ is understood to mean, at least, ‘unchecked’ and ‘unreasonable’, where both of these latter refer to liberal legal administration practices. In this perspective, the US Vice President Cheney’s assertion that ‘a terrorist does not deserve’ due process rights is an extremely disturbing position, both in its manifest meaning and in its implications and consequences when placed, for example, in the context of the US President’s military order of November 14, 2001, a self-authorized proclamation of ‘a national emergency... for national defense purposes’. The danger is the establishment of a secret police state for all intents and purposes. The irrepressible core of a liberal-democratic regime is the legal protection of political opposition and dissent. If this institution is scrapped, be it through securing the complicity of the majority, democracy will become an empty shell, fit only for sheep, in Tocqueville’s provocative words. The November 14 military order provides for secret arrest and indefinite detention with no access to legal counsel of persons suspected of being terrorists or of having terrorist links, and not just those arrested in combat. It applies to ‘any other non-citizen’ when ‘it is in the interest of the United States that such an individual be subjected to this order’ (s 2:A(2)). Legislative or executive enactment of illiberal measures, such as arbitrary arrest or criminalization of certain civil-disobedience acts, does not make these measures ‘lawful’.

It just makes a mockery of the rule of law. That terrorism laws do in fact involve authorization of arbitrary arrest, legalize police intimidation of dissenters, allow for the possibility of rendition of civil disobedience as terrorism, etc is the considered view of many legal experts and associations.

Section 802 of the *USA Patriot Act* ('Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001') defines any act 'dangerous to human life' that is a violation of the criminal laws of a state or the United States as domestic terrorism, if that action appears to be intended to 'influence' or 'affect' the policy or conduct of a government 'by intimidation or coercion'. In Australia's *Security Legislation Amendment (Terrorism) Act 2002*, 'terrorist acts' must be committed with the intention of advancing a political cause 'by coercing or intimidating' a government or a section of the public. Other terrorism legislations pretty much use the same definition. Plainly, political and criminal activities are mixed together in this definition, with the result that acts of radical political dissent may be described and thus treated as terrorism. In fact, under terrorism legislations an imputation of terrorist intent by security agencies (both intelligence and policing forces) constitutes sufficient grounds to treat 'targets' as terrorist. The formal exclusion of 'advocacy, protest, dissent or industrial action' from the definition of terrorism in Australia's terrorism legislation, for example, can be circumvented by law enforcement forces:

if the 'action' may be seen as 'intended' to 'cause serious harm' or 'create a serious risk to the health and safety of the public'. Once such an intention is suggested by police, the 'advocacy, protest, dissent or industrial action' can become 'terrorism' (Anderson 2003:312).

The attempt to legally define terrorism ineluctably ends up criminalizing political dissidence, and especially activist dissent. Terrorism laws are a liberal embarrassment, a legal perversion of liberal legal regime.

It is clear that the real and effective outcome of these laws is the expansion of the police powers of the state. It is also arguable that the 'terrorist threat' is basically a convenient pretext. The *USA Patriot Act*, a 342-page long, complex document, was drafted, debated and passed by the US Congress in only 45 days (October 26, 2001). The complexity and nature of the document make it almost certain that it was already prepared in its substance before September 11, which provided the perfect opportunity for its speedy and smooth activation. In the *Patriot Act*, the common-sense understanding of terrorism as the violent targeting of civilian population or of the infrastructure of social life for political ends is pressed in the service of the security needs and ambitions of the state, which is designated to be the ultimate intended target of terrorist acts. By the same token, of course, it is impossible for the state to commit terrorist acts. Those state actions that appear to be terrorist acts are rather (by the grace of definition!) anti-terrorist measures. Let us recall in passing that the massacres and destruction wrought by one or another state in the twentieth century — starting with the US 'benevolent assimilation' of the Filipinos of 1898, which killed 600,000 and produced the first concentration camp regime (as a 'counterinsurgency measure') of the modern times — dwarfs any crime committed by non-state actors. I do not think anyone doubts that the 'enhanced powers' of security agencies will be used regardless of whether their use is in fact justified — 'justification' is really a pointless gloss since under the new provisions these agencies are the judge of their own cause. A legally available instrument of power is always used, and its use will reinforce the very conditions that favor this use. This is how even emergency procedures become standard and routine. The state thus gives itself the legal cover to act outside the rule of law.

It has to be stressed that the fear of terrorism has a rational core, which consists in the horror that self-authorizing masters of life and death inspire. Without a sober regard for reality, doctrinal consistency and moral clarity of a project are no guarantee that it is not the vision of a mad and murderous ideologue. The quasi-divine power that advanced weapons technology makes available to those who can afford it does not hold itself accountable to the reality of physical and social bodies, of geography and history. Reality disintegrates or is laid to nullity in its confrontation with the awesome power of the new weapons of war. It does not matter with what ideology, in suit or in robe, the quasi-divine nihilist warriors set out to annihilate. On the other hand, the hysteric fear of terrorism as it is induced by the 'security state' is a different matter. It is an element in a regime of control that takes advantage of the horror of annihilation and aims at keeping society on the brink of a nervous breakdown. There is no doubt that prolonged exposure to the threat of annihilation is brutalizing. The state takes over and manipulates this debasement for its own purposes. *Terrorism* (i.e., the state induced fear of terrorism) is a political tool of mass society used by the security state to enhance its strategic manoeuvrability and its capacity of military intervention both at home and abroad. It is worth noting the concern expressed in the 2000 report of the National Intelligence Council to the CIA chief regarding the possibility of 'a growing antiglobalization movement' becoming 'a powerful sustainable global political and cultural force — threatening Western governmental and corporate interests.' In a sense, *terrorism* attempts to off-load society by politically decommissioning it. How does it achieve this? By separating society from the institutions that make it a 'civil society': various human rights organizations and community activist groups, but also free speech and the freedom of political expression and opposition. In other words, *terrorism blocks civil society's access to its sources of power*. In the United States, just before the start of the war against Iraq, citizens were questioned by the FBI about their political beliefs for being openly critical of a possible war. In Australia, activists are the regular target of intelligence and (covert) security operations, including, in June 2003, a number of Iranian dissidents whose political activity is almost exclusively against the Iranian regime. One is reminded in this context of Metternich's admonition to his counterparts at the Vienna Conference of 1815 not to forget their common adversary: their subjects.

Terrorism cordons off society from its sources of power by stigmatization. Everybody shuns the stigmatized (See Goffman 1990). *Terrorism* is a genuine product of consumer society, the latest magical image, jointly produced by advanced communication and political technologies, which conjures up all the appropriate emotions and elicits called-for responses. It prepares and moulds public opinion in order to make it easier for the state to dispose of troublesome elements or problems efficiently when the need to do so arises. It serves to stall conscientious objections that might be raised against selling out on (remember these?) human rights and democratic principles. The *terrorist* does not deserve to be treated like a human being. Anyone who says otherwise is a *terrorist* herself. One of the most disturbing phenomena of the 'dirty war' of the early 1980s conducted by the military dictatorship in Argentina was the blaming by society at large of the victims themselves for their fate. We would be foolish to believe this cannot happen in 'democratic' societies. It is already afoot in the United States and in some respects here in Australia. The enhancement of the state's 'soft power', thanks to the phenomenal expansion of its informational capabilities, on the one hand, and the mass penetration and infantilization of society by the entertainment media on the other, have made public opinion readily manipulable (see Hersh 2003). The Office of Special Plans at the Pentagon, which is charged with packaging information for public consumption, has or will soon have its counterparts in other Western countries. Thus, public opinion is increasingly formed by official fabrication of 'intelligence', inducement of hysteric fears, massaging egotistic

instincts and fostering herd mentality through different kinds of rituals and ceremonies. 'Formerly one only conspired against an established order. Today, *conspiring in its favor* is a new and flourishing profession' (Debord 1990:74). As far as the political capacity of society is concerned, with *terrorism* the no man's land between the domain of operation of intelligence and that of entertainment is secured. Beyond the step already taken in both the social psychology and law of countries like the United States and Australia, the slide into indiscriminate use of 'anti-terrorist powers' will be effortless and unnoticed. It comes (already!) on cat's paws in the back alleys of the security state.

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