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THE STATE OF FREEDOM IN EUROPE

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INTRODUCTION

The attacks by Al-Qaida on New York and Washington on September 11 2001
produced an immediate response from the European Union despite its relatively
remote location from the events. Within a day an emergency Council of the EU
was expressing its 'horror' at the atrocities.[1] Shortly afterwards a special
European Council was staged, with various policies being hastily created and just
as speedily promulgated, the EU quickly casting itself as 'one of the leading
partners of the global coalition against terrorism'.[2] The Commission president
Romano Prodi spoke in a Brussels Islamic Centre of the European Council's 'full
solidarity with the American people in the face of terrorist attacks' before
rushing to the US to repeat himself in person.[3] The European Parliament issued
its own resolution.[4] The steady implementation of a range of counter-terrorism
initiatives followed in the twelve months immediately following 11 September,[5]
since when the powers authorized in these heady counter-terrorist times have
been methodically followed up by diligent officials. Subsequent attacks, some
still far afield as in Kenya and Bali but others closer to home (Madrid on 11
March 2004; London on 7 July 2005; Bulgaria on 18 July 2012; and Paris on 7
January 2015[6]) have precipitated further, energetic engagement: a

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[1] See *EU Presidency Statement – September 11 Attacks in the US* http://eu-
un.europa.eu/articles/en/article_56_en.htm [accessed 8 September 2015].

[2] *EU Response to the 11 September: European Commission Action*
http://europa.eu/rapid/press-release_MEMO-02-122_en.htm [accessed 8
September 2015].

[3] Speech by the President of the European Commission on his Visit to the
Brussels Islamic Centre, 27 September 2001:
http://avalon.law.yale.edu/sept11/eu_016.asp [accessed 8 September 2015].

[4] Available at www.europarl.europa.**eu**/**meet**docs/committees/.../**2001**1108/04a_en.pdf
 [accessed 8 September 2015].

[5] See *EU Response to the 11 September: European Commission Action, op cit,* n 2
for full details of the 'effective contribution' being made by the EU during this
period.

[6] On the Paris attacks, see D. Bigo, E. Brouwer, S. Carrera, E. Guild, E. Guittet, J.
Jeandesboz, F. Ragazzi and A. Scherrer, *The EU Counter-Terrorism Policy
Responses to the Attacks in Paris. Towards an EU and Security Agenda* (CEPS
Paper in Liberty and Security in Europe No 81, February 2015):
http://www.ceps.eu/system/files/LSE81Counterterrorism.pdf [accessed 8
September 2015).

comprehensive edited collection by Fiona de Londras and Josephine Doody attests to the richness and variety of the field.[7] As Christina Eckes notes in her survey of one of the main areas of activity, we now have 29 different sanction regimes operating within the EU, thirteen of them responses to UN interventions but the rest autonomous to the EU.[8] Cian Murphy's monograph likewise traces in detail the plethora of measures in the fields of, *inter alia,* money laundering, data retention and warrants of arrest that have flowed under this broad rubric.[9] The era of EU counter-terrorism has clearly well and truly arrived, fed on a dependable diet of recurring atrocity.

But why, or – more specifically – why now? More than any other region it had been Europe that had been exposed to the worst of international terrorism in the 1970s and 1980s, Member States that had seen their airports turned into killing fields, their cities bombed, a cruise ship hijacked, even one of the world's greatest sporting events made infamous by a spectacular massacre of athletes from the wrong country.[10] As though this were not enough, many of the old common market countries had their own problems with indigenous violent subversion – the Red Army Faction in Germany; the CCC in Belgium; the Red Brigades in Italy; the Corsican Liberation Front in France – and with new members came also new problems – the British and Irish brought the IRA, the Spanish ETA.[11] And yet about this inferno not merely on the doorstep but within the house itself there came barely a murmur from the EU (as it was not then

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[7] F. de Londras and J. Doody (eds),*The Impact, Legitimacy, and Effectiveness of EU Counter-Terrorism* (London: Routledge, 2015). For the Durham University SECILE project see Durham Law School Research Briefing No 14: https://www.dur.ac.uk/resources/law/research/TheImpactLegitimacyAndEffectivenessOfEUCounter-TerrorismFindingsandProposals.pdf [accessed 29 September 2015].

[8] C. Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions' (2014) 51 (3) *Common Market Law Review* 869-906.

[9] C. C. Murphy, *EU Counter-Terrorism Law Pre-emption and the Rule of Law* (Oxford: Hart Publishing, 2012).

[10] Respectively the attacks in Rome and Vienna airports in 1985 and Athens airport in 1973; bombed cities would include London, Paris and Milan, on occasions too many to mention; the *Achille Lauro* cruise ship hijack in 1985; and the attack on the Munich Olympics in 1972. For the details see the full account from the period of most activity which covers the European situation extensively in P. Wilkinson and A. Stewart (eds), *Contemporary Research on Terrorism* (Aberdeen: Aberdeen University Press, 1987). A critical perspective on the idea of 'international terrorism' is offered by R. Jackson, L. Jarvis, J. Gunning and M. Breen Smith, *Terrorism. A Critical Introduction* (New York: Palgrave Macmillan, 2011).

[11] See the special issue on terrorist movements in Twentieth Century Europe: (2007) 14 (3) *European Review of History*. C. A. Gearty, *Terror* (London: Faber and Faber, 1991) has short accounts of many of the core European movements.

called). The occasional speech by a concerned functionary, some desultory calls for action from the European Parliament: little more.[12]

The change of personality so evident in the response to 2001 is, as Eckes has observed, popular with governments which 'consider the EU in principle better placed to adopt not only comprehensive embargoes but also targeted sanctions'.[13] Even the British are positive.[14] What is different about the present times of course is that there is a 'constitutional' base for engagement in this arena: for example, the extension of the sanctions regime to reach 'natural or legal persons and groups or non-state entities'.[15] Here is where the reasons for the new energy become apparent: it opportunistically (in a non-pejorative sense) follows the sovereign move which was begun by the treaties on the European Union and the European Communities at Maastricht in 1992 and on which the later Lisbon treaty was built.[16] We are no longer a disparate collection of institutions is the message; rather now we are a state, and with statehood comes new kinds of responsibilities. Having secured the liberty of Europe, we must now guarantee our people's security: policing, arresting, intelligence-gathering, and when it is needed 'counter-terrorism'. The early 1990s was exactly a time when it was perhaps forgivable to have such hubristic visions, and the 2001 attacks provided an unmissable opportunity for pushing towards their realisation in a particular and important aspect, for making constitutional noise. The various initiatives that flowed after the attacks drove integrationist efforts along strongly in these various policing and related spheres, counter-terrorism the Trojan horse arriving at Member State capitals, full of integrationist warriors hidden within.

As we all now know, sovereignty was a stretch too far for Europe, and even so stark a crisis as that precipitated by the events of 11 September 2001 could not make possible things that were bound not to be. It might have been feasible at an earlier time but then, even if it had been realisable, it had not been thought necessary. Now, whether necessary or prudent or neither, it was no

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[12] S. Peers, 'EU Responses to Terrorism' (2003) 52 *International and Comparative Law Quarterly* 227-243 briefly covers the slight pre-2001.

[13] Eckes, *op cit,* n 8 at 872.

[14] Foreign and Commonwealth Office, *The Review of the Balance of Competences between the United Kingdom and the EU* (Cm 8415, July 2012). The Review's progress and reports can be viewed at https://www.gov.uk/guidance/review-of-the-balance-of-competences [accessed 9 September 2015]. For the Foreign Policy report dealing with sanctions see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf [accessed 9 September 2015].

[15] Article 215(2) Consolidated Version of the Treaty on the Functioning of the European Union http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN [accessed 8 September 2015].

[16] Article 301 of the Treaty Establishing the European Community (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E301:EN:HTML:accessed [accessed 8 September 2015] is the predecessor to Article 215.

longer feasible, an attempt to hook on to a supranational sovereign dream just when that ideal had begun irretrievably to fade. The reaction to 11 September damaged the liberty of those living in Europe who found themselves targeted as suspect terrorists while seeming to do little to ensure the security of the wider community. It also reintroduced into the European thinking the dangerous idea of an (ongoing) emergency, a state of affairs of crisis rather than a one-off catastrophe. More recently a second emergency, rooted this time in the financial and economic collapse of 2008 onwards, has caused the further unraveling of the constitutional project and even threatened the gains of past generations of European idealists. Member states are resurgent; a cowed Europe fits itself around the plans of its most powerful national limbs; Brussels has shown itself not beyond the placing of its institutions at the disposal of state capitals and international capital.[17] The results are clear: life chances are diminished; democratic participation is dissipated; the human security offered to millions in 'misbehaving Member States' is truncated. Already battered by the response to 11 September, one of Europe's greatest (and it was once thought enduring) achievements – its commitment to rule by and of law – is now near almost being casually thrown to one side when this or that situation of exigency demands. The once noble ambition of universal freedom descends into the policed chaos of inequality.

The legacy of these two waves of emergency in Europe is a 'Union' that not only has not successfully secured personal security within the rule of law but has also latterly (the legacy of 2008) increasingly disowned any broader social obligations that should flow from a wider, more social, reading of what 'security' entails, a reading which should be (and was designed to be) a key aspect of the Union's sovereign dreams. This evisceration of any rich understanding of what security in Europe entails has been of necessity accompanied by a sharp attack on liberty, not only on the basic rights and freedoms of those judged to be 'security' threats in the narrowest ('counter-terrorist') meaning of the term but also, more and more, against those who would resist the trend towards the desecurization of Europe's people that has been such a feature of the region in the years since the financial and economic crises engulfed the region. The result is a Europe ostensibly committed to liberty and security that in practice delivers neither: a place that preaches security without delivering it, that is rooted in a commitment to freedom that on closer examination is not to be found. Facades like this serve a purpose – they preserve an appearance of continuity while the furniture within is being moved around, lulling passers-by into the belief that, despite the sounds of change within, all remains the same: hypocrisy protects us from knowing what we know we do not want to know. Whether one calls this a 'neo-democratic'[18] or 'post democratic'[19] or something equally bleak matters less than the obligation to understand it fully. And for that – to know where are now and so where we might be going – we must revisit where we have come from.

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[17] *Thomas Pringle v Government of Ireland,* Case C-370/12.

[18] C. A. Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013).

[19] C. Crouch, *Post-Democracy* (Cambridge: Polity Press, 2004).

The six states that came together in the 1950s to create what became the European Union 'had little sovereignty to lose.'[20] In its first framing the idea of liberty in this emerging European entity was fairly modest, amounting to not much more than the securing of a 'genuinely free trade area'.[21] It was through 'the creation of a single market, [that] it was intended to stimulate growth in trade and production'.[22] Even this version of liberty as the throwing away of constraints on freedom of action was always heavily qualified by *realpolitik*, in particular the 'network of protective agreements and indirect subsidies put in place at France's bidding' which 'was altogether out of keeping with the spirit and institutions of the international trading system that had emerged in the decades following Bretton Woods'[23] and of which the common market aspects of the new organization were such an exemplar. (More on these institutions later.) The 'liberty' of the 'Common Market' had no republican hue, its parliamentary assembly being filled with national nominees rather than directly elected representatives of the people. Nor was it much interested in human rights – to the extent that these were to emerge in the 1960s it was by way of a defensive European jurisprudence against feelings of national judicial superiority.[24] The law (and its wider more ambitious sibling 'the rule of law') was something that mattered for the regulation of the markets, not the betterment of people's lives. These various richer versions of what liberty entailed – liberty as political freedom; liberty as the equal right of all to lead full and successful lives - were the responsibility of the Member States. Safely reposed there, they were driven by the wider US-inspired move towards the development of a social Europe that made the democratic capitalism of the post-war period seem normal to those who knew of no other way of life. 'What Marshall aid did … was allow European States to continue along a path of industrial expansion and investment in heavy industry down which they had already started, while *at the same time* putting into place a costly but politically essential welfare state.'[25] Thus in post-war reconstruction while 'the notion of *social citizenship* was a decisive breakthrough'[26] it was not one that was sought to be delivered outside the nation states. The real action was within the domestic sphere: as Wolfgang Streeck

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[20] T. Judt, *Postwar. A History of Europe since 1945* (London: Pimlico Press, 2007), at 158.

[21] R. C. Mowat, *Ruin and Resurgence 1939-65* (London: Blandford Press, 1966), at 243.

[22] C. E. Black, R. D. English, J. E. Helmreich, P. C. Helmreich, A. James McAdams, *Rebirth: A Political History of Europe Since World War II* 2nd edn (Boulder Colorado: Westview Press, 2000), at 115.

[23] Judt, *op cit*, n 20, at 309.

[24] See A. O'Neill, *EU Law for UK Lawyers* (Oxford: Hart Publishing, 2011) ch 6 is a good account.

[25] W. I. Hitchcock, *The Struggle for Europe. The Turbulent History of a Divided Continent* (London: Profile Books, 2003), at 134.

[26] G. Eley, 'Corporatism and the Social Democratic Movement: The Postwar Settlement, 1945-73' in D. Stone (ed), *The Oxford Handbook of Postwar European History* (Oxford: Oxford University Press, 2012), 37-59 at 45.

observes 'in the years immediately after the Second World War, it was a widely shared assumption that, for capitalism to be compatible with democracy, it had to be subject to extensive political control so as to protect democracy from having to be constrained in the name of free markets.'[27] 'Europe' was an outrider to all of this.

What it could be proud off, though, was its central role in security.[28] The very first incarnation of Europe, the European Coal and Steel Community, made (in the famous words of the French foreign minister Robert Schuman) a future Franco-German war 'not only unthinkable but materially impossible.'[29] The Euratom agreement on atomic energy was designed with the same view in mind, and the success of these two initiatives made the grander coming together of the Common Market possible. By now secure against each other, the six member proto-community was also very much part of the US-inspired protection of western Europe against the Soviet threat from the East. Armies were of course available, drawn from other arrangements,[30] but the European Communities had a proper role to play (in tandem with the Bretton Wood financial institutions and the nation states themselves) in the defence of what was taking shape as a new kind of democratic (and therefore inhibited) capitalism against rival visions of how the world should look. In this early guise Europe's conceptualization of security was as limited as it was important: the protection of a space from the violent destruction of war delivered personal security from such personal catastrophe to millions, but it did not aspire to do more with their lives than achieve this powerful negative. The terrorism of the 1970s and 1980s was not a priority to those proud of having secured their peoples against the mutually assured destruction of war, whether it be nuclear or conventional.

Success often brings discontent with the *status quo* that has produced it. The functionalism of the market-driven approach of the Common Market delivered such strides that this small fellowship of nations found itself quickly growing (from six to nine in 1973; from nine to twelve by 1986; 28 today[31]), becoming what it would call without embarrassment first a European Economic *Community* and then (from 1992) a *European Community* (within a *European Union*), and later simply a *European Union*. The institutions of the three communities came together as early as in 1965[32] and an agreed single market

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[27] 'The Crisis in Context: Democratic Capitalism and its Contradictions 'in A. Schäfer and W. Streeck (eds), *Politics in the Age of Austerity* (Cambridge: Polity Press, 2013), 262-286 at 264 (footnotes omitted).
[28] Helpful to the conceptualization of security that follows is P. Hein, 'Four Concepts of Security; A Human Rights Perspective' (2013) 13 (1) *Human Rights Law Review* 1-23.
[29] Quoted in T. Buchanan, *Europe's Troubled Peace: 1945-2000* (Oxford: Blackwell Publishing, 2006), at 67.
[30] Pre-eminently of course the North Atlantic Treaty Organisation, established in 1949: http://www.nato.int/ [accessed 11 September 2015].
[31] See http://europa.eu/about-eu/countries/member-countries/ [accessed 13 September 2015].
[32] The Treaty of Brussels 1965.

achieved in the 1980s drove transactional unity further into the realms of everyday European life.[33] As this brand of freedom grew, a democratic ambition became increasingly part of its promoters' goals: the sturdy assembly of national worthies evolved into a European Parliament that became directly elected and whose powers inevitably increased thereafter as its members asserted their 'democratic' legitimacy in this new 'Republican' Europe.[34] The social Europe agenda of the Delors Commission of the late 1980s and early 1990s was of a piece with this ambitious expansionism, adding a commitment to the flourishing of Europe's people where once there had been concern only for their (often merely theoretical, given inequality of resources) capacity to trade. The highpoint of such an emphasis on the realization of the human potential of all – embracing thick readings of both liberty and security[35] - invariably takes contemporary shape in the form of human rights obligations, and these duly came along in Europe too, in the form of the EU Charter of Fundamental Rights, legally binding with the entry into force of the Treaty of Lisbon 2009, a document that as early as its second perambulatory paragraph showed how far the project had come:

'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.'[36]

How had Europe become able to tell such grand stories about itself with a straight face? Going with the groove of the 1990s fashion for globalization, the Union was able to think of itself as a sub-global regional entity in a world fast becoming post-national.[37] The collapse of the Soviet Union in 1989 led to the states of central and eastern Europe turning their faces now no longer east but west. What they saw when they made the switch was not one hegemonic power but rather a series of sub-powers welded together in an organization of supranational force that seemed to have cracked the contradictions they and their peoples had all been taught were bound to blow their old western

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[33] See http://ec.europa.eu/growth/single-market/index_en.htm [accessed 13 September 2015].

[34] There is a good clear account at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf [accessed 13 September 2015].

[35] For more on which see Gearty, *Liberty and Security, op cit,* n 18.

[36] See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN [accessed 13 September 2015]. For a clear web site on the charter see http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm [accessed 13 September 2015].

[37] Anthony Gidden's BBC Reith lectures for 1999 on our Runaway World, five different talks across five international locations, capture the energy and ambition of the time: http://news.bbc.co.uk/hi/english/static/events/reith_99/ [accessed 16 September 2015].

opponent apart, 'capitalism with a human face,'[38] or as the last Soviet leader Mikhail Gorbachev had touchingly thought was possible for his own country, Swedish-style social democracy.[39] The broadening of the EU remit at this time made it – not the nation states as had been the case in the decades before – the front-runners in the race to lead the continent in the new order that the end of the Cold War necessarily entailed:

'In the brief aftermath of the collapse of the Soviet Union, the idea of the co-originality and co-evolution of democracy and capitalism took hold of our collective imagination, a marriage that signified, on some accounts, no less than the end of history itself.'[40]

So it was natural to seize the counter-terrorist agenda, among others. But there was trouble ahead, rooted in the past.

VIRUSES

The international changes that made seemingly irresistible the increased role of the European Union both in the affairs of its own countries and in the world at large also unleashed forces that proved able both to resist and subvert the achievement of this community on a grander scale. There from the very start, these antagonistic presences have grown from being (mere) aggravations on the margins to occupying a series of central stages, forcing Europe to bend to their will, and in the process translating the noble ambitions of the Union's democratic capitalism into something darker, more divisive – a place where behind the appearances, beneath the camouflage of 'identity', 'principles' and 'human rights', liberty (in all its guises) is being eroded and security is morphing into an assumption for the affluent and a distant dream for everybody else.

Three such viruses can usefully be identified. The first and most obvious (which needs here only the briefest of acknowledgements) is the resurgence of what globalization was supposed to have rendered old hat, nationalism. Having experienced a 1990s marked by the Balkan wars, it is hard now to force the mind back into the post-Westphalian dreams of the late 80s and early 90s. Of course national identity had grown as an issue as the EU expanded past its original war-exhausted membership: British leaders brought talk of 'I want my money back!'[41], the Irish concerns about what they called the 'rights of the unborn', and

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[38] S. Brittan, *Capitalism with a Human Face* (Aldershot and Lyme, NH: Edward Elgar, 1995).
[39] W. Zimmermann, *Ruling Russia: Authoritarianism from the Revolution to Putin* (Princeton: Princeton University Press, 2014), at 196-197.
[40] M. A. Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' in D. Kochenov, G. deBúrca and A. Williams (eds), *Europe's Justice Deficit* (Hart: Oxford, 2015), 111-135 at 121 (citing F. Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992)).
[41] Attributed to UK Prime Minister Margaret Thatcher in relation to a dispute about VAT in the 1980s: there is a nice short film capturing the mood generated by her long political presence at

even before the membership acceleration of the two decades after 1989, the protocols and declarations that littered the Treaty on European Union (signed at Maastricht in 1992) amply demonstrate what had never been entirely absent from (remember the French farmers) and what was once again to the fore: the national pork-barrel dimension to European negotiation.[42] But there was a difference between the horse-trading that preceded European agreement on the one hand and a determination to favour one's own state at all costs on the other: the former was a prelude to progress (even Mrs Thatcher had signed the Single European Act) while the latter had fragmentation as its inevitable effect. That the second of these has now risen to such prominence – with arguments for withdrawal on the rise and questions of expulsion also being articulated, and with the EU Community acting as the organs of states rather than the corporate community – is due to the changes wrought by the two successive emergencies, already referred to that have fallen upon the Union ion the first decade of the 2000s. Nor even then would this first virus have gained its negative strength had it not had other negativities to feed off.

The second of our viruses – and driver of the first of these emergency moments – is that of religious extremism, or rather more accurately the 'fear of religious extremism'. At its inception and for much of its early life, the European project was so confidently Christian that the matter needed never to be discussed. Of course this was bound to change, not so much because of the growth of secularism or even on account of the migration that had always been a part of Europe. The growth of the latter under the impact of globalization did mean, though, that by the late 1990s, the editors of a survey of the EU and human rights were in no doubt that a chapter was needed on what they identified as the issue of 'The Internal and External "Other" in the Union Legal Order', subtitled 'Racism, Religious Intolerance and Xenophobia in Europe'.[43] Why should this 'other' now be mattering so much? By the mid to late 1990s it was clear that international power was forcing a new divide to the fore in the world, supplanting old Cold War certainties, between fundamentalist (Moslem) and non-fundamentalist (Christian? secular? liberal?) worldviews. Certainly the Iranian revolution of 1979 had been a shock to Western assumptions of (imposed) Middle-Eastern solidarity with its interests, and the rise of proxy-Iranian forces in the 1980s challenging Israel on the one hand and other 'stable' Moslem-majority countries on the other kept the subject to the fore in public discourse. Inevitably concerns about fundamentalism took specific shape as a reaction to 'terrorist' atrocities committed by Islamic fundamentalists, in their willed-war against the West, a challenge posed by barbarism to good order and

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https://www.youtube.com/watch?v=yzqDh9aB9qY [accessed 15 September 2015].

[42] See http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf [accessed 15 September 2015].

[43] P. Alston with M. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 2000). The chapter of this title was contributed by the present author: ch 10.

decency.[44] (Western marauding in Moslem states was either ignored, justified, or most often simply not noticed.[45]) Similar actions to the Palestinian-related violence in European cities in the 1970s and 1980s noted at the start of this essay were reconfigured as part not of a liberation struggle but of a wider religious Jihad, something of which the actors involved in such attacks were also aware and which they too actively promoted.[46] Europe's growing numbers of non-Christian peoples were to a great extent Moslem in religious background and so caught up to some extent in this new 'clash of civilisations.'[47]

The attacks of 11 September 2001 added large amounts of fuel to this already ignited but lightly-burning fire. The 'War on Terror' demanded by the then US President George W Bush was manifested in a series of strong UN resolutions[48] which even when they bedded down made substantial inroads into the assumptions of fairness and due process than had been assumed to be key fundamentals of the UN-inspired world order.[49] Soon countries were resisting the demands of UN human rights bodies on the basis of the overweening necessity to combat (as yet still undefined) terrorism.[50] Security was demanded on behalf of national not regional (much less global) entities. Part of the EU reaction, striving to keep up with its energetic, security-conscious state governments, has already been noted. EU implementation of UN demands for sanctions and its development of its own parallel sanctions system has led to a series of battles with the European Court of Justice which institution has tried (with some success) to hold the Community's executive actors to the standards of legality and respect for human rights that have (in theory at least) been among its most basic of principles.[51] It is without question that so far as some

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[44] See C. A. Gearty, 'Human Rights in an Age of Counter-Terrorism' in C. Miller (eds), *'War on Terror': The Oxford Amnesty Lectures 2006* (Manchester: Manchester University Press, 2009), at 83-98.

[45] S. Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2000).

[46] F. A. Gerges, *The Far Enemy: Why Jihad went Global* (Cambridge: Cambridge University Press, 2005).

[47] A term made famous by Samuel Huntingdon, originally in S. Huntingdon, 'The Clash of Civilisations' (1993) 72 *Foreign Affairs* 22-49.

[48] Starting with UNSC 1373 (2001):
http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf [accessed 29 September 2015].

[49] Gearty, *Liberty and Security*, *op cit,* n 18 has further details, at 30-49.

[50] For a flavor of the tensions in this area in the mid 2000s see the statement by the then Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, to the Security Council Counter-Terrorism Committee on 24 October 2005:
http://www.un.org/en/sc/ctc/docs/rights/2005_10_24_rapporteur.pdf [accessed 29 September 2015].

[51] The *Kadi* series of cases are key: N. Türküler Isiksel, 'Fundamental Rights in the EU after *Kadi* and *Al Barakat*' (2010) 16 (5) *European Law Journal* 551-577; J. Santos Vara, 'The Consequences of *Kadi*: Where the Divergence of Opinion

individuals and entities have been concerned, and we can confidently assume a shared religious affiliation as Moslem, their liberty has been sharply restricted by these Community interventions. The problem goes wider than individual injustice. As Christina Eckes has rightly observed, when calling for 'clearer rules and better internal control mechanisms' for the sanctions regimes, a '[u]nion of law is ... undermined when the Council and the Commission knowingly and deliberately continue to adopt measures that are not in compliance with basic procedural rights guaranteed by EU law and that, in the event of judicial challenge, can be expected to face annulment by the courts.'[52]

If liberty and the rule of law for suspected Moslems and Islamic-linked businesses have been part-casualties of the 11 September reaction to religious extremism, another line of engagement driven by the events of that day may prove to be even more damaging to universal liberty and security in the medium to long term. As is well-known, the US Bush presidency felt empowered by the 11 September moment to characterize its subsequent military actions in response to it as part of the 'clash of civilisations' earlier referred to, and the effect of this was inevitably further to exacerbate growing tensions between communities, both across the world and within specific regions.[53] At exactly this time, Europe – in search as we have already seen of a constitution that was never to be[54] - found itself caught up in a furious row about how explicit such a document should be about the 'Christian origins' of the Community whose values it was seeking to encapsulate.[55] Though the frontal attack aimed at securing explicit acknowledgement of a 'Christian Europe' was seen off, it became drearily the case that after the 11 September attacks, each subsequent, politically-motivated assault on civilians that could plausibly be characterized as Islamic-terrorism led to a ratcheting-up of this 'war of civilisations' trope, not only in the US and across the world but within the EU as well. The crisis was increasingly becoming not about what people did (plant bombs; kill people) but what they said ('terrorist propaganda) and who they were ('Islamic fundamentalists'). Having got involved in the first place, the Union could hardly avoid falling into line with the prevailing US-led discourse: the UN was issuing its own resolutions about

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between EU and International Lawyers Lies' (2011) 17 (2) *European Law Journal* 252-274. For a defence of both *Kadi* decisions see C. A. Gearty, 'In Praise of Awkwardness: *Kadi* in the CJEU' (2014) 10 (1) *European Constitutional Law Review* 15-27.

[52] Eckes, *op cit,* n 8 above, at 903.

[53] M. B. Salter, 'The Clash of Civilisations and the War on Terror(ists): An Imperialist Discourse' (2003) 5 (2) and (3) *Global Dialogue*   [no page refs: http://www.worlddialogue.org/content.php?id=222 [accessed 21 September 2015]].

[54] See http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_establishing_a_constitution_for_europe/treaty_establishing_a_constitution_for_europe_en.pdf [accessed 21 September 2015].

[55] 'Christianity bedevils talks on EU unity' *Guardian* 25 May 2004: http://www.theguardian.com/world/2004/may/25/eu.religion [accessed 21 September 2015].

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challenging 'terrorist' speech[56] and the language and actions of domestic political leaders were increasingly full of rhetoric of this sort.[57]

There was also the politics of the last atrocity to ensure that all this energy never went off the boil. After the Madrid attacks of 11 March 2004, the European Council felt compelled to create a new post of a 'Counter-terrorism Coordinator'[58], since when the Union has had its internal advocate for the ratcheting up its counter-terrorism profile, similar to that performed by the Counter-terrorism committee of the UN Security Council (itself newly created after the 2001 attacks). With all necessary laws in place, all security budgets well-spent and yet with occasional acts of politically-motivated violence still occurring, over time the international focus has increasingly come to be on not fighting terrorism as such so much as on countering the 'extremist' views that are said to make terrorist action more palatable, and therefore (received wisdom increasingly stridently maintains) more likely. A UN Security resolution of 24 September 2014 identifying as a special concern 'terrorist acts … motivated by intolerance or extremism' and calling for action against 'violent extremism' and 'radicalization'[59] was enthusiastically taken up by the current Counter-terrorism Co-ordinator Gilles de Kerchove (a long-standing EU civil servant, in this post for eight years), leading to discussion papers, declarations by the EU Council and further revisions of the already wide-ranging EU strategy for combating radicalization and recruitment to terrorism.

Thus, and following this new trend to the letter, after the Paris attacks in January 2015, the European Council committed itself to a course of action aimed at 'preventing radicalization and safeguarding values' that involved the development of 'communication strategies to promote tolerance, non-discrimination, fundamental values and solidarity throughout the EU, including through … narratives to counter terrorist ideologies.'[60] A Commission paper setting out the 'European agenda on Security' duly followed, confirming the elision that is now taken for granted between 'fighting terrorism and radicalisation'[61] and calling for the establishment of a 'European Counter-

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[56] UN SC Resolution 1624:
http://www.mofa.go.kr/mofat/htm/issue/policyplanning/UNSCR_1624.pdf [accessed 29 September 20-15].
[57] See Gearty, *Liberty and Security, op cit,* n 18, at 72-73 (President Bush) and 98 (Tony Blair).
[58] Declaration on Combating Terrorism, Brussels 25 March 2004, para 14: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/79637.pdf [accessed 21 September 2015].
[59] UN SC Resolution 2178: http://www.un.org/press/en/2014/sc11580.doc.htm [accessed 21 September 2015].
[60] Statement by Members of the European Council 12 February 2015, para 2: http://www.consilium.europa.eu/en/press/press-releases/2015/02/150212-european-council-statement-fight-against-terrorism/ [accessed 21 September 2015].
[61] COM (2015) 185 final, at para 3.1: http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf

Terrorism Centre' within Europol.[62] As with equivalent domestic interventions, crackdowns on free speech are made on the basis of assertions about connections that are never properly sourced, the Commission paper simply asserting (without citation) that '[e]xtremist propaganda has been shown to lead foreign terrorist fighters from Europe to travel abroad to train, fight and commit atrocities in combat zones, and to threaten the internal security of the EU on their return.'[63] Similar to all international and domestic initiatives along the same lines, the EU language used is at pains to present these interventions as rooted in respect for equality and diversity, and therefore seemingly entirely blind to the religious beliefs of those adversely affected by them. Equally obviously the effect is felt in one 'suspect community' rather than any other: it is, after all, Islamic violence and 'Islamic' extremism that has driven this agenda, not that of Anders Breivik or the many Neo-Nazi movements that continue to hold significant minorities in thrall to their ideology across Europe. The press release noting the newly-created EU-inspired 'Victims Day' recalls only the victims of Moslem attacks in its opening statement.[64] This inevitably follows from the way the language of terrorism and counter-terrorism is constructed; focusing only on subversive violence conventionally understood as terrorist rather than racist violence or hate crimes or (mere) murderous criminality, and ignoring equivalent conduct by military forces (other than to justify it as 'counter-terrorism'). The whole discourse favours established power and conventional wisdom. No doubt this explains its success. But its effect is to drive a wedge between European peoples while ostentatiously claiming not to. At least the European parliament notices the point when it condemns, in its comment on the EU security strategy, 'any analysis that leads to confusion between terrorism, insecurity, Islam and migrants'.[65] But Europe is learning that there are subtler ways of ensuring Europe's Christian superiority than merely declaring it to be so.

Does the European Parliament matter anymore anyhow? This might seem a counter-intuitive question given the expansion of its powers that were earlier noted. But the question takes us to the third and in many ways most devastating of the viruses that has eaten away not only at the physical health but also at the soul of Europe, in many ways the worst of all because the least

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[accessed 21 September 2015]. The strategy has been approved by the Justice and Home Affairs Council of the EU: for further details see EU Council 9798/15 10 June 2015: http://data.consilium.europa.eu/doc/document/ST-9798-2015-INIT/en/pdf [accessed 21 September 2015]. The European Parliament is also on board: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0269&format=XML&language=EN [accessed 21 September 2015].
[62] Com (2015) 185 final, at para 3.1.
[63] Com (2015) 185 final, at para 3.1.
[64] http://europa.eu/rapid/press-release_STATEMENT-15-4580_en.htm [Accessed 21 September 2015].
[65] European Parliament Resolution of 9 July 2015 on the European Agenda on Security, para 31: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0269&format=XML&language=EN [accessed 21 September 2015].

controllable, feeding off the first two while also giving them strength: Europe's collusion in capitalism's effort to shed its democratic constraints.

THE NEO-LIBERAL VIRUS

In a dispiriting sort of way, neo-liberalism can be not implausibly viewed as a return to the original common market mission, now allowed to run riot. The European project began to thrive when its Treaty of Rome in 1957 instituted the drive towards the greater and greater capacity of commercial entities within national states to trade with each other across borders. True, special deals existed, as we have seen, but the momentum was towards ever fewer restrictions on deal-making. There was a European intellectual background to such a strong market orientation as well, in the Ordoliberalism of the Freiburg school, the embedding of the market 'in a "constitutional" framework'[66] that grew in the mind and work of Frederick Hayek into the assertion that the state does not need even to play a role in preserving competition, that the market can look after itself even in this regard.[67] The German Ordoliberals who were so dominant after the Second World War never went this far however and like Karl Schmitt before them 'they never believed in a market economy independent from state authority.'[68] The Hayekian version secured an upper hand in Anglo-American versions of liberalism from which the state-phobic neo-liberalism that became such a feature of public policy from the 1980s began to emerge. Wolfgang Streeck has identified the late 1960s as the time when the post war settlement between democracy and capitalism began to fall apart with capitalism leading the way (to the amazement of those on the left which had taken its captivity by democracy for granted) in reconfiguring the markets' relationship with the popular will. On Streeck's analysis efforts by capital to remain within democratic frameworks have been unsustainable for years, driving the system from crisis to crisis.[69] With the events of 1989, capital founded itself needing to worry less than ever about its forced reconciliation with democracy: no longer did business feel the compulsion to worry that workers (in the US but Europe too) might be 'viewing [a] now globally influential socialist system as an appealing model'.[70] Those days were gone, and with them any pressing need to placate the people. What the army and police had done before they could do again.

Social Europe resisted the lure of neo-liberalism - the inherent rightness (indeed obviousness) of the market solution – longer and more effectively than

[66] D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press, 1998), at 232.

[67] Gerber, *op cit,* n 66, at 236-7.

[68] W. Streeck, 'Heller, Schmitt and the Euro' (2015) 21 (3) *European Law Journal* 361, at 363.

[69] W. Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism* (London: Verso, 2014). cf C. Crouch, *The Strange Non-Death of Neo-Liberalism* (Cambridge: Polity Press, 2011).

[70] D. M. Kotz, *The Rise and Fall of Neoliberal Capitalism* (Camb Mass: Harvard University Press 2015), at 61.

many of its constituent national parts. The chipping away continued through the first years of the 2000s, however, and took on a renewed vigour after the economic and banking crises of 2008 when a new term strode to the fore to do market-service:

'The pro-austerity position was accompanied by a reinterpretation of the causes of the crisis by neoliberal economists. To most observers it appeared that the private sector had self-destructed. However this was contrary to neoliberal theory, which insists that a capitalist economy is inherently stable and that serious problems can originate only from mistaken state actions.'[71]

The resurgence of national interests that forced themselves (as drivers of neo-liberalism) onto the EU negotiating table after 2008 did so against a background of emergency, but now of an economic rather than counter-terrorist nature. The precise nature of the actions taken is too well-known to warrant much further description here: the initiatives of the various troikas;[72] the fiscal compact and European Stability Mechanism that *de facto* amended EU law;[73] and the devastating impact of such changes on weaker EU states such as Greece.[74] As Scheuerman observes, 'Since the 2008 global economic crisis, elite-level rhetoric has repeatedly focused on the existence of a panoply of urgent exceptional threats in order to legitimize measures "contravening established procedures and norms" as necessary, unavoidable and therefore intrinsically rational.'[75] Furthermore, '[t]he crisis has allowed European political leaders to forge what in many respects constitutes a new – and more neoliberal – European order.'[76] As the intellectual Godfather of the European project has ruefully observed, '[h]ere, the executive, as always in times of crisis, felt compelled to empower itself'[77] The national interests being promoted have been those of the market, driving change through the EU: 'it is *now* finally fair to say that owing to the Union's impact on budgetary planning, there is no "nucleus of sovereignty" left to Member States'.[78] Europe has proved to be too liberal in its origins to be able to resist the assault of market common-sense on its social side, its roots always in

[71] Kotz, *op cit,* n 70, at 168. See M. Blyth, *Austerity. The History of a Dangerous Idea* (Oxford: Oxford University Press, 2013).

[72] M. A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination. Second Time as Farce' (2015) 21 (3) *European Law Journal* 313, at 327-8.

[73] A. Somek, 'Delegation and Authority. Authoritarian Liberalism Today' (2015) 21 (3) *European Law Journal* 340-360.

[74] M. E. Salomon, 'Of Austerity, Human Rights and International institutions' (2015) 21(4) *European Law Journal* 521-545.

[75] W. E. Scheuerman, 'Herman Heller and the European Crisis: Authoritarian Liberalism Redux?' (2015) 21 (3) *European Law Journal* 302, 308, citing J. White, 'Emerging Europe' (2013) *Political Studies* 3-4 (published online).

[76] Scheuerman, *op cit,* n 75, at 308.

[77] J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible' (2015) 21 (4) *European Law Journal* 546, at 550.

[78] Somek , *op cit,* n 73, at 342-3.

bettering the self rather than in growing a better life out of solidarity. Liberalism has long been vulnerable to being mustered by conservatism in support of the market 'against the solidaristic bonds of community that were perceived to deform it', and so it has proved to be in the hands of Europe's national leadership.[79] Michael Wilkinson reminds us of a disturbingly apposite intervention from the past: 'The authoritarian liberal, Heller remarks contemptuously, fights against the welfare state with one hand "whilst subsidizing large banks, large industry, and large agricultural enterprise" with the other.'[80] 'Ordoliberalism, in tune with its neoliberal cousin, "has more confidence in the economic constitution than in democracy"'.[81]

In the years since 2008 it has been under cover of this second emergency that democratic forms in Europe (already hardly strong despite the Republican enhancements of the European Parliament described earlier) have been truncated just as had been personal liberty following the first emergency sparked by the attacks of 11 September.[82] It may be going too far to say that 'while its exterior forms are still in place, its inner core has been eaten away'[83] but there has certainly been a 'hollowing out' of EU democratic institutions, to use Peter Mair's famous metaphor.[84] As the authors of a recent study have observed with disturbing precision, 'the EU responses to the crisis have exhausted the main democratic legitimacy sources of the EU polity'.[85] While states have had at least the potential (grossly under-used so far) to muster opposition to domestic change, Europe in contrast is 'not buttressed even nominally by a comprehensive popular collectivity' with the result that the '[t]he logic of rescue programmes, such as the Outright Monetary Transactions (OMT) and European Stability Mechanism (ESM) is not to protect European solidarity,

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[79] Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination. Second Time as Farce', *op cit,* n 72, at 337.
[80] Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination. Second Time as Farce', *op cit,* n 72, at 322 citing H. Heller, *Authoritarian Liberalism* reprinted in English from the original German (2015) 21 (3) *European Law Journal* 295, at 295.
[81] Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries', *op cit,* n 40, at 125 citing J. Habermas, *The Crisis of the European Union – A Response* (Cambridge: Polity Press, 2012) at 129.
[82] A. Ruser, 'By the Markets, of the Markets, for the Markets? Technocratic Decision Making and the Hollowing out of Democracy' (2015) 6 (Supplement 1) *Global Policy* 83-92. See M. Blauberger, S. Puntscher Riekmann, D. Wydra (eds), 'Symposium on the EU's Democratic Deficit in Times of Crisis' (2014) 52(6) *Journal of Common Market Studies* 1171-1223.
[83] D. Castiglione, 'Trajectories and Transformations of the Democratic Representation System' (2015) 6 (Supplement 1) *Global Policy* 8 at 9.
[84] P. Mair, *Ruling the Void. The Hollowing of Western Democracy* (London: Verso, 2013).
[85] E. Chiti and P. Gustavo Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 (3) *Common Market Law Review* 683, at 706.

identity or mutual recognition but economic-systemic stability.'[86]   The dreary impact of these changes at national as well as EU level is summed up well by Streeck:

'Today's post-democratic, or better perhaps a-democratic, Hayekian capitalism, after the victory, or almost-victory, of neo-liberalism, may be regarded as an historically updated version of ordoliberalism.... As democratic politics is in the process emptied of political-economic content, the vacated public sphere is re-dedicated to consumerist politainment.'[87]

While we might not be unduly surprised by the attack on democracy mounted by capital, an unexpected casualty of the neoliberal surge has been the law. Ordinarily one would expect law to be an irreducible guarantor of the stability that a contract-oriented market state needs. But the damage done to due process and the rule of law by the EU response to economic and banking crises has been in many ways more serious because more widely felt than the truncation of due process that followed the 11 September attacks.[88] That the 'legal basis for the actions by the European Institutions, the ECB and the European Commission, is debatable'[89] puts the point rather mildly, with the same author more emphatic in asserting later in the same essay that '[i]n participating in the conclusion of the MoUs, the European Commission and the ECB have infringed Union law'.[90] The *Pringle* case stands as a warning to those who would seek to hold the EU institutions within the bounds of the EU.[91] Looking at the legal position in the round, Wilkinson is surely justified in asserting that '[l]iberal legality has been replaced with authoritarian manageralism'.[92] To throw an even bleaker light on this, the Member States

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[86] Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination. Second Time as Farce' *op cit,* n 72, at 326.
[87] W. Streeck, 'Heller, Schmitt and the Euro' (2015) 21 (3) *European Law Journal* 361, at 365.
[88] For the location of these changes against the background of prevailing emergency discourses see C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 (2) *Oxford Journal of Legal Studies* 325-353. Another good recent assessment is Kochenov, deBúrca and Williams (eds), *op cit,* n 40.
[89] A. Fischer-Lescano, 'Competencies of the Troika: Legal Limitations of the Institutions of the European Union' in N. Bruun, K. Lörcher, I. Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Oxford: Hart Publishing, 2014) 55, at 55.
[90] Fischer-Lescano, *op cit,* n 89, at 81.
[91] P Craig, 'Pringle and the Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance (2013) 9 (2) *European Constitutional Law Review* 263-284; B. de Witte and T. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal order: *Pringle*' (2013) 50 (3) *Common Market Law Review* 805-848.
[92] Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination. Second Time as Farce'*, op cit,* n 72 at 330.

continue themselves to head along the same route, some moving even faster than the EU.[93]

 With democratic and legal safeguards under pressure, the barriers defending social Europe have been weakened to the point where they are no longer able effectively to resist the pressures on social Europe, and this has led to the human rights of many of its citizens (but especially those in the states that have been the main victims of austerity) being largely ignored. Even somewhat 'grudging and limited'[94] at their inception, the socio-economic rights of the Charter of Fundamental Rights are at risk of becoming what one (albeit harsh) critic has described as 'an empty rhetorical promise'.[95] Looking at the field as a whole, another writer has heralded 'the death of social Europe.'[96] While it is true that the Charter has not been available as a 'vehicle of constitutional justice'[97] for very long, and that 'it is notoriously difficult to track down evidence of judicial shifts,'[98] the temptation is to say simply look around you and report what you see[99] - 'the world turned upside down' as one Gramscian commentator has suggested.[100]

 If socio-economic rights have been reduced to shadows of their former selves, what of civil and political rights? The area is not one in which the EU has a traditional primacy. So far as the states are concerned, there has been a temptation to deploy the emergency powers designed to counter terrorism so as to curb dissent against the havoc caused by the imposition of harsh, austerity-based policies.[101] The EU has not had the capacity (and surely not had the inclination) to engage in the same level of repressive control, much less follow the logic of liberal authoritarianism into true coercion: 'European economic and monetary crisis management has not yet resorted to banning political parties or relied on marauding black shirts, aggressive storm troopers, the removal of

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[93] A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done' (2014) 51(1) *Common Market Law Review* 59-96.

[94] P. O'Connell, 'Let them Eat Cake: Socio-Economic Rights in an Age of Austerity' in A. Nolan, R. O'Connell and C. Harvey (eds), *Human Rights and Public Finance. Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart Publishing, 2013) 59, at 60.

[95] O'Connell, *op cit,* n 94, at 62.

[96] K. D. Ewing, 'The Death of Social Europe' (2015) 26 (1) *King's College Law journal* 76-98.

[97] D. Leczykiewicz, 'Constitutional Justice and Judicial Review of EU Legislation Acts' in Kochenov, deBúrca and Williams, *op cit,* n 40, 97 at 103-107.

[98] Leczykiewicz, *op cit,* n 96, at 104.

[99] On which see Salomon, *op cit,* n 74. The EU organs acting outside the EU system in the way upheld in *Pringle* might even be able to defy the Charter with impunity albeit Salomon argues that they are bound: *op cit,* at 534.

[100] J. Wills, 'The World Turned Upside Down? Neo-liberalism, Socio-Economic Rights and Hegemony' (2014) 27 (1) *Leiden Journal of International Law* 11-35.

[101] C. A. Gearty, 'Neo-democracy: Useful Idiot of Neo-Liberalism?' [forthcoming]

unwanted people or the shutdown of constitutional courts.'[102] The engaged citizen is caught in a bind: 'While resistance against EU policies is pointless at home, it is largely homeless in the Union.'[103] Civil and political rights are guaranteed because they can never be exercised; social and economic rights are guaranteed because they will not be realized.

CONCLUSION: THE STRUGGLE FOR HEALTH

What resources does Europe in general and the European Union in particular have to resist a world in which '[c]ore democratic institutions, such as parliaments or recurring elections, stay *formally* in place while the substance of political decision making is no longer determined by active citizens and their representatives'[104]? And we should add while the law comes and goes as neo-liberal exigencies demand, and human rights rhetoric grows ever louder as its real impact on the ground diminishes ever further? Pushing the point even more, is it right that 'one cannot but be afraid of the possibility of a new, however temporary, settlement of social conflict in advanced capitalism, this time entirely in favour of the propertied classes now firmly entrenched in their politically unconquerable institutional stronghold, the international finance industry'?[105] Is this what has become of the noble European dream, not now the preventer of wars and the deliverer of a rich version of liberty and security for all, but rather the regional servant of privilege, one that is these days quite incapable of issuing moral instructions to badly behaving member states with a straight face, its own hypocrisy now so extreme that it is impossible to conceal?[106]

The literature gives us a choice of ways of describing this state of affairs, my own 'neo-democracy',[107] but also 'imitation democracy',[108] 'post-democracy',[109] 'authoritarian legality'[110] and – already noted – 'ordoliberalism',

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[102] Somek, *op cit,* n 73, at 346.

[103] Somek, *op cit,* n 73, at 353.

[104] Somek, *op cit,* n 73, at 347.

[105] W. Streeck, 'The Crisis in Context: Democratic Capitalism and its Contradictions' in A. Schäfer and W. Streeck, *Politics in the Age of Austerity* (Cambridge: Polity Press, 2013), 262 at 284-5.

[106] 'Time for Europe to take a stand against Orbán te awful' *Guardian* 7 September 2015, at 30; J-W. Müller, 'Should the EU protect Democracy and the Rule of Law Inside Member States?' (2015) 21 (2) *European Law Journal* 141-160; O. Burlyuk, 'Variations in EU External Policies as a Virtue: EU Rule of Law Promotion in the Neighbourhood' (2015) 53 (3) *Journal of Common Market Studies* 509-523; I. Lusmen, 'EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania' (2015) 53 (3) *Journal of Common Market Studies* 593-608.

[107] *Liberty and Security op cit,* n 18.

[108] Perry Anderson on Dmitri Furman's ideas: (2015) 37 (16) *London Review of Books* 19, 22.

[109] Crouch, *Post-Democracy, op cit,* n 19.

with 'its indifference if not outright hostility towards democracy as a way of life'.[111] Is it all inevitable; have the viruses killed the patient? There is pushback in the courts from time to time, *Kadi* being a good example so far as the field of due process/civil rights is concerned,[112] and there are also those decisions which have from time to time shown that there is at least some bite in the Charter of Fundamental Rights.[113] The Strasbourg court can also still do some occasionally valuable work,[114] just as the European Parliament may be relied upon to raise the issues of democratic engagement that are missed elsewhere, indeed can sometimes manage the occasional bite despite the leash on its powers severely curtailing its movement. Social movements do influence public debate as well.[115] The fact that for many the best way of moving forward is to rely on the democratic energy of 'the people' may be evidence of despair or determined optimism, or indeed both.[116] The refugee crisis that burst fully onto Europe in 2015 may be the final straw for the Union, the point at which the three viruses of national selfishness, racist intolerance and the decay of life-chances produced by neo-liberalism the world over come together in a perfect and destructive storm. It is to be hoped that this is not the case, and that the horrors of this period are that high point when the patient, in the worst of the fever, is on the way to recovery, towards a 'pan-European social democracy.'[117] Optimism of the will is vital exactly when the intellect sees no escape from pessimism.

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[110] R. Diab, *The Harbinger Theory: How the Post 9/11 Emergency Became Permanent and the Case for Reform* (New York: Oxford University Press, 2015) – specific to the US counter-terrorism effort but of potentially wider application.
[111] Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination. Second Time as *Farce', op cit,* n 72, at 328.
[112] See n 51 above.
[113] On C – 300/11 *ZZ v Home Secretary* see N. de Boer, 'Secret Evidence and Due Process Rights Under EU Law' (2014) 51 (45) *Common Market Law Review* 1235-1262.
[114] K. Ewing and J. Hendy, 'International Litigation Possibilities in European Collective Labour Law: ECHR' in N. Bruun, K. Lörcher and I. Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Oxford: Hart Publishing, 2014), 295-314.
[115] See D. della Porta, *Social Movements in Times of Austerity.* (Cambridge: Polity Press, 2015).
[116] 'The key to a change may well be that governments of the Member States pass on to the Union the democratic resistance that they encounter at home': Somek, *op cit,* n 73, at 359. Cf C. Douzinas, *Philosophy and Resistance in the Crisis* (Cambridge: Polity Press, 2013).
[117] M A Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination. Second Time as Farce', *op cit,* n 72 at 339. Cf J Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible' (2015) 21 (4) *European Law Journal* 546-547.