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Enduring jewel of democracy is our tribute to the fallen

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When Australians woke up on September 12, 2001, to the images of the twin towers collapsing, it seemed, to use Marx's famous phrase, that suddenly all that was solid had melted into air. Unmistakably, in that terrible moment, everything had changed, with the horrifying photos of a man leaping from a crumbling skyscraper epitomising the terror that had been unleashed on the world.

The immediate shock was naturally greatest in the US, which had always perceived itself as being far removed from any significant physically proximate threats. It was the new nation's blessing, said Thomas Jefferson in his first inaugural address, that it was "kindly separated by a wide ocean from the exterminating havoc of one quarter of the globe".

Now, exactly two centuries later, a distant havoc had reached the continent's shores, striking three times in one day at the country's centres of power.

As the devastating scale of the attacks sank in, it became clear that a war was under way against an enemy whose goal was the destruction of the West and its civilisation. And with the jihadists intent on their apocalyptic quest, it was equally clear to Australia and the other advanced democracies that this war was theirs too.

Wars have never been won by debating societies, nor terrorists quelled by judicial injunctions.

Rather, fighting them has always imposed new demands on states that could be met only through harsh, often draconian, powers; a war that required defeating an elusive, constantly mutating foe was hardly likely to be an exception.

As a result, the fundamental question was not whether governments would need additional powers to wage war on the jihadists. It was whether those powers, with their potentially vast sweep, would undermine, perhaps fatally, the values and institutions the war was being fought to preserve.

That question was certainly not a new one. “*Salus populi suprema lex esto*” – the safety of the people must be the supreme law, Cicero had said, in arguing for special powers with which to crush the Catiline conspiracy; little did he realise that those powers, which he convinced the Senate to enact in 63BC, would later be used to kill him and destroy the Roman Republic.

Since then, the pattern that doomed Cicero has played itself out repeatedly. That is why Machiavelli, who knew more about tyranny than most, warned in his Discourses that “although measures which go beyond the norm may at times be necessary, their precedent is pernicious, for if the laws are disregarded for good purposes, they will soon be disregarded for purposes which are evil”.

And that is also why the struggle to tame the royal prerogative – which emerged in the Elizabethan era as the instrument monarchs could use to ignore the civil liberties being wrested from them by the common law – was the feature that most clearly defined England’s liberal tradition and most sharply distinguished it from the liberalisms that emerged on the continent.

To say that is not to suggest that the founders of British liberalism believed the crown should be denied the prerogative powers required to defend the realm.

On the contrary, Francis Hutcheson – one of the greatest philosophers of the Scottish Enlightenment – was by no means unusual in considering it obvious that “in Cases of extreme Necessity, it must certainly be Good to use the Force of the State for its own preservation, beyond the Limits fix’d by the Constitution, in transitory acts which are not to be made

Precedents”.

And even David Hume, who was not unduly sympathetic to the monarch or the then nascent executive, acknowledged that “in every government, necessity, when real, supersedes all laws and levels all limitations”.

However, the liberals’ constant preoccupation, which became increasingly acute as the prerogative powers were used in Ireland and the empire to brutally suppress rebellions, was to ensure that the prerogative – be it wielded by the monarch or the executive – was never unchecked.

By 1866, after the especially harsh use of martial law in Morant Bay, Jamaica, a vast campaign, spearheaded by John Stuart Mill, was under way to ensure that the scope of any extraordinary powers was fixed in legislation and that their exercise was reviewable by the courts. No less an issue was at stake, Mill wrote in stressing the importance of reform, than whether “British dependencies, eventually even perhaps Great Britain itself, were to be under the government of law or of military licence”.

It was that campaign, and the compromise forged through the classic texts on martial law of William Finlason, an ardent imperialist who was chief legal writer for The Times, that defined the legal framework for the special powers Australia and the other dominions subsequently relied on in times of war.

Developing from the Boer War to the present, the framework’s essential elements were to respect parliamentary sovereignty by requiring emergency powers to be legislated, provide for judicial review of their use, and subject administrative decisions that abrogate rights to several layers of close scrutiny – all features entirely alien to the Prussian tradition of “Not kennt kein Gebot”, necessity knows no law.

Viewed in that perspective, the special measures Australia and the other advanced democracies adopted in the wake of 9/11 are perhaps our finest, but also least heralded, triumph over the Islamists.

They are, no doubt, imperfect; some critics view them as too harsh, others as too lenient – and there is truth in both contentions. However, in marked contrast to their predecessors in the world wars, and to the fears expressed when they were enacted, those powers have not served to curb the freedoms of expression and association, dispossess stigmatised groups or silence legitimate opposition; yet they have helped dismantle countless jihadist networks, avert attacks and save innocent lives.

It could easily have been otherwise – indeed, even the recent experience with emergency powers in France in the aftermath of the Algerian war, the UK in Northern Ireland and Italy in the face of the Red Brigades pointed to a far grimmer outcome, inconsistent with the rule of law. Nor are there grounds for complacency: the use, and abuse, of emergency powers in the current pandemic underscores the risks they inevitably pose.

But two decades after 9/11, this much is certain: for all of the West's failings, we have not fought fire with fire, crushing the lawless with lawlessness; and while the Islamists may have levelled the World Trade Centre, constitutional democracy, which remains our civilisation's shining jewel and the most enduring monument to those who lost their lives on that day and in the months and years that followed, has not, and will not, be destroyed.