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How to do Things with Security Post 9/11[1]

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Abstract—Discourses and the ideas, perceptions and templates upon which they are based exert a powerful influence on law-making, push policy-making in a precise direction and determine operational action and outcomes. British counter-terrorist law and policy post 9/11 is heavily mediated through a conceptual filter that evokes a siege mode of democracy, which deliberately displaces the traditional rights-based model, and a security narrative based on a double asymmetry. By blending a discursive theoretical approach with an institutionalist perspective, the discussion examines the siege mode of democracy and its implications and the double asymmetry underpinning the Government's framing of the threat and of the means to counter it. Both features of the Government's security discourse are critical in explaining not only British counter-terrorist legislation and policy evolution in the 21st century and the controversial operation 'Kratos' adopted by ACPO in 2002, but also their official depiction as necessary, and singular, responses to some structured necessity and the associated logic of 'no alternative'.

1. *Introduction*

There is a tension inherent in liberal constitutionalism. Perplexing as it might seem, 'liberals have never been completely content with the state'.[2] This is far from surprising. Two world wars, nationalist aggression, the unrealized promise of equality and social inclusion, have all contributed to a sense of discontent with the state. Yet, in the liberal mind, discontent has never resulted in either a loss of hope for a better, albeit imperfect, collective life or outright opposition to the state. On the contrary, so long as the state sets in motion progressive social change, promotes democratic values and safeguards the rule of law and citizens' rights, liberals can live with it.

Interestingly enough, even critics of liberalism, including those who do not share the liberal view of human nature and the methodological individualism underpinning liberalism, find it difficult to contest the political core of

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[1] The title is borrowed from JL Austin, *How to Do things with Words* (Harvard University Press, Cambridge 1962).

[2] A Vincent, *Modern Political Ideologies* (Blackwell, Oxford 1992).

liberalism, that is, the idea of responsible government constrained by checks and balances and complemented by rights which are held to be inviolable.[3] It is, indeed, the political core of liberalism, fashioned out of its complex entanglement with the European constitutionalist tradition and resistance to absolutist rule that has created a 'categorical gap' between liberal democracies and authoritarian states. 'Keeping the rule of law intact' and respecting the inviolable status assigned to rights are thus the main differentiae specificae of liberal constitutionalism.[4]

In the last decade of the 20th century, one of the most interesting debates among liberal constitutionalists focused on the role of the state and the changing nature of statehood in the light of economic globalization, the process of European unification, assertive subnational demands, minority communities' claims-making and the development of governance networks beyond the nation-state. Different views, and predictions, were expressed by those who saw in these developments either 'a retreat of the state' or its strategic transformation.[5] Notwithstanding the existence of considerable divergence among such views, however, most scholars agreed on one issue; namely, that there had been a clear shift away from the Weberian 'coercive state' to a 'benign state'. The latter was distinguished by its 'caretaker' role with respect to people's liberties and standards of welfare and its co-ordinating activity above (i.e. supranational governance, international organizations and networks), below (subnational governance and civil society) and sideways (the markets).[6]

But 9/11 shattered this perspective. The soft and facilitating state was replaced by a strong and intrusive state, and the categorical gap between rights-based democracies and authoritarian polities narrowed worryingly under a declared open-ended state of emergency and the so called 'war on terror'.[7] The indefinite detention of 660 foreign nationals from 44 countries at Guantanamo Bay naval base in Cuba, without charge or trial, and initially without access to lawyers and without the right to challenge their detention in the US courts,[8]

[3] Rights have been conceived of as trumps (Dworkin), side-constraints (Nozick), or primary (Rawls).

[4] Clauses 39 and 40 of the Magna Carta state that: 'no freeman shall be arrested, or detained in prison, or diseased [deprived of his freehold], or outlawed, or exiled, or in any way molested . . . except by the lawful judgement of his peers and by the law of the land. To no one will we sell, to no one will we deny or delay, right or justice'.

[5] D Held, *Democracy and Global Order* (Polity Press, Cambridge 1995); D Held and others, *Global Transformations: Politics, Economics and Culture* (CUP, Cambridge 1999); G Sorensen, *The Transformation of the State: Beyond the Myth of Retreat* (Palgrave Macmillan, London 2004).

[6] C Hay, M Lister and D Marsh, *The State: Theories and Issues* (Palgrave, Basingstoke 2006) 248–61.

[7] Loader and Goold maintain the view that the current security politics and the alleged contradiction between respect for human rights and the pursuit of security have their origins in socio-cultural conditions and political changes that pre-date 9/11. In this respect, Loader's solution is to 'civilise' security, that is, to defend an 'other regarding and rights-conducive practice of security'; I Loader, 'The Cultural Lives of Security and Rights' in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing, Oxford 2007) 27–43 at 29; B Goold, 'Privacy, Identity and Security', in *Goold and Lazarus*, 45–71.

[8] Later proposals for the prosecution of Guantanamo detainees in special military tribunals have been met with resistance by the US Supreme Court and recently by senior Republicans, such as Senator John McCain and General Colin Powell; *The Times*, Saturday 16 September 2006.

challenged the basic foundations of liberal democracy.[9] In the UK, the indefinite detention of foreign nationals deemed to be national security threats at Belmarsh prison and the subsequent regime of control orders, displayed the executive's readiness to truncate liberal democratic ideals, thereby leading people to wonder whether respect for them had been deep enough and unqualified.[10] It is, perhaps, the insalubrious prospect of 'democracy without moorings' that led Lord Hoffmann to remark that 'the real threat to the nation comes not from terrorists, but from laws like these'.[11]

My intention in this article is not to show that the UK's counter-terrorist laws and practices following 9/11 are taking a toll on constitutional principles. This is visible enough. Scholars, judges, practitioners and commentators have remarked on the adverse impact of the Government's security programme on due process guarantees and civil liberties.[12] Rather, I wish to examine the ideas, perceptions, assumptions and narratives underpinning the Government's security discourse post 9/11 and the process of their institutional embedding. By the latter, I mean their conversion to law and policy—a process that eventually leads law and policy to a particular path, shapes interests, influences behaviour and, rather unavoidably, expands the power of the state. By blending a discursive theoretical approach with an institutionalist perspective, I argue that New Labour's response to the threat of terrorism post 9/11 is heavily mediated through a conceptual filter that evokes a siege mode of democracy, which deliberately displaces the traditional rights-based model, and a security narrative based on a double asymmetry. I define the siege mode of democracy and its implications (the multiple harm principle), and examine the double asymmetry underpinning the Government's framing of the threat and of the means to counter it. I argue that both are contestable and counterproductive. Both features of the Government's security discourse, however, are critical in explaining not only British counter-terrorist legislation and policy evolution in the 21st century and the controversial operation 'Kratos', but also their official depiction as necessary, and singular, responses to some structured necessity and the associated logic of 'no alternative'. In examining the complex dialectics of ideas, security narratives and institutions, a number of possible objections to my argument are examined throughout the discussion and the crucial role of the British judiciary in contesting the Government's interpretive schemas is highlighted. The possibility of a dialogic alternative approach and a different political vision is outlined in the last section of the article.

[9] O Fiss, 'The War Against Terrorism and the Rule of Law' (2006) 26 OJLS 235–256.
[10] H Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65 MLR 724–762.
[11] *A and Others v Secretary of the State for the Home Department, re indefinite detention* [2004] UKHL 56; [2005] 2 WLR 87.
[12] C Gearty, *Can Human Rights Survive?* (CUP, Cambridge 2006).

It must be noted from the outset that in what follows I do not take a position on other issues, such as under what circumstances political extremism may be justified. Rather, I take it to be obvious that terrorism prima facie causes much harm and that its use is presumptively unjustified. But my interest lies in the cognitive ideas, assumptions, frames and paradigms in the foreground of the security debate that constrain the range of useful and appropriate solutions to it, their embodiment in legal rules and practices and the ensuing effects. More specifically, I am concerned with the British counter-terrorist discourse, the conceptual filter through which various aspects of political extremism are mediated and the nature and range of harms committed in the name of preventing harm.

2. *The Liberty v Security Dilemma and The Multiple Harm Principle*

Democratic cultures value both majoritarian electoral processes and reflective values and rights which place constraints on governments' powers. Democratic societies are, thus, by definition rights-based polities, endorsing their citizens' enjoyment of freedom within the perimeters set by laws and regulations. Because freedom is a very important political value, and yet can only make sense within an associative context, which by definition is bound to give rise to tensions, constraints and collisions with other interests and/or values, rights-based democracies have stipulated some guiding principles which could legitimate state intervention. One such guiding principle draws directly on Mill's harm principle;[13] that is, the state would only be justified in infringing on the freedom of individuals if the purpose of that curtailment was to prevent harm to others. As Mill put it, 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant'.[14]

When a person's conduct affects prejudicially the interests of others, at least in the older branches of criminal and civil law, society assumes jurisdiction over it. The state has a positive duty to intervene in order to prevent individual and/or collective harm and to promote the general welfare. Indeed, citizens harbour a legitimate, baseline expectation that the state will do so. With this baseline in mind, liberal democracies prescribe that state action must conform to standards of legality and procedural propriety, must be both necessary and suitable in order to prevent harm and must be proportionate. If state action does not comply with the above principles and is divorced from the apparatus of legalism

[13] Compare also HLA Hart, *Law, Liberty and Morality* (OUP, Oxford 1963).
[14] J S Mill, *On Liberty and Other Writings* (ed Stefan Collini) (CUP, Cambridge 1989) 72.

and constitutionalism, then it becomes as intolerable as any failure to act. True, harm can be construed in many ways and critics have correctly pointed out the fuzzy boundaries underpinning Mill's distinction between self-regarding and other-regarding actions. Others have also doubted the meaningfulness of the category of self-regarding actions. Notwithstanding such criticisms, it, nevertheless remains the case that Mill's very simple principle provides a good ground for justifying government intervention and validating the added value of state action.

Undoubtedly, there exist a few exceptions. In times of war or a major catastrophe, governmental action might temporarily abrogate rights and civil liberties in an attempt to preserve democracy and values. All human rights instruments provide for derogations in time of emergency. But these derogations are, or at least should be, temporary in nature and limited in scope. By the latter, I mean that they must comply with the principle of proportionality and the relevant measures must be consistent with international law obligations. In times of peace, however, there is a strong presumption that governmental intervention in order to prevent a harmful action ultimately protects the liberty of others and secures the external and material conditions of the unimpeded development of everybody. In this respect, there exists no true opposition between liberty and state action for the prevention of a harmful action or the promotion of security. For both are co-constitutive; that is to say, liberty rests on a state's determination of what people can and cannot do and its intervention in cases of non-compliance. At the same time, state intervention in order to prevent harm aims at the promotion of liberty in the long-run or in other respects, even, as we shall see, when it aims at promoting values other than liberty. To cite an example mentioned by Raphael, 'when criminal law restricts freedom to take other people's goods, in protecting security it protects freedom, since theft is a restraint on the freedom of the property owner to make use of his property as he wishes'.[15]

Yet, there are times when the rights-based model of democracy is supplanted by what may be termed a siege mode of democracy.[16] Governments may believe that the nation's survival is at stake. Fear and a 'war mood' may take hold of populations, as they contemplate ways of thwarting certain risks. Under such circumstances, officials invoke the existence of an emergency in order to protect the life of the nation and are willing to apply the national security exception even to areas where clearly national security is not at issue. The arraignment of hundreds of thousands of people before Soviet Special Boards under Stalin, the internment of Japanese-Americans during World War II and MacCarthyism in the United States are salient examples. The 'war on terror'

[15] DD Raphael, *Problems of Political Philosophy* (Macmillan Press, London 1976) 152.

[16] The 'siege' mentality can also characterise authoritarian and totalitarian states. But the focus of my discussion is on democracies displaying a 'siege' mentality.

proclaimed by the Bush and Blair administrations following 11 September is yet another example of an open ended state of emergency designed to protect the people from allegedly imminent terrorist attacks. As President Bush stated in his call to renew the Patriot Act which expired on 3 February 2006, 'we are still under threat, there is still an enemy that wants to harm us, and they understand the Patriot Act is an important tool for those of us here in the executive branch to use to protect our fellow citizens'.[17] And in response to Mr Rumsfeld's discursive shift from 'war' to 'a global struggle' against terrorism, President Bush stated: 'make no mistake about it, we are at war'.[18]

The discursive configuration 'war on terror' is both misleading and dangerous. It is misleading, because terrorism, be it 'old' or 'new', is neither a war nor an invasion to be fought by launching a military crusade.[19] Nor does it represent a threat to the safety of the state. True, it can destroy buildings, kill innocent citizens and cause much suffering. But it cannot destroy the state. Terrorism is, essentially, a performative intervention, entailing demonstrative violence for the achievement of political ends[20] and can only be tackled effectively by taking into account the political and ideological matrix that has generated it. Yet, under the 'war on terror' construction, politics is reduced to a simplistic and, in my opinion, flawed opposition between 'us' and 'them', which, in turn, lends further support for the emergence of a politics and laws of fear. The political realm is not only permeated by the Schmittean exclusionist discourse of friend *v* foe[21] and the 'enemy' becomes stereotyped, but dissidents and opponents are also seen as traitors or outsiders, at best. In this 'duality trap', the institutional context of political violence is bracketed under the veil of simplistic explanations rooted in cultural differences or in envy and hostility towards American democracy and prosperity,[22] such as 'they hate us because we elect our leaders'.[23] By framing risks, such as international terrorism, as a 'clear and present danger to the existence of our civilisation'[24] or as a question of societal survival, and not as an issue of risk management, national executives manage to loosen the grip of the normal checks and balances that have underpinned the constitution and rule of law on executive decision making.

[17] The USA Patriot Act was renewed on 2 March 2006.

[18] R Stevenson, 'President Makes it Clear: Phrase is 'War on Terror', *New York Times* (New York 4 August 2005).

[19] C Townshend, *Terrorism* (OUP, Oxford 2002) 116–117.

[20] According to Münkler, it is political method of communication and not part of a military strategy; H Münkler, *The New Wars* (Polity, Cambridge 2004).

[21] C Schmitt, *Der Begriff des Politschen* (2nd edn Duncker and Hamblot, Berlin 1932) [*Concept of the Political*, trans. George Schwab] (Chicago University Press, Chicago 1996). See also G Agamben, *State of Exception* (trans Kevin Attell) (Chicago University Press, Chicago 2005).

[22] E Scheuerman, 'Survey Article: Emergency Powers and the Rule of Law After 9/11' (2006) 14(1) J Pol Phil 61–84.

[23] Townshend, above (n 19) 9.

[24] As President Bush argued in 2001, 'we wage war to save civilisation itself. We did not seek it, but we must fight it and we will prevail', cited in N Rengger et al, 'Apocalypse Now? Continuities and Disjunctions in World Politics After 9/11' (2006) 82(3) Int Affairs 539–553, at 544.

The siege frame of reference itself provides legitimizing reasons to justify restrictions on civil liberties. It is often said, for instance, that when national security is threatened, the protection of liberties becomes an optional extra that hinders the safety of the population. Tackling security threats thus, allegedly, necessitates a diminution in rights, be it in the form of increasing the stop and search powers of the police, restrictions on free speech, increasing requests for identification, or even indefinite detention without trial. In such narratives and institutional practices, one clearly discerns the breaking down of the constitutive relation between security and freedom underpinning rights-based democracies: security and freedom become opposites or values that can be traded off against each other.[25] Indeed, according to official discourses, pursuing the value of security may outweigh competing values, such as liberty, at times (the primacy of security) or the Hobbesian pursuit of the preservation of order necessitates the limitation of liberty (security as a precondition of liberty). Even critics of governments' intrusions on civil liberties tend to address the issue in terms of correcting a 'bad balancing' between security and freedom,[26] thereby paying little attention to the fact that what is at stake is not a struggle about levels of security and freedom and the difficulty of reconciling competing ideals. For, as noted above, in rights-based democracies, governments not only have an obligation to act to protect citizens from violence, but they are also constrained as to how to perform this obligation. If I am correct on this, then the quest for a proper balance between security and freedom and the search for an optimal trade off are, essentially, elements of a discursive attempt to legitimize governmental overreach and a trend towards authoritarianism.[27] For any strategy of security that is not anchored in respect for rights and civil liberties is essentially a strategy of insecurity. To put it differently, securing security under the siege mode of democracy creates insecurity and causes multiple harms. Conversely, protecting rights and the standards underpinning liberal constitutionalism enhances security. Thus, we cannot protect and enhance civil liberties by sacrificing them.

Another risk entailed by the 'war on terror' discursive template is the relaxation of the need to show 'a definite damage or definite risk of damage' justifying intervention. It may be recalled, here, that in elaborating on the

[25] See J Huysmans, 'Minding Exceptions. Politics of Insecurity and Liberal Democracy' (2004) 3(3) Contemp Pol Theory 321–54; J Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the European Union* (Routledge, London 2006); A Tsoukala, 'Democracy in the Light of Security: British and French Political Discourses on domestic Counter-Terrorism Policies' (2006) 54 Pol Stud 607–627; J Waldron, 'Security and Liberty: The Image of a Balance' (2003) 2 J Pol Phil 191–210; D Bigo and E Guild, 'The Worst-case Scenario and the Man on the Clapham Omnibus' in *Goold and Lazarus* (n 7) 99–121.

[26] See, for example, C Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (CUP, Cambridge 2005) 206–209 and A Etzioni, *The Common Good* (Polity Press, Cambridge 2004).

[27] As Eric Laurent has argued, the 'war on terror' has helped to produce an 'administration of impunity' which can get away with things that would not have been tolerated in previous administrations: E Laurent, *Bush's Secret World* (Polity, Cambridge 2004).

application of the harm principle, JS Mill stressed the need to show that the harm to specific individuals or their interests is real and specific, or, alternatively, that the risk of damage is strong.[28] Conversely, under the siege mode of democracy, abstract, vague and speculative harm or a 'free-floating anxiety'[29] can easily turn liberty into a weak background assumption. In the context of the 'war on terror', for instance, President Bush and Prime Minister Blair have attempted to justify their foreign and security policies by invoking the need for preventative or pre-emptive action in order to secure 'national survival' and to protect 'our values' and 'our civilization'. But the application of pre-emption or the precautionary principle, which prescribes antecedent precautions before a risk materializes, to the national security field is laden with risks. As Sunstein has noted, the precautionary principle is incoherent, unnecessarily compromises freedom for the sake of an exaggerated risk and is characterized by what he terms 'probability neglect', that is, by attention to the worst case scenario, without considering its low probability.[30] If this over-emphasis on adverse outcomes is, in turn, combined with infringements on the liberty of an identifiable subgroup, then precautionary thinking does not only erode key political freedoms, but it may also have a lasting effect on the nature of politics. Mill, too, was deeply suspicious of intervention in the way of prevention, for such 'preventive function' of government is 'most liable to be abused'.[31] But how is the 'war on terror' discursive structure sustained?

3. *Interrogating the Ideational: the Double Asymmetry*

Considerable discursive power is more often than not manifested in the definition of a problem (or a threat) and the framing of acceptable and appropriate solutions to it. There exists a double asymmetry at the heart of 'the war on terror' construction; namely, the asymmetry of the threat and the asymmetry of governments' reactions to it. The former refers to the understanding and definition of the threat and entails an exaggerated view of its nature and likely consequences. As the framing of the threat is one of the most important drivers for extending security,[32] 'narratives of fear' pursued by official discourses grip the citizenry by emphasizing the novelty, exceptionality and seriousness of the threat. True, narratives of fear do not have to be identical. Risks and threats are framed by the government and other agencies according to their tacit knowledge and ideological perspectives. Nor does fear have to be in close correspondence to the perceived threat; the threat could be

[28] J S Mill, *Utilitarianism and Other Essays* (ed HB Acton) (Dent, London 1972 (1910)) 50–1.
[29] B Ackerman, *Before the Next Attack* (Yale University Press, New Haven 2006) 1.
[30] Sunstein above (n 26) 205.
[31] Mill above (n 28) 153.
[32] F Furedi, *Culture of Fear* (3rd edn Continuum, London 2005).

general and amorphous, almost a floating signifier, stretching, shifting and evolving to include environmental risks, epidemics, crime, low level political violence or the prospect of the next terrorist attack. Three things are, however, present in these discursive structures. First, the threat is presented as an objective category, a raw historical fact that is unrelated to political processes. Secondly, the threat is framed in such a way as to threaten 'our ontological security', 'our survival or the survival of what we hold dear in our communities'. And thirdly, the narratives must produce an extensive intersubjective sharing of ideas and meaning. In other words, fear, suspicion and 'a war psychosis' need to become generalized and deeply entrenched in order to legitimize processes of securitization. Governments must be able to maintain high levels of public fear by accentuating narratives of risk, catastrophe or 'the imminent threat'. But 'public alarm, even if ill informed, is itself a harm and it is likely to lead to additional harms, perhaps in the form of large-scale "ripple-effects"'.[33]

Narratives of fear are thus intertwined with narratives of security, thereby furnishing the appropriate solution to the threat. By promising the elusive 'freedom from threat',[34] narratives of security respond to narratives of fear. They, too, reflect governments' asymmetrical responses to the threat: responses tend to be reactionary, disregard possible consequences or costs and display what may be termed 'a proportionality' neglect. Instead of keeping a sense of proportion in the face of the threat, states' responses are often premised on a strategy of 'as if', to borrow the term from the philosopher Hans Vaihinger (1852–1933), that is, an assumption that the risk has already materialized. The 'war on terror' and the siege mode of democracy structures thus leave little room for rational and strategic thinking designed to forestall the risk.[35]

States' responses are often fuelled by anger, frustration and a desire for retaliation and decisive action. Although such measures can, in the short run, reassure domestic constituencies that the government is in control, by embarking upon pre-emptive action, offensive strategies, the easy approval of authoritarian legislation and draconian practices, states lay themselves open to the charge that their response to terrorism is neither quantitatively more calibrated nor qualitatively more principled than terrorist action. And given that 'terrorists can easily reverse any counterterrorist "victories" with one placed bomb',[36] thereby calling into question the effectiveness of the laws and politics of fear, the cycle of repression and the injustices resulting from disproportionate and unprincipled state action not only may create a number of

[33] Sunstein above (n 26) 63.
[34] B Buzan and others, *Security: A New Framework for Analysis* (Lynne Rienner, Boulder 1998).
[35] As Bigo and Guild have observed, 'if securitisation means coercion without effective protection, then desecuritisation is a necessary step': above (n 25) 112.
[36] Townshend above (n 19) 118.

vengeful radicals, but they can also have a long-lasting, corrosive impact on political and social life. After all, history shows that rules and practices adopted under exceptional circumstances can easily become regularized and routinized.[37]

The winners are, without a doubt, the executive—at least in the short term because governments taking such action will eventually lose legitimacy.[38] By utilizing narratives of fear and security, they succeed in making authoritarian legislation an acceptable and legitimate response to existing situations. By so doing, they shield unilateral decision-making from the traditional checks and balances, and are even prepared to step outside the realm of the rule of law by devising special laws, special courts and states of emergency. Such a course of action, however, makes the boundaries between liberal democracy and authoritarian statism indistinct. But even in polities resisting the shift to authoritarianism, the failure to consult a wider constituency of interests, and in particular those groups that are disproportionately affected by the laws and politics of fear, and to establish independent channels of inquiry dealing with risk assessment, dampens trust in democracy. By routinizing non-accountability, eroding the rights culture that places limits on executive power, discouraging public participation and enhancing the executive's dominocracy, the siege mode of democracy, in all its gradations, causes multiple harms to individual citizens and residents under the guise of harm prevention. The subsequent discussion will elaborate on this by examining the embedment of ideas, assumptions and security frames in British counter-terrorist legislation and practices and their impact.

4. *Putting the Ideational Into Legal Context; Locating the Threat*

A. *A Counterterrorist Legislation and the Harm Index*

11 September 2001 provided the context rendering the siege mode of democracy and the concomitant notion of public emergency not only pertinent, but also mandating specific types of state action. Indeed, following 9/11, legislative initiatives on both sides of the Atlantic, such as the Patriot Act and the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), were rushed into law without receiving appropriate consideration and scrutiny in the Congress and the Parliament, respectively. Congress rushed the bill into law within

[37] Compare, here, Ignatieff's argument about the banalisation of torture in M Ignatieff, 'Moral Prohibition at a Price' in Kenneth Roth and Minky Worden (eds), *Torture: A Human Rights Perspective* (The New Press, New York 2005) 24.

[38] A Schmid, 'Terrorism and Democracy' in A Schmid and R Crelinsten (eds), *Western Responses to Terrorism* (Frank Cass, London 1993); L Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Goold and Lazarus (n 7) 257–275.

thirty-three days of its proposal by the Attorney General, John Ashcroft, while the Anti-Terrorism, Crime and Security Act 2001 was seen as a necessary response to a public emergency facing the UK, that is, the existence of a terrorist threat from persons suspected of involvement in international terrorism, and was predicated on the UK's derogation from Article 5(1) of the ECHR.[39] As the Prime Minister, Mr Tony Blair, wrote, 'after September 11, 2001, in common with many other nations, we passed new anti-terror laws.[40] In the aftermath of such an outrage it was relatively easy to do so. We gave ourselves the ability, in exceptional circumstances, to detain foreign nationals who we believed were plotting terrorism but against whom there was insufficient evidence to prosecute. It was an important power. They were, of course, free to leave Britain. But we would not let them be free here.'

Part IV of the ATCSA introduced the indefinite detention of foreign nationals deemed to be 'national security threats' without charge or trial. More specifically, under s 21, the Home Secretary had the power to certify a person as a suspected international terrorist, if he reasonably (a) believed that the person's presence in the UK constitutes a risk to national security, and (b) suspected that the person is a terrorist.[41] And s 23 gave the Home Secretary powers to detain indefinitely non-British citizens under certification who cannot be deported owing to an international agreement or if there is no safe third country to which they could legally be deported. Few would dispute that such a power of executive detention predicated on nothing more than belief and suspicion, which could have been based on information obtained under torture or other inhuman or degrading treatment, 'is on its face grossly antithetical to established constitutional rights', as Lord Justice Laws noted in *A and Others v SSHD*.[42] However, the encroachment upon liberty was allegedly justified, because the executive had managed at a very early stage to locate the threat. The latter stemmed from the 'dangerous outsider'. The fact that the 'dangerous outsider' was always free to leave Britain voluntarily,

[39] The Order was made on 11 November 2001 (SI 3644/2001, in force on 13 November 2001). Notably, Article 15 ECHR envisages derogation from some Convention articles in time of emergency. Although Article 15 of the ECHR is not one of the articles expressly incorporated by the 1998 HRA, section 14 of that Act makes provision for prospective derogations by the UK to be designated for the purposes of the Act in an order made by the Secretary of State. The Home Secretary made a Derogation Order, invoking the existence of a terrorist threat to the UK from persons suspected of involvement in international terrorism. But critics remained unconvinced. The Sixth Report of the Joint Committee on Human Rights, entitled 'Anti-Terrorism, Crime and Security Act 2001: Statutory Review and continuance of Part IV' (2004) raised serious doubts as to whether the detention provisions were required to deal with a public emergency threatening the life of the nation and as to the necessity of the derogation. In *A and Others v Secretary of State for the Home Department*, the appellants contended that there was not a public emergency threatening the life of the nation, since the threat to the nation was not shown to be imminent, the emergency was not of a temporary nature and no other state felt the need to derogate from Article 5 of the Convention; Above (n 11).

[40] 'Shackled in the war on terror' *The Times* (London 27 May 2007) 19.

[41] The latter term refers to a person who is or has been concerned in the commission, preparation or instigation of acts of international terrorism as defined in s 1 of the *Terrorism Act 2000*, is a member or belongs to an international terrorist group or has links with an international terrorist group.

[42] [2004] EWCA 1123, 224.

thereby immediately calling into question the Government's own assessment, was immaterial.

What was important was that the Government was not going to tolerate the presence of radical foreign nationals. The certification and detention of non-UK nationals, who could not be deported following the *Chahal* Court ruling in 1996, demonstrates not only the boundary-drawing function of the security discourse permeating the siege mode of democracy, but also the double asymmetry underpinning the Government's security discourse. Whereas nationality cannot be construed to be a determinant of terrorist activity post 9/11, the Government's first move following 9/11 was to portray non-national residents as the main and immediate locus of the threat to national security. By drawing a clear line between 'outsiders' and 'insiders', it sought to externalize security risks. Such an externalization was important for the politics of security management for a number of reasons. First, the Government could appease the electorate's security concerns by expelling 'bad foreigners' and detaining indefinitely 'unwanted aliens, who have no right to be here', but cannot be deported. Secondly, by taking effective action in this area, the Government could create the popular, albeit illusory, belief that it was in control of not only international terrorism, but also its borders and migration. Thirdly, it gave credence to fears about domestic safety, which, in turn, could only be addressed by increasing the repressive powers of the state, enhancing surveillance and allocating more resources to security agencies.

Its main weaknesses, however, outweighed any perceived advantages. Despite official justifications drawing on security, the indefinite detention of non-UK nationals could easily be exposed as a strategy of 'symbolic politics'. Since detainees could at any time walk away from the place of detention by agreeing to return voluntarily to their home states, the Government's commitment to combating international terrorism could be deemed to be superficial. Britain would 'export' terrorists to other countries. Furthermore, the Government did not provide an objective justification for the anisomorphism between national and non-national 'Islamic radicals'. By engaging in what may be called performative politics and the ensuing securitizing strategy of containing the dangerous foreigner, the Government failed to respect the fundamental rights of non-national residents; respect for the human right to liberty was conditioned on nationality differentials.[43] By so doing, it also gave insufficient thought to the requirements of a rational and effective antiterrorist programme.

[43] Non-national suspects had only one chance of appeal to the Special Immigration Appeals Commission (SIAC) against the Home Secretary's certification decisions; the remit of the SIAC had been circumscribed; the decision on the appeal was made on the basis of secret evidence heard in closed evidence proceedings from which the appellant and his legal representative were excluded; and the special advocate's ability to represent the interest of the detainee was circumscribed by the restrictions under which he was required to operate. Such measures, clearly, failed to observe fair trial guarantees under Articles 5, 6 and 5(4) of the Convention and article 14 of the Covenant respectively.

The broad range of executive discretion and its adverse impact on fundamental human rights led the House of Lords to rule that neither the Derogation Order nor s 23 of the ATCSA could be justified. More specifically, resisting the Attorney General's call for judicial deference to the political authorities, the House of Lords quashed the Derogation Order and declared that s 23 ATCSA was incompatible with Articles 5 and 14 of the European Convention since detention powers were disproportionate and discriminatory on the ground of national origin. As Lord Nichols stated,

> The Government contends that these post-9/11 days are wholly exceptional. The circumstances require and justify the indefinite detention of non-nationals suspected of being international terrorists. The principal weakness in the Government's case lies in the different treatment accorded to nationals and non-nationals. The extended power of detention conferred by Part 4 of the Anti-Terrorism, Crime and Security Act 2001 applies only to persons who are not British citizens. It is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists.[44]

The Law Lords thus discerned that neither the nationality nor the migration status of suspected terrorists were relevant considerations. Nor can it be said that the right of liberty of foreign nationals places qualitatively different obligations on UK authorities. The differential suspicion and treatment of non-nationals was thus essentially a technique of risk management which displayed cognitive bias, weaknesses in governmental counter-terrorist strategy and a creeping authoritarianism.

The Government swiftly responded to the declaration of incompatibility by introducing control orders under the Prevention of Terrorism Act 2005. Control orders are designed to 'protect members of the public, including armed forces abroad, from the risk of terrorism' by 'preventing or restricting involvement by certain individuals in terrorism-related activity' (s 1 of the Act) and are applicable to both British nationals and non-nationals. In this respect, the Government's identification of the location of the threat shifted; alongside outsiders, 'insider outgroups' were placed on the interpretive grid. Notably, two types of control orders are envisaged by the Act; namely, derogating control orders, which impose obligations that are incompatible with Article 5 of the ECHR, require a derogation under s 14 of the HRA 1998 and can thus be made by a court on an application by the Secretary of State, and non-derogating control orders, which are made by the Home Secretary. The Home Secretary is thus empowered to impose, for an initial period of 12 months, a number of significant restrictions, prohibitions and limitations on liberty,

[44] *A and Others v SSHD*, above (n 11) [76].

the movement, residence, occupational activity, association and communications of certain individuals he reasonably suspects are or have been involved in terrorist activity, or consider it necessary to make such an order. Control orders can thus range from electronic tagging to house arrest and from restrictions on work or business to reporting requirements to specified people at specific times and places.

And although control orders, which, according to the Home Office's quarterly statement are now 18,[45] are sustained by the flawed opposition between liberty and security (see the discussion above), the British judiciary does not believe that the latter two values are either mutually exclusive or tradable. True, the application of these provisions to UK nationals may have shielded the Government from the charge of discrimination, but the normative deficiencies of the control order regime have not escaped the judiciary's attention. Control orders are normatively deficient in so far as the obligations they impose 'potentially interfere with a wide range of Convention rights, such as the right to respect for private and family life and home (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of association (Article 11), and the right to peaceful enjoyment of possession under Article 1 Protocol 1',[46] and can be so restrictive of liberty as to amount to a deprivation of liberty. It thus comes as no surprise that on 12 April 2006, the High Court ruled that the orders as imposed on MB, who wished to travel to Iraq to fight 'coalition forces', violated his right to a fair trial under the Human Rights Act and were an 'affront to justice'. Mr Justice Sullivan ruled that it was 'conspicuously unfair' that there was no judicial review of control orders and that the review process provided for in the Prevention of Terrorism Act was the equivalent of 'executive decision-making untrammelled by any prospect of effective judicial supervision'.[47] Given this 'thin veneer of legality' and the absence of 'any effective oversight by judges', the High Court made a declaration of incompatibility of the procedures under s 3 of the Act relating to judicial supervision with the right to a fair hearing under Article 6.1 ECHR, thereby causing embarrassment to the government. And on 28 June 2006, the High Court quashed the control orders of six suspects, which had resulted in their confinement within a one-bedroom flat for 18 hours a day, on the ground that they imposed obligations which are incompatible with the respondents' right to liberty under Article 5 ECHR.[48] True, the Secretary of State brought appeals against Sullivan J's decisions successfully with respect to *MB* and unsuccessfully in *JJ and Others*.[49] In *E*, the

[45] Home Office, 'Control Orders Quarterly Statement', 22 March 2007.

[46] House of Lords and House of Commons Joint Committee on Human Rights, *Twelfth Report Session 2005* HL 122 (2005) HC 915 (2005) [33]. See also D Feldman, 'Human Rights, Terrorism and Risk: The roles of Politicians and Judges' (2006) PL 364–384.

[47] *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin), [103] 12 April 2006.

[48] *Secretary of State for the Home Department v JJ and Others* [2006] EWHC 1623 (Admin).

[49] *SSHD v MB* [2006] EWCA Civ 1140; *SSHD v JJ and Others* [2006] EWCA Civ 1141, 1 August 2006.

third case in this area, the High Court also ruled that E's rights under Article 5 ECHR had been infringed. *E* had been made to live under conditions similar to those experienced by *JJ* and his mental state had been affected.[50] On 31 October 2007 the House of Lords ruled that control orders imposing a curfew of 18 hours amount to a deprivation of liberty.[51] However, control orders of up to 12 and 14 hours do not breach Article 5 ECHR since they merely restrict the liberty of individuals.[52]

In view of such criticisms, coupled with the fact that terrorism in the UK and Europe has been a recurring phenomenon, Sunstein has been correct to observe that British counter-terrorist legislation should serve a cautionary tale for many: 'the ease with which a country (Britain) with such a proud tradition of freedom can take the wrong course should encourage the rest of us to pause, reflect, and take decisive action to avoid similar cycles of repression'.[53] The heightened need for such a reflection has been advocated by senior Lords, such as Lords Woolf, Hoffmann, Steyn and Bingham, and has been reinforced by the increase in the search and arrest powers of the police and subsequent counter-terrorist legislation.

B. *Battle Lines Around Pre-charge Detention, Free Expression and Search and Arrest Powers*

Following the London bombings on 7 July 2005, the Labour Government announced 12 new measures designed to increase security on 5 August 2005. Although this was consistent with the double asymmetry underpinning the government's security discourse (Section 2 above), one notices that the official identification of the location of threat changes once again; it is no longer confined to 20 or so 'dangerous outsiders' or 'dangerous insiders', but it widens and spills over to include young British Muslims who are prone to incitement by extremist imams, and others. This interpretation, in turn, prompts a broader definition of the threat, which now lies in radical Islam, and alters the conception of the necessary means to counter it. New tougher laws are thus allegedly needed because many could be 'potential terrorists'. Accordingly, the Government proposed an unprecedented extension in the police's powers of detention; any person suspected of being involved in terrorist activities could be

[50] *Secretary of State for the Home Department v E and another* [2007] EWHC 233.
[51] *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45.
[52] *Secretary of State for the Home Department v E and another* [2007] UKHL 47, *Secretary of State for the Home Department v MB* [2007] UKHL 46. In relation to Article 6 ECHR, the House of Lords held that a non-derogating control order did not involve the determination of a criminal charge – it involved only 'a foundation of suspicion'. It was also held that procedures allowing the withholding of intelligence-based evidence from suspects and their lawyers (and use of special advocates) do not inevitably amount to a breach of the civil limb of the right to a fair trial - but they could if persons were denied knowledge in whatever form of the case against them. The cases of *AF* and *MB* were thus remitted to the High Court for reconsideration in the light of the House of Lords' decision and for determination of their compliance with Article 6 ECHR; *SSHD v MB* (*FC*) [2007] UKHL 46.
[53] Sunstein above (n 26) 173.

detained for up to 90 days without charge. On the grounds that the police must be given sufficient time to gather the relevant information necessary for the prosecution of suspected terrorists and that 'the rules of the game' have changed owing to the unprecedented nature of 'the organized Islamist threat', it was argued that it is the state's overriding duty to safeguard the safety of its citizens and to prosecute actively terrorists. But neither the above mentioned justifications nor active public advocacy by the police convinced parliamentarians that making such a fundamental retreat from habeas corpus, enshrined by the Magna Carta, was necessary. The Bill was eventually defeated in Parliament by 322 votes to 291, the worst such defeat for any Government since 1978, and a compromise was later reached to extend the permitted detention time from 14 (as stipulated under the Terrorism Act 2000) to 28 days. In light of this amendment which was enacted on 25 July 2006, the Terrorism Act 2006 increased the time limit for detention without charge from 14 to 28 days, subject to successful applications being made to a judicial authority authorizing weekly extensions. However, it is debatable whether judicial involvement prevents arbitrary imprisonment, since judges have 'only a modest opportunity for in depth scrutiny' and the information communicated by the security forces cannot be challenged by the detainee or his/her legal representative. In light of this, Amnesty International pinpointed that pre-charge detention may give rise to abusive practices and lead detainees to make involuntary statements that may prejudice the outcome of future trials.[54] Others pinpointed that the 28-day detention without charge, which is the most sweeping power of detention in Western Europe, shows that civil liberties have been rolled back, owing to hastily drafted laws and the government's single-minded determination to produce headlines that would please voters. One notices, for example, the absence of safeguards, such as the confinement of pre-charge detention to the prevention of a terrorist act (as opposed to suspected involvement in terrorist activities) and a full hearing in front of a judge, having the power to release the suspect outright or to put conditions on his release after certain days. Everyone believes that risk-limiting policing could be required to thwart terrorism, but when security becomes the overriding value to be pursued at the expense of constitutionally guaranteed liberties and secured even by extreme and unlawful means (the Belmarsh regime of indefinite detention, control orders, internment), then liberal democracy becomes indistinguishable from authoritarianism, thereby causing multiple harms (see Section 1 above).

In addition to the increase in detention powers, the 2006 Prevention of Terrorism Act introduced warrants to let police search property owned or controlled by terrorist suspects and a number of new offences, including

[54] Amnesty International, *Briefing on the Draft Terrorism Bill 2005*, 2005.

committing acts preparatory to terrorism, encouraging terrorism and disseminating terrorist publications. It also increased the flexibility of the proscription regime, including the power to proscribe groups that glorify terrorism and the continuation of the proscription when the group changes its name. It is thus a criminal offence, carrying a maximum penalty of seven years imprisonment, to 'publish or cause another to publish a statement that is likely to be understood by some or all the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism'. Indirect encouragement statements include statements glorifying the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances. This provision was criticized for its vagueness and for potentially infringing on citizens' right to reflect on governmental policy and the causes of terrorism. The very fact that the provision was not confined to present events and could capture past events which, in the Home Office's opinion, could be construed as acts of terrorism (as opposed to acts of resistance), showed the full extent of the Government's inroad into the right of free speech. It is also interesting that someone could be guilty of the offence, even if (s)he has no intention of encouraging terrorism, that is, if (s)he 'was reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit terrorist acts'. NGOs have argued that the vague wording of the provisions, coupled with the absence of a definition of the term 'glorification', could lead to the prosecution and criminalization of persons who lawfully exercise their right to free expression and might express anti-American views.[55]

A person is also guilty of a crime under the Terrorism Act 2006, if (s)he disseminates a terrorist publication, which is defined as one that contains information that could 'be understood, by some or all the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement of terrorism or if the publication is simply "useful" for the commission or preparation of acts of terrorism'. Matter which 'glorifies' terrorism is likely to be understood as indirectly encouraging terrorism. Once again, the wording and broad scope of these provisions gives the government ample scope to criminalize individuals, and as Justice has pointed out, even a map of the London underground and any timetable for a bus, train or plane could be viewed to be 'useful in the commission or preparation of an act of terrorism'.[56]

[55] Ibid 9; Justice, 'Terrorism Bill, Briefing for House of Lords Second Reading' (2005).
[56] Justice above (n 55).

While many worry about the provisions' scope for arbitrary interpretation and the Government's heavy handed approach which drains civil liberties of their former force, the latter invokes the basic harm approach and the security *v.* liberty dilemma. According to the former Prime Minister, Mr Tony Blair, 'We have chosen as a society to put the civil liberties of the suspect, even if a foreign national, first. I happen to believe that this is misguided and wrong'.[57] By drawing on the false dichotomy between liberty and security (Section 1), the above discursive constructions continue to depict civil liberties as a hindrance to security, thereby overlooking that respect for the rule of law and the civil liberties of individuals, irrespective of their nationality, not only constitutes an important component of a democratic polity's understanding of security,[58] but it is also a precondition of security.

As the security paradigm becomes embedded in institutional arrangements, it funnels interests towards specific policy directions and spreads to areas that are less connected with terrorism and the need to safeguard national security, such as crime prevention. The state's web of interference with people's liberty is thus cast more widely, thereby causing harm and probably boosting radicalism since people feel that they are unjustly targeted and criminalized. For instance, although s 44 of the Terrorism Act 2000 gave the police the power to stop individuals in areas seen as being at high risk from terrorism, even if they are not suspected of a crime, the Serious Organised Crime and Police Act 2005, strengthened further the operational capacity of the policy without giving due consideration to civil liberties. Following the publication of the Home Office's consultation paper, entitled 'Policing: modernising police powers in order to meet community needs',[59] the Serious Organised Crime and Police Act 2005, in force on 1 January 2006, revealed the prevalence of a law enforcement and deterrence model of policing over strategic thinking about crime prevention and rights protection. More specifically, whereas under s 24 of the Police and Criminal Evidence Act 1984 (in force in 1986), the definition of an arrestable offence to which the summary power of arrest applies was confined to offences committed by persons over 21 years of age that carry a minimum term of five years imprisonment as well as to a list of miscellaneous statutory offences, s 110 of the Serious Organised Crime and Police Act removed the element of seriousness that underpinned the definition of an arrestable offence. This has resulted in a significant increase in police powers, which now apply to any offence defined in either statute or common law. Constables can arrest anyone, without warrant, who is about to or is in the act of committing an offence; (s)he is suspected that (s)he is about to or in the act of an offence; anyone who

[57] 'Shackled in the war on terror' *The Times* (London 27 May 2007) 19.
[58] I draw on the statements made by the Supreme Court of Israel, *Public Committee Against Torture in Israel v Israel* (1999) 7 BHRC 31, 54 [39].
[59] Home Office (HMSO, London 2004).

has committed an offence; anyone guilty of committing an offence or anyone they suspect is guilty of having committed that offence. True, the increase in police powers is tempered by the inclusion of a necessity clause, that is, enumerated reasons which make an arrest necessary.[60] But it is debatable whether the latter can thwart abuses of power and prevent unjustified arrests.[61] After all, the police can always justify arrest in order to 'obtain evidence by questioning' and to 'prevent the offender causing physical injury to themselves or others, or suffering physical injury'.[62]

Perhaps more worryingly, in late May 2007 the Government announced its intention to introduce tough new powers which would permit the police to stop and interrogate individuals about who they are, where they have been and where they are going, without needing to have a suspicion that a crime has taken place. If individuals fail to stop or refuse to answer questions, they could then be charged with a criminal offence and fined up to £ 5000. According to the then Home Secretary, Mr John Reid, the police could use the stop and question power to gain information about 'matters relevant' to terror investigations.[63] In early November 2007, the Prime Minister, Mr Gordon Brown, noted that security demands the extension of the period of pre-charge detention to 56 days. And the Counter-Terrorism Bill (Bill 63) introduced in the House of Commons on 24 January 2008 conferred further powers to gather and share information for counter-terrorism and other purposes, created the offence of wilfully obstructing a constable in the exercise of the power to remove documents for examination, provided a constable with powers relating to the taking and use of fingerprints and non-intimate samples from an individual subject to a control order and granted the Secretary of State a reserve power to increase the period of pre-charge detention to 42 days in specified circumstances. The maximum time period for which the reserve power will remain available is 60 days. The introduction of such intrusive new measures would not only attest the harmful effect of the unreflective promotion of notions and narratives of security on constitutional principles and civil liberties, but it would also reinforce the view that the alleged 'new and unprecedented terrorist threat' is a manifestation of a form of 'security entrepreneurship' which is designed to strengthen executive and coercive state apparatuses.

[60] Under s 24(5) of the Act, a constable must consider it necessary to arrest a person in order to ascertain the name of the person; their address; to prevent the person from causing physical injury to themselves and others; from suffering physical injury; causing loss or damage to property; committing an offence against common decency; causing an unlawful obstruction of the highway; to protect a child or other vulnerable person; to allow the prompt and effective investigation of the offence or of the conduct of the person in question and to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

[61] E Cape, 'Arresting Developments: increased police powers of arrest' (2006) Legal Action 24–7.

[62] A Keogh, 'Police State or Proportionate Response?' (2006) 156 New L J 81.

[63] 'Police to get tough new terror powers',*The Sunday Times* (London 27 May 2007).

5. *Putting the Ideational Into Operational Context: Operation Kratos*

The foregoing discussion has focused on the ideas, perceptions and cognitive filters on which counter-terrorist legislation following 9/11 has been predicated and which explain the latter's orientation, content and change over time. This section extends further the discussion about the constitutive and explanatory role of ideas, perceptions, assumptions and frames about security by focusing on the police's operational strategies, tactics and, more specifically, on operation Kratos. Forming a central part of the UK's counter-terrorist response, operation Kratos was adopted by the Association of Chief Police Officers (ACPO) in 2002 and entails a wide range of operational tactics,[64] including the controversial deployment of a specialist arms unit and the 'shoot to kill' strategy. Drawing on Israel and Sri Lanka's experiences of dealing with suicide bombers, the Association of Chief Police Officers devised Kratos with the aim to minimize and manage the risk of suicide terrorism by using force that is proportionate in the circumstances, including lethal force. Lethal force, defined as five shots in the head, can be used when it becomes absolutely necessary to safeguard the public.

Although the deployment of lethal force by the state against suspected suicide bombers *prima facie* fails to observe the fundamental right to life, it may be argued that in exceptional circumstances saving the lives of potential victims outweighs the sanctity of a suicide bomber's life. This, perhaps, explains why the use of lethal force is circumscribed by an absolute necessity test: 'it can only be used when it becomes essential for the protection of life'. Since it is likely that a suspect will attempt to detonate the device (s)he is carrying, if (s)he is either challenged or stopped for the purpose of identification, police officers have concluded that only his/her 'total and immediate incapacitation' can foil detonation. At first sight, the 'shoot to kill' operational strategy appears to be both reasonable and necessary for the protection of the public, since it displaces the risk of injury and death from innocent parties to the suicide bomber threatening to detonate an explosive device. Additionally, it appears to comply with the proportionality test, since the deployment of non-lethal force and human alternatives to firearms might not prevent the detonation of an explosive device. On this reasoning, it may be argued that the 'shoot to kill' tactic strikes a proper balance between liberty and security and is consonant with the principles underpinning rights-based democracies (see Section 1).

Before concluding so, however, it seems to me that three requirements must be met. First, the test of absolute necessity must refer to an actual, clear and sufficiently serious threat. In other words, the Designated Senior Police Officer,

[64] These are named Andromeda, Beach and Clydesdale.

who authorizes a fire-arms officer to kill a member of the public, must have ascertained that the suspect is carrying a suicide belt or a bomb and must have verified this by intelligence. Evidently, lethal force cannot be deployed as part of a general preventive action. Secondly, the means employed, that is, immediate incapacitation of the suspect by five shots in the head, must be suitable for the attainment of the desired objective. Thirdly, lethal force should only be used as a measure of last resort, that is, if and when less severe measures would not achieve the same objective.

As regards the first requirement, it is worth noting that, whereas in Israel police officers have to ascertain that a person is carrying a suicide belt or a bomb and must have corroborated this with intelligence, in the UK police officers 'do not have to see the suicide jacket or what they think may be a suicide jacket before they open fire'. Rather, they need only be 'satisfied that the threat exists and this has to be in conjunction with the assessment made by a senior police officer'.[65] The shooting of Mr de Menezes at Stockwell underground station on 22 July 2005, the innocent Brazilian electrician who was wearing a light denim jacket and was not carrying a bag of any description and who was under surveillance by undercover officers, but was neither challenged nor stopped, is an uncomfortable reminder of the high likelihood of human fallibility and flawed intelligence.[66]

Critics might observe, here, that it is preferable that authorities overreact, make mistakes and are accused of excessive zeal rather than risking mass casualties. Critics could even go a step further to argue that, given the 'present state of emergency' and the 'absolute imminence of the attack', security has to be the overriding consideration and that infringements of human rights are not only consistent with liberalism, but are actually warranted by it.[67] But such arguments bringing forth a clear juxtaposition of rights and security are apposite to the siege mode and the 'war without limits' approach outlined in Section 1 above.

The prevalence of the siege mode of democracy is accentuated, if one proceeds to examine the other two requirements. Doubts exist as to whether total and immediate incapacitation of a suspect can abort the detonation of an explosive device. For if suicide bombers opt for a button release device, instead of a button push one, the intervention of a firearms officer could trigger the explosion. In addition, a device could be detonated by remote control. In this respect, it is only through less severe means, such as the interception of the suspect, close surveillance and so on, that a suicide attack can be

[65] Panorama, 'Stockwell; Countdown to Killing' *BBC One* (London 8 March 2006).

[66] It is interesting that the Independent Police Complaints Commission's report found that Operation Kratos had not been deployed with respect to the shooting of Menezes. 'The Kratos code words were not used'; IPCC Report, 8 November 2007 (4). The Report is available at <http://www.ipcc.gov.uk>.

[67] T Meisels, 'How Terrorism Upsets Liberty' (2005) 53(1) Pol Stud 162.

effectively foiled. If this argument is correct, then depicting the 'shoot to kill' strategy as an effective and necessary means of preventing mass casualties may be misleading.

Although it is extremely important that the state takes all possible measures to prevent atrocities, one would have expected that the above considerations and the senior police officers' decision to adopt an operational strategy, such as 'shoot to kill', which marks a clear break from standard patterns of policing and can cause generalized unease and alienation owing to its likely disproportionate impact upon non-white citizens and residents, would have been subject to close scrutiny and parliamentary debate. Yet, apparently, operation Kratos was devised under a veil of secrecy and officials have insisted that details concerning Kratos must remain secret for 'operational reasons'. When Mrs Hazel Blears was asked in the House of Commons 'what discussions she had had with the police concerning operation Kratos', she replied: 'None. Operational tactics are a matter for the police. Operation Kratos is a response developed by the police following September 11 which Ministers were not asked to approve but were told about'.[68] And following the shooting of Mr de Menezes, the Metropolitan Police Service initially resisted an investigation by the Independent Police Complaints Commission.[69]

Problematic as it may be the absence of democratic oversight over such an operational strategy which gives the police *carte blanche* to act without any restraint,[70] what is important for the purposes of this discussion is to understand the adoption of operation Kratos and its acceptance by the executive. A close inspection of the rationale behind Kratos shows that it is predicated upon the same ideational framework as terrorism legislation and, in turn, reinforces it. One notices the reiteration of the security/liberty trade off, the defence of emergency rules and relaxation of the need to show a clear and actual threat (Section 1). One also observes that suicide bombing is depicted as an act of asymmetrical warfare that the state has to win by any means necessary (see Section 2 above). Chief police officers thus shared the same cognitive framework and security template as the executive and the suggested rationale for Kratos resonated with the government's security discourse. They, too, put emphasis on war-like situations, states of emergency and the

[68] Hansard HC vol 439 col 1761W (21 November 2005). I am grateful to my former student, Mr Cohen, for bringing this to my attention.

[69] See IPCC statement, *The Guardian* (London 18 August 2005). See also "Met 'resisted Tube death probe'", *BBC News* (London 18 August 2005) <http://news.bbc.co.uk/1/hi/uk/4163568.stm>. The Report of the IPCC, known as 'Stockwell 1', which was published on 8 November 2007, detailed command, communication and operational failures contributing to the killing of Mr de Menezes and made 16 recommendations for change to the police service. The Report and the statement from Nick Hardwick on 8 November 2007 are available at <http://www.ipcc.gov.uk> and <http://www.ipcc.gov.uk/news/pr 081107_stockwell_statement.htm>, respectively.

[70] The IPCC Report called for 'a wider debate and understanding of the tactical options available to the police service for combating the threat of suicide bombers'.

existence of new and unprecedented threats and less attention to the causes of political extremism. But by bracketing questions, such as 'how we got here' and failing to address the political grievances that give rise to extremism, elites narrow the means of tackling it,[71] thereby pushing law and policy-making in certain directions. Discursive articulations equating terrorism with religious fanaticism, that is amenable to neither reason nor restraint, are more likely to increase alienation, recrimination, anger and resentment. After all, many would regard the simplistic ascription of political problems to cultural and religious difference and approaches, such as 'the best defence is a good offence',[72] as unprincipled and foundationalist as the people they are 'waging war' against, thereby undermining liberalism from within.[73]

Another discursive construction that explains the adoption of the 'shoot to kill' tactic concerns the distortion of the relationship between extremism and politics by creating a gap between society and political extremists. This, too, is a symptom of the siege mode of democracy (Section 1). The gap is created when political extremists are depicted as not only culturally alien, but also the incarnation of the irrational and evil.[74] This misrecognition, that is, the process of framing political extremists as monsters or homicidal fanatics who must be destroyed, creates an emotional apartheid that divides and destroys the common humanity, thereby enabling the representation of the political motives of suicide bombers as threats to 'our values and national survival'. Misrecognition therefore leads to the non-recognition of the political character of their actions and thus to the impossibility of an ultimate political resolution. Moreover, it fuels racial or religious discrimination, since Al-Qaeda members and sympathisers are allegedly inspired by a religion and a culture that is not only 'too alien to comprehend', but also irrational, since it rewards martyrs. Accordingly, the citizen status of suspected terrorists is often erased; they cease

[71] The growing politicisation and radicalisation of British Muslims since 9/11 has been noted by studies. Following 7/7, young Muslims are among the most politically conscious and active people in Britain. They are drawn towards those who articulate what they consider to be injustices suffered by Muslims everywhere. See Ziauddin Sardar, 'Can British Islam Change?', *New Statesman and Society* (London 3 July 2006) 34. Compare also the open letter to the Prime Minister dated on 12 August 2006. The letter was signed by thirty-eight Muslim organisations, four Muslim MPs and three Muslim peers. All blamed governmental foreign policy for the increased risk of terrorism. Although the Government dismissed this argument and suggested that any such criticism comes close to justifying terrorism, it is interesting that two weeks prior to the 7/7 attacks, the Joint Terrorism Analysis Centre noted that Iraq provided a motivation and focus for UK based terrorist activity. See Nafeez Mosaddeq Ahmed, 'Engaging the Enemy Within' *The Independent* (London 13 August 2006) <http://www.independent.co.uk/opinion/commentators/nafeez-mosaddeq-ahmed-engaging-the-enemy-within-411602.html>.

[72] This is a central feature of US national security strategy under the Bush administration. See HA Giroux, *The Terror of Neoliberalism* (Paradigm Publishers, Boulder Colorado 2004).

[73] D Cole and J Dempsey, *Terrorism and the Constitution* (3rd edn New York Press, New York 2006); D Cornell, *Defending Ideals: War, Democracy and Political Struggles* (Routledge, New York 2004), R Dworkin, *Terror and the Attack on Civil Liberties* (Blackwell Publishing, New York 2005), R Goodin, *What's Wrong with Terrorism?* (Polity Press, Cambridge 2006), A Tsoukala, 'Democracy Against Security: The Debates About Counter-Terrorism in the European Parliament, September 2001–June 2003' (2004) Alternatives 417–39.

[74] Compare R Bernstein, *The Abuse of Evil* (Polity Press, Cambridge 2006).

to be members of the society. Instead, they become 'dangerous others', threatening to 'destroy things that are fundamental to our civilization'. As Charles Clarke has stated, 'we have no common bonds with people who have different beliefs'.[75] Non-white citizens and residents also become the objects of suspicion (e.g. Mr de Menezes)[76] and mistrust spills over into the overwhelming majority of law abiding Muslim citizens and residents. As Liz Fikete has observed, post 9/11 Muslims tend to be represented by governments as collective threats to the nation's core values. This representation relies on two flawed assumptions which are not remote from racism; namely, that the acts of extremist members of communities can be generalizable (the generalization of the exception) and that culture is the root cause of political violence.[77] In this respect, the 'war on terror' is easily transformed into a war of values, of religions, of good *v.* evil, thereby validating the adoption of the 'shoot to kill' operational strategy.

6. *Conclusion*

Discourses and the ideas, perceptions and templates upon which they are based exert a powerful influence on law-making, push policy-making in a precise direction and determine operational action and outcomes. The foregoing discussion shed light onto the constitutive role of the security ideational framework by giving an account of how the template of a siege mode of democracy has shaped counter-terrorist legislation post 9/11 and the controversial operation Kratos adopted by the ACPO in 2002. But in life the surest things can change, and, like much else, discourses are fragile constructions. If they are not reinforced with deep ideological or philosophical commitments, they are prone to change and reconfiguration. And even when they are accompanied by such doctrinal commitments, they are exposed to 'demythologization' owing to contestation, counter-discourses and structural changes. By examining the ideas, perceptions and assumptions underpinning the official security discourse, the discussion has highlighted the need to think critically and reflectively about security and the security *v.* liberty dilemma.

It seems to me that liberal democratic countries have a legal and moral responsibility to maintain the integrity of their political culture in countering political extremism. For liberal democratic principles are not an optional extra.

[75] <http://press. Homeoffice.gov.uk/Speeches/12-05-sp-terrorism-bill>.

[76] In July 2006 the Crown Prosecution Service announced that it would not carry forward any charges against any individual involved in the shooting of Mr de Menezes owing to a lack of sufficient evidence. Instead, the Metropolitan police faced charges under s 3(1) and 33(1)(a) of the Health and Safety at Work Act 1974 for 'failing to provide for the health, safety and welfare of Jean Charles de Menezes'. And on 1 November 2007 the Metropolitan Police were found guilty of the above offences and were fined £175,000 with £ 385,000 legal costs. However, the trial judge emphasised that there were no 'systemic failures' within the Metropolitan Police.

[77] L Fekete, 'Anti-Muslim racism and the European security state' (2004) 46(1) Race and Class 3–30, 18–21.

Instead, they form 'the grammar of political conduct' which must inform political judgement and action in ordinary situations and in challenging times.[78] And it is especially in challenging times that complex interventions, respecting due process guarantees and rights and observing Mill's qualifications, are warranted in order to make security secure. Otherwise, the fight against terrorism becomes a pretext for undermining the rule of law and eroding civil liberties. As the Parliamentary Assembly of the Council of Europe has stated 'all measures taken by the state to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory behaviour.'[79] In addition, democratic polities need to steer clear of overreactions that erode the credibility of counter-terrorist action, must observe the principle of proportionality and resist unhelpful dualisms, such as 'us *v.* them', 'British values *v.* violent Islamist theology' and 'shoot to kill *v.* inertia'. In light of the above, the need for a more mature and principled approach should not be underestimated. Although the development of such an approach is a much bigger task than the one I set upon myself here and cannot be pursued within the confines of the present article, it seems to me that politicians should at least consider the dialogic alternative;[80] namely, the shift of focus from the primacy of power politics and militarism to dialogue and multiple conversations across boundaries;[81] from the 'war on terror' and states of emergency to a discourse on peace and respect for law, be it international or constitutional; and from the portrayal of Muslim communities as the adversary and the locus of blame and suspicion towards recognizing terrorism as a shared problem affecting all communities within Western states. Unless polities 'unshackle' themselves from 'the war on terror' and the institutional practices that legitimize it, resist simplistic dualisms, be they of a theological, moral or cultural nature, challenge the legitimation of violence and militarism and acknowledge that war and occupation in the Middle East are crucial sources of grievances and obstacles to achieving a resolution of conflicts and a diminution of political extremism, the possibilities of transforming the present conditions will be pretty slim. The heightened need for a politics of hope and a critical debate on peace therefore should not be overlooked.

Democratic control is essential, too. More robust democratic institutions are needed to scrutinize the police, the security services and governmental policy. The House of Commons monitoring of the security services and their

[78] E Verdeja, 'Law, Terrorism and the Plenary Power Doctrine: Limiting Alien Rights' (2002) 9(1) Constellations 89–95, 89.

[79] Resolution 1271, 24 January 2002.

[80] Alternative proposals include Bruce Ackerman's proposal for an 'emergency constitution'; 'Before the Next Attack', *New Statesman and Society* (London 3 July 2006) 38–42.

[81] The term is borrowed from F Dallamyr, 'Conversation Across Boundaries' (2001) 30(2) Millennium 331–347.

increasing budgets should be made more effective, and the Intelligence and Security Committee should have full access to all the information it requests. The Committee should also be able to 'call upon lay experts among the senior MPs and peers, as well as being able to summon ministers, civil servants and security chiefs. It should also be given the task of compiling and issuing regular terrorism assessments to the public, taking the job away from the government'.[82] Alternatively, an independent organization could oversee security services and carry out the above mentioned tasks. Such reforms are, in my opinion, necessary because the absence of democratic control and of a critical debate about security, including about how security is framed and enacted at present, cannot but result in the dwarfing of democratic politics. And when this happens, the cracks in citizenship will, unfortunately, be beyond repair.

[82] *New Statesman and Society*, 'A Terrorist Threat and a Crisis of Trust' (London 3 July 2006) 4.