

## U.K. COUNTERTERRORISM LAW, PRE-EMPTION, AND POLITICS: TOWARD “AUTHORITARIAN LEGALITY”?

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*Since the turn of the century, across North Atlantic countries, counterterrorism law has been an area of relentless, highly prioritized, legal production that often challenges rule of law principles. This article provides a general overview of United Kingdom counterterrorism legislation and, drawing from jurisprudence, state theory, and political philosophy, constructs an analytical framework to assess its implications for the broader shape, function, and logic of law. It starts by assessing the dynamic tension between authoritarian and democratic elements that constitutes modern law, thus setting the overall conceptual framework in which counterterrorism law pertains. It proceeds to analyze U.K. counterterrorism law, by juxtaposing it to its United States counterpart and by deciphering the key trends into which its provisions combine. Based on this account, the article considers the implications of counterterrorism law for the law-form, that is, for the articulation between legal content, logic, and institutionality. It finds that, although the content and logic of counterterrorism law are incompatible with rule of law principles, they are developed in an institutional framework adherent to the rule of law. To account for this paradox, the article concludes that counterterrorism law signals the advent of authoritarian legality, a reconfiguration of the rule of law where the latter holds its institutional shape, but comes to consist of, and be driven by, authoritarian content and purposes. The article outlines the main characteristics of authoritarian*

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*legality, compares it to existing approaches to counterterrorism law, and indicates its plausibility for U.S. counterterrorism jurisprudence.*

**Keywords:** *authoritarian legality, criminal law, counterterrorism law, law-form (exceptional vs. normal), pre-emption, security*

## INTRODUCTION

Across European and North American jurisprudence, counterterrorism law is, arguably, the major legal development in the twenty-first century. It is a dynamic area of legal production; it is highly prioritized politically, introduces novel elements—and reinstates discarded ones—into the legal framework. Counterterrorism law has caused concern among legal scholars, practitioners, and criminologists, who see some of its provisions as disruptive of established rights, liberties, and standards. Nonetheless, critical accounts of counterterrorism law remain partial and disjointed. At best, they provide in-depth analysis of specific powers and show how they contravene particular legal standards, rights, or principles. This article aims to unify these critiques and overcome their limitations, by offering a comprehensive overview of United Kingdom counterterrorism law and its implications for the overall shape of the jurisprudence.

To do so, the article reframes the analysis of counterterrorism law in three respects. First, it provides a full overview of U.K. counterterrorism legislation. This is surprisingly rare in the literature,<sup>1</sup> possibly due to the scattered and constantly evolving nature of U.K. counterterrorism legislation. The latter comprises eight dedicated parliamentary Acts and a mosaic of provisions in legislation concerning crime, finance, immigration, investigation, among other areas. To overcome this difficulty, the article synthesizes the scattered provisions into decipherable legal trends, providing thus a broader and more systematic vista of U.K. counterterrorism law than has hitherto been available.

Second, the article constructs a framework for the analysis of counterterrorism law that is broader and more defined than in existing analyses. Its outmost limits are demarcated by an assessment of modern law as

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1. The only attempt to provide a broad overview that the author is aware of, is Roach (2011, pp. 238–308); another could be pieced together by selecting sections throughout Donohue (2008).

constituted by the dynamic interaction between democratic and authoritarian tendencies. Within this broad context, the article focuses on the implications of counterterrorism law in three interrelated but analytically distinct registers: legal content, the “logic” of law (i.e., the principles and purposes that organize and motivate the law), and its institutionality (the respective roles, positions, and relations among the institutions that produce and implement the law). The historically specific articulation of these elements constitutes the “law-form.”

Third, the article concludes that, rather than inflicting multiple partial infringements of the rule of law, U.K. counterterrorism law outlines a general, systematic reshaping of the rule of law framework so that it can accommodate legal rules and jurisprudential logic that are incompatible with the rule of law. It signals the advent of a new law-form, *authoritarian legality*, defined as *a reshaping of the rule of law that allows the systematic development of authoritarian legal content and logic within its framework*.

This account unfolds in five substantive sections. The first assesses modern juridical and political arrangements as compounds of democratic and authoritarian elements in dynamic tension. This delimits the broadest analytical framework to which counterterrorism law pertains, and which it affects. The second section briefly juxtaposes U.S. and U.K. counterterrorism law, offering an entry point to the latter to readers unfamiliar with it. The third section deciphers the main trends of U.K. counterterrorism law. It examines them from a criminal law vantage point, rooted in liberal concepts of individual autonomy and freedom, and concerned with the need for conduct and intention elements to determine guilt. Here, the analysis draws from existing critical accounts, but also diverges from them in three respects: it views pre-emption as the decisive master-trend in counterterrorism law, not as one trend among many; it suggests that the Intelligence mechanism acquires a crucial role in determining legislation; and it highlights the political character of counterterrorism law, a feature that is unique to it, sets it apart as an area of study, and permeates its other trends.

The fourth section engages with the content of counterterrorism law, the logic that underpins it, and its institutionality, to confront a paradox: Even as counterterrorism aligns law with *raison d'état* and enemy jurisprudence and is, therefore, structurally incompatible with the rule of law, it is produced and implemented by institutions that maintain their constitutional character. To address this paradox, the fifth section draws from the

jurisprudence of Franz Neumann and the state theory of Bob Jessop and Nicos Poulantzas to advance the notion of *authoritarian legality*. It sees counterterrorism law as a readjustment between the democratic and authoritarian elements that comprise modern law, and as a reconfiguration of the law-form. The latter is named “authoritarian legality.” It is marked by the systematic (as opposed to circumstantial or temporary) development of authoritarian elements within the framework of the rule of law. Its overall tendency is to amplify the coercive power of the state over society, and concentrate it at the hands of the Executive branch. Authoritarian legality denotes a de-formalization of law, whereupon legal content and process become ad hoc, discretionary, and amorphous. Finally, this section argues that the account of authoritarian legality could apply beyond the U.K. It juxtaposes authoritarian legality to established conceptualizations of U.S. counterterrorism law (extra-legality, state of exception, militant democracy), and suggests that it is well suited to capture the normalization of U.S. counterterrorism law, whereupon the latter shreds its “exceptional” features and increasingly operates within the constitutional framework.

The assessment of authoritarian legality is inevitably tentative, for two reasons. First, focused as it is on legislation, this article is an abstract study of designs and possibilities that are not necessarily fully realized. And second, in focusing on counterterrorism law, this article addresses only a small part of the overall legal framework. What the article strives for is to outline the juridico-political horizon affected (and, however partially, *reshaped*) by counterterrorism law and, by doing so, to deepen its critique.

## I. THE DUAL CONSTITUTION OF MODERN LAW

Before analyzing counterterrorism law, it is useful to survey the broadest context in which it ultimately pertains and affects: the modern juridico-political institution. In general terms, modernity is constituted on the interface of two mutually antagonistic social projects and imaginaries. The first is that for collective and individual autonomy, that is, self-institution and self-determination. It creates the aspiration for democracy, and is expressed historically in a multitude of struggles for political freedom and for social, economic, gender, or racial emancipation. The second is that of rational mastery over humans and nature. This knowledge-based imaginary seeks to manage and subdue social, animate, and dead matter to expand the

conditions of capital accumulation. It is expressed in the development of expertise-based bureaucratic fields that assume direction and control over society, premised on their knowledge of “objective laws” that are not created by society but determine its affairs (Castoriadis, 1997, pp. 37–39; 2007; 2015, pp. 7–8; Santos, 2002, pp. 1–20; Smith, 2014, pp. 179–182).

The tension between these imaginaries shapes the modern juridico-political constellation. The modern state embodies autonomy insofar as it is conceptualized as an authority stemming exclusively from—and referring exclusively to—society (rather than some extra-social institutive source, like god). This also makes it the affair of society, thus providing a platform for democratic politics. The state also embodies rational mastery inasmuch as it bases its authority on its (assumed) expertise on objective laws—of nature, history, or the market—that supposedly determine social affairs (Boukalas, 2012, pp. 278–280; Kelsen, 1929).

This tension is impressed on the juridical institution of the state as rule of law *and* as its suspension. The modern state, while maintaining the attribute of being the sole purveyor of law, defines and limits its powers through it. Its powers (what it can do, how, and in relation to what) are set out in advance and rendered systematic in the form of laws that are clearly formulated, universal, and public. In short, the meta-legal concept of the rule of law (Loughlin, 2010, p. 314) is constitutive of the modern state and sets it apart from other forms of political organization. Yet, the state is also premised on its capacity to overcome, evade, and even suspend law, and to adopt any modality and intensity of force necessary to preserve “itself”—that is, the social order that contains it and which it helps to (re)produce. In short, *raison d'état* is a co-constitutive principle of modern statehood (Santos, 2002, p. 42; Hirsch, 1978, pp. 64–65; Jessop, 2016, p. 28; Poulantzas, 1978, pp. 84–86). In this sense, the state is a compound of legality and illegality.

As the formal expression of the relation of force between the state and society, criminal law is a nodal point in this juridico-political arrangement. Again, it is doubly determined. It is rooted in the concepts of individual freedom and autonomy, which determine its core principles. Yet, rather than a negation of state violence, criminal law is a specific configuration of it (Poulantzas, 1978, pp. 76–77). Even as it sets out to protect the individual from arbitrary state force, it is also shaped by, and helps to safeguard, a social order organized around the primacy of the relation of private property (Norrie, 2001). Thus, criminal law is doubly instituted on the grounds of liberty *and* security.

The account of the juridico-political institution of modernity must, in the confines of this article, remain brief and sketchy. But it would be misleading without one clarification: the elements of the duality are *not* mutually exclusive. They can coexist, be mutually supportive, incorporate features of one another so that their duality is reproduced within each in a fractal fashion, and combine into hybrid forms.

The rule of law highlights this point. Although at odds with *raison d'état* practices, the latter provides its ultimate support under duress. Furthermore, the rule of law constantly attempts to subjugate *raison d'état* into its code, producing a variety of legally defined situations of state illegality (state of siege, exception, necessity, emergency: Schmitt, 1921/2014), as well as designs to absorb the “emergency” in the constitutional framework (Ackerman, 2006).

Moreover, the rule of law is a compound of emancipation and control, of freedom and order (Santos, 2002, p. 38; Loughlin, 2010, p. 318). The rule of law is the contingent outcome of social struggles. It is therefore forged by the exigencies of capitalist social relations, which it shapes, accommodates, supports, promotes, and protects (Fine, 1984, pp. 81, 100, 105–119, 145; Neumann, 1937, p. 109; Norrie, 2001; Pashukanis, 1929/1989; Poulantzas, 1978, pp. 63–70, 86–88). Yet, at the same time, it can protect the weaker, subaltern social groups; it can function as a springboard for democratic struggles; it can be stirred to egalitarian directions; and, even as a mode of domination, it is infinitely preferable to the authoritarian law of a dictatorship (Marx, 1867/1990, pp. 340–416; Neumann, 1937; Poulantzas, 1978, pp. 90–92, 203–204; Thompson, 1975, pp. 258–259).

Counterterrorism law makes a modest but clear intervention in this dynamic juridico-political field, favoring certain elements over others. This becomes apparent when we examine its key features and trends.

## II. COUNTERTERRORISM LAW IN THE UNITED KINGDOM AND THE UNITED STATES

In providing a comprehensive overview of U.K. counterterrorism law, this article offers an entry point for readers unfamiliar with this subject. Thus, before examining U.K. counterterrorism law in earnest, the article briefly juxtaposes it to that of the United States, the (arguably) most studied

counterterrorism jurisprudence. Without attempting a comparative account, it aims to help the reader navigate the U.K. material by highlighting some similarities and differences vis-à-vis the United States.

The North American scholar will be intrigued by the augmented powers that the United Kingdom allows its Home Secretary to revoke a person's citizenship and even render him stateless—powers that have no parallel in U.S. law. Pre-inchoate offenses, which can criminalize any conduct when it is related to the preparation of a future terrorist act, and encouragement offenses, which criminalize acts of expression as such, are also alien to U.S. jurisprudence. Nonetheless, they outline an expansion of the remit of criminal law—a trend present in U.S. counterterrorism law in the shape of material support offenses.

U.K. and U.S. approaches to indefinite detention of terrorism suspects comprise dissimilar measures that, nonetheless, produce similar trends. In the United States, this power materialized in presidential powers to designate suspects as enemy combatants, a deregulated regime of detention, and pseudo-trials by ad hoc military commissions. In the United Kingdom, it crystallized into the Terrorism Prevention and Investigation Measures (TPIMs). These are restrictions short of deprivation of liberty, issued by the Home Secretary. Although extremely different in outlook and intensity, both provisions aim to neutralize individuals that pose a potential threat, and outline a parallel regime of justice controlled by the Executive branch.

Closer alignment between the two jurisdictions is evident with regard to due process. In both countries, due process suffers similar travails, involving closed and *ex parte* adjudication, based on uncontested and often secret intelligence, which shatters the sense of equality of arms between prosecution and defense. Another area of coincidence is that of terrorism (*and* criminal) investigations. Counterterrorism legislation *de facto* disengages investigation from suspicion. It is set to accommodate the intelligence agencies' preferred "discovery approach," which effectively consists of monitoring the sum total of social activity to identify suspect behaviors and relations. However, since late 2015, a divergence appears. In the United States, the Freedom Act signals that there are limits to intelligence powers. By contrast, the United Kingdom, in the Investigatory Powers Act appears committed to allow a virtually limitless scope for intelligence.

Finally, ensuring that by "counterterrorism" we are comparing like for like, the definitions of terrorism in both countries (Patriot Act and Terrorism

Act 2000, respectively) demand a substantive act *and* a political motivation. While in the U.S. definition the substantive act must be a federal offense, in the United Kingdom *actus reus* is more open. And, while the United States locates the political motivation necessary for terrorism only in the objectives the act aims to accomplish, the United Kingdom additionally identifies it in the springs that inform the act.

Beyond specific powers and trends, deeper paradigmatic shifts are also aligned. In both countries, counterterrorism law is shaped by the logic of pre-emption and the exigencies of national security. It is designed to intercept and neutralize terrorist threats before they materialize. This disrupts law's own logic and temporalities, and turns law into an instrument at the service of security objectives. As a result, the role of the Judiciary in penal processes is reduced, and penal processes are controlled by the Executive. Moreover, they indicate a shift in legal subjectivity. They are dominated by a presumption of guilt, and consider the citizen as a suspect. Finally, law becomes overtly political in the objectives it seeks to achieve and in the conduct it primarily targets. In counterterrorism the distinctions that typically concern modern law—legal vs. illegal, innocent vs. guilty—are underpinned by that between friend and enemy.

In the United States, this paradigmatic shift mainly occurred through extra-legal measures (military and executive orders, memoranda, and guidelines) and through exceptional powers vis-à-vis exceptional categories of subjects (spies, aliens, enemy combatants). By contrast, in the United Kingdom, it involved a realignment of criminal law and justice. Yet, while in the United States the entry point for counterterrorism powers was in the legal and constitutional periphery, these powers are gradually incorporated into legislation and precedent (Boukalas, 2014, pp. 76–78, 95–96). They become “normalized”: institutionalized, systematic, and permanent.

This brief juxtaposition of the two counterterrorism jurisprudences shows that, despite a disparity between specific measures, the broader trends into which they combine are aligned. This alignment derives from coinciding political premises (national security) and strategic choices (pre-emption) that inform the creation of counterterrorism law. Crucially, although this strategic shift is expressed in different, opposite forms (criminal law in the U.K., extra-legal measures in the U.S.), a process of alignment is underway as U.S. counterterrorism law is being normalized.



### III. TRENDS: UNDOING LEGALITY, PRE-EMPTING POLITICS

Comparative analysts of counterterrorism law, like Kent Roach and Claire Macken, conclude approvingly that U.K. counterterrorism law adopts a “criminal justice model.” In contrast to the “intelligence model” adopted by the United States, where counterterrorism law relies considerably on Executive and Military Orders, U.K. powers are legislated by Parliament, are subject to judicial control, and are therefore aligned with human rights and rule of law requirements (Macken, 2011, pp. 140, 151–153; Roach, 2011, pp. 238–239, 306–308). Still, is the U.K. model criminal justice “as usual”? Deciphering its key trends is a first step toward an answer.

#### A. Defining Terrorism: Criminalizing Politics

Counterterrorism law is designed to counter a crime defined in political terms. This is its defining feature. The need for a general definition of terrorism as a *sui generis* crime stems from the intention to penalize the politics that inform it (Saul, 2005, pp. 82–83).

The definition of terrorism in U.K. legislation affirms this. In its first section, the 2000 Terrorism Act (TA) defines terrorism as the “use or threat of action” that involves serious violence against a person, serious damage to property, endangers life, creates a serious risk to the health or safety of (a section of) the public, or seriously interferes with an electronic system (§ 1(2)); *and* it is “designed to influence the government”<sup>2</sup> or to intimidate a section of the public, and “is made for the purpose of advancing a political, religious<sup>3</sup> or ideological cause” (§ 1(1)).

This definition presents two elements, one of conduct or effect, and one of motivation. For terrorism to occur, both elements must be present. The conduct element encompasses acts that threaten or damage life and, in equal measure, acts that damage property. Moreover, it encompasses otherwise lawful conduct when, regardless of intention, it could cause serious risk (Anderson, 2011, pp. 28–29; 2014b, pp. 27–28, 76; Roach, 2004, p. 176). Terrorism can be a violent or non-violent crime, a crime against

2. “or an international governmental organisation”: Added by Terrorism Act 2006, § 34.

3. “racial”: Added by Counter-Terrorism Act 2008, § 75(1)(2)(a).

the person or against property, and can reside on intention or negligence. Thus, terrorism is a crime that evades typification.

By contrast, the definition is emphatic regarding the motivational element: the political, ideological, religious, or racial motivation; or the objective to influence the policy of a government—of any government, regardless of how oppressive it may be, in any of its policies, regardless of how unjust, unpopular, or dangerous they may be. Thus, the definition involves two elements that are highly unusual (and anomalous) in criminal law: it makes motivation a constitutive element of the offense, and it explicitly delineates it in political terms. In effect, the offense of terrorism serves to insulate governmental policy from unwarranted popular interference. Characteristically, although Australia and South Africa, which have adopted definitions similar to that of the United Kingdom, explicitly exempt public protest from their definitions, the United Kingdom does not (Fenwick & Phillipson, 2009, p. 460; Roach, 2011, p. 306).

In the absence of a clear conduct element, political motivation becomes the decisive aspect of the definition. Thus, the act designates politically informed offenses as especially abhorrent (Anderson, 2014b, p. 86; Cram, 2009, p. 51), and stigmatizes the political views associated with terrorism, regardless of which other actors espouse them and what means they employ (Sanguinetti, 1979).

## B. Legal Uncertainty: Penal Expansion

The creation of terrorism-related offenses tends to add new layers of indeterminacy to those resulting from the uncertain conduct element in the general definition. The offenses of preparation and encouragement highlight this trend.

Preparation offenses enter the counterterrorism repertoire through the 2000 TA, which criminalizes the possession of anything (“substance or any other thing” (§ 121)) in circumstances that give rise to reasonable suspicion that possession is “for a purpose connected with the commission, preparation, or instigation of an act of terrorism” (§ 57(1)). It also criminalizes (§ 58) the collection, recording, and possession of “information of a kind likely to be useful” to a person preparing an act of terrorism. It provides 15- and 10-year maximum sentences, respectively. Similarly, the 2006 TA provides for life imprisonment for engaging “in any conduct in preparation for giving effect to [the] intention” of committing acts of terrorism (§ 5). In

every case the onus is on the defendant to prove that possession, collection, and preparation were undertaken for purposes other than terrorism.

The reversal of the onus of proof and their broad, unspecified *actus reus* sets these preparatory offenses apart from established inchoate crimes (Ashworth, 2009, p. 90; Fenwick & Phillipson, 2009, p. 462; Macken, 2011, p. 118; McSherry, 2009, pp. 142, 153). They do not reside on any specific conduct, but on a perspective final act, and can criminalize any conduct leading to it, including conduct that would otherwise be lawful. By constructing *actus reus* in terms of an assumed future act, preparatory offenses expand the temporal reach of criminal law and the range of behaviors it encompasses. The final act that recasts “preparatory” conduct as criminal, is terrorism, and terrorism resides on political motivation. Thus, political conviction is decisive for determining the existence of a preparatory offense (Tardos, 2007, pp. 671–672, 676). Possibly because of their loose determination and expansive scope, preparatory offenses are broadly used as charges in terrorism cases, and tend to secure convictions (Anderson, 2011, pp. 91–92; 2013, pp. 124–126).

Encouragement offenses are also future-oriented and expand the scope of penalization. They apply to publishing and disseminating terrorist statements and material. TA 2006 (§ 1) creates the offense of publishing “a statement that is likely to be understood by some or all of 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.” Regarding dissemination, § 2 outlaws the distribution, circulation, giving, taking, selling, lending, electronic transmission (etc.) of a terrorist publication. A “terrorist publication” is anything that contains “matter” likely “to be understood, by some or all of the persons to whom it is or may become available . . . as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.”

For both offenses it is irrelevant whether anything in the statement or publication relates to the commission, preparation, or instigation of terrorist acts, or whether any person has been encouraged by the statement to commit, prepare, or instigate such acts. Instead, the defendant has to prove that the statement did not express his views nor had his endorsement, and that he made this clear in all the circumstances of its publication. Thus, encouragement offenses rely on negligence; they punish (with a seven-year maximum sentence) the creation of a risk that someone might be encouraged to commit, prepare, or instigate terrorist acts.

The very structure of these offenses challenges legal certainty. Their *actus reus* is elusive. They rely mainly on the interpretation of a communication by some members of their audience. (In the case of dissemination the audience is not actual but prospective). The audience, the decisive factor for “encouragement,” is also interpreted. The offense effectively resides in the assumed predispositions of an (actual or prospective) audience. Thus, in defining offenses of encouragement, the act grants state authorities (police, prosecutors, and courts) license to selectively prosecute and punish expression by construing audiences and their predispositions.

Finally, the expressions that can be prosecuted as encouragement may take any form (written or spoken word, song, music, art, performance, etc.). They are targeted because of their political content or resonance. This stems from the definition of terrorism. Yet, whereas the definition demands both political ends *and* substantive acts, encouragement effectively does away with the latter, to penalize political expression as such. The assurance that the government would only rarely prosecute political protest as encouragement (Barendt, 2009, p. 445) confirms that protest is within the remit of the offense.

### C. Bypassing Criminal Law: Particularism and Punishment without Justice

Apart from stretching the reach of criminal law, another way of extending penalization is to bypass criminal law and deal with suspects through administrative measures and civil-criminal hybrids. Although imposing heavy sanctions, these alternative routes fall short of depriving liberty. They do not belong to criminal law, and hence they are not subject to its standards.

The stand-out specimen here is the TPIM, introduced by the 2011 Terrorism Prevention and Investigation Measures Act (TPIMA). The Home Secretary can issue a TPIM notice when she “is satisfied in the balance of probabilities that the individual is or has been involved in terrorism-related activity” and finds that restrictions are necessary for protecting the public (Counterterrorism and Security Act 2015, CtSA, § 20(1)). “Terrorism-related activity” refers to: (a) the commission, preparation or instigation of terrorist acts; (b) any conduct intending to facilitate such acts; (c) encouragement; or (d) “conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in terrorism-related activity” (TPIMA § 4(1)). The Secretary can

impose restrictions on the individual's belongings, activities, employment, association, communication, finance, and travel; and obligations to regularly report to the authorities, accept electronic tagging, and receive unannounced visits, searches and seizures by the police (TPIMA Sch.1; CtSA §§ 16–20). Breaching imposed restrictions is a criminal offense with a ten-year maximum sentence (TPIMA § 23; CtSA § 17).

To be valid, TPIM notices must be approved by a High Court judge in an *ex parte* hearing. The individual concerned is unaware of the impending notice and unable to make representations (TPIMA § 6(4)). The judge can reject the notice only if it is “obviously flawed” (§ 6(3)(a), § 6(7)) on grounds of illegality, procedural impropriety, or irrationality. This is an extremely high threshold for the judge, who, moreover, has no competence to second-guess the intelligence on which the notice is based (Roach, 2011, p. 281). The individual can appeal the notice. The appeal hearing is *ex parte* and adjudicated on the basis of restricted and summary evidence, submitted by the Secretary so that it does not compromise the national interest. The appellant is represented by a Special Advocate, who is security-cleared and appointed by the Attorney General. She represents the point of view of the appellant, but cannot communicate with him (TPIMA Sch.4) (Donkin, 2014, pp. 30–31, 86).

TPIMs combine civil standards of proof with sanctions the severity of which approaches criminal punishment (Dennis, 2012; Stanton-Ife, 2012, p. 194). They allow the Secretary to target individuals when she does not have enough evidence to prosecute, or wishes to keep relevant evidence secret. The sole basis of their issuing is a risk assessment conducted by the Home Secretary (Ramsay, 2009, p. 118) through unknown procedures, criteria, and methods. TPIMs evade legal certainty standards and can envelop individuals with only tentative or peripheral relation to terrorism (Anderson, 2014a, p. 49). They apply to ill-defined behaviors, allowing the Executive to penalize individuals selectively. They institute a particularistic regime of justice that distributes sanctions tailored for each individual (Norrie, 2009, p. 33). This parallel justice regime is fully controlled by the Executive and reduces justice to a personal relation between the Secretary and each suspect.

Another, more established avenue for bypassing criminal law is that of administrative powers. Among them, powers to proscribe an organization “concerned with terrorism”, and subsequently criminalize all its members and associates regardless of individual wrongdoing, were set out in the 2000

TA and expanded by the 2006 TA to include groups that encourage terrorism without engaging in it (Cram, 2009, pp. 56–57; Fenwick & Phillipson, 2009, pp. 460–461). Proscriptions are made on the basis of intelligence and are recommended by intelligence agencies. They need the assent of parliament, but Members cannot access the classified material that informs the Secretary’s decision (Anderson, 2011, p. 32). An organization can challenge its proscription by appealing to the Secretary and, further, to the Proscribed Organisations Appeal Commission (POAC), a court of record that adjudicates in closed hearings on the basis of secret evidence. With POAC permission either party can make a final appeal to the Court of Appeals, something that has yet to happen. Charges of membership and support of a proscribed organization were amongst the most common in counterterrorism cases until 2008, when they declined abruptly, at least as “principal offense” (compare: Anderson, 2011, p. 35; 2014b, p. 66). Proscription offenses outline a regime of guilt by association, determined by Executive decision.

Finally, the 2006 Immigration, Asylum and Nationality Act (§ 56) allows the Home Secretary to deprive someone of British citizenship whenever she is satisfied that “deprivation is conducive to the public good”—an undefined concept, determined unilaterally by the Secretary (Lavi, 2010). Individuals can appeal at a secret immigration tribunal that replicates the TPIMs procedure of secret evidence and *ex parte* hearings. Further, the Immigration Act 2014 (§ 66) authorizes the Secretary to revoke, on the grounds of acts “seriously prejudicial to the vital interests” of the state, the citizenship of people who only have British nationality. The Secretary can render people stateless, depriving them of all citizenship-based rights in one stroke. Resort to citizenship revocation has markedly risen since 2010 (Rooney, 2014).

#### D. Due Process: No Judge, No Evidence

The trends described above undermine due process and diminish the role of the Judiciary. Open-ended offenses undercut the trial’s substantive basis, *de facto* undermining due process (Tardos, 2007, pp. 670, 675, 677). Legal hybrids and administrative measures allow only for *post festum* control, through a spectral judicial system with limited power and capacity to ascertain truth. The exclusion of the defendant from the penal process contravenes the “equality of arms” tradition, erasing a key legitimating

feature of the criminal trial (Brants & Field, 2000). It effectively casts the defendant as mere matter of the justice process.

The sidelining of the judiciary is largely the result of an amalgamation between evidence and intelligence. *Evidence* relates to past occurrences and pertains to a system geared toward determining guilty acts and intentions. It is submitted in the context of a public trial, and is scrutinized and measured against defined burdens and standards of proof. *Intelligence* is instrumental, conditioned by the objectives of its users. It is concerned with future occurrences, and strives to identify threats. It is subject only to internal verification, and depends on secrecy. Hence, its reliability is hard to determine. It is evaluated not on the basis of legal principles and standards, but on the severity and likelihood of the threat it describes (Donkin, 2014, pp. 8–9; McCulloch & Pickering, 2009, p. 634; Roach, 2010, pp. 51–53).

Legal hybrids allow sanctioning on the basis of intelligence substituting for evidence. Similarly, citizenship revocation and proscription impose sanctions on intelligence grounds evaluated only by Executive actors (Roach, 2010, pp. 54–55). Further, intelligence is key in identifying terrorist purposes behind otherwise lawful acts (preparation), and the propensity of audience members (encouragement). Thus, counterterrorism law allows for punishment based on material that can be uncertain, unreliable, and flanked by prejudicial and politically defined determinations of suspicion (McCulloch & Pickering, 2010, p. 21; Shapiro & Cohen, 2007, pp. 128–132). As terrorism is a political crime, intelligence typically focuses on political conviction and activity (Boukalas, 2014, pp. 103–106, 148–149; Donohue, 2008, p. 66; Lyon, 2003, p. 54; McCulloch & Pickering, 2010, p. 21; Ratcliffe, 2008, p. 224).

The travails of due process culminate in the 2013 Justice and Security Act (JSA), which provides for closed material hearings in civil trials every time the Home Secretary or an involved party requests the protection of sensitive material (§ 6). Thus, closed trials are normalized, indicating a colonization of justice by the concerns of the intelligence apparatus.

## E. Intelligence Law

Combined, the key trends in counterterrorism legislation marginalize the judiciary and concentrate coercive powers in the hands of the Executive, especially enhancing the role of Intelligence (with capital “I” when referring to the apparatus). Decisions to revoke citizenship or proscribe an

organization are made on the basis of information provided by intelligence agencies. The TPIM system was devised to protect the operationality of Intelligence from exposure in court (Ashworth, 2009, pp. 95–99). The proliferation of closed procedures is also meant to protect Intelligence: JSA was designed to overcome the stringent Public Interest Immunity process for the classification of sensitive material in court (Hickman, 2013).

A clear confirmation of Intelligence empowerment is provided by the 2016 Investigatory Powers Act (IPA). It imposes on Communications Service Providers (CSPs) a duty to retain communications data for up to a year (§ 87, § 89). It thus renders permanent the regime imposed by the 2014 Data Retention and Investigatory Powers Act (DRIPA), which, in turn, was meant to temporarily allow expanded retention after the European Union Court of Justice had struck down the E.U. Directive underlying this power (*Digital Rights Ireland*, Joined Cases C-293/12 and C-594/12). It also acknowledges weblogs (a user’s history of website visits) as “communications data,” that is, as communications traffic rather than content (§§ 61–62, § 85). Further, IPA obliges CSPs to overcome their own encryption, either by providing the relevant keys to the authorities or by designing security flaws in their software and informing the authorities on how to exploit them (§§ 252–253). It legalizes practices of blanket surveillance and interception, which monitor the communications of millions of people suspected of nothing (Part 6). It acknowledges and legalizes, including in bulk form, “equipment interference” practices, thus allowing Intelligence to hack into computers, appropriate all information stored therein, monitor them in real time, and even take over their operations (Part 5; Part 6, Chapter 3). Crucially, the powers that IPA legislates had been legally challenged: the retention regime maintained by DRIPA was found (partly) unlawful by the High Court (2015 EWHC 2092 (Admin)); bulk retention of data was declared unlawful by the ECJ (C-203/15 and C-698/15); and bulk surveillance and equipment interference are also scrutinized by European and U.K. courts (Anderson, 2015, pp. 203–243; also ECtHR: *Big Brother Watch et al. vs. UK*; Investigatory Powers Tribunal: Joint Cases *GreenNet et al., Privacy International*). The Bill undercuts these legal challenges to grant Intelligence the powers it demands (Anderson, 2015, pp. 190–202).

The interests, rationale, and modus operandi of Intelligence shape counterterrorism law. The latter is, appreciably, law created *for*, and *by*, intelligence. The empowerment of Intelligence stresses the political nature of



counterterrorism. Targeting political activity is legislated (Security Service Act 1989) as the *raison d'être* of domestic intelligence agencies, whose purpose is the protection of parliamentary democracy from threats posed by political, industrial, or violent means (Donohue, 2008, p. 194).

#### F. Pre-Emption: The Master-Trend

Thus far we have seen that, through offenses with uncertain *actus reus*, counterterrorism law disengages the offense from a specified conduct, expanding the reach of criminal law and the behaviors that may come in its remit; and that legal hybrids further expand the penal relation and bring due process under duress. These trends combine to augment coercive state power over society, and adjust the balance of power between branches of the state bringing the Executive, spearheaded by Intelligence, to dominate penal processes.

These trends are not parallel to one another, but form a nexus. They can be summed up in a singular tendency: *expansion and intensification of state coercion, combined with diminishing legal protections*. This degree of coherence is symptomatic of their common origin. They are techniques for achieving a singular objective, the disruption of crime before it occurs: pre-emption.

Pre-emption is forceful intervention aiming to neutralize a threat. It seeks to incapacitate an enemy by striking first, to deny the enemy's capacity to attack. Its, essentially military, logic dictates that threats should be neutralized as soon as possible. It envisions possibilities for future harms and targets those seen as likely to undertake them. Hence counterterrorism law is less concerned with evidence, prosecution, and conviction, but focuses on incapacitating those identified as related to potential threats (Janus, 2004, p. 2; McCulloch & Pickering, 2009, pp. 629, 631; 2010, pp. 13–17).

Thus, defying legal certainty is essential to targeting crimes that have not, and may never be, committed. Similarly, the temporal expansion of criminal law is inscribed in a pre-emptive strategy, as it allows intercepting threats even before they are formed or, in the case of encouragement, conceived. And legal hybrids repress potential threats by restricting the capacity of individuals to commit crimes at an undefined time in the future (Dennis, 2012, pp. 179, 187; McCulloch & Pickering, 2010, p. 19).

Adjudication determined by intelligence-based presumption of guilt, contravenes criminal trial procedures marked by regulated procedures stemming from a presumption of innocence (Cole & Lobel, 2007, p. 50;

McCulloch & Carlton, 2006, p. 404); but is well suited to the purpose of suppressing criminal potentiality.

Naturally, Intelligence, the par-excellence pre-emptive mechanism, is most favored by pre-emptive law. All-encompassing offenses, dissociated from specific acts, necessitate the expansion of surveillance to perpetually scan social interactions regardless of suspicion, enabling it to discover emerging threats.

The importance of political motivation in defining terrorism helps orient pre-emption. The identification of criminal potentiality resides in the divergence of the politics espoused by an individual from those tolerated by the state (Tardos, 2007, p. 684). Consequently, counterterrorism intelligence typically focuses on collecting “political information”—not doing so would be a dereliction of duty (McCulloch & Pickering, 2009, p. 634; Roach, 2004, p. 177).

In sum, the pre-emptive turn in criminal law entails ill-defined *actus reus* and disregarded *mens rea*. It compromises the core function of criminal law, as it undermines its capacity to proscribe prohibited behaviors and thus guide individuals’ conduct. Pre-emption also causes the disruption of due process and the reversal of the burden of proof. It thus displaces the core commitment of criminal justice, from protecting individual freedom to protecting the social order. Thus, counterterrorism law compromises core premises and functions of criminal law, turning the latter into a framework enabling the selective punishment of criminal potentiality. As the latter largely resides in political conviction, the combined effect of counterterrorism law is the *pre-emption of antagonistic politics*.

Therefore, the alleged commitment of U.K. counterterrorism law to the “criminal justice model” is in fact the insertion of an advanced detachment of the anti-legal pre-emptive logic at the heart of the legal system. Rather than jettisoning the “intelligence model,” U.K. counterterrorism law builds it into criminal law and justice.

#### **IV. COUNTERTERRORISM LAW: ITS CONTENT, LOGIC, AND INSTITUTIONALITY**

Based on the above analysis, this section examines what counterterrorism law indicates for the broader law-form: whether it is normal or exceptional, and how it relates to the rule of law. This account is informed by the state

theory of Bob Jessop and Nicos Poulantzas, which conceptualizes the state (here: the law) as a social relation and as a strategic agency in the social field, and differentiates between normal and exceptional state-forms. It also draws from the jurisprudence of Franz Neumann, which sees the rule of law as a relatively plastic framework, amenable to internal reconfiguration according to social demands and/or state strategies.

The notion of the “law-form” refers to the socio-historically specific articulation among three main relations, those between: (a) the content, logic, and institutionality of law; (b) law and the state; and (c) law and society (Boukalas, 2014, pp. 23–24). The analysis here focuses only on the first of these relations, which is more directly related to the study of legislation. Certainly, an analysis centered on a singular area of law can only offer partial insights into the broader law-form. The location of counterterrorism law partly ameliorates this limitation: it is mostly situated in criminal law, a legal area that regulates the relations of violence between the state and society and, therefore, underwrites most law. Moreover, criminal law moves in step with counterterrorism law in important ways: there are currently twelve different kinds of restriction order (but, unlike TPIMs they are issued by judges or magistrates: Ashworth & Zedner, 2015, pp. 75–76); encouragement has replaced the traditional incitement offense across the criminal spectrum (Crime and Security Act 2007 § 44–47); and the Law Commission complains that the proliferation of preparation offenses has become “opportunistic,” resulting in over-extension of the reach of criminal law (Ashworth & Horder, 2013, p. 467). In the administration of justice, full trial is increasingly substituted by “summary justice” instruments (guilty pleas, reprimands, cautions, and Penalty Notices for Disorder: Young, 2008; Zedner, 2009); and there has been some ill-fated experimentation with indefinite, risk-based sentencing in the form of the Imprisonment for Public Protection scheme (Zedner, 2012). Beyond criminal law, ad hoc, particularistic, and vague legislation, and marginalization of the judiciary have been mainstays in commercial law (Cutler, 1995; 2003, p. 237; Dezalay & Garth, 1996; Scheuerman, 1999, 2001; Scott, 2004). Although in those areas they involve a movement away from public and toward private law and quasi-legal arrangements (Sugarman, 2000), counterterrorism jurisprudence introduces them into public law.

The key question regarding the law-form described by counterterrorism jurisprudence is whether it is normal or exceptional. To answer it, the starting point is the distinction between normal and exceptional forms of

state. The state comprises democratic and authoritarian elements. In normal forms, democratic elements are predominant, and dictatorial ones take a secondary role. In exceptional forms, authoritarian elements predominate, bringing an abrupt augmentation of state force over society.

Normal forms (e.g., liberal-parliamentary democracy, welfare-administrative state) are characterized by a formal separation of the state from civil society and a separation of powers within the state. These separations are regulated by law. Succession in government occurs regularly in a multiparty system through general suffrage. Society raises its demands to the state through institutional channels. These arrangements pertain to a social arrangement that enjoys broad consensus regarding its core premises, while allowing for changing configurations of power among social forces. Their capacity to accommodate social change through relatively peaceful, institutionalized processes renders normal forms resilient and durable (Jessop, 2016, pp. 213–215; Poulantzas, 1968, pp. 229–252, 296–303).

By contrast, exceptional forms (e.g., fascism, military dictatorships) take over when the predominant mode of social organization is unstable. They cancel elections and undermine the separation of powers, concentrating state power in the hands of the Executive. They disrupt the separation of the state from civil society and subject the latter to state control. They suppress social antagonism, which makes them unstable and brittle (Jessop, 2016, pp. 216–221; Poulantzas, 1974, pp. 313–329; 1976).

As they represent relatively stable arrangements among social forces, normal state-forms tend to exercise power in predictable ways, on the basis of formal law within a constitutional framework. Exceptional forms represent interventions in an unstable situation, and therefore resort to arbitrary power, expressed in ad hoc statutes and Executive decrees, that cancel democratic freedoms and the rule of law (Jessop, 2016, pp. 218–220; Neumann, 1936/1986; Poulantzas, 1978, pp. 87–92).

Adherence to the rule of law is therefore the key criterion in differentiating between exceptional and normal states at the juridical register. Hence, this article proceeds to evaluate the proximity of the content, logic, and institutionality of counterterrorism legislation to rule of law principles.

### **A. Content: Perish the Rule of Law**

In all its variations, the concept of the rule of law entails limits to state power over society and the individual. Although biased toward an

organization of social relations favorable to capitalism, the rule of law is more than a capitalist construct. It incorporates popular demands for democracy and social equality (Fine, 1984, pp. 21–22; Neumann, 1937; Poulantzas, 1978, pp. 82–84). In other words, the rule of law is a modern phenomenon, and therefore contains and expresses in juridico-political terms a synthesis between the project of capitalist rational mastery and that of emancipation.

The stalwarts of classic liberal thought (Locke, Rousseau, Montesquieu, Kant) regard the protection of individual freedom from arbitrary state force as the foundation of the legal system. Every element of the rule of law follows from a presumption in favor of freedom (Neumann, 1937, p. III). Individual freedom entails the requirement that state action should rest on norms that are, as much as possible, general, clear, public, prospective, and stable. The principle of freedom pre-supposes the autonomous individual. Individual autonomy is arguably *the* fundamental concept of modernity, and the core of the legal system. It implies that the individual is an end in itself, and cannot be treated as a means to an end, personal or collective (Stamatis, 2011, pp. 259, 395–396). Thus, autonomy constitutes a limit to mastery over humans.

In producing law, the imperative for universality is a fundamental methodological criterion (Stamatis, 2011, p. 223–224). The requirement for clarity and universality conditions the capacity of the Legislature to produce law: particularistic and unclear law is equivalent to irregular decree, for it allows Executive actors to act arbitrarily (Neumann, 1937, pp. 106–107; Scheurman, 1994, p. 69). Counterterrorism legislation defies the request for clarity by creating a system of vague offenses. On the basis of offenses designed to cover an unlimited range of behaviors, actual penalization depends on Executive selection. Along with personalized regimes of punishment, they designate a particularistic jurisprudence that circumvents the request for universality. Counterterrorism legislation permits punishment to be imposed regardless of the individual's actions and intentions. It thus undermines individual autonomy to enhance the achievement of state purposes (Norrie, 2001, p. 209).

In applying the law, the request for an act that contravenes existing law, the individualization of culpability, the respect of basic rights, and judicially overviewed, fair procedures are essential to the rule of law. Judicial processes are based on the presumption of innocence, which informs the standards and criteria regulating the stages of adjudication, ending with the

imposition of punishment proportionate to the infraction of the law. Counterterrorism jurisprudence dismantles this process. The vagueness of its offenses neutralizes the fundamental *nulle crimen* principle. Its pre-emptive character reverses the temporalities of the justice system. The combination of pre-emptive targeting and ill-defined offenses establishes a judicial process based on presumption of guilt. By substituting intelligence for evidence and by marginalizing the Judiciary from the process that was its core competence, counterterrorism law brings criminal justice under Executive control. The incompatibility of counterterrorism legislation with the rule of law is demonstrated when attempts to align pre-emptive measures with the rule of law (e.g., by introducing judicial control) produce new incompatibilities (e.g., secret courts) that further dissolve the rule of law fabric.

Pre-emption reorients the justice system away from determination of guilt and toward identifying dangerous individuals and repressing their threatening potentiality (Janus, 2004, p. 1; Macken, 2011, p. 120). The determination of dangerousness is based on assessments of patterns of behavior, demographic and socio-economic features, mental outfit, and the like (Lacey, 2016; Zedner, 2012, p. 224). Instead of *What have you done?*, criminal justice asks *Who are you?* (Foucault, 2008, p. 34). Counterterrorism law locates this dangerous potentiality on political conviction. The latter becomes a main consideration of the law, often separating the criminal from the lawful. Criminal justice now asks *What is your vision of a good society?*

## B. The Logic of Law: Raison d'État

These last observations point beyond legal content, to the “logic”—the ideas, principles, purposes, and calculi—that motivates the law. Criminal law has, innately, a preventive function. By assigning conducts that are punishable regardless of who undertakes them, it seeks to prevent them from occurring. Moreover, preventive considerations and techniques have been mainstays of criminal justice virtually throughout modernity. This is evident in the targeting and punishment of behaviors associated with the “dangerous class” and, over the last forty years, in statistical assessments of risk as a sentencing factor (Ashworth & Zedner, 2015, pp. 29–50; Zedner, 2009, pp. 35–44).

Nonetheless, although prevention dominates entire eras, it was largely subdued between the second half of the nineteenth century and the 1970s

(Ashworth & Zedner, 2015, p. 50). This thaw coincides with the long rise of emancipatory struggles, expressed in recurring labor, women, youth, race, decolonization, and democracy movements (Lacey, 1998; Norrie, 2001, p. 27). It seems that reactive criminal law tends to correspond to democratic arrangements, whereas preventive criminal law trends relate to state attempts to shape and control society while excluding it from the process.

Counterterrorism expresses a further shift, from prevention to *pre-emption*. Whereas prevention seeks to intervene in (partly identified) causes of crime, pre-emption has unknowability as its ontological condition. It seeks to thwart the ontogenic potential of unidentified enemies and threats before they emerge (Krasmann, 2007, p. 307; Massumi, 2015, pp. 5–14, 27, 30). And, whereas preventive risk-management occulted the political character of legal considerations under a cloak of technical neutrality (Zedner, 2009, p. 44), pre-emption is overwhelmingly and explicitly political: in its targeting, operation, and objective.

Pre-emption represents a shift from “risk management” to “precaution”—that is, punishment of potential future harms not on the basis of knowledge, but on that of uncertainty (Zedner, 2009, pp. 45–56). It introduces in criminal law the precautionary principle, which requires the state to act against threats that are believed to be catastrophic, but about which specific knowledge is scarce or contested. Transplanted into criminal law, the precaution principle no longer constrains or obliges the Executive, but grants it license. Moreover, from substances and micro-organisms with relatively determinate qualities and potentialities, the principle comes to apply to people. It treats the latter as if they were the former, cancelling the conceptual space for autonomy. And even as “society” or “the population” is the object-for-protection for both the precautionary principle and counterterrorism law, due to its political character counterterrorism law also locates the subject of the threat in society. Applied to humans, the precautionary principle becomes a security imperative.

Its capturing by security dissolves law’s specifying logic and reduces it to a political instrumentality (Aradau & Munster, 2008, pp. 33–35; McCulloch & Pickering, 2010, p. 14). In the legislative process, this instrumentalization means that considerations with legal soundness and compatibility with democratic rights and freedoms are replaced by concerns with law’s effectiveness in combating terrorism (McGarrity & Williams, 2010, pp. 132–143). The logic of criminal justice is also compromised. Its concern with impartiality, institutional independence, and detachment from

political objectives gives way to a partisan logic defined by sharp distinctions between friend and enemy (McCulloch & Pickering, 2009, p. 631). Security redraws legal subjectivities. Law sees the individual as, primarily, a potential threat—and imposes strict liability, presumption of guilt, and obligations to refrain from unspecified conducts.

By defying the criminal law requirement that offenses are clearly defined, and duties precisely set out, for their infringement to constitute an offense (Roxin, 2000, pp. 61–64), counterterrorism law fails to deter or guide individuals' conduct. Instead, it implicitly imposes an amorphous obligation on them to perpetually reassure the authorities that they do not represent a threat (Aradau & Munster, 2008, p. 31; Lavi, 2010, pp. 405–406; Ramsay, 2009, pp. 120–121, 132). Underlying counterterrorism law is the jurisprudence of the enemy, developed by Günther Jakobs.

For Jakobs, the social function of criminal law is to generate and uphold expectations of conduct, thus enabling mutual trust among individuals in societies where most interactions are impersonal. To fulfil this function, it is necessary that individuals display “loyalty” to the law, that is, readiness to follow its norms *and* the outward appearance of doing so. This posture is essential to reassure fellow citizens that the law will be obeyed, thus freeing them from the constant worry of being wronged. On this basis, Jakobs identifies two kinds of criminal and proposes a different treatment for each. The *circumstantial criminal* generally carries himself in accordance to legal norms; his crime is a failure to comply on a specific occasion. He therefore remains a person-in-law, and his punishment aims at his rehabilitation. By contrast, the *systematic offender* exhibits disregard of the law. She assaults the legal order *per se*, and hence excludes herself from the judicial order. She is not a citizen, but an enemy. Accordingly, legal rules and protections do not apply to her. The state is obliged to use all force necessary to neutralize the threat she represents, even before it materializes; and its effectiveness in doing so is the only criterion for its actions (Jakobs, 2003, 2011; also: Krasmann, 2007, pp. 303–304; Ohana, 2010, pp. 726–727, 741, 745).<sup>4</sup> “Enemy penology is thus warfare” (Jakobs, 2000, in Krasmann, 2007, p. 303). The duty to reassure does not belong to the constellation of the rule of

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4. This approach to criminal law has lineage in reactionary legal and political theory, starting with Nietzsche, who saw penal law as war measures used to rid oneself of the enemy (Kirchheimer, 1940, p. 172), and culminating with Schmitt (2007) banishing the partisan from the spheres of law and morality.



law, but to that of *raison d'état*. Rights are conditional on its fulfilment. This means that access to rights is perpetually reviewed by the state, and depends on citizens' compliance. Although Jakobs "sociologically" describes the duty to reassure as a relationship between citizens, it is in fact a relationship between them and the state, and outlines an organization of political power. The conditionality of rights makes them a possession of the state, negating individual autonomy (or any other constitutive principle outside the state). It threatens a relapse to pre-modern relations of power centered on the sovereign, with the individual reduced to power's object (Bobbio, 1996, pp. 39–43, 65).

But what is "it" that the individual should not represent a threat to? An answer comes from a 2005 parliamentary debate of the Immigration bill: "In current legislation, such actions are expressed in terms of disloyalty or disaffection towards the Crown, or as unlawful trade or communication with an enemy in time of war. Those expressions . . . have become dated and perhaps fail to reflect the *full width of activity that might threaten our democratic institutions and our way of life*."<sup>5</sup> Leaving aside the reference to treason and war that firmly places us in *raison d'état* territory, we see that what counterterrorism law strives to protect is "our democratic institutions and our way of life." These are astonishingly broad terms—especially the latter, which can be interpreted in unlimited ways. Yet, the combination of the way of life and political institutions comprises "the social order," which is elevated to the status of a legal good to be protected by force (Kirchheimer, 1940, p. 173). In this light, citizens' "reassurance" duty consists of reassuring the state of their compliance with the existing system of social and political relations.

### C. Institutional Framework: The Rule of Law Prevails

Counterterrorism law constitutes a reversal of rule of law premises. This reversal is not circumstantial, but expresses a strategic realignment of law: its militancy in defense of the social order as the latter is defined by the state. Nonetheless, counterterrorism law presents a paradox, which is, arguably, its most remarkable feature: the reversal of legal practice, concepts, and objectives is meticulously codified in legislation. Promptly and consistently, the state codifies its unregulated powers and the spectral

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5. Proceedings of the House of Commons Standing Committee, Committee Sessions 27; cited in Lavi (2010, p. 407) (emphasis added).

crimes to which they apply, *in law*. Executive actors do not overstep the legal framework, but expand it so that it can allow for the actions they want to take.

Counterterrorism law does not entail a state in a decisionist rampage, attempting to cancel or suspend the liberal-democratic legal order, break or bypass the law. Instead, the institutional shell of the rule of law remains intact. Counterterrorism law is created by Parliament, observing the processes of consultation, drafting, deliberation, debate, review by the Lords, voting. Parliament regularly reviews and amends the laws it makes. Even when laws are passed through emergency procedures, this is done with parliamentary consent, for parliament maintains its capacity to resist Executive infringement. In implementing the law, the courts are almost always present, even if post-hoc and in the shape of secret tribunals. The formal independence of the judiciary is maintained, and so is its capacity to have the final word regarding all cases involving terrorism offenses and measures.

Yet, while parliament legislates unobstructed, it does so without knowing, strictly speaking, what it is legislating about. It knows nothing about the threat it strives to counter, except whatever Intelligence discloses to it via the Home Secretary. Similarly, the independent Judiciary reviews, and has the final say on, penal procedures, but does so on the basis of open-ended offenses and has limited power to overrule Executive decisions or scrutinize intelligence evidence. Apparently, even with regard to the institutional framework, the adherence to the rule of law is merely a spectacle.

Still, these formal attributes are important. There is nothing stopping parliament from repealing any (or all) counterterrorism provisions, and the Judiciary's insistence on having the last word ("it is not legal until I said it is") shows that, even if crippled, the Judiciary maintains its claim to monopoly on determining legality. In doing so, it maintains a key element of the logic that specifies it (Bourdieu, 2015, p. 320). The persistence of these "formalities" influences the production and the application of law. Even if legitimizing the Executive is the only thing the other branches do, legitimation still entails a degree of limitation.

## V. TOWARD AUTHORITARIAN LEGALITY?

To the extent that we can extrapolate from a single area of law, counterterrorism law indicates a reconfiguration of the law-form. The overall tendency

of this “authoritarian legality” is the augmentation of coercive state power over society, combined with diminished legal protections. This power is concentrated at the Executive, motivated by the logic of *raison d'état*, strategically pre-emptive, and primarily concerned with antagonistic politics.

Coercive powers are codified in open-ended provisions that disengage penalization from the criminal act, and describe a particularist law dependent on Executive discretion. They redefine due process by limiting the role of the Judiciary, augmenting the role of Intelligence, and reversing the presumption of innocence. Legal provisions grant license, rather than pose limits, to Executive power.

This potentially chaotic system is made coherent by its political character. Political conviction is a key factor for suspicion and criminalization, and society is requested to demonstrate compliance with the existing social order. Law loses its specifying rationale and purpose and becomes an instrument for the political project of security. As law is overwhelmed by politics, its categories cyclically fold back upon themselves in a self-referential loop. Outlining a closed jurisprudence, law's purpose of securing the social order directly determines its content and practice, and becomes the criterion for its evaluation.

This indicates an exceptional law-form, and a decline of law as a mode of regulation of state-society relations. Yet, the political overwhelming of law, its subjugation to security, and the reversal of rule of law content, rationale, and functions, are all expressed *in* law. State-society relations are codified in, and regulated by, law, and the state expresses its power through law. Moreover, law is reproduced according to its own norms, not through external channels and agencies as is typical in exceptional-dictatorial forms (Buckel, 2011, pp. 164–165). This endows the law-form with elasticity and stability.

Thus, while developing authoritarian trends and organizing them in a relatively coherent whole, counterterrorism law does *not* signify the advent of an exceptional form. Exceptional elements are developing within the framework, and under the dominance, of normal ones. It is an “internal” reconfiguration of the normal form of law. Thus (following Poulantzas's outline of the state-form emerging in the 1970s), we may say that authoritarian legality is both “better” and “worse” than an exceptional form, whose violence would be much more broadcast and intense, but whose temporal horizon would be limited (Poulantzas, 1978, pp. 208–209).

Whereas normal forms express a relatively stable social arrangement that can, through institutional channels, accommodate social change without

risking collapse, compared with exceptional forms, which signify forceful state action when existing institutions cannot cope with social antagonism, authoritarian legality indicates a state that claims monopoly over (legitimate) politics and processes of social change, but does so through and within legal and constitutional arrangements. Authoritarian legality is a hardening of the rule of law framework that enables the state to pre-empt political crisis without breaking the legal-constitutional cast (Boukalas, 2015; Jessop, 2016, pp. 222–236).

Finally, authoritarian legality realigns the constitutive elements of modern juridical forms, favoring the project of mastery upon society over that of social emancipation. The principles of individual autonomy and freedom retreat, and criminal law is defined primarily as security, as defense of the social order.

## VI. AUTHORITARIAN LEGALITY BEYOND THE UNITED KINGDOM

Although this account of authoritarian legality is drawn exclusively from U.K. legislation, it could apply to counterterrorism law beyond the United Kingdom. This is evident when it is compared, in abstract, to established critical accounts of counterterrorism law that were mainly developed with reference to the United States. First among them is the *permanent state of exception* thesis, which sees counterterrorism law as a revelation of the true nature of power that reduces law to sovereign force (Agamben, 2005). This account is triggered by a singular feature of U.S. counterterrorism law: the treatment of enemy combatants. It focuses exclusively on legal logic, ignoring legal content and institutional arrangements. Moreover, whereas authoritarian legality sees law as a social relation and is concerned with its present configuration, the state of exception thesis is concerned with accounting for the trans-historical structure of power (Agamben, 1998, 2005), and treats counterterrorism law as evidence thereof. Finally, whereas the permanent exception thesis attributes jurisprudential supremacy to the exception (thus rendering itself a jurisprudential impossibility), authoritarian legality also stresses the continuing importance of normal elements in the configuration of the legal field.

A second, more exegetic than critical, account of counterterrorism law across several countries is that of *militant democracy*, which sees

counterterrorism law as the temporary suspension of specific constitutional rights by democracies under duress (Loewenstein, 1937; Sajó, 2004). It sees counterterrorism law as a narrow, temporal shift in legal content and ignores its implications for the logic or institutionality of law. Thus, despite its invocation of democracy, it does not raise the political question underpinning counterterrorism law. Regardless of the infringements of their constitutions, the (Western) countries under consideration are always, self-evidently, democratic and liberal. By contrast, in addressing not only the content, but also the logic and institutionality of law, authoritarian legality allows space for the political question regarding the nature of the polity that produces and employs such law. Finally, their constitutional framing prevents militant democracy accounts from correctly reading the legal content they focus on. More than a partial, temporary suspension of specific democratic rights, counterterrorism law signifies their (permanent) conditionality and amorphousness.

More advanced jurisprudentially, but also confined in the constitutional framework, are *extra-legality* accounts, concerned with the sidestepping by the Executive of legal restrictions through invocation of emergency powers (Gross, 2003; Roach, 2011, pp. 198–235). Although they provide powerful critical assessments of counterterrorism law, they are systematically selective regarding the content they examine. Thus, they consider legislatively enacted powers as unproblematic—including the FISA amendments that permit U.S. Intelligence to monitor the entirety of the citizenry's social interactions, and the entire U.K. counterterrorism edifice (Roach, 2011, pp. 175–198, 238–239, 306–308). Whereas *extra-legality* can be a feature of authoritarian legality, the latter is a broader concept, able to account for situations where exceptional powers do not enter the legal framework *qua* exceptional, but are codified in normal statutes. In this sense, the account of *counter-law*, comprising both extra-legal measures and legal ones that reverse rule of law principles (Ericson, 2007), is closer to authoritarian legality. Yet, while the counter-law approach successfully addresses the content of law, it fails to appreciate that it does not constitute merely an infringement of certain principles, but their displacement by a different motivating logic. It thus offers a powerful critique of counterterrorism law, but does not fully appreciate its character.

Not only the theory, but also the actuality of U.S. counterterrorism law indicates the relevance of authoritarian legality. Key legal trends and the deeper shifts in legal logic that inform the account of authoritarian legality

are present in U.S. counterterrorism law: undermining of legal certainty, expansion of the scope of penalization, disruption of due process, development of parallel penal regimes, increased Executive control over justice processes, instrumentalization of law to the service of security, pre-emption, disruption of autonomy, recasting of legal subjectivities as threatening, and overt politicization of legal meaning, objectives, and targets—they are all present in U.S. as well as U.K. counterterrorism law. So is the overall tendency of authoritarian legality: augmentation of state power over society, combined with decline of legal protections.

Crucially, in the United Kingdom, the authoritarian realignment of the rule of law is effectuated through arrangements that maintain their constitutional shape. In this respect, the United States is more problematic, as Commander in Chief powers are a considerable part of the counterterrorism arsenal, indicating the partial relapse to decisionism captured by extra-legality approaches. Yet, rather than openly antagonizing the constitution, the Executive sought to constitutionally justify even its most extreme powers. Like the United Kingdom, the United States did not rupture its juridico-political institutions, but reconfigured them to accommodate an expansion of state power over society.

Thus, via different routes, the United Kingdom and the United States arrive at the same destination: a law-form that systematically develops authoritarian elements within the institutional framework of the rule of law. Crucially, over the last eight years, the United States is gradually shredding its most extra-legal powers (e.g., license to torture), or reigning them in the constitutional framework (e.g., enemy combatants) (Boukalas, 2014, pp. 102–116; Greenberg, 2016, pp. 173–262). As U.S. counterterrorism law becomes normalized, authoritarian legality provides a suitable framework for critically assessing it, for it underlines the possibility that even fully constitutional powers may be hollowing out the rule of law.

## CONCLUSION

This article has outlined a new perspective for the analysis of counterterrorism law. It consists, on the one hand, in deciphering the general line of force (the “trends”) into which the multitude of specific provisions combine, and on the other, in accounting for its implications in three registers: legal content, logic, and institutionality. The configuration and articulation

of these three elements comprises the law-form, the integrity (or internal unity) of law in a specific socio-historical conjuncture. In turn, the configuration of the law-form affects the dynamic between authoritarian and democratic tendencies that marks modern law. The discussion of U.K. counterterrorism legislation in this framework permits an accounting of it in its totality and an appreciation of the breadth and depth of its implications. While focused on U.K. counterterrorism law, this analytical framework could be employed to produce comprehensive analysis of counterterrorism law in other jurisdictions.

With regard to U.K. counterterrorism law, the article finds that it constitutes an augmentation of coercive state power over society, and concentrates this power at the Executive. This is not effectuated by infringement of legal rights, nor by imposing draconian punishments, but through a wholesale deregulation of criminal law. The latter is driven by the strategic turn to pre-emption (which also upgrades the role of Intelligence in legal processes, including the production of law) and is designed to directly and primarily target political conviction. These trends describe legal content that infringes core rule of law principles; they outline a logic of *raison d'état* that treats law as an instrument for pursuing security, but also emanate from, and are applied by, an institutional assemblage that is constitutional and compliant with the rule of law. On the face of this paradox, the article suggests that counterterrorism law signals a reconfiguration of the law-form that keeps the institutional shape of the rule of law intact, but allows the systematic growth of authoritarian content and logic within its frame. It captures this reconfiguration of the law-form in the term *authoritarian legality*.

Finally, the article argues that the notion of authoritarian legality could be relevant to the analysis of counterterrorism law beyond the United Kingdom. It does so by briefly comparing authoritarian legality to established accounts of counterterrorism law—accounts that were mainly developed in relation to the United States. In every case, authoritarian legality is seen as a more comprehensive account, one that permits examination of “more” law in more registers, providing thus a deeper understanding of its character and effects. Further, the article addresses the current stage of U.S. counterterrorism law, marked by its “normalization,” its gradual inscription in the constitutional framework. Here, authoritarian legality is ideally suited to account for the development of authoritarian elements *within* an institutional environment aligned with the constitution and the rule of law.

It also admonishes that even its full constitutionalization does not guarantee that counterterrorism law has lost its authoritarian character.

Authoritarian legality merges the rule of law and *raison d'état*. The former becomes the framework for the development of the latter. If counterterrorism jurisprudence realigns the law-form, it does not thereby create an exceptional law-form, but, precisely, one that has no need for “exceptions.” Here, illegality, in the shape of arbitrary state force, becomes the content of law, and *raison d'état* becomes the animating principle of the rule of law. If the rule of law is a juridico-political aspiration to reconcile freedom with order, the former has become conditional to the demands of the latter—and is therefore eclipsed.

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