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The reaction to the events of 11 September 2001 and later terrorist attacks have posed a major challenge to the protection, and indeed the very concept, of human rights. In the name of the 'war on terror', law enforcement agencies have been granted unprecedented powers,[1] people have been detained without charge or trial,[2] and the prohibition of torture has been questioned by academics[3] and systematically undermined by governments.[4] Whilst this shift away from liberty and towards more repressive criminal justice policies forms the backdrop to this paper, it is not my aim to add to the burgeoning literature that explores whether or not it is justified by the necessities of the fight against terrorism.[5] This paper starts from the premise that, even in an alleged 'age of terror',[6] human rights do deserve to be upheld, and its intended readership are those who share this belief. I am interested not in *whether*, or to what extent, human rights should be protected, but instead in *how* this can be effectively done: what are promising strategies of challenging repressive counter-terrorism policies? This, it seems to me, is one of the key questions, if not *the* key question, facing 'the human rights movement' today.

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[1] E.g., USA Patriot Act, Public Law No 107-56, ss 201-25; Anti-Terrorism, Crime and Security Act (ATCSA) 2001; Prevention of Terrorism Act 2005; Terrorism Act 2006, ss 21-33.

[2] For the United States, see USA Patriot Act, s 412; Disposition of Cases of Aliens Arrested Without Warrant, 8 CFR, s 287.3(d) (2001); Office of the Inspector General of the US Department of Justice (hereinafter OIG), *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003). For the United Kingdom, see ATCSA 2001, Part IV; *A v Secretary of State for the Home Department* [2004] UKHL 56.

[3] A Dershowitz, *Why Terrorism Works* (New Haven, Yale University Press, 2002); M Bagaric and J Clarke, 'Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable' (2005) 39 *University of San Francisco Law Review* 581.

[4] See *Saadi v Italy*, European Court of Human Rights, Judgment of 28 February 2008, Application No. 37201/06; KJ Greenberg and JL Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (New York, Cambridge University Press, 2005).

[5] See, e.g., RA Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge, Cambridge University Press, 2005); RA Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford, Oxford University Press, 2006); M Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh, Edinburgh University Press, 2005).

[6] Ignatieff, n 5.

On the side of those who are largely sympathetic to the idea of human rights, two main schools of thought have emerged about how to respond to the 'war on terror'. According to what is clearly the dominant position, human rights violations committed in the fight against terrorism are the consequence of an exceptional lack of legal regulation and must thus be addressed by insisting on the rule of law and turning to judicial mechanisms. This invocation of the rule of law and reliance on litigation has recently been increasingly subject to criticism from a number of authors who argue that the post-September 11 measures are not exceptional, extra-legal phenomena but in fact firmly rooted in the law. Therefore, these scholars, whom I will describe as – for want of a better term – 'critical', warn against an endorsement of the rule of law and instead call for a 'political response'. Their arguments made in the context of the 'war on terror', and especially Guantánamo Bay, reflect a wider scepticism in critical legal circles about the potential of the rule of law and legal procedures to prevent or rectify human rights abuses[7] and corresponding warnings against 'turn[ing] political conflict into technical litigation'.[8] I will argue that the analysis of these critical scholars is largely correct but that their suggested prescription of abandoning the rule of law should be rejected.

Section 1 gives an overview of the arguments advanced by the two schools of thought referred to above. Section 2 analyses the claim, central to the position of the first school, that the problem with counter-terrorism practices is their exceptional, extra-legal character. Section 3 examines the argument, made by the second school, that it is futile to insist on the rule of law. Section 4 tries to draw some practical lessons for human rights activists from this – rather theoretical – discussion of the two opposed positions.

1. Two views of the 'war on terror'

There are, of course, myriad different analyses of the relationship between counter-terrorism and human rights. Nevertheless, two main sets of views can be distinguished that fundamentally differ in their diagnosis of 'the problem with' counter-terrorism practices and, accordingly, in their suggestions as to what should be done to protect

[7] See, e.g., C Douzinas, *The End of Human Rights* (Oxford, Hart, 2000) 91.

[8] Ibid., 14.

human rights. Although this is a simplification, these sets of views will be described here as 'the liberal' and 'the critical' perspective.

1.1 The dominant, liberal view

For the vast majority of commentators who are critical of the 'war on terror', the fundamental problem with contemporary counter-terrorism measures is their exceptional nature. Though often not expressly referring to the work of Carl Schmitt, they understand these measures as being based on his notion of the 'state of exception' as the realm where law is suspended and the sovereign exercises unfettered discretion.[9] According to this account, the emergency regimes established since September 11 are 'outside' the normally valid legal system – the exception to the rule – and it is this exceptional lack of legal regulation that carries with it the risk of human rights violations. The paradigmatic manifestation of this exceptionality is, of course, the US naval base at Guantánamo Bay, which has been characterised as a 'place … beyond the rule of law',[10] a 'legal black hole'[11] and a space of 'utter lawlessness'[12] where the detainees are left without 'any rights whatever'.[13] The fact that these are descriptions, not by human rights campaigners, but by English judges is an indication of the prevalence of this view. Even the then-British Prime Minister Tony Blair described Guantánamo as an 'anomaly'.[14] US commentators have used similar characterisations. Jordan Paust has described Guantánamo as a 'legal no man's land',[15] Gerald Neuman sees it as an 'anomalous zone'[16] and Harold Koh has

[9] C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (translated by G Schwab) (Chicago, University of Chicago Press, 2005) 12.

[10] D Hope, 'Torture' (2004) 53 *International and Comparative Law Quarterly* 807, 830.

[11] *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, para. 64.

[12] J Steyn, 'Guantánamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1, 15.

[13] Ibid., 11.

[14] D Fickling, 'PM denies knowledge of "CIA torture"', *Guardian*, 7 December 2005.

[15] J Paust, 'Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantánamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions' (2004) 79 *Notre Dame Law Review* 1335, 1346.

[16] G Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197, 1228.

maintained that the judgments of the military commissions convened at Guantánamo would be perceived as 'based on politics, not legal norms'.[17]

Also other counter-terrorism measures are typically described in terms that are meant to highlight their extraordinary, non- or quasi-legal, nature. In the House of Lords decision on the detention of foreign terrorist suspects ('Belmarsh decision'), for example, Lord Nicholls stated that '[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law'.[18] Therefore, '[w]holly exceptional circumstances must exist before this extreme step can be justified.'[19] And Lord Hoffmann equally stressed the exceptional nature of the measure: 'The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.'[20]

Counter-terrorism measures are thus understood as victories of the exception over the established rule (of law), and the human rights violations they entail are presented as the result of an extraordinary lack of law and legal protection. This understanding rests on a number of crucial binary distinctions: normalcy-emergency, norm-exception, inside-outside (the law), law-political power. This type of analysis leads its proponents to suggest a particular response to 'the problem' of counter-terrorism regimes. The key to the protection of human rights is, according to the predominant, liberal view, to insist on the rule of law and to turn to legal institutions (domestic courts, international human rights bodies etc.) to reclaim these extraordinary spaces of lawlessness.[21]

Although he would hardly describe himself as belonging to the liberal mainstream, also Giorgio Agamben highlights the exceptional character and lawlessness of Guantánamo and the 'war on terror' in general. Of the Guantánamo detainees, he writes that 'they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is

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[17] H Koh, 'The Case against Military Commissions' (2002) 96 *American Journal of International Law* 337, 341.

[18] *A v Secretary of State for the Home Department* [2004] UKHL 56, para. 74.

[19] Ibid.

[20] Ibid., para. 86

[21] See generally, A Tsoukala, 'Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies' (2006) 54 *Political Studies* 607, especially 614-617 and 620-622.

entirely removed from the law and from judicial oversight.'[22] To Agamben, Guantánamo is the embodiment of the 'state of exception', which he characterises as 'a space devoid of law, a zone of anomie in which all legal determinations … are deactivated.'[23] But unlike the liberal commentators referred to above, Agamben sees this 'state of exception' not as 'outside' the legal order. Instead, it has a juridical form. In fact, '[t]his space devoid of law seems, for some reason, to be so essential to the juridical order that it must seek in every way to assure itself a relation with it, as if in order to ground itself the juridical order necessarily had to maintain itself in relation with an anomie.'[24] Not only is the state of exception 'the constitutive paradigm of the juridical order',[25] it also comprehensively subordinates the juridical order: 'the law employs the exception – that is the suspension of law itself – as its original means of referring to and encompassing life'[26] so that 'the exception everywhere becomes the rule.'[27]

1.2 The critical view

This prevailing, mainly liberal, analysis and criticism of the 'war on terror' has recently itself been subject to criticism from 'critical' scholars. They argue that Guantánamo and other counter-terrorism measures are not exceptional at all. In fact, they contend, the very distinction between the norm and the exception, between law and lawlessness, is untenable.

Fleur Johns points out that the US government has constructed an elaborate normative and institutional system at Guantánamo Bay (consisting of the military commissions, the Administrative Review Board, the Combatant Status Review Tribunal and other mechanisms) and concludes that Guantánamo, far from being a 'legal no man's land',[28] is 'a space filled to the brim with expertise, procedure,

[22] G Agamben, *State of Exception* (trans. K Attell, Chicago, University of Chicago Press, 2005) 4.

[23] Ibid., 50.

[24] Ibid., 51.

[25] Ibid., 7.

[26] Ibid., 1.

[27] G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (trans. D Heller-Roazen, Stanford, Stanford University Press, 1998) 9.

[28] Paust, n 15, 1346.

scrutiny and analysis'[29] – 'a profoundly anti-exceptional legal artefact'.[30] Claudia Aradau similarly argues that Guantánamo is 'not lawless or normless, but is filled with rules and regulations'[31] and that it is 'not … a singular and exceptional occurrence but … symptomatic of the transformation of law'.[32] Pointing to 'the sheer volume of … regulations and interpretations'[33] governing the 'war on terror', Nasser Hussain equally rejects the notion of exceptional lawlessness. In fact, he maintains, 'what one witnesses in contemporary emergency is a proliferation of new laws and regulations', almost to the point of 'hyperlegality'.[34] Thus, 'norm and exception have blurred severely'[35] and 'the exception as it has historically and theoretically been understood, as a suspension of regular law, even a space of nonlaw, no longer exists.'[36] In short, as Peter Fitzpatrick and Richard Joyce argue, 'the exception is not *to* but within law'.[37]

Accordingly, these authors have a radically different view than the liberal authors referred to above of how those concerned about human rights should respond to Guantánamo and other counter-terrorism practices. To them, the notion of lawlessness is misleading and dangerous because 'once such an idea of a space of nonlaw becomes commonplace the seemingly logical conclusion is to advocate the insertion of law, of more rules, regulations, conventions, and court cases'.[38] However, Johns contends, given the legal mechanisms in place, 'it is not upholding the rule of law that seems tricky.'[39] Aradau similarly warns against 'the endorsement of the "rule of law" by human rights lawyers, activists and even politicians against the exception of Guantánamo'[40] and the 'fortification of the legal space of the norm.'[41] Hussain,

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[29] F Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16 *European Journal of International Law* 613, 618.

[30] Ibid., 615.

[31] C Aradau, 'Law Transformed: Guantánamo and the 'Other' Exception' (2007) 28 *Third World Quarterly* 489, 495.

[32] Ibid., 489.

[33] N Hussain, 'Beyond Norm and Exception: Guantánamo' (2007) *Critical Inquiry* 734, 742.

[34] Ibid., 741.

[35] Ibid., 750.

[36] Ibid., 735.

[37] P Fitzpatrick and R Joyce, 'The Normality of the Exception in Democracy's Empire' (2007) 34 *Journal of Law and Society* 65, 76.

[38] Hussain, n 33, 751-2.

[39] Johns, n 29, 618-19.

[40] Aradau, n 31, 498.

finally, points to 'the limits of the law as a response to an increasingly repressive and undemocratic sovereignty'.[42]

Instead, what is called for according to these scholars is 'a broader political and ethical response.'[43] This invocation of the need for politics reflects Schmitt's insistence on the pure politics of the decision on the exception.[44] For Schmitt, the decision on the exception is 'a decision in the true sense of the word' as the exception 'cannot be circumscribed factually and made to conform to a preformed law'.[45] Johns advocates a 're-invigoration of that sense of the exception that may be derived from the work of Carl Schmitt', that is, 'of operating under circumstances not pre-codified by pre-existing norms',[46] as a way of restoring appreciation of 'the scope for political action'[47] and 'decisional responsibility'.[48] 'Recognizing in herself or himself Schmitt's exceptional decision-maker,' she argues, 'the functionary implementing a programme [such as Guantánamo] might come to experience that programme as a field of decisional possibility and impossibility, with all the danger and difference that that implies.'[49] Hussain similarly invokes the political by again 'insisting on an awareness of the limits of law'[50] and repeating Schmitt's call 'for the pure politics of the decision on the exception, a decision that would break the "crust" of legal life'.[51] Aradau, finally, laments the fact that '[t]he law that governs Guantánamo functions through administrative practices from which decision has retreated … in a maze of institutions', whereas 'Schmitt's insight on the arbitrary decision at the heart of law could become a tool for critical thought inasmuch as it made norms contestable and exposed their reliance on an initial decision and foundational violence.'[52] In summary, the critical school of thought warns against appealing to the law, insisting on the rule

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[41] Ibid., 491.
[42] Hussain, n 33, 735.
[43] Ibid., 752.
[44] Schmitt, n 9, 15.
[45] Ibid., 6.
[46] Johns, n 29, 615.
[47] Ibid., 635.
[48] Ibid., 615.
[49] Ibid., 635.
[50] Hussain, n 33, 752.
[51] Ibid., 753.
[52] Aradau, n 31, 491.

of law and turning to the courts as a human rights strategy and instead advocates a 'political response' that would restore a sense of decisional responsibility.

2. Exceptionality

The second group of authors is, I believe, right to reject the prevailing characterisation of Guantánamo and other counter-terrorism measures as exceptional phenomena that are somehow 'outside' the normal legal order. Not only does this kind of account draw on simplistic binary oppositions – between the norm and the exception, between law and lawlessness, between inside and outside – that do not stand up to scrutiny: it may also serve to legitimise questionable boundaries between what is accepted as 'normal' and rejected as 'exceptional'.

To describe Guantánamo as a 'legal black hole',[53] and thereby to imply that law is not implicated in the human rights abuses committed there, is clearly misleading. Both the detention and the trial systems in place at Guantánamo Bay have an explicit legal basis, originally in the Authorization for the Use of Military Force Joint Resolution[54] and a 2001 Presidential Military Order respectively,[55] and, since 2006, in the Military Commissions Act of 2006.[56] Furthermore, detention is subject to review by an elaborate system of different legal mechanisms.[57] As far as the military commissions are concerned, the 2006 Act is supplemented by the Manual for Military Commissions, which sets out the Rules for Military Commissions, the Military Commission Rules of Evidence, and the Crimes and Elements (setting out the crimes punishable by military commission).[58] Aradau's characterisation of Guantánamo as a space 'filled with rules and regulations'[59] is thus apposite. Nor is there anything

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[53] *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, para. 64; Steyn, n 12.

[54] Authorization for the Use of Military Force, Public Law No 107-40, 115 Stat 224 (2001).

[55] Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Noncitizens in the War against Terrorism, 66 Fed Reg 57,833 (16 November 2001).

[56] Military Commissions Act of 2006, Public Law No 109-366, 120 Stat 2600 (codified at 10 USC sections 948a–950w and other sections of Titles 10, 18, 28, and 42).

[57] See Department of Defense Order, 'Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantánamo Bay Naval Base, Cuba', 11 May 2004; Deputy Secretary of Defense, 'Order Establishing Combatant Status Review Tribunal', 7 July 2004.

[58] Manual for Military Commissions, 18 January 2007, available at <http://www.loc.gov/rr/frd/Military_Law/pdf/manual-mil-commissions.pdf>.

[59] Aradau, n 31, 495.

'exceptional' about the US government's use of the Guantánamo Bay naval base to detain people without charge. In the 1990s, the US authorities, in an attempt to block Haitian and Cuban refugees from entering the United States, used Guantánamo over several years as an offshore processing centre, detaining tens of thousands of people.[60]

The same could be said of pretty much any of the other repressive measures introduced after September 11: rather than being exceptional and unrelated to the 'normal legal system', their introduction was made possible by long-term structural conditions and they often build on previous laws. To again use the most prominent British example, detention of foreign terrorist suspects under the Anti-Terrorism, Crime and Security Act (ATCSA) 2001, it can hardly be argued, as Lord Hoffmann did in the Belmarsh case, that detention without charge or trial is 'antithetical to the instincts and traditions of the people of the United Kingdom.'[61] On the contrary, detention without trial of those thought to pose a national security risk has a long history in the United Kingdom. The first of a series of Habeas Corpus Suspension Acts, allowing the executive to hold individuals on treason charges without bringing them to trial, was introduced as early as 1688.[62] During the second part of the nineteenth century, Ireland was governed with the use of detention powers that were shielded from any form of judicial supervision.[63] The British government again relied upon preventive detention powers in both world wars to intern 30,000 and 28,000 'enemy aliens' respectively.[64] Furthermore, as Brian Simpson has pointed out, the power of executive detention was 'always valued in the colonies'[65] and, even in the waning years of the British Empire, used to incarcerate tens of thousands of troublesome political opponents.[66] As far as the specific context of terrorism is

[60] HH Koh, 'America's Offshore Refugee Camps' (1994) 29 *University of Richmond Law Review* 139; A Kaplan, 'Where Is Guantánamo?' (2005) 57 *American Quarterly* 831.

[61] *A v Secretary of State for the Home Department* [2004] UKHL 56, para. 86.

[62] RJ Sharpe, *The Law of Habeas Corpus* (Oxford, Clarendon Press, 2nd edn, 1989) 94.

[63] AWB Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford, Clarendon Press, 1992), 3-4; AWB Simpson, *Human Rights and the End of Empire* (Oxford, Oxford University Press, 2001) 79-80.

[64] Simpson (1992), n 63, 163.

[65] Simpson (2001), n 63, 876.

[66] In 1954, for instance, 30,000 people were arrested in Kenya in an operation designed to identify Mau Mau supporters. Ibid., 879-880.

concerned, detention without trial was a regular feature of a series of anti-terrorism laws applicable in Northern Ireland throughout the last century.[67]

The constant invocations of the exceptional nature of the post-September 11 regimes not only obscure the fact that these sorts of repressive measures build on historical precedents and that they can, and have always been, accommodated by the 'normal' legal system. They also help to legitimise other sets of current repressive measures by letting them appear normal in comparison to the allegedly exceptional anti-terrorism regimes. Detention without charge or trial, for example, far from being limited to the counter-terrorism context, is a common feature of every state's legal system. Executive detention powers are employed against vagrants, the mentally ill, drug addicts, immigrants and other allegedly dangerous groups of people.[68] Especially immigration detention has become a widespread phenomenon throughout the Western world in recent years.[69] In the United Kingdom, for example, the immigration authorities detained approximately 35,000 foreign nationals in 2003.[70] Characterisations of detention without charge or trial as 'antithetical to our instincts and traditions' and as limited to the exceptional terrorism context thus distort the reality of mass incarceration at the executive's behest. And when European government leaders brand Guantánamo as 'anomaly', then this could also be read as a conscious rhetorical move to deflect attention away from the deprivations of liberty to which tens of thousands of immigrants are subjected to in Europe on a daily basis.

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[67] Civil Authorities (Special Powers) Act (Northern Ireland) 1922 and Northern Ireland (Emergency Provisions) Acts 1973-1998. See RJ Spjut, 'Internment and Detention Without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice' (1986) 49 *Modern Law Review* 712 and RJ Spjut, 'Executive Detention in Northern Ireland: The Gardiner Report and the Northern Ireland (Emergency Provisions) (Amendment) Act 1975' (1975) 10 *Irish Jurist* 272. For a historical account, see J McGuffin, *Internment* (Tralee, Anvil Books, 1973).

[68] See European Convention on Human Rights, Art 5(1) (expressly authorising the detention of all these categories of persons).

[69] See J Hughes and O Field, 'Recent Trends in the Detention of Asylum Seekers in Western Europe' in Hughes and Liebaut (eds), *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (The Hague, Kluwer Law International, 1998) 5; P Morante, 'Detention of Asylum Seekers: The United States Perspective' in ibid., 85; M Welch and L Schuster, 'Detention of Asylum Seekers in the US, UK, France, Germany, and Italy: A Critical View of the Globalizing Culture of Control' (2005) 5 *Criminal Justice: The International Journal of Policy and Practice* 331. See also the Jesuit Refugee Service's website on detention in Europe (http://www.detention-in-europe.org/) and the website of the International Detention Coalition (http://www.idcoalition.org/portal/index.php).

[70] Amnesty International, *United Kingdom: Seeking Asylum is Not a Crime: Detention of People Who Have Sought Asylum*, 20 June 2005, 43.

3. The rule of law

From the fact that the post-9/11 measures are not exceptional, extra-legal phenomena, but firmly rooted in the legal system, the critical authors referred to above conclude that 'it is not upholding the rule of law that seems tricky.'[71] Thus, they warn against 'the endorsement of the "rule of law" by human rights lawyers'.[72]

Central to their argument in this respect is the quantity of legal regulations and mechanisms involved in contemporary anti-terrorism regimes. Hussain points to the 'sheer volume of these regulations', specifying that '[t]he well-known torture memoranda … run into hundreds of pages.'[73] Aradau highlights the 'detailed rules and norms' governing Guantánamo[74] and the 'maze of institutions' operating there.[75] Johns argues that there is 'a panoply of regulations' governing the handling of the Guantánamo detainees and that since 2004 'the normative and institutional network at Guantánamo Bay has become even denser,' so that it is now 'a space filled to the brim with expertise, procedure, scrutiny and analysis'.[76] Today, one could add to this that the Military Commissions Act of 2006, supplemented by the 238 pages-long Manual for Military Commissions issued in 2007, provides very detailed regulation of the commission trials.

Yet it is not clear how these repeated references to the sheer mass of regulations and procedures support the claim that it is futile to insist on the rule of law. Even a minimal, formal, conception of the rule of law[77] requires more than just that there must be law, that power must be exercised through detailed legal regulation. According to Dicey's classic formulation, the rule of law means, first, 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power', excluding 'wide discretionary authority on the part of the government'.[78]

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[71] Johns, n 29, 618-19.

[72] Aradau, n 31, 498.

[73] Hussain, n 33, 742.

[74] Aradau, n 31, 491.

[75] Ibid., 496.

[76] Johns, n 29, 618.

[77] On the distinction between formal and substantive conceptions of the rule of law, see P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.

[78] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Basingstoke, Macmillan, 1959, 10th ed.) 202.

Second, it requires 'equality before the law'.[79] Third, it implies that 'the rights of individuals' are protected by common law 'as defined and enforced by the courts'.[80]

Whether the Guantánamo system and the numerous other post-September 11 measures are compatible with a concept of the rule of law that builds on Dicey's three elements is, at the very least, highly doubtful. A detailed analysis of this issue is beyond the scope of this chapter, and so I will only briefly list a few concerns. First, the laws on which contemporary counter-terrorism measures are based are – even though, it is true, often very voluminous – typically not clear, stable and determinate as required by the 'regular law' element. Instead, they are vague and flexible, giving the executive wide scope of discretion. For example, terrorist offences are normally very broadly and vaguely drafted.[81] In addition, anti-terrorism laws grant law enforcement authorities wide discretionary powers to prevent terrorism, for instance to detain those who 'endanger national security',[82] or to stop and search people without having to show reasonable suspicion.[83] Second, counter-terrorism measures are typically based on distinctions between different categories of people ('unlawful enemy combatants' – 'other combatants', 'citizens' – 'foreign nationals' etc.) who are afforded different levels of legal protection or even subject, as in the case of the US military commissions, to trial before different types of tribunals. These categorisations undermine the principle of equality before the law. Since this issue is at the heart of the human rights violations committed in the 'war on terror', I will return to it in the following section. Third, post-September 11 laws tend to undermine the ability of courts to protect individual rights. Often these laws expressly exclude effective judicial review of the exercise of anti-terrorism powers[84] or they replace proper courts with quasi-judicial mechanisms that are not independent from the executive. Neither the US Combatant Status Review Tribunals nor the military commissions nor any of

[79] Ibid.

[80] Ibid., 203.

[81] See, for example, the offence of 'encouragement of terrorism' under section 1 of the British Terrorism Act 2006.

[82] USA Patriot Act, s 412.

[83] Terrorism Act 2000, s 44.

[84] E.g., USA Patriot Act, s 217.

the other legal institutions at Guantánamo referred to by the critical scholars are truly independent decision-making bodies.[85]

In view of these different concerns, I find it difficult to understand how upholding the rule of law at Guantánamo and elsewhere in the 'war on terror' can be described as 'not tricky'. Upholding the rule of law is in fact not only very tricky, but also of crucial importance as it is a highly effective means of protecting human rights in the 'war on terror'. For one of the features of even a Diceyan conception of the rule of law, which is only concerned with the formal structure of the law, is that it has a power-restraining effect. It requires that the law must be general, that is, that rules must be 'issued in advance to apply to all cases and all persons in the abstract.'[86] The rule of law forces those in power to articulate their claims in terms of rules that are equally applicable to everyone, both the powerful and the powerless, and, as EP Thompson understood, thus renders them 'prisoners of their own rhetoric'.[87] In this way, the very form of law functions as a crucial inhibition on state power. As the Frankfurt-school jurist Franz Neumann observed, '[t]he generality and the abstractness of law together with the independence of the judge guarantee a minimum of personal and political liberty'.[88] As such, these requirements of the rule of law have an ethical value.[89]

Of course, this is not to say that the rule of law is, as Thompson claimed, an '*unqualified* human good'.[90] Rather, it also has an ideological, disguising function. In a class society, the generality of the law conceals the realities of substantive inequality. And, as explained above, states that would claim to be based on the rule of law have not only always been able to accommodate repressive measures within their ordinary legal system but by grounding them therein may also let them appear as normal and acceptable. At the same time, however, the rule of law also 'has a socially

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[85] See Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin: Addendum: Mission to the United States of America, 22 November 2007, UN Doc. A/HRC/6/17Add. 3.

[86] F Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa, Berg, 1986) 213.

[87] EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (London, Penguin Books, 1990) 263.

[88] F Neumann, *Behemoth: The Structure and Practice of National Socialism* (London, Victor Gollancz, 1942) 362-3.

[89] Ibid., 362. See also Neumann (1986), n 86, 213.

[90] Thompson, n 87, 266 (emphasis added).

and politically protective function. It is equalising.'[91] This is what Bob Fine has described as the 'contradictory character' of the rule of law: it may be part of the 'superstructure', masking exploitation and oppression, but at the same time it is a crucial means of inhibiting the power of government and protecting the rights of the people.[92] Therefore, it should not be discarded. Also in this respect, I would hold it with Neumann. If one replaces 'universalism' with 'the rule of law' in his following remark, then this is, I believe, a good summary of his view on the issue: 'To abandon universalism because of its failures is like rejecting civil rights because they help legitimize and veil class exploitation, or democracy because it conceals boss control, or Christianity because churches have corrupted Christian morals. Faced with a corrupt administration of justice, the reasonable person does not demand a return to the war of each against all, but fights for an honest system.'[93]

The conclusion that it is futile to insist on the rule of law in the 'war on terror' because the post-September 11 measures involve detailed regulation and various legal mechanisms thus rests on a misunderstanding of the functions of the rule of law and an underestimation of its potential to restrict state power. Of course Guantánamo Bay is not an exceptional lawless space. And of course all the other post-September 11 practices are not extraordinary phenomena that are somehow unrelated to the law. Yet just because law is implicated in the human rights violations committed in the 'war on terror' does not mean that there is no value in endorsing the rule of law. On the contrary, as I will try to show in the following section, rule-of-law arguments can be very effective tools to challenge what is arguably the root cause of these human rights abuses.

4. Lessons for human rights campaigners and lawyers

There are two main practical lessons for human rights campaigners and lawyers to be drawn from the above, largely theoretical, discussion. The first follows from my point about the (non-)exceptionality of counter-terrorism measures, the second from my point about the functions of the rule of law.

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[91] Neumann (1986), n 86, 213.

[92] B Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London, Pluto Press, 1984).

[93] Neumann (1942), n 88, 133.

4.1 Reconsider campaigning focus

If one agrees that the post-September 11 measures are not as exceptional as they are commonly depicted, then some of the leading human rights organisations should clearly reconsider their campaigning focus. Since, as Johns has pointed out, 'it is the exception that rings liberal alarm bells',[94] most of the large human rights organisations have devoted a great – and, I would argue, disproportionate – share of their attention on counter-terrorism policies in recent years. Human Rights Watch, for example, set up a new programme devoted to Terrorism & Counterterrorism, alongside its more established programmes on the different regions of the world and issues such as women's and children's rights. Since September 11, the organisation has issued approximately 550 news releases, reports and other publications on the human rights impacts of counter-terrorism. In comparison, in the same time period, 51 of its publications dealt with 'health and human rights' and approximately 170 each with 'labor and human rights' and 'treatment of prisoners'.[95] In the United Kingdom, much of the energy of national human rights organisations such as Liberty and other critical commentators has been absorbed by the numerous counter-terrorism proposals put forward by the government in recent years. Especially the proposed extension of pre-charge detention (14 days, 28 days, 42 days, 90 days etc.) has provoked countless campaigns, policy papers, demonstrations and even international interventions by celebrities such as Desmond Tutu.[96] In contrast, Liberty's most recent press release on Anti-Social Behaviour Orders – an issue affecting the human rights of thousands of people in the United Kingdom – dates from March 2006.

But above all it is the degree of attention that Guantánamo Bay has attracted over the last few years that is, in my view, out of all proportions. All international (and countless national) human rights organisations have been running major campaigns against Guantánamo for several years. There have been films, demonstrations, readings of poems and even a 'virtual flotilla' to Guantánamo. The secretary general of Amnesty International justified the considerable resources and

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[94] Johns, n 29, 629.

[95] See www.hrw.org (accessed 20 May 2008).

[96] Liberty, 'The International Perspective on Pre-Charge Detention', available at http://www.liberty-human-rights.org.uk/issues/2-terrorism/extension-of-pre-charge-detention/the-international-perspective.shtml.

efforts invested by her organisation by claiming that Guantánamo is 'the gulag of our time'.[97] But if one was to make this kind of historical comparison (which I do not think one should), then surely 'the gulag of our time' is not Guantánamo with its now approximately 270 detainees but the worldwide web of immigration detention centres holding tens of thousands of people who have not committed any criminal offence.[98] From this perspective, it can be argued that most human rights organisations have fallen into the trap of blindly following the political agenda set by governments. Just like governments, they have made (counter-)terrorism their top priority, even though there are other human rights issues that are at least equally as pressing.

Of course, my argument is not that Guantánamo and other instances of counter-terrorism detention do not deserve attention because they affect only a relatively small number of people. Nor is all of the above to suggest that these battles against counter-terrorism policies do not deserve to be fought. Pre-charge detention of 42 days can, and should, be opposed even if one thinks that there are more pressing human rights issues. Therefore, following on from the above discussion of the role of the rule of law, the following section makes a few suggestions as to how human rights litigation and campaigning strategies can be designed effectively in the 'war on terror'. At the heart of these suggestions is my conviction that rule-of-law arguments should not be readily discarded but that, on the contrary, it is crucial to insist on the generality of the law.

4.2 Invoke the rule of law

A central aspect of the criticism of endorsements of the rule of law by the critical scholars is their warning against the common tendency to respond to governmental counter-terrorism measures by instigating litigation in national courts or international legal institutions.[99] I assume that this warning against turning to judicial fora is more intended to reflect a supposedly radical theoretical position than meant as a concrete practical recommendation. If it was the latter, then it could not be described otherwise than as cynical. Who would seriously suggest that, for example, terrorist suspects

[97] R Norton-Taylor, 'Guantánamo is gulag of our time, says Amnesty', *Guardian*, 26 May 2005.

[98] See notes 69 and 70 above.

[99] See Johns, n 29, 621; Hussain, n 33, 751; Aradau, n 31, 496-7.

languishing in Guantánamo or elsewhere in indefinite detention should not exhaust every means available to them, whether legal or otherwise?

A second aspect of the scepticism towards an insistence on the rule of law is the characterisation of a strategy that relies on formal legal arguments as somehow 'too limited'. Instead, the critical school of thought calls for a 'broader political response' that would restore a sense of 'decisional responsibility'. Yet often formal legal, rule-of-law based, arguments are the most promising ones, both as far as litigation strategies and political processes are concerned. In the following, I point to two ways in which invocations of the rule of law can be used as effective argumentative tools to challenge counter-terrorism policies.

First, as explained above, a central element of the rule of law is the requirement of equality before the law or formal equality. Insisting on equality before the law is a particularly promising litigation strategy to challenge counter-terrorism policies. As Neal Katyal has pointed out, it will often be difficult for courts to decide whether counter-terrorism measures are *substantively* correct, that is, whether they strike the right balance between liberty and security or not.[100] Equality challenges do not require courts to make that decision: they are not about the *what* of anti-terrorism laws (that is, their substance) but about *who* is affected by them.[101] In this sense they are, just like separation-of-powers arguments (which are about *how* counter-terrorism measures are passed), formal or procedural. As such, they are more likely to be successful in court. The petitioner in *Hamdan v Rumsfeld* won his case on the basis of a separation-of-powers argument.[102] In *A v Secretary of State for the Home Department,* the Belmarsh prisoners prevailed because the House of Lords found that there was no justification for treating them differently from British terrorist suspects.[103] Since counter-terrorism policies typically involve distinctions between different categories of people, the same kind of equality challenges could be deployed to oppose numerous other government measures. Examples include the US military

[100] N Katyal, 'Equality in the War on Terror' (2007) 59 *Stanford Law Review* 1365.

[101] Ibid., 1368.

[102] 126 S. Ct. 2749 (2006).

[103] *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 WLR 87.

commissions, which only have jurisdiction to try foreign nationals,[104] or the widespread use of immigration restrictions as a means of countering terrorism.[105]

As the example of the Belmarsh case demonstrates, insisting on equality before the law is not only a promising litigation strategy: it may also have a profound impact on political processes. The original act providing for detention without trial, the ATCSA 2001, which was limited in scope to foreign nationals, had been passed with a comfortable majority and without attracting great public attention.[106] However, once the House of Lords had found that the ATCSA was incompatible with the prohibition of discrimination, the government had to come up with legislation that was applicable to both foreign and British citizens. As a consequence, the proposed Prevention of Terrorism Act 2005 led to a major public debate on the relationship between liberty and security and to 'parliament's longest and sometimes rowdiest sitting for 99 years'.[107] The act was only passed after the government had made substantial concessions, in particular by providing for greater involvement of the judiciary in the suggested control order process[108] and by making the act's key provisions subject to annual renewal by parliament.[109] The extension of the scope of anti-terrorism powers to British citizens due to the House of Lords decision thus reshaped the debate in crucial ways. The discussants were forced to consider the possibility of the law being applied against themselves (or at least their constituents), and, as a consequence, the discussion now had to be articulated in terms of generally applicable rules and principles. This shift towards general rules resulted, as Thompson would have predicted, in a curtailment of the executive's powers: preventive detention was replaced with lesser forms of restrictions on liberty, which, in addition, are subject to greater judicial control. The import of insisting on equality should not be overestimated: generally applicable rules are not necessarily good rules. The control order system introduced by the Prevention of Terrorism Act 2005 still raises a number

[104] 10 USC ss 948a(3), 948c. See D Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'* (Oxford, Oxford University Press, 2008) 140-162.

[105] See ibid., 165-180; C Walker, 'The Treatment of Foreign Terror Suspects', (2007) 70 *Modern Law Review* 427.

[106] The vote was 341 to 77. *Hansard*, HC vol 375, col 404 (21 November 2001).

[107] P Wintour and A Travis, 'The Longest Day', *Guardian*, 12 March 2005.

[108] Prevention of Terrorism Act 2005, s 4.

[109] Ibid, s 13.

of important human rights issues.[110] But it would be absurd to claim that control orders are not an improvement on indefinite detention in a high-security prison.

A second, so far less explored, way in which invoking the rule of law can serve as an effective instrument of challenging counter-terrorism policies is by insisting on another, closely related, aspect of it: the requirement that rules must be abstract and general rather than situation-specific. It is this requirement which, ultimately, secures equality before the law.[111] In recent years, the generality and abstractness of the law has come under increased pressure, including in the field of criminal justice. Following September 11, numerous states have adopted special anti-terrorism laws and created new specialised mechanisms and institutions, including ad hoc tribunals and special law enforcement agencies, to deal with terrorism.[112] A similar regime specifically designed to counter terrorism is emerging at the international level.[113] This special treatment approach is largely prompted by political pressures. Special laws are typically passed amidst great public outrage in the wake of terrorist attacks and designed to denounce terrorist acts, stigmatise the terrorists and reassure the public. As a consequence, those subject to these anti-terrorism regimes are inevitably singled out for particularly harsh treatment. To name just one example, the special terrorist sanctions regime imposed by the UN Security Council provides far less protection to those affected by the sanctions than is generally available under national and international law, in particular depriving them of the right to a fair hearing and the right to a judicial remedy.[114] This inferior level of due process

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[110] See *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45; *Secretary of State for the Home Department v MB* [2007] UKHL 46.

[111] I Kant, *Groundwork of the Metaphysics of Morals* (Cambridge, Cambridge University Press, 1998); F Neumann, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (New York, Free Press of Glencoe, 1957) 42; Neumann (1986), n 86, 256-7.

[112] Examples include the USA PATRIOT Act of 2001 and the Military Commissions Act of 2006; the British ATCSA 2001; the German *Gesetz zur Bekämpfung des internationalen Terrorismus*, 9 January 2002, BGBl. I, 361; and the Indian Prevention of Terrorism Act (POTA) of 26 March 2002. For a good overview, see VV Ramraj, M Hor and K Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge, Cambridge University Press, 2005).

[113] See, for instance, E Rosand, 'The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?' 11 *Journal of Conflict & Security Law* (2006) 399.

[114] See the contribution by Bill Bowring to this volume. See also 'Targeted Sanctions and Due Process', Study by Prof. B. Fassbender commissioned by the UN Office of Legal Affairs, 20 March 2006; Council of Europe, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions', Report prepared by Prof. I. Cameron, 6 February 2006; A Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' 17 *European Journal of International Law* (2006) 881, 903-10; E de Wet and A Nollkaemper, 'Review of Security Council Decisions by National Courts' 45 *German Yearbook of International Law* (2002) 166; E Miller, 'The Use of Targeted

protection has been judicially sanctioned on the basis that the Security Council's sanctions resolutions, by virtue of Article 103 of the UN Charter, prevail over every other obligation of states under domestic or international law, including obligations under human rights treaties.[115] In this sense, it is the notion that not all categories of people deserve the same level of legal protection and the corresponding fragmentation of the law at both the national and international level – the replacement of the general law by special, particularly restrictive, legal regimes – which is at the root of the human rights abuses committed in the 'war on terror'. Opposing this dangerous trend by insisting on the rule-of-law requirement that norms must be generally applicable must therefore be a central element of any effective strategy to protect human rights.

The relevance of the principle of the generality of law reaches far beyond the counter-terrorism context. The emergence of a specialised anti-terrorism regime is arguably part of a wider trend whereby criminal justice systems increasingly rely on special powers to deal with 'special' crimes and risks.[116] In the 'risk society',[117] government crime policies are concerned with categorising people according to their dangerousness and subjecting these different subpopulations to different risk management models.[118] As also Hussain seems to acknowledge,[119] the emergence and proliferation of such specialised regulatory models of repression (immigration law, Anti-Social Behaviour Orders, Sex Offender Orders etc.) makes an insistence on the rule of law, on general rules, today more important than ever before.

Finally, it is important to stress that a strategy of insisting on the rule of law and turning to the courts is not only a potentially very effective 'tool' of challenging

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Sanctions in the Fight against Terrorism – What about Human Rights?', 97 *ASIL Proceedings* (2003) 46.

[115] See European Court of First Instance, Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council of the European Union and the Commission of the European Communities*, [2005] ECR II-3533; Case T-315/01, *Kadi v. Council of the European Union and the Commission of the European Communities*, [2005] ECR II-3649.

[116] C Walker, '50th Anniversary Article: Terrorism and Criminal Justice – Past, Present and Future' (2004) *Criminal Law Review* 311, 325.

[117] U Beck, *Risk Society: Towards a New Modernity* (London, Sage, 1992).

[118] For its integration of insurance techniques into processes and practices of crime control, Feeley and Simon have termed this development 'actuarial justice'. M Feeley and J Simon, 'Actuarial Justice: The Emerging New Criminal Law' in D Nelken (ed), *The Futures of Criminology* (London, Sage, 1994). See already S Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge, Polity Press, 1985), Chapter 4; N Reichman, 'Managing Crime Risks: Toward an Insurance Based Model of Social Control' (1986) 8 *Research in Law, Deviance and Social Control* 151; P O'Malley, 'Risk, Power and Crime Prevention' (1992) 21 *Economy and Society* 252.

[119] Hussain, n 33, 752.

counter-terrorism policies but also an important 'resource' to mobilise wider political resistance and build up grassroots campaigns. This mobilising, 'constitutive' function of law and legal claim-making has been explored and convincingly established by a number of authors,[120] including by Colm Campbell and Ita Connolly for the context of terrorism and counter-terrorism.[121] There is no need to review these arguments in detail here. It is sufficient to note that, in view of this additional function of appeals to the law and the instigation of court proceedings, a position that outright rejects these strategies as 'apolitical' appears all the more unconvincing. In fact, such a position is arguably itself based on an untenable binary distinction between law and politics.

Conclusion

The critical perspective adds an important dimension to the understanding of how, and how not, to protect human rights in the 'war on terror'. Critical scholars are right to point out that preventing human rights abuses is not simply a matter, as the dominant discourse would have it, of more regulation, legal mechanisms and judicial overview. Invocations of the lawlessness of anti-terrorism regimes only serve to obscure how the 'normal' legal system is implicated in, and may legitimise, human rights violations.

Yet it does not follow from this observation that the rule of law has no role to play in a response to repressive counter-terrorism policies. Rejection of an endorsement of the rule of law and calls for its replacement by a 'political response' are based on an equally untenable distinction between law and politics and an oversimplification of the choice at hand. In fact, the perhaps most striking feature of the critical analyses of the 'war on terror' described above is that, framed in Schmitt's and Agamben's theoretical terms, they operate at an almost completely abstract level. None of the critical scholars referred to above explains what the suggested 'political response' might look like or what a 're-invigoration of that sense of the exception that

[120] See, e.g., M McCann, 'Reform Litigation on Trial' (1992) 17 *Law and Social Inquiry* 715, esp. 735 ff.; M McCann and H Silverstein, 'Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States' in A Sarat and S Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York, Oxford University Press, 1998) 261; C Coleman, LD Nee and LS Rubinowitz, 'Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest' (2005) 30 *Law and Social Inquiry* 663.

[121] C Campbell and I Connolly, 'A Deadly Complexity: Law, Social Movements and Political Violence' (2007) 16 *Minnesota Journal of International Law* 265.

may be derived from the work of Carl Schmitt'[122] might entail in practice.[123] What exactly is meant by restoring 'the experience of politics'[124], 'the space of political decision'[125] and 'decisional responsibility'?[126] Should unfettered discretion be given to decision-makers at Guantánamo Bay as 'the experience of deciding in circumstances where no person or rule offers assurance that the decision that one takes will be the right one'[127] automatically ensures that they will respect the human rights of the detainees? And who should these decision-makers be – some military officer, some political body? To take a parallel case, was the problem with Abu Ghraib that the interrogators lacked a sense of decisional responsibility and authority? Or was perhaps not just the opposite the case? And does the call for deciding 'under circumstances not pre-codified by pre-existing norms'[128] imply that, for instance, the criteria for detention of terrorist suspects can be made up by whoever happens to be in charge of the decision?

Both the liberal and the critical schools of thought only obscure the issues at stake when they either reduce counter-terrorism practices to exceptional extra-legal phenomena or simply reject reliance on the rule of law as irrelevant and apolitical. Those concerned about human rights should neither pretend that Guantánamo Bay is some extraordinary lawless space nor should they forgo rule-of-law arguments when opposing the US government's practices there. They do not need to choose between law and politics. Instead, they should try to identify the most promising tools of challenging repressive counter-terrorism policies. I have shown that often these will be insistence on the rule of law – especially the requirement that laws must be generally applicable – and instigation of court proceedings. Human rights activists should not be afraid to use these tools. Especially when they oppose the practices of a bureaucracy and a military machinery that see themselves as engaged in a war directed against particular groups of people, it is not enough to call for 'political agency under conditions of radical doubt' and to appeal to 'decisional

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[122] Johns, n 29, 615.

[123] For a similar criticism, see WE Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, MIT Press, 1994) 247.

[124] Johns, n 29, 634.

[125] Aradau, n 31, 489.

[126] Johns, n 29, 615.

[127] Ibid., 634.

[128] Ibid., 615.

responsibility'.[129] In a climate where the blame for terrorism is increasingly put on foreign nationals and particular ethnic groups, it is crucial to defend the few existing legal checks to protect those in the political minority from being subject to the unrestrained power of the state. Of course, legal checks are by no means sufficient to prevent human rights abuses and may lend the respective legal system a degree of legitimacy it does not deserve. However, at least to me, it seems equally clear that this is not a reason to reject them.

[129] Ibid.