

## Security, Risk and Human Rights: A vanishing relationship?

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**Anastassia Tsoukala**

### Abstract

In contrast to many studies that link the weakening of human rights to the post-September 11<sup>th</sup> counter-terrorism policies, this paper seeks to attribute it to the gradual disappearance of the person as subject of rights in contemporary legal systems. It argues that this vanishing legal personhood is not the side-effect, but the natural outcome of the prevalence of the risk-focused mindset in both the crime control and the human rights realm since the late 1970s. To present this argument, it describes briefly the key features of the risk-focused mindset in order to show how they jeopardise or even negate personhood, and how they correlate with certain deep changes in the legal frame of the protection of human rights in a democracy.



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This project assesses the relations between the European Union (EU) and Canada in the area of Justice and Home Affairs (JHA). It aims at facilitating a better understanding of the concepts, nature, implications and future prospects related to the Europeanisation of JHA in the EU, as well as its role and dilemmas in the context of EU-Canada relations.

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# SECURITY, RISK AND HUMAN RIGHTS: A VANISHING RELATIONSHIP?

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ANASTASSIA TSOUKALA\*

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## Introduction

Following the terrorist attacks of 11 September 2001, on New York and Washington, of 11 March 2004, on Madrid, and of 7 July 2005, on London, as well as several terrorist attacks against Western people and interests in usually non-Western countries,<sup>1</sup> an array of new counterterrorism laws and regulatory texts has been enacted in Europe both at national and EU level. In their attempt to counter what was perceived to be a major threat to European security, these texts often introduced provisions and even parallel legal frameworks that have entailed serious restrictions on the civil rights and liberties of European populations.

The increasing infringement of human rights in the name of the efficient fight against terrorism has rapidly drawn the attention of many scholars, who, in analysing certain legal and political questions related to the issue, denounced the introduction in European legal systems of a quasi-permanent state of exception (Waldron, 2003; Haubrich, 2003; Sarafianos & Tsaitouridis, 2004; Gearty, 2005b; Balzacq & Carrera, 2006; Starmer, 2007). While some jurists and political scientists sought to explain this tendency by analysing the nature of states of emergency and the relationship between the rule of law and politics in a democracy (Guild, 2003a, 2003b; Bigo, 2007; Tushnet, 2007; O’Cinneide, 2007; Lynch, 2007; Sands, 2007; Ewing, 2007), other academics broadened the scope of their analysis to question, on the one hand, the frame and the grounds of the protection of human rights in present liberal democracies and, on the other hand, the effects of counterterrorism on social groups and policies that are *a priori* unrelated to terrorism. The former sought to analyse the protection of human rights and the challenges posed on their normative foundations and on their political usefulness in light of the changes that have occurred in the post-bipolar political agenda (Gearty, 2005a; Dembour, 2006); the latter focused on the dynamics of a rapidly expanding suspicion and studied the impact of the new counterterrorism policies on illegal migrants and asylum seekers (Brouwer et al., 2003; Baldaccini & Guild, 2006).

Other scholars have focused on the way public discourses on terrorism framed the threat and structured the arguments in favour of the introduction of new, liberty-restrictive counterterrorism policies both in Europe and the US (Johnson, 2002; Lewis, 2002; Steinert, 2003; Graham et al., 2004; Lazar & Lazar, 2004; Leudar et al., 2004; Hodges & Nilep, 2007; Merola, 2008). They showed that the legitimisation of the increasing infringement of human rights was being established in the name of the efficient protection of public safety and national security, and was mainly resting upon the idea of a balance to be struck between security and liberty (Waldron, 2003; Starmer, 2007). Yet, as analysis of many relevant political discourses has revealed (Tsoukala, 2004, 2006a, 2006b), this idea in turn rests upon a highly controversial interpretation of the status and place of freedom in the European legal systems, according to

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\* Professor in Criminology at the University of Paris XI, Research Fellow at the University of Paris V-Sorbonne, and Research Associate at the Panteion University of Athens.

<sup>1</sup> This was the case, for example, of the terrorist attacks that took place in 2002 and 2005 in Bali; in 2003 in Istanbul and Casablanca; and in 2005 in Sharm-el-Sheikh.

which freedom ceases to be the condition *sine qua non* of liberal democracies, the matrix from which stem all rights in a democracy, to be turned into an ordinary right. Once included among the many different social values that have to be protected by the law, it may be subject to the arbitration that usually occurs in the case of a conflict between two equal rights, and thereby can be in part sacrificed for the sake of its allegedly opposed right, that is, security.

This political and legal downgrading of freedom has been further reinforced by the powerful dissemination in the public arena of a definition of the concept that frames it in negative rather than positive terms (Tsoukala, 2006a, 2009). According to this scheme, terrorism is not seen as a threat posed to people endowed with free will in democracy but as a threat from which people have to set themselves free in order to enjoy their rights. Political discourses on freedom and human rights are thus turned into discourses on fear (Robin, 2004; Altheide, 2006) in front of a grave situation that requires the introduction of all appropriate measures, even freedom-restricting ones, if these are believed to counter the threat. In other words, far from referring to civil rights and liberties, 'freedom' legitimates the very restriction of these civil rights and liberties. People are then expected to accept these restrictions in the name of protection of their freedom from fear.

Further analysis of many different political discourses on the definition of the terrorist threat in the post-September 11<sup>th</sup> era (Tsoukala, 2008a, 2008b, 2009) has revealed that the framing and broadcasting of its core elements had been closely linked to an array of domestic political and bureaucratic interests that were deeply embedded in the functioning of the political and security fields of a given country. Moreover, the findings of past research show that the representation of the terrorist threat in many different European countries has also varied significantly according to the importance attached by governments to certain important geopolitical issues, which are usually irrelevant to terrorism (Tsoukala, 2009).

Nevertheless, notwithstanding the intrinsic quality of the aforementioned analyses, in most cases their findings remain somewhat misleading in that they are explicitly or implicitly linked to the present counterterrorism policies. In this respect, although they do not forcibly share the prevailing view of the newness of the terrorist threat, many of them end up sharing the idea of a key turning point in the elaboration of security policies and in the ensuing tension between liberty and security in Europe. In so doing, they rightly stress the importance of the changes that have occurred in the security policy realm since the terrorist attacks of 11 September 2001, but they wrongly perceive them solely in terms of discontinuity and rupture. In other words, while the analyses of the forms taken by the present counterterrorism policies and their impact on human rights pertinently focus on the web of interactions between politicians, security professionals, the media and civil society in order to grasp the evolving relationship between politics and the rule of law, they usually fail to highlight the continuities that lie beneath present and past security policies.<sup>2</sup>

Only recently have some studies sought to shed light on these continuities following two different angles. In the former case, the growing infringement of human rights is dissociated from the post-September 11<sup>th</sup> counterterrorism policies, to be related to the professional routines and practices of a vast array of public and private security agents, who, in constantly reinforcing their multilateral collaborations since the late 20<sup>th</sup> century, have come to form a solidly

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<sup>2</sup> This shortcoming is not counterbalanced by the many different legal studies that rightly highlight the non extraordinary character of emergency law in several European constitutional democracies (Donohue, 2001; Ewing, 2007) but do not correlate the ensuing infringement of human rights to the structural evolution of the political and/or security fields. When scholars do take into account the decision-making process of the political class and the interplay between politicians and other actors involved in the political field, they address the issue from a historical perspective (Ewing & Gearty, 2000).

constituted security field both at national and transnational level (Bigo, 2007; Bigo & Tsoukala, 2008). In another attempt to address the issue, through the analysis of the evolution of the social control of a specific criminal behaviour since the late 1960s, the present restrictions on human rights are seen as one of the effects of the profound changes that have taken place in the criminal justice field since the late 1970s. Far from being transient and fragmentary, they are inherent to the structure and operational logic of the currently prevailing risk-focused crime-control model, thereby signalling a gradual erosion of civil liberties which, quite simply, has spread and gathered pace since the terrorist attacks that took place at the beginning of the 21<sup>st</sup> century (Tsoukala, 2008c).

Yet, despite their pioneering character, the above-mentioned studies still do not address what arguably is one of the key aspects of the issue. In focusing either on the security field effect or the crime-control policy effect, they both tend to explain restrictions on human rights through analysis of various factors that may have impacted on them. In all cases, the rationale behind these studies attributes the increasing infringement of human rights in modern liberal democracies to the adverse effect exerted on their scope by an array of social and political processes. In other words, in spite of their different explanatory frameworks, both of these theses adopt a rights-focused approach.

While endorsing these theses, which to some extent can be seen as complementary, this paper will address the issue from a different angle that focuses instead on the place of people within the presently prevailing risk-based security policies. It will seek to attribute the weakening of human rights to the gradual disappearance of the person as a subject of rights in our contemporary legal systems. It will argue that this vanishing legal personhood is not the side-effect but the natural outcome of the prevalence of the risk-focused mindset in both the crime-control and the human rights realms. To present this argument, it will describe briefly the key features of the risk-focused mindset in order to show how they jeopardise or even negate personhood, and how they correlate with certain deep changes in the legal framework of the protection of human rights in a democracy.

## 1. Risk and crime control

One of the key changes that have taken place in the criminal justice realm since the late 20<sup>th</sup> century is the transition from a rehabilitation-oriented crime-control model to a risk-focused one. The former, which was prevailing from the 19<sup>th</sup> century till the late 1970s,<sup>3</sup> was seeking to protect the community from the danger produced by an offence by centring on the subjective aspects of the offence, that is, the motive and needs of the offender. Clearly circumscribed in time and space, the reaction of the criminal justice system would manifest itself after a person had breached the sphere of legality, to restore order and social peace. Punishment would then usually seek to attain a threefold objective, that is, a retributive, a dissuasive and a rehabilitative one. Although this crime-control model did not exclude the control of deviant behaviour, this was somehow seen as the expression of a form of social control that veered off course, usually related to the ordinary work of law enforcers and tolerated as long as it did not extend beyond some conventionally accepted limits.

The rationale behind this crime-control model rested upon the assumption that individuals were indissociable from their community, and vice versa. So, it was admitted that the community had to moderate its exclusionary force towards individuals who had departed from the legal norm (Garland, 1985; Mary, 2003), and impose on them both exclusionary and inclusionary

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<sup>3</sup> This is a rough indication that corresponds to the US criminal justice system. In Europe, the transition did not become visible until the 1980s.

mechanisms in order to allow them to reintegrate into the mainstream society. As the State was seeking both to preserve its authority, by exerting legal violence upon its citizens, and to ensure social cohesion, criminal law was resting upon a prudent articulation between the wish to punish and the need to forgive (Salas, 2008: 15). Consequently, while punishing the individual offence, this crime-control model also looked to the future by seeking rehabilitation at the individual level and prevention at the collective one. In the former case, the widespread belief in the reforming capacities of disciplinary power over the ‘undisciplined’ incarcerated criminals (Foucault, 1975) led to the rapid spread, throughout the post-war years, of rehabilitation policies for prisoners. At the collective level, the acceptance of a causal link between crime and society led to many studies of the crime-generating social milieu (Sellin, 1938; Cohen, 1955; Merton, 1957; Cloward & Ohlin, 1960; Sutherland & Cressey, 1960; Szabo, 1965; Shaw & McKay, 1969) and, consequently, to the establishment of many long-term social prevention programmes.

However, from the mid-1970s onwards, the neo-conservative rejection of the rehabilitation-oriented crime-control model as inefficient (Martinson, 1974) and the rising calls for a new, realistic policy, which, far from paying attention to the crime-generating social environment, would be merely centred on the idea of controlling the social effects of crime (Wilson, 1975), led to the introduction and subsequent development in all Western countries of a crime-control model that aimed at defending the mainstream society from crime by managing in advance any relevant risk.

The objective of crime control is thus radically modified (Feeley & Simon, 1992; Simon, 1997; Ericson & Haggerty, 1997; Shearing, 2001; Johnston & Shearing, 2003; Feeley, 2003; Hörnqvist, 2004). In sharp contrast to past policies, social control agents are no longer seeking to defend the community against a danger posed by the commission of an offence but to protect it from the potential risk inherent in a given behaviour. The harm that stirs up the criminal justice system does not stem then from a specific misdeed but from a vague fear, a feeling of insecurity aroused by behaviour deemed to endanger the well-being of the community (Salas, 2008: 17).

Since the former objective assessment of the perpetrated harm is replaced by subjective assessments of possibly risk-producing situations, the target of social control shifts from the individual offenders to the members of deviant, ‘risk-producing’ groups, who are controlled on the ground of being suspects, in the present time, and potential offenders, in the future. From now onwards, instead of seeking to normalize undisciplined people according to a prefixed range of socially desirable behaviours, in order to have them at some moment reintegrated into the mainstream society, the social control apparatus aims at regulating spaces and populations in the Foucauldian sense of the term (Foucault, 1997: 213ff).

In detaching itself from the offence and seeking to identify sources of risk in order to anticipate the commission of future misdeeds, social control also becomes increasingly proactive. It rests then upon a vast array of surveillance and control mechanisms that manage crime control by profiling suspects according to usual actuarial risk-assessment criteria (Silver & Miller, 2002). In line both with the general concern about risk in post-modern societies (Beck, 1992, 1999) and the growing impact of technology on the design and implementation of surveillance mechanisms, the storage of such profiles in many different (trans)national police databases is nowadays a commonplace in the everyday and strategic management of internal security issues. The ensuing establishment of a vast control of deviant behaviour that, in some cases, leads even to the direct punishment of suspects,<sup>4</sup> and the underlying transformation of the relationship

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<sup>4</sup> This is the case, for example, of football supporters subject to football banning orders on the ground of suspicion, that is, in the absence of a football-related conviction.

between politics and the rule of law have been frequently criticised in academia (Lyon, 1994, 2001; Norris et al., 1998; Jones, 2000; Dillon, 2003; Graham & Wood, 2003; Bonditti, 2004; Webster, 2004; Ceyhan, 2007). Usually framed in quantitative terms, one of the key arguments of these criticisms relates the threat thus posed on civil liberties to the present technological progress that allows intelligence gathering to reach unprecedented dimensions both in the size and the inter-connectability of the collected data (Geyer, 2008). Only recently have some studies pointed out that the control of deviance thus entailed is also qualitatively different from any of its previous forms because, to the extent that it is provided by the law, it ceases to be a marginal form of social control and becomes fully institutionalised (Tsoukala, 2007, 2009).

It should be noted at this point that, however pervasive it may be, the spread of this risk-oriented crime-control model did not result in the abandonment of the previous crime-control policy but, as usually happens in similar cases, in an evolving form of co-existence (Johnston & Shearing, 2003: 133ff). In commenting on the rising populism within the criminal justice system, John Pratt pertinently summarised this process by saying that penal thought and strategies are usually submitted to a range of competing and conflicting influences at any given time, rather than the supreme dominance of any of them because they are marked by fluidity and overlap rather than rigid compartmentalisation (2007: 125-8). In the specific case of the competing crime-control models, the development of the risk-focused crime-control policies led of course to the introduction of new measures but, above all, allocated new meanings to existing approaches and practices to make them consistent with the risk-based way of thinking (Shearing, 2001: 212). Therefore, while, formally speaking, certain measures are still based on the earlier crime-control model and others follow the risk-focused one, the risk-based mindset has in fact been gradually taking over (Hörnqvist, 2004: 39).

## **2. Risk, crime control, and personhood**

The issue of whether, and to what extent, the aforementioned changes in the objective and target of social control, and the introduction of new elements in the crime-control management following the risk-focused mindset have entailed a profound alteration of the place held by persons in the criminal justice realm, cannot be addressed without defining the key features of personhood that may be relevant in this respect. Indeed, what personal identity consists of and how individuals may be perceived in their relationship with the others has been a longstanding matter of discussion within philosophical circles (Martin & Barresi, 2006). For the needs of the present paper, it would suffice to define the issue following a twofold criterion, that is, material and intellectual. It is therefore considered that persons have a material substance, as any living being, inscribed in time and space, and develop a dialectical relationship with their environment, be it natural or social, in order to satisfy their own needs and desires and achieve their goals. Persons are further seen as endowed with reason, self-awareness and free will. In the field of law, the latter elements imply that they may have a legal capacity, that is, be subject of rights, duties and obligations.

While the rationale behind the rehabilitation-oriented crime-control model is entirely consistent with the aforementioned key features of personhood, thereby guaranteeing the stability of a certain legal personhood as well, the conceptual frame underlying the risk-focused crime-control policies seems, in many respects, to devalue or even negate some of these characteristics.

### **2.1 Denial of the individual**

First of all, in shifting attention from the effectively delinquent person to the deviant, potentially risk-producing group, the risk-focused crime-control model is no longer placing the person at

the core of the criminal justice system. The social control apparatus is no longer targeting individuals, that is, persons who are deemed to be socially dangerous because of their unique behaviour, but members of groups, that is, persons who are seen as threatening precisely because they share certain common features with other persons.

In this new configuration, the more a person's features tend to be essentially perceived and interpreted in connection with a series of parameters related to other persons and situations, the more the person is likely to draw the attention of social control agents. In other words, the inclusion of a person into the criminal justice system is not done in the name of what makes the person distinct from all the other members of the community; on the contrary, the relevant decision is to a great extent determined by the absence of such a unicity. In the UK, sexual offenders thus came to be seen as 'a homogeneous group, not differentiated by offence, risk, or individual circumstance' (Rutherford, 2007: 67). North African youth living in disadvantaged French suburbs may have their data entered in police databases, as suspects for urban riots and petty crime, if they meet with certain criteria, such as spending time in specific public places, meeting regularly certain peer groups and sharing with them specific forms of leisure, and so on (Muchielli, 2001: 40ff; Bonelli, 2008a: 399-402). English football supporters may be profiled as suspects for football-related violence if they are known to keep the company of football hooligans (Armstrong & Hobbs, 1994: 225) or if 'they regularly form part of a risk group' and 'seem to be frequently in the vicinity of disorder' (statement of a senior intelligence officer, quoted by Perryman, 2006: 210), while the Italian government is considering the introduction of an order to fingerprint all Roma children living in Italy (*La Repubblica*, 26 June 2008).

## 2.2 Denial of the individual in society

In putting forward this impersonal, group-oriented objective, risk-focused social control further dismisses all crime-producing factors related to the motives and the ensuing guilt of the offender, to deal only with the effects of socially undesirable behaviours. This shift of attention from the causes to the symptoms of crime wipes away the offender in three respects. Firstly, notwithstanding the cases where the dangerousness of the delinquent personality is attributed to a pathological state,<sup>5</sup> the elements that usually make up one's personality and underlie one's decision as regards the engagement in crime are not taken into account. All psychological factors that may facilitate or, on the contrary, impede the commission of an offence are thus disregarded.

This marginalisation of the individual personality goes hand in hand with the implicit divorcing of the offender from the mainstream society. While the rehabilitation-oriented crime-control model was linking individuals to their community in two ways, that is, in correlating the engagement in crime to a given social milieu and in admitting that the optimal development of the community could only be achieved with the participation of as many of its members as possible, the risk-focused crime-control model refuses to admit the pertinence of these bonds. Therefore, the question of whether and up to what extent the mainstream society may be seen as one of the potential sources of crime, due to the combined influence of an array of political, social, economic, cultural and demographic reasons, is not raised. Following the same reasoning, the development of the community can henceforth be conceived in most advantageous terms even without the participation of those members, who, at some moment in the past, had veered off course.

This way of perceiving the position of individuals in a society has had a double impact on the design of crime-control policies. Since individual behaviour is no more seen as reflecting in part

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<sup>5</sup> This is increasingly the case with regard to all sexual offenders and especially child abusers.



the structure and functioning of a living-together state, long-term preventive programmes are gradually being marginalized for the benefit of situational prevention and proactive approaches. Accordingly, since the involvement of a maximum of citizens in the making of social life is no more seen as one of the preconditions of the successful achievement of collective goals, rehabilitation of prisoners' programmes are increasingly being abandoned (Mary, 2003: 32ff; Salas, 2008: 106ff).

The latter point highlights the impact of risk-focused crime-control policies on punishment and especially on imprisonment. From the very moment punishment does not seek to rehabilitate an offender but to protect real or imaginary victims from an effectively or hypothetically threatening behaviour, it remains confined in its retributive and dissuasive functions, thus becoming indifferent to the prisoner's future. Therefore, the decision of whether a prisoner should be released or not does not depend on the degree of seriousness of the harm caused in the past but on the assessment of the risk he or she may still represent for the others. Punishment may then become boundless in time and space, as is clearly shown by the community notification legislation introduced in many countries with regard to sexual offenders, or by the adoption of indeterminate sentences, imposed after the expiration of the initial punishment upon persons deemed to remain somewhat socially threatening.<sup>6</sup> Punishment may also go beyond the frame of the ordinary, impersonal, judicial procedure and become emotion-driven,<sup>7</sup> as is revealed by the practice of introducing the victims in the process of determining parole for offenders (Pratt, 2007: 136; Salas, 2008: 181ff).

### 2.3 Denial of free will

The place accorded to the person in the criminal justice system is further weakened by the prevalence of a proactive, anticipatory pattern of action in the risk-based crime-control policies. While, as will be developed below, the wish to manage future risks wipes away all prior distinction between criminal and deviant behaviour, the shift from the individual offender to the deviant, 'risk-producing' group jeopardises most of the individual-based principles related to the definition and the punishment of offences.

The first principle to be thus endangered is the presumption of innocence. In the incremental surveillance mechanisms applied to many different categories of people believed to be threatening for security, a person is no longer deemed to be innocent till proven guilty. The social control apparatus has no more to justify its action in the name of the transgression of a legal norm. Nor is it confined in the search of evidence of guilt. It can be set in motion and produce formally legal effects on the mere ground of suspicion. The Europol Computer System thus has information on possible future offenders; administrative football bans, currently introduced in many European countries, entail serious restrictions on the freedom of movement of football supporters who are simply suspected of being involved in football-related violence; in the name of the safety of air travels, passenger name record (PNR) databases contain a significant amount of personal data of all passengers travelling to the United States, which is transferred to a broad range of law enforcement agents, while a similar scheme is to be applied soon to every passenger travelling to and from the European Union (European Commission, 2007).

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<sup>6</sup> This is the case, for example, of the French law 2008-174 that provides for the indeterminate detention of dangerous criminals convicted to long imprisonment sentences if, when they are going to be released, it is believed that they are likely to offend again.

<sup>7</sup> For a thorough analysis of the emergence of the victim and the ensuing emotional element in the Western criminal justice systems, see Salas, 2008: 63ff.

The vanishing of the offence as the justificatory basis of the setting in motion of the criminal justice system further calls into question the principle of legality. Penalties may thus be imposed even in the absence of a conviction, as shown in the case of certain suspects for terrorism in the UK, who are subject to a control order<sup>8</sup> if there is insufficient legally admissible evidence. This institutionalisation of penalties on the ground of suspicion leads in turn to the disregard of the principle of the criminal liability. The target of social control is no more defined according to an array of legally defined links between the person and the punishable act. Risk-persons are defined following an array of allegedly relevant information and traces that may end up establishing guilt but may as well remain in an in-between state. In the latter case, the moral assessment of the punishable act as the ground of the liability that entails punishment is irrelevant. Quite unsurprisingly then, as Clifford Shearing has rightly noticed (2001: 208), the relation between offender and individual or collective victim that used to be at the core of the rationale behind punishment is now waning.

The institutionalisation of penalties on the ground of suspicion further entails the weakening of the principle of their proportionality and the dismissing of the principles of their personal and individual character. While the latter become meaningless when punishment is imposed as an answer to behaviour rather than specific acts, the former is becoming somewhat loose. As a matter of fact, in the absence of an offence, that is, in the absence of an assessable act according to legally defined criteria, the ground upon which may possibly rest the assessment of the proportionality of the punishment of a certain behaviour becomes floating. Legal certainty is thus diminished and, to the extent that such forms of punishment may be imposed by non-judicial agents, persons may even be *de facto* prevented from enjoying the guarantees offered by the judicial procedure.

Being the direct effect of the proactive pattern of action of the risk-focused crime-control model, this downgrading of the offence and the offence-related legal principles further unveils a profound change in the way social control agents perceive free will. As a matter of fact, their pretension to possess a kind of global knowledge of future behaviours denies the freedom to decide whether, and under what circumstances, a person will commit a given act. Persons are thus reduced to predictable systems of behaviour, the efficient monitoring of which cannot but prevent them from taking certain expectable forms. Their personhood, which is deemed to be reproduced through the analysis of an array of allegedly relevant collected data, their future decisions and actions are therefore taken for granted.

Yet, as David Lyon has rightly noticed (2001), surveillance creates an illusion of knowledge over unreal people. Data gathering for crime-control purposes actually rests upon the aggregation of disparate pieces of information, which are seen as unable to make sense unless they are related to each other (Froment, 2006). Once collected, this data may be interconnected with other (dis)similar data preserved in other databases, be they intelligence, law enforcement, commercial, or health ones, thus creating a digital persona, composed out of these fragmented pieces of information. Henceforth, it is this selectively fragmented, deprived of consciousness and sociality digital persona that will be seen as a representation of the subject to be put under control, arrested and probably punished.

In this highly predetermined frame of possible human action, free will is logically disregarded, as an element likely to introduce disorder in what seeks to produce an orderly image of social life. Far from being a side-effect of the functioning of the social control apparatus, this exclusion is fully consistent with the key features of the risk-focused mindset. The intrinsic

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<sup>8</sup> The Prevention of Terrorism Act 2005 provides that the Home Office may impose on them many different restrictions, ranging from curfew and house arrest to electronic tagging and restrictions on association with specified people and communications in general.

unpredictability of free will makes it incompatible with the predictability that lies beneath the risk-focused surveillance and control mechanisms. In other words, free will has to be disregarded because the pretension of the social control agents to control and even punish people in the name of their capacity to foresee the future behaviour of these people can no more be seen as based on a reasonable ground unless it is admitted that human behaviour does not remain *in fine* unpredictable.

## 2.4 Denial of the time-space dimension

The place of persons in the risk-focused crime-control model is further weakened due to the way social control agents inscribe their operations in time and space. Actually, in adopting an anticipatory pattern of action, the social control apparatus dismisses the control of persons living in the time-space dimension of real life to privilege the control of flows of population that are somewhat floating in time and space.

While the time dimension is distorted by the introduction of many different proactive measures that are set up before the commission of the harmful act and, therefore, end up moulding the future (Johnston & Shearing, 2003: 122ff; Ericson, 2007), the space dimension is warped by the spread of an array of remote control devices and mechanisms. Anti-social behaviour legislation thus enables ‘preemption of every imaginable source of disruption to domestic security’ (Ericson, 2007: 200), CCTV cameras introduce various spaces of control,<sup>9</sup> whereas border controls of the EU countries are increasingly exerted in an array of homocentric geographic circles that go well beyond the European borderlines and, in some cases, even expand in other continents (Bigo & Guild, 2003; Cuttita & Ragazzi, 2007).

The shift from a definite post-offence time to a vague ante-risk-behaviour period and from a clear-cut space of control to a web of overlapping spaces of control eventually alters the relation of the risk-based social control with reality. To the extent that it focuses on potential rather than real behaviour, its effects are produced not only in the name of its links with reality but also in the name of its projection to a virtual reality. As Ulrich Beck has put it (2006), “risks are not ‘real’, they are ‘becoming real’”. Therefore, in seeking to control undisciplined persons by managing in advance risk-producing groups, the behaviour of which is monitored thanks to a series of speculations on its future manifestation (Bigo, 2008a), social control agents end up operating in an essentially virtual time-space dimension.

## 3. Risk, persons and human rights

This summary presentation of the relationship between the risk-based crime control and personhood clearly suggests that the former dismisses the temporally linear<sup>10</sup> and spatially definable rational frame of action of the unique, interior and autonomous person to privilege a predetermined array of actions of a figure, in the double sense of the term, that is, an outline of the person, and a serialised number. Such a figure can be included in a list of security threats, it

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<sup>9</sup> Surveillance by CCTV cameras involves at least two spaces of control, that is, the one that is actually controlled and the one where stands the controller. Yet this scheme only applies to the so-called proactive CCTV cameras, that is, these that are related to live surveillance. Most CCTV cameras are non-active and act only as visual deterrence that creates the illusion of surveillance – in which case, surveillance constructs a real and a virtual space of control. Other CCTV cameras may be reactive, allowing access to footage of incidents after the event has occurred – in which case, surveillance constructs two spaces of control that are not simultaneous. For an analysis of the typology of CCTV systems, see Webster (2004: 234).

<sup>10</sup> That is, inscribed in a past-present-future sequence.

can be traced and filed in many different law enforcement databases, but arguably it cannot fully exist as the subject of rights.

This assumption is actually grounded on the very nature of the links between personhood and legal personhood. When it refers to individuals, legal personhood consists of the virtual extension of a person in the legal domain.<sup>11</sup> It prolongs the capacities of a person – capacities that usually stem from the key features of personhood. It guarantees the person can enjoy certain legally defined rights – rights that emanate from personhood. Its very existence and development in a lifetime is closely related to that of the personhood it refers to. When some of the key features of personhood are deemed to be diminished<sup>12</sup> or when the person dies, legal personhood is accordingly limited or ceases to exist. It should be stressed, however, that these commonplaces for all jurists only correspond to the cases where legal personhood has to adapt itself to the biological and/or psychological state of the physical person of reference.

What happens then to legal personhood when personhood is modified not by any extra-legal factor but by the legal system itself? To what extent can legal personhood resist the legal downgrading or even negation of some of the key features of personhood? Given the indissociable nature of the two concepts, it is not unreasonable to presume that, *mutatis mutandis*, this internal contradiction will entail a substantial alteration of legal personhood. As will be shown in the remainder of this paper, the effects of this contradiction arguably gather momentum in the human rights realm, especially when they interact with certain profound changes induced by the risk-focused mindset in the legal system of protection of human rights.

### **3.1 Change in the legal ground of the protection of human rights: The ‘legal upgrading’ of the control of deviance**

The shift from the delinquent person to the ‘risk-producing’ group and the ensuing introduction of an anticipatory pattern of action has blurred in many respects the prior distinction between crime and deviance. The rationale that sources of risk may be identified in every aspect of human activity, ranging from delinquent to deviant and even ordinary behaviour, produces a continuum of control (Feeley & Simon, 1992: 459) that encompasses indistinctly all types of behaviour. For example, CCTV cameras installed in football stadia monitor the behaviour of troublemakers, rowdy football supporters and ordinary football fans alike, while the collection and exchange of intelligence in case of international tournaments extend well beyond known and potential troublemakers to include even ordinary football supporters wishing to attend these sports events.

As mentioned above, this control of deviance is new not only in quantitative terms but also, and above all, in qualitative terms. Indeed, while its expansion has reached unprecedented dimensions due to the combined effect of an incremental technological progress and the widening of the field of action of the law enforcement agents, the fact that this expansion is now provided by the law entails what has been qualified elsewhere as ‘legal upgrading’ of the control of deviance (Tsoukala, 2008c). From the moment the control of deviant behaviour is included in normative texts, it ceases to be a form of social control that has veered off course. It is no longer simply the marginal manifestation of an excess of power on the part of the law

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<sup>11</sup> As Yves Cartuyvels has observed (2006: 182), the idea of a subject of rights that is unique and equal in front of the law, that is, the construction of an abstract, free and responsible moral person corresponds to the promotion of a dual vision of the political society that entrusts the State to organise the common good, to share out and control the persons’ rights and obligations.

<sup>12</sup> As happens, for example, during childhood or in case of mental illness.

enforcement agents. It becomes a key component of the legal system, fully consistent with the way in which crime-control policies actually operate.

Its legal upgrading produces in turn a moral one. The control of deviance is no more a shameful aspect of the exercise of social control, an evidence of an undemocratic trend in the way the executive power restrains its force in the criminal justice realm. It is no longer an embarrassing shadow in security-related operations that, if ever denounced, requires justification, and calls for political and bureaucratic remedies. Its inclusion in law removes it from the dark operational facets of social control and brings it to light, like any other element of a legal norm. Far from being seen as outrageous, it is proposed as one among other normal expressions of the legislator's will.

The break with the past is so radical that it arguably calls into question the whole conception of the criminal justice system in a democracy. This institutionalisation of the control of deviance is so wide-ranging, both at national and EU level, that it can no longer be seen as a specific swing away from a liberal social control apparatus to one that is more authoritarian in orientation. It is no longer a question of occasional deviations by a criminal justice system that otherwise complies with the rule of law, a subject that was analysed at length in the 1980s (Delmas-Marty, 1983: 102ff). While this new form of control confirms Stanley Cohen's predictions (1985) about the establishment of an expanding and more intense control of deviance in our societies, it also goes beyond these predictions because the hold the social control apparatus increasingly exerts over the private sphere is now formally established and legitimised.

### **3.2 Change in the value to be protected by law: From the individual to the group**

The issue of whether the normative foundations of human rights can possibly rest upon a universal basis remains a matter of debate among human rights experts (Gearty, 2005a; Dembour, 2006; Oberdorff, 2008; Griffin, 2008). Nevertheless, it is believed here that sharing this scepticism should not prevent us from assuming that human rights are primarily grounded on the values of personhood, and aim at protecting individual personhood (Griffin, 2008: 33ff).

Though human rights violations in the criminal justice realm have not been unusual throughout the second half of the 20<sup>th</sup> century, when committed in liberal regimes they were more often than not the result of the way the executive and occasionally the judicial power would perceive the rule of law and, consequently, would seek to modify for their own benefit the limits of their power in a given society (Tamanaha, 2004). In this respect, these violations were, above all, the symptom of an ongoing struggle for the (re)positioning of various agents in the political and security fields of a given country. Arguably then, they did not originate from any structural opposition between the guiding lines of the rehabilitation-oriented criminal justice system and the human rights-related principles.

This compliance between criminal justice and human rights principles has however been gradually broken up following the rapid spread of the risk-focused crime-control model. These two legal systems are no more seeking to protect the same values. While the purpose of human rights law remains individual, that is, it focuses on the protection of every single person, the purpose of criminal justice becomes increasingly collective since it aims mainly at protecting society as a whole from risk-producing groups.

This opposition creates in turn a form of contradiction that ends up hampering the efficiency of the legal protection of human rights. Actually, the shifting from the person to the group, as the key target of social control, and the ensuing dismissal in the criminal justice realm of many key features of personhood, cannot but weaken the scope of the protection of human rights to the extent that, due to its intrinsically individual nature, this protection becomes, in a certain way,

purposeless. People are being increasingly controlled, arrested and even punished in the name of a group- rather than person-based identity, while the protection of their rights is still grounded on their personal identity. These two legal systems do not fit into each other anymore; they defend antinomic values. As long then as the collective value of the risk-focused crime-control model prevails, it will logically hinder the development of its opposite value. Consequently, not only will it lead to the growing transgression of human rights in the criminal justice realm but also it will impede the efficient application of the legal protection of human rights that, henceforth, will be seen as counterproductive. Quite unsurprisingly then, apart from some extreme cases, where violations of human rights are still committed but formally denied,<sup>13</sup> these violations are justified and accepted as normal aspects of crime-control policies. Intrusive surveillance devices are therefore constantly being justified in the name of their efficiency to counter crime, while proactive measures that entail serious restrictions on civil rights and liberties are formally accepted because they are not considered as penalties.<sup>14</sup>

### 3.3 Change in the nature of the protection offered by the law: From impersonal principles to person-based approaches

Though grounded on and oriented towards personhood, the political project on human rights and its subsequent transcription in law are conceived in terms of abstract principles. The protection they guarantee to any single person is legally and politically possible precisely because it is impersonal. From this point of view, their introduction and development in liberal democracies throughout the post-war period was to some extent consistent with the rehabilitation-oriented crime-control model. Because, as long as the criminal justice system was being mostly set in motion by the transgression of a legal norm, it too was impersonal.

This impersonal approach is however no longer prevalent in the risk-focused crime-control model, which, on the contrary, is increasingly person-focused in that it frequently rests upon a series of profiling of human groups. The criminal justice system is now being set in motion not only by the transgression of a legal norm but also by the identification of risk-producing personalities regardless of the transgression of any legal norm. The fact that risk-producing personalities are defined in collective rather than individual terms does not alter the substance of the person-based approach that lies beneath this crime-control management. People are still controlled and arrested for what they are, or they are supposed to be, instead of what they do.

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<sup>13</sup> To this day, the most accurate example is the commonly known as US extraordinary rendition programme, the implementation of which rested upon the kidnapping and transfer of suspects for terrorist activities to countries with low standards of human rights' protection, where they have been subject to torture or at least harsh interrogation techniques. On the forms and practices of denial with regard to torture and, generally, violations of human rights, see Cohen (2001).

<sup>14</sup> British and Belgian courts have thus ruled that administrative football bans do not entail a breach in human rights because, despite their punitive element, they are not penalties but preventative measures (Belgian Court of Arbitration, ruling 175/2002 of 5 December 2002; Laws LJ in *Gough vs Chief Constable of Derbyshire*, 2001, QBD; Court of Appeal in *Gough vs Chief Constable of Derbyshire*, 20 March 2002). Following a similar reasoning, the French Constitutional Court ruled that the recent introduction in French law of the indeterminate detention of dangerous criminals, after the end of their initial sentence, is not violating human rights because it is not a penalty but a security measure (Ruling n° 2008-562 DC of 21 February 2008). Analysis of these rulings would go well beyond the scope of this paper. Nevertheless, it should be reminded that the European Court of Human Rights has constantly stipulated that, in order to prevent the disciplinary from encroaching illegally on the criminal justice realm, punitive measures should be defined in law according to their effect (Delmas-Marty, 2002: 448ff).

Notwithstanding the probable discredit of the social control apparatus and the ensuing decline of trust in the impartiality of the criminal justice system, this transition from a principle-based to a person-based approach cannot but jeopardise the efficient protection of human rights. As long as the legislator remained impersonal in his way of managing social life, and was looking at persons only if they caused harm to society and to the extent they could be rehabilitated at some moment, the persons' rights could be efficiently protected. All attempts made by the social control agents to deviate from these principles were seen as unlawful and, therefore, were likely to be denounced, formally rejected and even punished. From the moment the legislator became person-focused, seeking to mould in advance the personality of the people targeted so that they can never cause harm to society, the persons' rights are being restricted. The person-based approach, which implies, among others, the institutionalisation of the control of deviance, denies or at least hampers the possibility to challenge the ensuing violations of the persons' rights.

## Conclusion

The argument that the present restrictions on human rights cannot be fully understood unless we take into account the impact on both personhood and legal personhood of the prevailing risk-focused mindset in the criminal justice and human rights realms should not shift our attention away from the fact that this effect is indirectly enhanced by the place currently accorded to human rights by the political class.

As shown elsewhere (Tsoukala, 2009), while losing part of their political interest in the post-bipolar geopolitical context, human rights have also been subject to a downgrading process imposed by domestic politicians. The prevailing reframing of freedom in negative terms in the post-September 11<sup>th</sup> security-related political discourses, and the ensuing dissemination of the idea of a balance to be struck between the henceforth taken-for-granted opposed values of liberty and security have had a double effect on human rights. On the one hand, they justified the introduction of liberty-restrictive laws and, therefore, legitimised highly controversial security policies. On the other hand, they established the idea that freedom is just one among other rights to be protected by law, thus altering the substance of the concept and, consequently, of its corollary, that is, human rights.

Once included in this way in the political arena, human rights lose the 'sacral' status they had acquired in the post-war period (Warbrick, 2004: 999). They cease to be seen as indissociable from democracy, like the rule of law or the accountability principles,<sup>15</sup> and are being transformed into political tools, adjustable to the needs of the government of the day. Either then they can be totally dismissed<sup>16</sup> or temporarily suspended, as counter-productive, or they are restricted in the name of an allegedly superior value, that is, security. In this ongoing struggle to (re)define the relationship between politics and the rule of law, security professionals play an increasingly important role both in the definitional process of the security threats and the design of the counter-security-threat policies (Tsoukala, 2008a, 2008c). Their growing involvement in arenas that till recently were reserved for politicians and judges has in turn entailed a gradual change in the nature of the loci of the protection of human rights. Parliaments and Courts cease to be the sole natural definers and protectors of human rights for the benefit of the law

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<sup>15</sup> Although in some cases protection of the values they referred to was relative, it was admitted that these values were accepted as fundamental by the international community (Hoffman, 2004: 934). It was also acknowledged that some fundamental human rights were 'non-derogable even in extreme emergencies' (Tushnet, 2007: 276).

<sup>16</sup> As happened, for example, during the implementation of the so-called US extraordinary rendition programme.

enforcement agencies. Whether it takes the form of a corporatist force that seeks to defend its own interests, a closely interconnected web of domestic and international police and intelligence agencies that claim their expertise in the name of the specific knowledge they possess while eluding democratic control (Bigo, 2008b; Bonelli, 2008b), a domestic and/or international consultancy that seeks to promote ideological schemes and bureaucratic interests, or a communication strategy, the influence of the police and intelligence officials in the defining of security-related issues and, consequently, of human rights is sharply on the rise.

In this dense interplay between politics, law, law enforcement, media and civil society, where value systems are constantly (re)defined according to an array of domestic and international interests and priorities, the place accorded to human rights can never be taken for granted. The present restrictions on the latter could have been expected, to the extent they are one of the possible outcomes of political and bureaucratic games in the post-bipolar political and security arena of liberal democracies (Alexander, 2002: 1157ff). Indeed, if we assume, along with Lloyd Weinreb (1987: 156), that “every significant liberty, conceived as a right, alters the natural distribution of powers”, it is plausible to assume that the (re)positioning of the key actors involved in the political and security fields of Western liberal societies would, among other things, imply the redefining of the relationship among them and between them and the people. Following the same reasoning, the institutionalisation of the control of deviance could be seen as foreseeable, to the extent that its targets may be understood as “impersonated embodiments of the otherwise vague and scattered, but daily and commonly suffered fears and nightmares” in an era of increasing uncertainty and insecurity for the future (Bauman, 2002: 60). Yet, arguably again, these restrictions on human rights would not have been so rapidly introduced and legitimised if personhood and legal personhood had not already been eroded by the longstanding spread of the risk-focused mindset in both the criminal justice and human rights realms of all Western liberal democracies.

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# About CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is among the most experienced and authoritative think tanks operating in the European Union today. CEPS serves as a leading forum for debate on EU affairs, but its most distinguishing feature lies in its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

## Goals

- To carry out state-of-the-art policy research leading to solutions to the challenges facing Europe today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the European policy process.
- To build collaborative networks of researchers, policy-makers and business representatives across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

## Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- Formation of nine different research networks, comprising research institutes from throughout Europe and beyond, to complement and consolidate CEPS research expertise and to greatly extend its outreach.
- An extensive membership base of some 120 Corporate Members and 130 Institutional Members, which provide expertise and practical experience and act as a sounding board for the utility and feasibility of CEPS policy proposals.

## Programme Structure

CEPS carries out its research via its own in-house research programmes and through collaborative research networks involving the active participation of other highly reputable institutes and specialists.

### Research Programmes

Economic & Social Welfare Policies  
Energy, Climate Change & Sustainable Development  
EU Neighbourhood, Foreign & Security Policy  
Financial Markets & Taxation  
Justice & Home Affairs  
Politics & European Institutions  
Regulatory Affairs  
Trade, Development & Agricultural Policy

### Research Networks/Joint Initiatives

Changing Landscape of Security & Liberty (CHALLENGE)  
European Capital Markets Institute (ECMI)  
European Climate Platform (ECP)  
European Credit Research Institute (ECRI)  
European Network of Agricultural & Rural Policy Research Institutes (ENARPRI)  
European Network for Better Regulation (ENBR)  
European Network of Economic Policy Research Institutes (ENEPRI)  
European Policy Institutes Network (EPIN)  
European Security Forum (ESF)

CEPS also organises a variety of activities and special events, involving its members and other stakeholders in the European policy debate, national and EU-level policy-makers, academics, corporate executives, NGOs and the media. CEPS' funding is obtained from a variety of sources, including membership fees, project research, foundation grants, conferences fees, publication sales and an annual grant from the European Commission.

E-mail: [info@ceps.be](mailto:info@ceps.be)

Website: <http://www.ceps.be>

Bookshop: <http://shop.ceps.be>