

**MAX PLANCK INSTITUTE FOR
SOCIAL ANTHROPOLOGY
WORKING PAPERS**



MAX-PLANCK-GESELLSCHAFT

Working Paper No. 76

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**THE POLITICS
OF SECURITY**

Halle / Saale 2005
ISSN 1615-4568

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The Politics of Security ¹

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Abstract

The paper examines the effects that the ‘global war on terror’ has had on notions of security and citizenship. Comparing legislation across various countries, it advances the thesis that there is a) a decisive shift in the division of powers, which also entails an abandonment of the principle of equality before the law; and that b) security measures introduced further the culturalisation of membership in a polity as well as the re-moralisation of access to rights. It calls for anthropological research into the effects of the social dichotomisation engendered by the politics of security.

¹ I thank Nina Glick Schiller and Tatjana Thelen for their insightful comments on this paper. I am also grateful to the participants of the workshop ‘The Social Life of Anti-Terrorism Laws’ held from May 26th to 27th 2005 at the Max Planck Institute for Social Anthropology in Halle/Saale for the fruitful discussions on the issue. I am also indebted to the initiative “*Justizgewährung, Staatsraison und Geheimdienste*” of the Berlin Brandenburg Academy of Sciences from which I have gained valuable insights into the legal debates on the topic. I thank Werner Schiffauer for many engaged discussions on the politics of security that have inspired this paper.

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Introduction

The ‘war on terror’ has affected anti-terrorism laws and anti-terrorism policies world wide. New legislation has been passed in many countries; laws existing prior to September 11th 2001 have been used with a new focus on security and prevention; and there have been attempts to integrate and harmonise national and international measures of combating terrorism in order to coordinate strategies against what is perceived as a global and globally coordinated threat.

This paper addresses two developments in the conceptualisation of citizenship that arise from the ‘war on terror’, namely the re-culturalisation of membership in a polity and the re-moralisation of access to rights. Furthermore, the paper asks in what ways these developments are globalised, and how they are adopted, adapted, instrumentalised, and circumvented in different political and social contexts. It traces the ways in which the trans-nationalisation of the ‘war on terror’ has affected national (or regional) notions of security and danger and images of ‘the dangerous other’, asking what changes in the ideas of the state and of the nation have been promoted by the emerging culture of security, and how these changes affect practices of citizenship, group relations and ways of dealing with conflicts.

The Omnipresent Threat

The new terrorism is, of course, Islamist terrorism. There are competing criminologies of the so-called ‘new terrorism’ that identify either Islamist fanaticism, a clash of civilisations, US imperialism, Palestine or undemocratic structures in many Muslim countries as the root cause of Islamist terrorism, and thus hold either cultural or political and sometimes also social factors responsible for violence. However, security policies and measures taken are neither related to assumed causes of terrorism nor are they designed to remedy those causes. They are instead related to a specific perception of risk. The risk inherent in the ‘new terrorism’ is perceived as potentially immense yet at the same time elusive; that is, while possible damages are considered potentially apocalyptic, the actors are seen to be firstly highly dispersed and only loosely connected to a transnational network; secondly they are ‘invisible’, and most so as ‘sleepers’; and thirdly they are seen to be beyond negotiation or deterrence since they are said to be inspired merely by a general hatred of the West (or modernity or ‘our freedom’) and thus largely ‘aimlessly’ or nihilistically destructive. “New terrorists want only to express their wrath and cripple their enemy” (Stevenson 2001/2: 35) felt one commentator. His words echoed many other analyses of the alleged specificity of religious terrorism. The novelty of

the new terrorism, it is said, lies in the fact that it is de-territorialised in two ways: it is neither based in any one territory from which terrorists operate or whereto they can withdraw but it is potentially everywhere, in loosely connected undiscoverable sleeper cells of amateur terrorists; nor does it aim at territory, as insurgent or secessionist terrorism did (Diner 2004). Rather, it is said to be merely destructive, with a complete, indiscriminate contempt for life. Suicidal terrorism above all, allegedly inspired by mere hatred and alien in its motives, makes not only bargaining but also deterrence impossible.

Thus, the ‘new terrorism’ is perceived and presented as external to society to a new degree. Its causes or its relation to the society that it targets become secondary to an assumed essential alienness and a religious fanaticism that is allegedly unrelated to a social and political context. Terrorism comes to be perceived more and more as part of and identical to a general global danger, the roots of which lie not so much in ‘causes’ but in ‘culture’.

Thus, there is also a new concept of danger (Lepsius 2004: 66, 67, 83; Bender 2003: 138, 139) that plays itself out in legal terms. ‘Danger’ is no longer connected to the actions of individuals but to a general situation of threat emanating from an elusive network and its fundamental ‘occidentalism’ (Buruma and Margalit 2004) in which individuals are replaceable.

Because of the characterisation of the ‘new terrorism’ as an omnipresent but elusive threat arising from a de-individualised (Lepsius 2004: 66) general and diffuse Islamist terror “we do not know where, and precisely who, the enemy is,” as one member of the EU Parliament³ expressed. This necessitates measures that presume that the enemy could be everywhere and everyone – nearly. Makdisi speaks of “spectral terrorism” that offers the “foundation for a universal campaign of investigation, interrogation, confiscation, detention, surveillance, torture and punishment on, for the first time, a genuinely global scale (...) not only where it [terrorism] *does* manifest itself but where it *might* manifest itself, which could, of course, be anywhere” (Makdisi 2002: 267).

There is of course the question to what degree the ‘new terrorism’ is actually so new and whether it is really so diffuse, de-territorialised and ‘aimless’ as is claimed.⁴ One could demonstrate that there are clear and identifiable aims, even rather territorial ones, of transnational Islamist terrorism (see also Steinberg 2005), such as the removal of the US army from Saudi Arabia and now also from Iraq, or the destruction of Israel. Moreover, many of those Islamic insurgent groups that are now considered to be connected to the transnational

³ Mogens Camre, Danish member of the Union for a Europe of the Nations (UEN), European parliamentary debate 6.2.2002 quoted in Tsoukala (2004: 6).

⁴ See also David Tucker 2001 on the similarities between old and new terrorism; Peter Waldmann 2004 criticising the thesis that the network structures are entirely new. On the network thesis see also Mayntz 2004.

networks of Al Qaida, and that constitute this network, have, of course, very ‘conventional’ aims, such as the independence of Chechnya, the withdrawal of the Indian army from Kashmir, the independence of Aceh or of Mindanao. Most importantly, the characterisations of the ‘new terrorism’ mostly fail to see or, because of the apparent enormity of the attack of 9/11, refuse to take into account any political context within which the ‘new terrorism’ arose. There have been references to the chosen traumata of the Muslim world and the grievances of Arab populations. But the idea that the ‘new terrorism’ might not constitute a rejection of modernity as such but a rejection of being shut out from it (Mamdani 2004: 19) or not being able to define it oneself has been obliterated by the construction of an essential alienness rooted in ‘culture’ and fundamentalist religion.

But the question of what is new and what is old about the new terrorism is not the question that this paper wants to raise. After all, in most cases, neither were all the laws that were now enacted entirely new, nor were the conflicts new that are now seen to be addressed with these laws. In many cases the claimed novelty related to a re-categorisation of longstanding conflicts, a re-interpretation of domestic issues under the banner of the terrorist threat and a tendency to relate both specific types of conflicts and various policy fields to the phenomena of terrorism and to security concerns. Thus, in most places the measures undertaken within the framework of the ‘war on terror’ target people, organisations and issues that are well known, localised and identified. They target specific categories of citizens, they are employed in longstanding conflicts where the novelty lies mainly in their connection to ‘terrorism’, and they change policies in everyday domestic fields.

No matter, thus, how realistic or unrealistic a description of the ‘new terrorism’ is, the claims to the diffuseness of the threat, the new nature of invisibility of the perpetrators, the new potential for destruction and the allegedly novel form of organisation in transnationally loosely connected cells have been the main grounds for justification of the specific measures taken against ‘the new terrorism’. These claims have justified:

- indeterminate detention without charge or trial;
- the abandonment of the presumption of innocence and the reversal of the burden of proof; and
- ethnic profiling and the emergence of dual or a two tiered system of law.

Structural Commonalities of the Measures

Terrorism has often been defined in the new legislation in a rather vague manner that enables the concept to cover all sort of acts, including association or even simple contact as in the now

repealed Indian anti-terrorism law, the Prevention of Terrorism Act (POTA)⁵, or material support even if unintentional as in the PATRIOT ACT.⁶ The term ‘terrorism’ is used not in a neutrally descriptive manner, describing specific forms of political violence,⁷ but in a normative manner, and some scholars have held that it can only be used in such a pejorative manner and have therefore abandoned the term saying, like Cynthia Mahmood, that “terrorism is a concept that mystifies rather than illuminates; it is a political and not an academic notion” (Mahmood 2001: 528). But it is of course precisely the insinuation of a normative judgement, as well as the vagueness with which the term is used that shapes the politics of security. “Terrorism has been used in a calculatedly undefined and indefinite, rather than specific, way. It names not a specific Other, but a general and omnipresent threat” (Makdisi 2002: 266).

The idea of the omnipresent threat has shaped the new measures in that they raise ‘suspicion’ to a new importance as grounds for action: suspicion as grounds for governmental action undermines the presumption of innocence. Particularly policing laws now involve suspicion, or the idea of the potential of a risk to a much larger degree. Previous legal distinction between suspicion (that entitles the police to investigate) and prognoses or probable cause, that is: the well-founded expectation of an event to occur that entitles the police to use preventive measures, have been abandoned in many places. ‘Prevention’ – with the expansion of policing into peoples’ lives before anything has happened – is the task of the day. Prevention, that seemingly innocent word, relates to the idea of controlling potentials, of surveying future possibilities, of controlling not what people did or do or are planning to do but what they might at some point do. Prevention changes security from a matter of politics into one of technology, involving specialists’ knowledge of risks and their preemption (see also Bigo 2002: 74). Thus, this innocent word ‘prevention’, so much less brutal than repression, so much less vindictive than punishment entails possibilities for the expansion of state powers that potentially undermine not only civil liberties but also procedures of political deliberation.

The measures legislated in various countries all seem to have in common a change in the division of powers; they often entail an (often only implicit) strengthening of the executive and an increase in the competencies of the security agencies. As mentioned above, most of the legislation now enacted entails measures that had been debated for a long time in connection with other perceived threats such as ‘organised crime’, drug trafficking etc. (see e.g.

⁵ POTA was introduced as an ordinance in 2001 and passed by the Indian parliament in a joint session with the upper house in 2002 against the fierce resistance of the opposition.

⁶ For a review of the legislation in various countries see Amnesty International or Bascombe 2003 and 2004.

⁷ The problems of defining terrorism are discussed by Charles Tilly 2004 among others.

Crenlinden 1998). Some new legislation revived earlier security laws; some built upon existing legislation (for Germany see: Hirsch 2002: 7; for India see: Krishnan 2004; for the US see Cole 2004; for Malaysia see Bascombe 2003). Most new legislations envision new forms of cooperation between the different security agencies, i.e. the police, internal and external intelligence services and the military, the path for which was prepared in many countries with reference to the new challenges posed by globalisation and by transnational criminal networks. There is, accordingly, a certain diffusion of the distinction between internal and external security (Bigo 2001), expressed practically in the new tasks of collaboration between the above mentioned services or legislated in new competences for some sections of the army, border security etc.⁸

Some shifts in the division of power are encoded in law, as for example the extended periods of legal detention in many countries before an arrested person must appear before a magistrate. This has always been one of the most common measures of anti-terrorism legislation (Crenlinden 1998: 405) and is being employed again for example not only in the PATRIOT ACT in the US, which allows indefinite detention of non-deportable non-US citizens, but also in the British anti-terrorism law; the now repealed Indian anti-terrorist law POTA; in Singapore; in South Africa's anti-terrorism bill; or in the Philippines, where the immigration law is used for indefinite detention. Encoded in law are also the new surveillance measures, stop and search licenses and similar methods without judicial warrant as in the US, in Belarus, in Germany and France (see Amnesty International). The severe problems of the detainees at Guantanamo and other US detention centres to gain access to law are the most extreme example of these developments.

Many laws, particularly those concerning changes in arrest laws and detention laws and the expansion of police powers, explicitly sideline the judiciary or reduce its role. Thus, Rorty's warning that "the courts would be brushed aside, and the judiciary would lose its independence" (Rorty 2004: 10) might already be beginning to take shape, and possibly with the connivance of the judiciary. To examine how the judiciary has reacted to the curtailing of its powers and autonomy, and whether there were struggles, unwitting collaboration or unanimity about the process of shifting the balance within the division of powers, could throw light on processes whereby a consensus is forged within a state apparatus and beyond on the necessity of changes in the structure of the state implied in the new measures.

⁸ Didier Bigo interprets the developments within the security agencies as a move on their part to develop a new field of activity and give themselves a new lease on life after the end of the Cold War made them well-nigh redundant (Bigo 2002: 64). Richard Rorty warns of the advent of the security agencies as "de facto rulers" (Rorty 2004: 11).

It is not that unanimity reigns everywhere about the necessity of a shifting balance of power. The conditions for and precise processes of generating a consensus and overcoming competing interests or oppositional positions within the state apparatus are thus in themselves a matter for analysis. Consensus seems to be dependent on the successful portrayal of an 'us vs. them' distinction so as to make security measures appear to target only 'them' and identify the state with 'us', rendering public enemies and private enemies quasi-identical. Wherever such a dichotomy could not be convincingly established, either, it seems, because the targeting of all by state security measures was too fresh like in Kenya, or, as in many Muslim majority countries, because no essential alienness could be argued, the plausibility of the necessity of the security measures, or their beneficial nature for the 'good citizen' seems to have been less evident. Thus, unanimity on securitisation apparently proceeds best alongside the dichotomisation of society. More on this below.

Not in all cases is the shift towards further competencies for the executive and for security agencies encoded in law. Often it is produced by the practices of state agencies such as the greater reliance of the judiciary on intelligence reports (taking them as proof that makes further evidence unnecessary), and generally the enhanced status of intelligence information for political decision making. This relates also to the apparently increased legitimacy of secrecy of governmental activities within democratic regimes. Secrecy is couched not only in terms of security needs but also in terms of expert knowledge. It relates to an increased authority of specialised agencies to 'know best'. This curtails the powers of legislatures. Added to this is often a new level of 'loyalty' of the fourth estate, the media, in relation to governmental policies towards Muslims and Islam.

In the wave of legislative activities around the world after September 11th we also see a reclassification of domestic conflicts and an integration of various policy fields into the anti-terrorism strategy. Thus, the introduction of new security measures has had repercussions in the legal organisation of fields not immediately related to terrorist activities. In fact, the identification of the fields that are directly related to the threat of terrorism and which, therefore, have to be addressed by the new security measures, is a matter of contestation. Because of the allegedly diffuse nature of the terrorist threat, policy makers and different state agencies adopt encompassing visions of the new necessities of preventive control: not only financial transactions, organised crime and illegal border crossing are under observation, but also whole geographical areas have been classified as potential 'bases' of terrorist organisations that demand intervention (such as the Sahel region, and of course Taliban Afghanistan). Moreover, policies towards minorities, towards migration and immigrants

(whether naturalised or not),⁹ towards religious (Islamic) or minority rights organisations and, of course, towards data protection have been re-thought in connection with current perceptions of the threat of terrorism.

This securitisation of various policy fields has not only changed administrative priorities within these fields; it has moreover made possible the use of administrative and procedural law for security concerns. Procedural and administrative law are used in many places to circumvent the safeguards built into criminal law (see Cole 2003: 14). Moreover, administrative procedures are used where criminal law would not hold as those targeted cannot be convincingly accused of committing a crime recognised by penal law (Schiffauer 2005b). Legal status thus attains a new significance in matters of fundamental rights and the access to law since the universality of protections under criminal law do not pertain to administrative procedures or immigration law etc. for which legal status is of course central (see also Bender 2003). Germany is using its Law for Foreigners (*Ausländerrecht*) and its provisions for deportation and denial of entry rather than criminal law to deal with people considered to potentially pose a security risk. The reasoning holds that thereby potential danger is banished from German territory – regardless of the disproportionality of the measures and irrespective of the violation of fundamental rights.

Citizenship and Culture

Consequently, the conceptualisation of citizenship has undergone implicit but fundamental changes. Firstly, there is a shift of rights and duties in favour of the state related to the new role of suspicion: “because ‘the risk’ exists always and everywhere, it becomes normality; to be harmless is then the exception that has to be proven by the citizen for his or her own person.” (Denninger 2001: 472, my translation)

Although this has been posed as a general description of anti-terrorism measures by those who fear for the future of civil rights, not all people are equally likely to be suspect and come under observation. The ‘war on terror’ operates with categories that are for the most part ascriptive categories. What I mean is that the classification of people as potentially dangerous relates only marginally or not at all to their actual activities. Rather, because of the alleged elusiveness of ‘the enemy’, suspect subjects are classified according to their religious or national background, their ethnicity, their associations or other so called ‘characteristics’. These form the basis of the current data gathering and surveillance activities. Surveillance,

⁹ In debates in the European Parliament a close connection between terrorism and immigration is frequently made; see Tsoukala (2004: 3); see also Bigo 2002.

registration, the gathering of personal data, tracking e-mails and internet usage, monitoring financial transactions and above all stop-and-search and ‘sneak-and-peak’ searches are, in the end, not undertaken indiscriminately but according to criteria such as race, religion and national background. All involve categories and classification that are not related to the activities of those targeted but to their legal status, their history (migration), their nationality or their religious affiliation. “Seeing like a state” (Scott 1998) in the war on terror involves categories that are at the same time selective and distinctive but also broad and vague.

Connected to these categories and classifications, a new focus on national homogeneity is emerging; heterogeneity is perceived as a ‘problem’ to be tackled and potentially a security risk. Of course, heterogeneity has often been considered and treated as a problem, not only since the rise of the idea of the nation state, and particularly in Western immigration countries.¹⁰ However, the current idea of homogeneity, implicit as it is in the categories of ‘potential danger’ does not only supersede heterogeneity (or specific kinds of ethnic or religious forms of heterogeneity) but introduces instead a dichotomy related to the spectre of the clash of civilisation. Some forms of heterogeneity are thus not a matter of difference or plurality but of alienness. This firstly targets Muslim minorities. While distinctions are made on all levels of the new security discourses (mostly by non-Muslims) between ‘good Muslims’ and ‘bad Muslims’, between Islam and Islamism, and despite the references to the similarities between the abrahamic religions, the implicit labelling of people (and of types of conflicts) under the quasi-explanatory heading of Islam constructs Muslims as the ‘other’. This construction, rooted as it is in the history of Western imperialism (Mamdani 2004; Agnes 2005), also relegates Islam to the realm of the innately pre-modern. Unlike others designated as pre-modern, Islam is assumed to be also largely anti-modern, thus replacing philanthropic or paternalist relations designed for the purely pre-modern with those of “fear and preemptive police or military action.” (Mamdani 2004: 18)

Social discourses of ‘othering’ differ, and particularly in countries with a majority Muslim population, they take on different forms of distinguishing between others that can be re-integrated and others that are essentially alien. The question in this paper, however, is when do complex systems of ‘othering’ give way to simple dichotomisations.

The impact of this dichotomisation on group relations, both the relation between majority and minority populations and social relations within targeted groups, has yet to be explored, and even more so since the concept of ‘the sleeper’ as the undiscovered and undiscoverable ‘dangerous other’ has complicated the relation between assimilation and ‘otherness’. The

¹⁰ As Nina Glick Schiller has pointed out in a personal communication, in the US there has often been a relationship between anti-immigration laws and assimilation campaigns and measures against religious and political diversity, which even included de-naturalisation. See also Cole 2003.

sleepers is an idea of invisible otherness; it questions commonly held ideas of similarity and belonging while those who are clearly identifiable as (practising) Muslims are still associated with their religion have gained the nimbus of the quintessential ‘other’ and are therefore often considered or even treated as potentially suspect, the real danger is now seen in those who cannot be seen as being different, but are assumed to be essentially so. The allegedly malevolent concealment of their essential otherness justifies the return to criteria of “heritage” in blood or ethnicity for distinguishing between us and them.

Related to this, conceptualisations of different ‘degrees of membership’ in polities have gained a new saliency. The idea of a national core culture, be it the so-called ‘Judeo-Christian tradition’ of Europe – which, of course, officially became ‘Judeo’ only after the annihilation of six million Jews in Europe – or, for example, Hinduism in India, which different groups can be more or less close to, and which bestows on them more or less legitimate claims to membership, re-emerges as a notion of political organisation. Claims to membership and membership itself can have different degrees of legitimacy, and this legitimacy is being grounded more generally in an *ius sanguinis* and/or a religio-cultural complex.

This culturalisation of membership rights enters legal categories in naturalisation procedures, legal grounds for expulsion or denial of entry, observation, screening and inspection of whole categories of the population (rather than of individuals). It is thus not mere rhetoric; it undermines our very principles of universality by re-introducing systems of dual law.

Dual Law

The attachment of civil rights to membership ideas that rely not on formal criteria but on criteria of ‘culture’ or ‘blood’ is visible in the tendencies towards a shift of the burden of proof onto members of certain social categories and very concretely in the policing laws that ground legitimate police action in mere suspicion, or even merely the ‘potential’ of a person committing a crime: if whole categories of people are considered potential threats, individuals belonging to these categories have to prove their non-dangerousness. This abandons the presumption of innocence and introduces a measure of *Sippenhaftung*, i.e. the collective liability of family members, co-religionists, or others categorised as having the ‘same’ characteristics. If ascriptive membership or legal or merely ‘biographical’ status such as that of being an ‘immigrant’ – and particularly a Muslim one, whether naturalised or not – is enough to provide grounds for suspicion, and suspicion now provides grounds for police action, this shift of the burden of proof is extended to people who have not engaged in any

criminal activity but are suspected of having the potential at some point to do so because of their religious or national background, their legal status, their acquaintances or possibly their extended family relations (see also Cole 2003: 2). The presumption of innocence is restricted to ‘us’, for ‘them’ there is the suspicion of guilt.

The changing conceptualisation of citizenship is thus visible in the developments that lead to unequal structures of access to law. Not only citizenship rights but even basic civil rights and human rights that should pertain to all persons on the territory of a state, whether citizen or not, whether legally or illegally present, attain a new character as they become attached to conditions either of membership or of ‘worth’.

Adding to a culturalisation of membership is a *moralisation of rights*. Although all rights, and all law entails at its core moral ideas, the principle of equality before the law is based on the idea that law’s validity is independent of the moral judgement about the behaviour or character of a person. The new moralisation that re-attaches rights to the moral worth of a person – as judged by those that can provide access to or deny rights – is visible in extremis in the treatment of ‘unlawful enemy combatants’ in Guantanamo and other places of detention and in its justification by Dick Chaney when he said: “the people that are at Guantanamo are bad people.”¹¹ These detentions not only contravene any codes of international law, but also introduce the logic of the rights of (assumed) terrorists to be less important, less valuable than the rights of others since they are ‘bad people’. There are two versions of this argument. Firstly, it has been held that the protection of the rights of (alleged or convicted) terrorists is not compatible with justice since the protection of their rights would violate the rights of their victims and even their potential victims (see for example the debates of the European Parliament as described in Tsoukala 2004: ft 27 and 28). Secondly, the denial of rights with the argument that a person is ‘bad’ goes in some ways even further since it categorically denies those esteemed to be ‘bad’ the right to have rights. Jakobs has defined the duty of the state for a “law for enemies” (*Feindstrafrecht*) in the following manner: “whoever does not provide sufficient cognitive securities of behaviour as a person cannot expect to be treated as a person. More, the state must not treat him as a person since he would otherwise violate the right to security of other persons.” (Jakobs 2004: 93, my translation)

The re-moralisation of rights in this manner, of connecting access to law, or the right to have rights to the moral value of a person – a moral value, that is defined, of course, by those that can determine access – and the new role of the state in defining morally worthy citizens or people adds to old forms of exclusion new forms of legitimising (and legalising) inequality before the law.

¹¹ Dick Chaney on Fox News Channel, Monday 13th June 2005.

The construction of a normative community that is evident in all the Manichaean and belligerent oppositions of civilisation vs. barbarism, freedom vs. hatred, ‘with us or against us’ etc. condemns certain categories of people who are considered morally not to be members of the normative community to the state of outlaws. This exclusion, again, is not done according to the activities or deeds of the persons concerned but according to their religious or national background. “If to live by the rule of law is to belong to a common political community, then does not the selective application of the rule of law confirm a determination to relegate entire sections of humanity as conscripts of a civilisation fit for collective punishment?” (Mamdani 2004: 257)

This dual system of law finds its climactic formulation in the debate on a special criminal law for ‘enemies’ as practically invented by the US in its detention centres (of which Guantanamo is only one), or the *‘Feindstrafrecht’* as it has been called in German (Jakobs 2004). A special criminal law for ‘public enemies’ is emerging. It differs from other criminal law in that it creates different legal standards for ‘enemies’ whatever that may be, and even for potential ‘enemies’. Since the point of the law for enemies is prevention of future deeds (Jakobs 2004: 92) an enemy cannot be distinguished from a potential enemy. The identification of a potential of a person to become an enemy will differ: it can either rely on previous deeds, or on intentions and processes of planning, or on membership in specific organisations or on categories of people that are deemed potentially hostile. Guantanamo and other centres of detention, and the whole concept of ‘unlawful enemy combatants’, are the beginnings of such a special criminal law for ‘enemies’. However, it is also visible in the circumvention of ‘normal’ criminal law and its safeguards by the use of administrative law in security measures.

Philosophically, these ideas of dealing with ‘the enemy’ have frequently been related to the fundamental distinction between friend and foe that was for Carl Schmitt, the German jurist whose ideas gave Nazism a justification in legal philosophy and political theory, the essence of the political. Schmitt, unlike the propagators of the ‘war on terror’ does not write about morals;¹² he insists that the opposition between friend and foe that underlies the political is in no way related to the opposition between good and evil (Schmitt [1932] 1963: 27) or any other such opposition. Schmitt does of course hold that the existence of the state (state security) supersedes all other legal norms: “In a state of emergency the state suspends law by virtue of its right to self-preservation” (Schmitt [1934] 1985: 19, my translation). This is

¹² Denninger 2005 sees Fichte, rather than Carl Schmitt, as the original thinker of the law for enemies, the *Feindstrafrecht* (Denninger 2005: 9). Fichte’s ideas on the outlaw are also cited by Jakobs 2004 in his advocacy of this kind of law, although Jakobs uses also Kant and Hobbes for the justification of *Feindstrafrecht* (2004: 89-91).

reminiscent of the US's justifications for the suspension of rights during the 'war on terror', although US officials have usually used a more mundane language than Schmitt's theoretical elaborations.

The law for enemies also differs from ordinary criminal law in that it does not intend to rehabilitate, reform or even punish, but, above all, to banish (see Jakobs 2004: 89). Banishment, of course, can be a punishment more severe than other kinds of penalties. All measures, those seemingly banal ones of gathering data on to the religious belonging of a person or those dramatic ones at the detention centres, are justified largely with reference to 'banishing danger' or preventing it from materialising: indefinite detention at Guantanamo has been justified by pointing out that some of the detainees that had been released had taken up the fight against US forces again and that this needed to be prevented.¹³ In Germany the use of the Law for Foreigners (*Ausländerrecht*) and its provisions for deportation and denial of entry rather than of criminal law to deal with people considered to potentially posing a security risk is justified by the idea that thereby potential danger is banished from German territory.¹⁴

Banishing danger is the core idea of the preventive state. It relates to what Garland has described as the 'culture of control' that de-socialises crime, and gives up on rehabilitation or reform and restricts itself to "retribution, incapacitation and the management of risk" (Garland 2001: 8). The enemy (and the criminal) are perceived to be beyond redemption or the possibility of (re-)integration because their deviance is seen to be rooted in their 'nature' or personality (Garland 2001: 181) rather than in the social context.

"Intrinsic evil defies all attempts at rational comprehension or criminological explanation. There can be no mutual intelligibility, no bridge of understanding, no real communication between 'us' and 'them'. To treat them as understandable (...) is to bring criminals into our domain, to humanise them, to see ourselves in them and them in ourselves." (Garland 2001: 184)

The externalisation of 'the enemy' is, of course, all the more plausible when the explanation for his 'difference' is strengthened by reference to 'another culture' and its fundamental 'otherness' or the perception of a 'new terrorism' that it is fuelled by an innate hatred of modernity. Because the 'enemy', the deviant or the criminal are in this way treated as essentially different and thus beyond (re-)integration, they primarily need to be banished,

¹³ Dick Cheney, quoted in *Süddeutsche Zeitung*, 15th June 2005, "*Schlechte Menschen*", p. 10.

¹⁴ The contradiction inherent in the call for a global 'war on terror' and the practice of banishing people considered to be potentially a security risk beyond national boundaries is not addressed. In this way, the US detention centres and all forms of indefinite detention are consequent to the proclaimed globality of the 'war on terror'.

excluded, incapacitated. For Garland it is the prison that is “located precisely at the junction point of two of the most important social and penal dynamics of our time: risk and retribution” (Garland 2001: 199). Of course, expulsion, deportation or the denial of entry, have the same potentials for the management of risk, and they have similar if sometimes more fundamental aspects of retribution or punishment (see Bender 2003: 132).

Banishing danger de-socialises conflicts; it de-politicises terrorism and merges ideas of innate alienness with (in many cases largely) administrative procedures of exclusion. Since in the ‘war on terror’ banishing is done categorically, that is, to categories of people rather than to individuals according to their deeds and activities, and since it cannot be done other than categorically since ‘we do not know where and who exactly the enemy is’, it creates that Schmittean distinction between us and them. The belligerent opposition of ‘good and evil’, ‘freedom and hatred’, ‘civilisation and barbarism’ is thus not mere rhetoric or the creation of enemy images but has already entered the procedures of law and administration.

The inadvertent proximity of general trends in policing, of the preventive posture of the war on terror, and the ideas of Schmitt have triggered a debate on the advent of the permanent state of emergency (Agamben 2003). But just as debates on the general threat to civil liberties posed by security measures – which is, of course, also a valid criticism – overlook the development of a dual class system of rights, the idea of the age of exceptionalism also seems to miss the asymmetry of the state of emergency. Of course, all states of emergency do not target all citizens equally; usually they target certain forms of behaviour and certain activities equally, regardless of the person in question – denying rights to these actions. The current situation, however, treats certain activities differently according to who ‘commits’ them. “While there has been much talk about the need to sacrifice liberty for a greater sense of security, in practice we have selectively sacrificed *non-citizens’* liberties while retaining basic protections for citizens” (Cole 2002: 955, emphasis in the original). Since citizenship now comes in different degrees,¹⁵ the protection of someone’s liberties and rights depends also on his or her degree of legitimate membership. Generally, criticism and opposition to the politics of security have not been forcibly stifled. Indeed, there are many dissenting voices from human rights organisations, lawyers and academics. Beyond a potential general threat to civil liberties entailed in the new measures, it is the idea of equality before the law that seems to be undermined in a new manner – and with a new degree of legitimacy.

¹⁵ A case in point beside the various cases of the revocation of citizenship when the persons concerned hold a double citizenship and one is revoked, is one case in which German citizenship was revoked despite the person in question having no other citizenship, and having committed no deed other than not declaring his membership in an organisation that is under observation by the German Federal Security Agency. The organisation in question is not outlawed and has not even been accused or is suspected of promoting violence or similar such unconstitutional activities.

The Global War on Terror

Although many countries around the world adopted new or re-enforced preexisting legislation (e.g Bascombe 2003) after 9/11, and were obliged to do so by the UN Security Council Resolution 1373, the war on terror played itself out differently in different countries. Not all countries jumped onto the bandwagon of the new discourse of security. Some, of course, were excluded from the outset, being seen as part of the enemy; and some only joined the agenda after they had been pressured by the US and the EU, for example with the threat of withholding aid. There were several governments that hesitated to join the war on terror or to link their domestic problems to its agenda, such as Indonesia and Morocco. Both joined the war on terror only after ‘their own’ terrorist disasters: Bali and Casablanca.

What differed was, however, not only the readiness to join the agenda, but also the ways the agenda was used and implemented. For different governments it served different ends. Some, such as Russia, China, Uganda or the Philippines used the politics of security mainly to justify their own wars against insurgents. Others instrumentalised the measures against political opposition, tendencies observable for example in Egypt, or Malaysia. Yet other governments, such as those of Mali or of Djibouti¹⁶ sought out the new possibilities in acquiring aid inherent in the anti-terrorism strategies of the US. Others were forced to introduce anti-terrorism measures (Bascombe 2004: 4), mainly the small islands of the Caribbean and the Pacific that had to change their financial or gambling laws to enable the surveillance of transnational financial transactions and money laundering operations. They were pressured both by the US and the EU with the threat of withholding financial aid.¹⁷ The introduction of anti-terror measures in line with the new international architecture of security became part of development politics.¹⁸ “Across the world recipients of USAID assistance must now sign agreements conforming to anti-terrorist conditions as contractually expressed” (Large 2005: 3; see also Bachmann 2004: 6). Thus, legal innovations, technologies and ideas about security and danger entered different countries in ways related to their local tensions and concerns.

Processes of othering differed too. They connected to local plausibilities, and in some countries they failed to take root. Countries with significant Muslim minorities, such as the European countries or India differed from countries with Muslim majority populations.

¹⁶ Djibouti for example received \$ 30 Million for letting the US establish a permanent military base.

¹⁷ Another means of pressure is the blacklist of Non-Cooperative Countries and Territories of the Financial Action Task Force (FATF).

¹⁸ Little material is yet available to answer the question of whether the securitisation of development relates beneficially or detrimentally to aid objectives such as poverty alleviation. Since large funds are designated for security enhancement, such as police training, air safety etc., priorities within aid allocation are definitely changing. See for example <http://www.bond.org.uk/advocacy/globalsecurity.htm>.

Muslim majority countries, however, also differed widely in their reactions depending not so much on their democratic or authoritarian set up but on the status of religion in their state ideology.

Despite the differences in the ways the 'war on terror' entered into national or local politics, it is leaving its traces in many places. The question is in how far the export of policy transports not only specific legal provisions and security technologies but also schemes of understanding crime and risk and security as well as categorisations of the dangerous other. Although the ways of adopting policy is shaped by regional or local concerns, the ideas and procedures characteristic of the 'war on terror' seem also to be exported because in their encompassing and rather unspecific nature they offer themselves for various purposes to different actors. The justificatory imagery of the 'war on terror' that accompanies the specific measures can subsume diverse conflicts under the banner of the 'new terrorism'. As mentioned above, they have served several authoritarian regimes to justify their oppression of opposition and dissent, Uzbekistan being only the most dramatic recent example. They could likewise be used to relate all sorts of Muslim led insurgencies to 'global terrorism' and to justify strategies towards regions of unrest accordingly. Of course, new relations might in fact have been established between different local or regional armed groups and others, or with Al Qaida. But the re-classification of these conflicts went further as it justified approaches to tackling different instances of unrest that had so far been illegitimate, often legalising practices that had hitherto been illegal.

But the new laws were also instrumentalised in less obvious ways in various conflicts. In India, for example, they were used by politicians of various parties – even those that had initially opposed the new law – against political competitors. The great majority of cases under the anti-terrorism law POTA were against Muslims, among them those who were charged in relation to the burning of a train carrying Hindu nationalists.¹⁹ In this way, India did not differ from the general trend. The rise of Hindu nationalism as an idiom for political reasoning even beyond the Hindu nationalist organisations provided a fertile ground for the adoption of the 'war on terror'. However, in India, but also in Morocco, the new possibilities for damaging an opponent inherent in the laws also entered into extremely local quarrels, being used as a weapon in struggles and disputes at the neighbourhood level, or in local

¹⁹ While over a hundred Muslims were charged under the draconian POTA, often without the slightest proof of their involvement in the fire (and it is still not clear whether the fire was not due to an accident rather than to arson) none of those considered responsible for or those hundreds involved in the pogroms against Muslims in Gujarat, in which over 2000 Muslims died, were charged even under the common criminal law. Justifying the refusal to charge the rioters under POTA, members of the ruling party BJP (Bharatiya Janata Party, the leading Hindu nationalist party in India) explained that POTA was for anti-national violence while the riots had been national in spirit.

rivalries amongst different economic groups (Turner 2005) and became a powerful weapon for the police and anybody in league with them.²⁰

Not only governments made use of the new possibilities for ‘preemptive punishment’ and control inherent in the security measures; civil society actors, too, adopted the measures for their own purposes. They also often adopted the particular approach to conflicts and to rights promoted in the discourses accompanying the ‘war on terror’. Through the adoption of the measures, their justificatory imagery of friend vs. foe, of the ‘unworthy other’, of the moralisation of rights also enters into the practices of those using the measures. This imagery can be as useful as the measures in themselves, since subsuming diverse conflicts under one banner potentially creates new alliances²¹ that strengthen different agendas thereby united against a common enemy.

Decisive for the social life of anti-terrorism laws seems to be whether there is or emerges a congruence between governmental categories of ‘the dangerous other’ and societal forms of othering. This seems to have had an impact on the ways in which preventive measures may expand and whether dual law structures emerge.

The export of ideas through the export of policy thus succeeds best when there is an additional local use for the exports. So far it is mainly in those countries and societies where social tensions can be interpreted along the lines of the ‘war on terror’, that is, where the foe can be externalised from society by some means and such externalisations have their history that dual law emerges, and the culturalisation of membership and the moralisation of rights takes root.

Resistance

In a few countries, resistance to the expansion of anti-terrorist measures seems to have born fruit – for different reasons. In Kenya their introduction was prevented by public protests (Bachmann 2004: 5), apparently largely because of the memory of authoritarian rule still so fresh in the public’s mind. In Mauritius, both the president and vice president refused to give assent to the Prevention of Terrorism Special Measures Regulations that was enacted in 2003 and resigned. In India the new anti-terrorist law POTA was resisted when the BJP passed it by

²⁰ The measures were more easily instrumentalised in this manner when the targets were Muslim, since then they could be more plausibly connected to the global discourse of the ‘dangerous other’, but some prominent cases also involved non-Muslim politicians opposed to the regional leading parties.

²¹ One striking new alliance is that in Germany between left wing feminists, such as Alice Schwarzer, and right wing politicians who both oppose Islam in the name of protecting women against ‘tradition’. In India, on the other hand, the hijacking of women’s issues by the Hindu Right was resisted by the feminist movement, albeit not always successfully.

parties in opposition (and of course many civil rights activists) and it was repealed by the Congress led government that came to power in 2004. This might not have been for the love of civil liberties but for other political reasons and it also does not necessarily mean that the new Indian government employs entirely different practices against what it classifies as terrorism.²² Nonetheless, these examples raise the question of what the conditions are for ‘logics’ other than that of the preventive state to be effective, other perceptions of the situation to be accepted and other voices to be heard – and why this is not so elsewhere.

In many countries, especially those in the West, previous resistance to far reaching security measures seems to have dissolved.²³ This is due, it seems, firstly to the emergence of dual law: since most people actually do not feel – rightly or wrongly – that they might be a target of the new laws since they do not belong to the categories of people who are addressed by them, they also do not oppose measures that they would otherwise find unacceptable (see also Hirsch 2002: 6).²⁴ The production of clarity by locating societal woes in a foe – who is without history or reason – potentially overcomes the deep ambivalence towards some surveillance measures and other expansions of state control. The dichotomisation of good and (potentially) dangerous, of worthy members and suspicious subjects and the apparent bifurcation of the threat (of being a victim of terrorist attack and of being victim of the war on terror) reproduce the dichotomy of us and them underlying the dual law system.

Secondly, there seems to be a new consensus on a conceptualisation of security and risk that relates individual, national and international security in a new manner. The security discourse elevates state security above all other forms of security, especially above social security, but also above civic security (i.e. the security from the state, *habeas corpus*, privacy etc.). This rests on the claim that state security is the precondition for other forms of (individual or societal) security. Accordingly, the distinction between private and public enemies is dissolved (Bigo 2002: 81). The politics of “unease” as Bigo has called it (Bigo 2002), the new role of fear that can be witnessed in the dramatic scenarios in the media, the moral panics, as several authors have described the new Islamophobia (Schiffauer 2005a), bring about a return to Hobbes – who had probably never been very far anyway. New ideas of security become common sense in the acceptance of governmental authority to know best how to protect and

²² India amended its unlawful activities (prevention) bill to include some of the provisions of the repealed POTA. However, it abolished the provisions on indefinite detention and on confessions to the police being admitted in court, thus abandoning those measures most prone to misuse.

²³ There are of course many voices of dissent such as human rights organisations, immigrant rights and asylum groups, concerned lawyers etc. As suggested above, they have not been forcibly silenced. Their media presence is, however, marginal. Moreover, their dissenting opinions remain marginal also in the face of the social dichotomisation already prevalent.

²⁴ An indication of this is also the outcry caused by the suggestion in Britain to extend the powers of detention without trial inherent in the British anti-terrorism law to all Britons in order to make the law less discriminative (Large 2005: 3).

from what. Thus, it seems that the structures created and the laws passed do affect political practices and social relations far beyond their immediate goal.

Research Needs

While the contradictions between the various measures taken and civil liberties or international law have been addressed by jurists and political scientists, their impact on social relations has as yet hardly been explored. In order to explore the social significance of the new legal measures, four fields of inquiry emerge as particularly important.

State Processes

Firstly, we need to look at how the preventive state actually comes about in practice. We need to look closely at the adoption, adaptation, instrumentalisation and circumvention of the new politics of security by different actors, the ways consensus was achieved, and the interactions of various state agencies, the government, the media etc., in order to trace the dynamics of both expansion and possibly limitation or modification and reproduction of the preventive state and its institutions. This involves an evaluation of how and in what cases anti-terrorism laws have been used in different contexts and how domestic political issues and problems of security are linked to the international agenda of combating terrorism.

The implicit changes in the division of powers can only be assessed if the interactions between different state agencies and their routine practices are studied. It is therefore of interest to identify the actors behind different practices. This also concerns the study of the implementation of the new laws or previously existing laws: many of the changes seem to lie in the actual practices with which these are interpreted and employed. Therein lie the often implicit reformulations of norms. We also need to look closely at the unintended outcomes of strategies and policies, of practices of instrumentalisation and of adaptation to be able to provide an empirical analysis of the current developments.

Dual Law

A second field of research concerns the emergence of unequal access to law, of two tiered systems of law or dual law. Since dual law tendencies are often not explicit in legislations the ways in which such unequal access to law or dual law is de facto created need to be explored.

Reactions

Related to this is a third field of inquiry, which examines the reactions of targeted groups to labelling and to unequal access to law. One important question is whether these developments actually serve to diminish the threat of further terrorist activities and recruitment (see Crenshaw 1991). Since they fail to isolate terrorism from widely felt grievances, but rather seem to further the plausibility of this link, one could claim that they are likely to produce more anger and hatred among those targeted (or: categorically targeted) and thus possibly produce more terrorists or at least sympathies with their ideas.

The actual 'production of terrorists' would be hard to prove, but the reactions of those belonging to targeted categories can be assessed in terms of their withdrawal from social relations beyond their group and in terms of their identification with and use of norms and institutions of a polity. Both are possibly strongly affected by the experience of labelling and of unequal access to law. From what we know from research into individual and collective identity formation, the measures implemented under the 'war on terror' are likely to produce a social dichotomisation that leads to experiences of alienation and processes of self-segregation. These may trigger militancy and anti-systemic violence.

The question is thus under what conditions and in which contexts the new security discourses lead to a retreat of the targeted groups and further segregation, or even to the creation of new tensions and an escalation of conflict? This is important as the social and political costs might be high. The social and political costs of escalation seem obvious, but also the retreat and further segregation of groups considered and treated with distrust, and faced with a constant suspicion has social costs. Organisations that are being criminalised or forcibly dissolved might go underground, where they will most likely develop a new internal dynamic, structures of leadership and new ideologies towards integration or alienation. Moreover, social segregation also often means new social relations within one group, and a strengthened exclusivity of identification with that group that entails new dependencies, new hierarchies and new structures of communication and trust.

Group Relations and Social Conflict

Related to this is a fourth field of enquiry, which explores the impact of these developments on the way social conflicts are conducted. It seems as if the measures and their accompanying justifications in their unspecificity can destroy both social and state institutions of processing conflicts. Thus, on the one hand we might observe an increased readiness of state agencies to use repressive measures in conflicts with citizens, and increased legal means for this. On the other hand, we might observe the dismantling of social institutions of conflict processing

institutions between and also within groups. What is of interest here is also to trace the links between societal ways of othering and governmental categories.

Both the question on possible reactions triggered by security measures and their impact on the ways conflicts are conducted could also be phrased as the question about the counter-productive effects of security policies. For security specialists it would mean to ask: what security risks do security measures produce.

Development

One field in which the above questions can be explored and for which legal anthropology is especially well equipped is the examination of the impact of the securitisation of development. By the securitisation of development I mean the tendencies to subsume development objectives under security policies, or to merge security and development policies. When priorities within development policies are determined by their alleged effect on security issues we observe the securitisation of development. Here it does not suffice to evaluate the effects, on the designation of funds, on criteria for distribution and allocation, but we also need to trace the transmission of ideas, the transmission of knowledge and of (security) technology. We need to ask about the effects of the securitisation of development on the division of powers in aid receiving countries, on the ways of dealing with conflicts between citizens and the state and on state justifications of limiting freedoms. Moreover, knowledge of the impact on group relations, particularly in ethnically heterogeneous societies where one group might be more of a target of security measures than others, is of vital importance. Thus, it is also a question of the changes in ideas and practices of citizenship, both those of state agencies and of citizens and subjects themselves, and of the merger of local ideas with a now global imagery. This concerns the imagery of the 'dangerous other', the ideas about what constitutes security and whose security, as well as the connections that are made between individual and state security. It also concerns tendencies towards the culturalisation of membership and the moralisation of rights in local arenas.

The New State of the World

Thus, we are left with the question of what changes in the ideas of the state and of government have been promoted by the emerging culture of security, and how do they affect notions and practices of citizenship. What does the securitisation of politics mean? Is it the advent of a general state of emergency (Agamben 2003)?

The claim has been made that these changes serve long term goals of changing state structure. Makdisi (2002) as well as Dux (2003), for example, claim that we are observing the final push for a general shift from a providing state (either of welfarist or developmental nature) to a controlling or preventive state for which 'terrorism' is merely an occasion for expansion.

This thesis is supported by the fact that most legislations claiming to be necessary because of the novelty of the 'new terrorism', or the general merger of internal and external security were in themselves not new but had long been debated in many countries. 9/11 provided an opportunity for many governments to overcome some – or most – of the resistance posed by parliaments, the media, civil rights groups or the judiciary. Likewise, the re-emergence of retribution and incapacitation as a way of dealing with conflicts or with crime has been emerging since the late 1990s, as Garland has shown (Garland 2001). Despite these precedents, it appears that the 'war on terror' gives these developments a new quality: firstly it globalises them to a new degree and with a new urgency and force; secondly, it merges more tightly independent developments in policing, in development cooperation, in policies concerning migration and in notions of citizenship; and thirdly, it introduces the culturalisation of membership and moralisation of rights to a new degree and with new legitimacy.

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