

Laws for Enemies

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Introduction

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

This book 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 book asks in what ways these developments are globalized, and how they are adopted, adapted, instrumentalized, 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 and societal group relations.

The new security regime comprises legal frameworks, technologies, regional and global alliances, but at the same time it also employs categories and images of danger and the dangerous other. Furthermore it usually entails the securitisation (Wæver 1995; Buzan et al. 1998) of ever more policy fields. In the processes of the globalisation of this security regime, laws are harmonized, technologies exported, the production of specific knowledge about threats and conflicts is coordinated. The question is to what extent 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.

The adoption of the security regime by governments and other interested parties always implies a localisation of these technologies, the categories and cartographies. Many countries around the world adopted new or re-enforced pre-existing legislation (e.g. Bascombe 2003) after 9/11, and were obliged to do so by the U.N. Security Council Resolution 1373. Most of the legislation now enacted entailed measures that had been debated for a long time in connection with other perceived threats such as 'organized crime', drug trafficking etc. (see, e.g. Crenlinsten 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 U.S. see Cole 2003; for Malaysia see Bascombe 2003). Most see 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. In the wave of legislative activities throughout the post-9/11 world we can also see a reclassification of domestic conflicts into the anti-terrorism strategy and a tendency to relate both specific types of conflicts and various policy fields to the phenomenon of terrorism and to security concerns.

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 considered to be directly related to the threat of terrorism and which, therefore, have to be addressed by the new security measures, is a matter of contestation.¹ 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

1 Terrorism was often defined in the new legislation in a rather vague manner that allows to cover all sorts of actions, including association or even simple contact, as in the now repealed Indian anti-terrorism law, the Prevention of Terrorism Act (POTA); the expression of support for the 'causes' of terrorist organisations (as in Turkey); or material support even if unintentional, as in the U.S. PATRIOT ACT. The term 'terrorism' is used not in a neutrally descriptive way, describing specific forms of political violence, but in a normative way, and some scholars have held that it can only be used in such a pejorative manner and have therefore abandoned the term entirely, claiming, 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, which shapes the politics of security. The problems of defining terrorism are discussed by Charles Tilly (2004), among others.

only financial transactions, organized crime and illegal border crossing are under observation, but whole geographical areas were classified as potential ‘bases’ of terrorist organisations that demand intervention (such as the Sahel region, and of course Taliban Afghanistan; see Bachmann in this volume). Moreover, policies towards minorities, towards migration and immigrants (whether naturalized or not – see Schiffauer this volume),² towards religious (Islamic) or minority rights organisations (see Peter this volume) and, of course, towards data protection have been rethought in connection with current perceptions of the threat of terrorism.

This securitisation of various policy fields not only changed administrative priorities within these fields; it has also affected administrative practice and practical interpretations of norms and policies, as Werner Schiffauer and Frank Peter show in their contributions to this volume.

Thus, despite the precedents, it appears that the ‘war on terror’ gives these developments a new quality: Firstly, it globalizes 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.

However, the war on terror was adopted and adapted 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 considered an enemy; and some only joined the agenda after they had been pressured by the U.S. and the EU, for example under threat of withholding aid. There were several governments which hesitated to join the war on terror or to link their domestic problems to its agenda, such as Indonesia and Morocco (see Bertram Turner in this volume). Both joined the war on terror only after they had experienced ‘their own’ terrorist disasters: Bali and Casablanca.

What differed was, however, not only the individual country’s readiness to join the agenda, but also the ways in which the agenda was used and implemented. For different governments it served different ends. Some, such as those of Russia, China, Uganda or the Philippines, used the politics of security mainly to justify their own wars against insurgents. Others instrumentalized the measures to cope with political opposition, a tendency observable for example in Egypt, Malaysia, or Uganda. The governments of India and Pakistan engaged in their own race to be regarded and treated as an ally, motivated by their own regional conflict and the hope for financial, technological and political U.S. American support for their strategies within this conflict. Yet

2 In debates of the European parliament, a close connection between terrorism and immigration is frequently claimed; see Bigo (2002); see also Tsoukala (2004: 3).

other governments, such as those of Mali or of Djibouti,³ sought out the new possibilities in acquiring aid inherent in the anti-terrorism strategies of the U.S. Others were forced to introduce anti-terrorism measures (Bascombe 2004: 4), mainly the small islands of the Caribbean and the Pacific, which were compelled to change their financial or gambling laws to facilitate the surveillance of transnational financial transactions and money laundering operations. They were pressured both by the U.S. and the EU under the threat of withholding financial aid.⁴ The introduction of anti-terror measures in line with the new international architecture of security became part of development politics worldwide (Large 2005: 3; see also Bachmann in this volume).⁵ Thus, legal innovations, technologies and ideas about security and danger entered different countries in ways related to their local tensions and concerns and their position within the global order, a global order now interpreted in terms of its security implications. As Jan Bachmann shows in his contribution to this volume, the geography of security is one of friends and foes, safe havens and areas of withdrawal, of failed states and rogue states.

The processes of adopting the models and ideas underlying the new security regime were shaped by these factors: by the local tensions and conflicts which were now interpreted in the light of the globally unified security paradigm, or for which the latter was now used if only as a legitimization; and by the position of a state in the global geography of security. The measures entered political structures at different levels: They were responded to at national level, had their effects at the local level, and were made use of by different societal agents in conflicts of diverse nature, local, national, transnational. Each appropriation spun off its own social effects, and each connected differently to other implementations of security measures, as Turner shows vividly in his chapter on Morocco in this volume.

Despite the differences in the ways the 'war on terror' entered into national and local politics, and although the ways of adopting a policy is shaped by regional or local concerns, the ideas and procedures characteristic of the 'war on terror' also seem to be exported. In their encompassing and rather un-specific nature, they offer themselves for various purposes to different actors.

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- 3 Djibouti for example received \$ 30 million for letting the U.S. establish a permanent military base.
 - 4 Another means of pressure is the blacklist of Non-Cooperative Countries and Territories of the Financial Action Task Force (FATF).
 - 5 Little material is available as yet to answer the question of whether the securitisation of development relates to aid objectives such as poverty alleviation beneficially or detrimentally. 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>

The Omnipresent Threat

Particularly influential in the realisation of security measures all over the world seems to be the specific construction of danger in the contemporary context. The 'new terrorism' is said to be inspired by religious fanaticism (e.g. Laqueur 2000). Since 11 September 2001, this so-called 'new terrorism' is first and foremost Islamist terrorism. There are competing criminologies of Islamist terrorism, referring to either cultural or political causes. However, security policies and measures taken are neither related to the assumed causes of terrorism nor are they designed to remedy those causes. Instead, they are related to a specific perception of risk. This risk is shaped on the one hand by the specific structures of organisation attributed to the 'new terrorism', and on the other hand, by the dynamics attributed to religious fanaticism. This risk is perceived as potentially immense, yet at the same time elusive. Possible damages are considered possibly apocalyptic (cf. Morgan 2004: 30) due to the potential access of terrorists to biological weapons, nuclear and other dangerous materials inherent in advanced technology (e.g. Laqueur 2000). At the same time the perpetrators are seen to be, firstly, highly dispersed and only loosely connected to a transnational network. Secondly, they are well-nigh 'invisible', and most so as 'sleepers'. Thirdly, they are regarded as beyond negotiation or deterrence, since they are said to be inspired by religious fanaticism and an alleged general hatred of the West (or modernity). They are perceived as largely 'aimlessly' or nihilistically destructive. 'Today's terrorists seek destruction and chaos as ends in themselves' (Morgan 2004: 30). 'New terrorists want only to express their wrath and cripple their enemy' (Stevenson 2001-2002: 35). These opinions echoed many analyses of the alleged specificity of religious terrorism (e.g. Laqueur 2000). The novelty of Islamist terrorism, it is said, lies in the fact that it is de-territorialized 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, hidden in loosely connected undiscoverable sleeper cells of amateur terrorists; nor does it aim at territory, as insurgent or secessionist terrorism used to (e.g. Diner 2004). Rather, it is claimed 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, renders not only bargaining but also deterrence impossible.

Thus, the 'new terrorism' is perceived and presented as external to society to a new extent. The question of 'Why do they hate us so much', which initially arose in the U.S. and was revived in a British version after the 7 July bombings of the London Underground with the additional shock of home grown Muslim terrorists, in some ways never quite sought an answer. Terrorism's causes or its relation to the society it targets became secondary to an assumed essential alienness and a religious fanaticism that is beyond reason,

beyond understanding, and allegedly disconnected from a social and political context.

Thus, there is also a new concept of danger. Danger, legally defined as a specific action that will, if not hindered, lead to the damaging of a good that is protected by law, is now no longer connected to the actions of individuals, but to a general situation of threat (Bender 2003: 138, 139; Lepsius 2004: 66, 67, 83). This general situation of threat is emanating from an elusive network⁶ and its fundamental 'occidentalism' (Buruma/Margalit 2004), in which individuals are replaceable. 'We do not know where, and precisely who, the enemy is', felt one member of the EU parliament.⁷ Because of the characterisation of the 'new terrorism' as an omnipresent but elusive threat, arising from a de-individualized (Lepsius 2004: 66) general and diffuse Islamist terror, security measures are said to be necessary which presume that the enemy could be everywhere and everyone – nearly. Makdisi speaks of a '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).

No matter how realistic or unrealistic a description of the 'new terrorism' is,⁸ the claims to the diffuseness of the threat, the new invisible nature of the

6 On the network thesis see also Mayntz (2004).

7 Mogens Camre, Danish member of the UEN (Union for a Europe of the Nations), European parliamentary debate 6 February 2002 quoted in Tsoukala (2004: 6).

8 There is, of course, the question to what degree the 'new terrorism' is actually so new and whether it is really so diffuse, de-territorialized and 'aimless' as is being claimed. See also David Tucker (2001) on the similarities between old and new terrorism; as well as Peter Waldmann's (2004) critique of the theses of alleged novelty of the network structures. It is easy to demonstrate that there have been, and still are, clear and identifiable aims, even rather territorial in nature, of transnational Islamist terrorism (see also Steinberg 2005), such as the removal of the U.S. army from Saudi Arabia and now also from Iraq, or the destruction of Israel. Moreover, many of those Islamic insurgencies which are now considered to be connected to the transnational networks of Al Qaeda, and which 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. The security discourse related all sorts of Muslim led insurgencies to 'global terrorism' and thereby justified strategies for 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 Qaeda. 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 terro-

perpetrators, the unparalleled potential for destruction and the allegedly novel form of organisation in transnationally loosely connected cells, all have been the main grounds for the justification of the specific measures taken against 'the new terrorism'. '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).

Prevention

The idea of the omnipresent, elusive threat has shaped a new type of security measures in that they now raise 'suspicion' to a new importance as grounds for action. Previous legal distinctions between suspicion (entitling the police to investigate) and prognoses or probable cause, that is: The well-founded expectation of an event to occur entitling the police to use preventive measures, have been abandoned in many places. 'Prevention', this 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 furthermore changes security from a matter of politics into one of technology, involving specialists' knowledge of risks and their pre-emption (see also Bigo 2002: 74; on experts see also Peter this volume).

Most countries, therefore, detect new forms of cooperation between the different security agencies, i.e. the police, internal and external intelligence services and the military, the stage for which was set 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), practically expressed in the new tasks of collaboration between the above mentioned services or legislated in new competencies for some sections of the army, border security, etc.⁹

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

rism' might not constitute a rejection of modernity as such but a rejection of being shut out from it (Mamdani 2004: 19) or losing out within it or not being able to define it oneself has been obviated by the construction of an essential alienness rooted in 'culture' and fundamentalist religion.

- 9 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 of 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).

common measures of anti-terrorism legislation (Crenlinsten 1998: 405) and is being employed again, for example, not only in the PATRIOT ACT of the USA, which allows indefinite detention of non-deportable non-U.S. 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 or similar methods without judicial warrant as in the USA, in Belarus, in Germany and France (see Amnesty International).

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.

Not in all cases, however, 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. Werner Schiffauer in his contribution to this volume explores the 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. This also relates 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 specialized 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. 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.

Not everywhere unanimity reigns about the necessity of a shifting balance of power, as Thomas Hawley indicates for the USA in his contribution to this volume. 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. And, as Frank Peter shows in his contribution to this volume, anti-terrorism measures can take an altogether different form, attempting to administer an Islam suitable, that is: incorporable into the nation state.

Identity

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: Suspicion as grounds for governmental action undermines the presumption of innocence. ‘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 was 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 first task of prevention is, of course, to separate the potential threat from the protected.

The ‘war on terror’ operates with categories that are for the most part ascriptive categories; the classification of people as potentially dangerous relates only secondarily 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, registration, the gathering of personal data, tracking emails 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 like race, religion and national background. All involve categories and classifications that are not related to the actual activities of those targeted but to their legal status, their history (migration), their nationality or their religious affiliation. Above all it is the construction of ‘supporting milieus’, those social groups that terrorists might hail from, hide in or that are believed to ‘breed’ terrorist mind-sets, that extends the preventive measures and their categories to include innumerable people who have no other connection to the perceived threat than their religious identity or regional background (see Schiffauer and Turner in this volume). ‘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.

Attempts to fix identities, to create secure knowledge about individuals, such as are discussed by Tobias Kelly in his contribution to this volume, always produce their specific possibilities of fraud and concealment – and thus further perceptions of insecurities for the state. Kelly shows why attempts to make people more legible through biometric identity documents actually force security personnel to resort back to the actual bodies of people, and thus promotes a racialized approach to security measures. ‘Precisely because identity cards do not tell the state everything they want to know, state officials are

forced to resort to reading bodies for marks of suspicion, feeding into racialized notions of danger.'

Connected to the categories and classifications of security measures, 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 instead introduces a dichotomy related to the spectre of the clash of civilisations. The idea of a clash of civilisations, and particularly its implicit or explicit applications in security measures, employs a concept of culture as being of a deterministic nature.

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, Muslims are assumed to be also largely anti-modern, thus replacing philanthropic or paternalist relations designed for the purely pre-modern with those of 'fear and pre-emptive police or military action' (Mamdani 2004: 18). This spawns two seemingly divergent types of administrative and legal strategy. On the one hand we have those counter-terrorism strategies which are 'played out in the incorporation, administration and regulation of Islamic institutions and practices', as Frank Peter shows in his contribution to this volume. For him, civil Islam, as he calls it, is a governmental strategy, 'a state policy aiming to re-fashion a certain number of institutions and practices among immigrants from Islamic background in order to reduce the risk of socio-political conflicts and terrorism'. It risks, however, 'entrenching the perception of Islam as a potential threat'. On the other hand we have policies that aim at exclusion, banishment or containment, such as those discussed by Schiffauer, Kelly and Hawley.

10 As Nina Glick Schiller has pointed out, in the U.S. there often existed 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).

Social discourses of ‘othering’ differ and connect to local plausibilities. Islamophobia (cf. EUMC 2006) and the fear of ethnic heterogeneity reign large in countries of immigrant Muslim communities, but also in India, a country with an indigenous Muslim population of about 140 million. Muslim majority countries 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 (Middle East Working Group 2002). As Bertram Turner shows in his chapter on Morocco, social patterns of othering there took on different forms of distinguishing between ‘others’ who could be re-integrated – ‘lost sons’, so to say – and those who were constructed to be foreign, dangerous and essentially alien. Thus, the dichotomisations of the war on terror take root wherever and to the degree that societal fissures and tensions correlate to the categorisations of security.

The impact of such dichotomies 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 sleeper’s’ is an idea of invisible otherness; it questions commonly held ideas of similarity and belonging. While those who are clearly identifiable as (practizing) Muslims in Europe have gained the nimbus of the quintessential ‘other’ and are therefore often considered and even treated as potentially suspect, the real danger is now seen in those who cannot be distinguished 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 politics 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 own different degrees of legitimacy, and this legitimacy is being grounded more generally in a *ius sanguinis* or a religio-cultural complex, that is something of a *ius culturae*. Culture here again is perceived as a quasi-natural disposition. It is clearly demarcated according to one’s religious background.

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 developments leading to unequal structures of access to law. The tendencies towards a shift of the burden of proof onto members of certain social categories, and very concretely the policing laws that ground legitimate police action on mere suspicion or even merely the ‘potential’ of a person committing a crime is possibly the foremost instrument of this development: 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 categorized as having the ‘same’ characteristics. If ascriptive membership or a legal or merely ‘biographical’ status such as that of being an ‘immigrant’ – and particularly a Muslim one, whether naturalized 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 to at some point do so simply 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.

Werner Schiffauer in his contribution to this book explores the ways in which unequal access to law is established in Germany. He shows how 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 lie in the practices of judges and administrators and their interpretations of norms.

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*.

As becomes apparent in Thomas Hawley’s discussion of the ‘citizen terrorist’, the two processes are related. 9/11 brought onto the stage terrorists as foreigners. Hitherto, most terrorists had been nationals of the state they attacked. The foreignness of Islamist terrorists was in line with the construction of their cultural alienness and their status as outsiders. However, there were

the perplexing cases of nationals who joined the Islamist cause. This was a matter of betrayal. The perception that terrorists were aliens in a legal sense gave way to the perception that terrorists were aliens in a social sense, whereby nationals also became outsiders to the moral realm of the community.

The new moralisation that re-attaches rights to the moral worth of a person – as judged by those who can provide access to or deny rights – is visible in extremism 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 code 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). The denial of rights with the argument that a person is ‘bad’ goes in some ways even further, since it categorically denies those deemed to be ‘bad’ the right to have rights. Jakobs 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. Even 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 who have the power to determine access – and the new role of the state in defining morally worthy citizens or people adds new forms of legitimizing (and legalizing) inequality before the law to old forms of exclusion.

The construction of a normative community which is evident in all the Manichean and belligerent oppositions of civilisation vs. barbarism, freedom vs. hatred, ‘with us or against us’ etc. condemns certain categories of people who are not considered morally to be members of the normative community to the status of outlaws. This exclusion, again, is not achieved with respect to the activities or actual deeds of the persons concerned but with respect 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

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

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 USA 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 or whoever 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 who are deemed potentially hostile. Guantanamo and other centres of detention, and the whole concept of ‘unlawful enemy combatants’, are the beginnings of such 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’ were frequently 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’, did not write about morals;¹² he insists that the opposition between friend and foe underlying 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] 1979: 19, my own translation). This is reminiscent of the U.S. justifications for the suspension of rights during the ‘war on terror’, although U.S. officials usually employed 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, the seemingly banal ones of gathering data on the religious belonging of a person, or the dramatic ones applied at the detention centres, are justified largely with reference to ‘banishing dan-

12 Denninger (2005) therefore sees Fichte as the original thinker of the law for enemies, the *Feindstrafrecht* (Denninger 2005: 9), and Fichte’s ideas on the out-law are also cited by Jakobs (2004) in his advocacy of this kind of law.

ger' or preventing it from materializing: Indefinite detention at Guantanamo has been justified by pointing out that some of the detainees who had been released had taken up the fight against U.S. 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 in order to deal with people considered to potentially pose a security risk, is justified by the idea that this way, potential danger can be banished from German territory.¹⁴ The securitisation specific to the 'war on terror' made possible such uses of administrative and procedural law for security concerns. Procedural and administrative law is used in many places to circumvent the safeguards built into criminal law (see Cole 2003: 14). Administrative procedures are used where criminal law would not hold as those targeted cannot be convincingly accused of committing a crime recognized by penal law (Schiffauer in this volume). 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 does not pertain to administrative procedures or immigration law etc., for which legal status is of course central (see also Bender 2003).

Banishing danger is the core idea of the preventive state. It relates to what Garland has described as the 'culture of control' that de-socializes crime, and gives up on rehabilitation or reform, but 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 humanize 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 their 'difference' is strengthened by reference to 'a different culture' and its fundamental 'otherness' or the perception of a 'new terror-

13 Dick Cheney, quoted in *Süddeutsche Zeitung*, 15 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 U.S. detention centres and all forms of indefinite detention are consequent to the proclaimed globality of the 'war on terror'.

ism' that is fuelled by an innate hatred of modernity. Because the 'enemy', the deviant or the criminal is in this way treated as essentially different and thus beyond (re-)integration, they primarily need to be banished, 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-socializes conflicts; it de-politicizes terrorism and merges ideas of innate alienness with (in many cases largely) administrative procedures of exclusion. Technologies of prevention and neo-liberal thinking about crime as discussed by Garland (2001) prepared the ground for thoughts about terror. The crime regime Garland describes presents itself as 'un-ideological' 'technical', preventive and incapacitating, etc. It is, of course, ideological in its interpretation of social relations and the individual, depicting crime as resulting from a natural disposition rather than from circumstances. With the war on terror this whole way of thinking is pushed further into a field of morals ('evil'). And culture enters into the equation replacing the nature of character or psyche with a quasi-natural cultural disposition, as implicit in any notion of a clash of civilisations. In this way, the neo-liberal philosophy of crime prepared the grounds for the neo-conservative philosophy of cultural enmity and its translation into policy. The belligerent opposition of 'good and evil', 'freedom and hatred', 'civilisation and barbarism' is thus no 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 also depends on his or her degree of legitimate membership. Generally, criticism and opposition to the politics of security were not 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.

Consensus

In many countries, especially those in the West, previous resistance to far-reaching security measures seems to have dissolved.¹⁶ This is due, it seems, firstly to the emergence of dual law: Since most people actually do not feel – rightly or wrongly – they might become a target of the new laws, since they do not belong to the categories of people addressed by them, they also do not

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- 15 A case in point beside the various cases of the revocation of citizenship when the persons concerned hold a double citizenship and one of them 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. In 2007, the Administrative High Court overturned the ruling and granted the plea for the retention of German citizenship.
- 16 There are many voices of dissent, such as human rights organisations, immigrant rights and asylum groups, concerned lawyers, etc. As suggested above, they were not forcibly silenced. Their media presence is, however, marginal. Moreover, their dissenting opinions remain marginal also in the face of the social dichotomisation already prevalent. In a few countries, resistance to the expansion of anti-terrorist measures seems to have borne 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 is still 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, which were enacted in 2003, and resigned. In India, the new anti-terrorist law POTA passed by the BJP was resisted by opposition parties (and of course many civil rights activists), and it was repealed by the Congress-led government which came into power in 2004. This might not have been for the love of civil liberties but rather 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. 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 elsewhere this is not so.

oppose measures they would otherwise find unacceptable (see also Hirsch 2002: 6).¹⁷ The production of clarity by locating societal troubles in a foe – who is without history or cause – 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 falling victim to terrorist attacks and of falling victim to 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 as the precondition for other forms of (individual or societal) 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.). The distinction between private and public enemies is dissolved (Bigo 2002: 81). The politics of ‘unease’, as Bigo called it (Bigo 2002), the new role of fear that can be witnessed in the dramatic scenarios of the media, the moral panics, as several authors have described the new Islamophobia (Schiffauer 2005); 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 from what. 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.

Consensus seems to be dependent either 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 citizens by state security measures was still too vividly remembered, 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. 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. Unanimity on securitisation apparently progresses best alongside the dichotomisation of society.

On another level, and in some ways even more subversive, the new laws served as powerful instruments in conflicts entirely unrelated to security is-

17 An indication of this is also the outcry in Britain about the suggestion 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).

sues and thus were embedded in the structures of political competition. They became indispensable, and even in places where they were revoked, like in India, where the anti-terrorism law of 2002 was repealed in 2004, they found new forms in criminal law reforms or in other extraordinary laws.¹⁸ In India like in Morocco, the new possibilities for damaging an opponent inherent in the laws also entered into local quarrels, being used as a weapon in struggles and disputes at the neighbourhood level, or in local rivalries amongst different economic groups (Turner in this volume), and became a powerful weapon for the police and anybody in league with them.¹⁹ They had the potential to change local power relations by providing new measures of legitimate participation. Individuals or groups, the legitimacy of whose membership could be questioned along the lines of the new culturalisation of membership and the moralisation of rights, now find it harder to articulate their claims. Not only governments made use of the new possibilities for 'pre-emptive punishment' and control inherent in the security measures; civil society actors, too, adopted the measures for their own purposes. As Turner writes in his contribution to this volume: 'The fact that local people make use of Moroccan anti-terror legislation for their own purposes implicitly keeps it operative.'

Thus, the structures created and the laws passed in the course of the 'war on terror' can affect political practices and social relations far beyond their immediate goal. They become embedded in the political structures through their usefulness for diverse strategies. 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 alliances²⁰ that strengthen different agendas, thereby uniting against a common enemy.

The export of ideas through the export of policy, however, succeeds best when there is an additional local use for the exports. So far it is mainly in countries and societies where social tensions can be interpreted along the lines

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

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

20 One striking new alliance is the one 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.

of the ‘war on terror’, that is, where the foe can be externalized from society and such externalisations have a history that dual law emerges, and the culturalisation of membership and the moralisation of rights takes root.

Reactions

There are as yet no investigations into the reactions of those groups specifically targeted by anti-terrorist measures and their categorisations of labeling and of unequal access to law. One 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 the targeted and thus possibly produce more terrorists or at least sympathies with their ideas.

The actual ‘production of terrorists’ is possibly hard to prove, since causative explanations must be more complex. The reactions of those belonging to targeted categories can be assessed, however, 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 learned 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 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 must cause social costs. Organisations which are being criminalized or forcibly dissolved might go underground, where they will most likely develop new internal dynamics, new structures of leadership and new ideologies of integration or alienation. Moreover, social segregation also often means new social relations within one group, and a strengthened exclusivity of identification with that group which entails new dependencies, new hierarchies and new structures of communication and trust.

Conclusion

The globalisation of the ‘war on terror’ operates on at least two levels: One is the explicit export of security technologies, legal arrangements, knowledge, and the coordination of alliances and forms of cooperation in various policy fields. These efforts take different courses, some relying on pressure, others on financial incentives, or both, and yet others on a moral economy of alliances.

On another level, the ‘war on terror’ is globalized by the various forms of appropriation of its specific ideas of security and danger, its categories and maps as forms of knowledge, its interpretations of conflicts. It is established on different levels, entering into political relations as a new tool and steering ideas about security and danger in a specific direction: Ideas of security are, again, first and foremost ideas about state security, subsuming other forms of security under the former. This also entails renewed sources of nationalism, relying, of course, on enemy images that have always accompanied such sentiments. Thinking about difference, belonging and alienness, however, is increasingly shaped in broader, more global and therefore in more inescapable and fundamental terms of ‘civilisational’ core cultures.

The ‘war on terror’ seems to have globalized the de-socialized conception of conflict that stems from neo-liberal thinking about crime prevention. It has added the cultural dimension, albeit treating culture as a non-social, quasi-natural disposition. Moreover, the notion of ‘evil’ and the concomitant moralisation of rights affect the ways conflicts are dealt with. The emergence of dual law, explicitly legislated or implicit in the practices of administrators, is due both to the technicist approaches of the preventive state and the culturalisation of belonging and the moralisation of rights. Ideas of ‘civilisational’ unity and homogeneity shape the ways various forms of social difference are dealt with and are the base of offers of different degrees of membership or exclusion.

Each adoption of the tools provided, for whatever purpose, embeds them in political structures. Power relations between societal groups change or are re-enforced due to differences in the legitimacy of claims to membership and participation established by the model of rights entailed in the security regime of the ‘war on terror’. Reactions of the individuals and groups who are targeted by these measures might differ; they might take the form of resignation and withdrawal, radicalisation and the escalation of conflict, or the protest might be voiced by other means. The social and political conditions of each need to be explored.

Thus, we are left with the question of which changes in the ideas of the state and of government have been promoted by the emerging culture of security, and how they affect notions and practices of citizenship. What does the

securitisation of politics mean? Is it the advent of a general state of exception? (Agamben 2003) The claim was made that these changes serve long-term goals of altering state structure. Makdisi (2002) as well as Dux (2003), for example, maintain 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 legislation allegedly necessary because of the novelty of the ‘new terrorism’, or the general merger of internal and external security, was 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 developing ever since the late 1990s, as Garland (2001) has shown. Despite these precedents, it appears that the ‘war on terror’ gives these developments a new quality: Firstly, it has established the dispositive of security as the globally predominant one, at least for the time being. It has made plausible the employment of specific expertises about social conflict (rather than others), and it has furthered a specific merger of social and governmental practices of othering, resulting also in the culturalisation of membership and the moralisation of rights.

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