

Poetic Injustice: A Case Study of the UK's Anti-Terrorism Legislation

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This paper explores the effects of anti-terrorism policy and legislation on the Muslim immigrant communities, in general, and British-born Muslims, in particular. *R v Malik*, in which the Court of Appeal quashed Samina Malik's conviction on terrorism charges, provides our point of entry into the legal discourse on counter-terrorism. Malik's conviction at the Old Bailey and the subsequent decision of the Court of Appeal to declare her conviction unsafe, will serve to highlight three interrelated aspects of anti-terrorism policy and legislation in the UK. These two decisions, firstly, will help to examine how the legal and policing measures to combat the threat of terrorism interact with the ethno-cultural relationships in contemporary Britain. Secondly, they will allow us to view the UK's anti-terrorism policy and legislation in relation to what David Garland termed the »culture of control«, which marks the move from a criminal policy based on »penal welfarism« to a governance of crime based on »the management of risks«. Finally, they will throw light on the tension between the UK government and the judiciary.

Keywords: Anti-Terrorism, Security, Islamophobia, Managerialism

Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning.

(Kafka 1978, p. 7)

Hip hop musician and Oxford graduate, Zuby, who was confronted as he stepped off a train, said, »I have never been so traumatised in my life. It took me a couple of seconds to realise it was me all those guns were aimed at. I felt like I'd stepped off the train and into a really bad dream«... Zuby was dragged off to a toilet cubicle, handcuffed and searched for a gun before being taken to a police station.

(Metro 9 July 2008)

1 Introduction

Domestic and international terrorism, organised by groups and individuals who identify themselves with extreme interpretations of Islam, pose a serious threat to the security of Western democracies and the everyday safety of their citizens. Although the public is generally supportive of special measures to prevent terrorism, there is little consensus in legal and political circles on how these measures are to be planned and executed. Some observers have voiced concern about the excessive

and draconian character of counter-terrorism measures, which in their opinion is leading to a gradual erosion of the foundations of the Western democratic systems (Walker 2007a). Others argue that »Western legal orders are not living in a time of emergency or terror«, even though our leaders try very hard to convince us otherwise (Dyzenhaus – Thwaites 2007, p. 9).

Since the terrorist attacks of 9/11, much time and energy have been devoted to debating and devising ways of meeting the threat of terrorism without compromising democratic rights and civil liberties (Ignatieff 2005; Viscusi – Zackhauser 2005; Zedner 2005; Lazarus – Goold 2007). However, much of this debate is caught up in the ideological web of »the clash of civilizations«, manufactured by people such as Samuel Huntington in the 1990s. Huntington draws a sharp line between the democratic Western civilization and a monolithic Islamic culture of despotism and oppression, arguing that confrontations between these two world-views are inevitable (Huntington 1997).¹ Those who knowingly or unwittingly share this monolithic concept of Islam and the inevitability of »civilizational conflicts«, understandably, treat domestic extremist groups and international terrorist networks as part of a homogeneous Islamic movement with the same anti-Western ideology and socio-political objective.

The focus of this study is on the measures adopted by the UK authorities to preempt the threat of Islamic terrorism in Britain. The basic assumption of this paper is that versions of Islam operate as the medium through which loosely defined groups of people mobilise themselves around a religious banner in order to realise their political aims (Husain 2007). Their chosen medium, i.e. the various interpretations of Islam, admittedly becomes the message they communicate in respect to their identity and political and cultural aspirations, but this medium (like any other ideology) cannot act as a mobilising force unless certain societal conditions are satisfied. These conditions, which ultimately shape the way Islamic movements manifest themselves, differ from society to society and over time. Thus, although militant networks and al-Qaeda groups operating in places such as Pakistan and home-grown Islamic terrorist groups in the UK use the same type of anti-Western rhetoric, they represent different socio-political developments, address different audiences and serve different ends.² Violent resistance of the sort directed by »nomadic insurgents« (Baxi 2005) against foreign troops in Afghanistan or Iraq, al-Qaeda's global war against infidels which is fuelled by a feeling of humiliation and resentment against the West, and the formation of Islamic militant groups in Britain are pro-

1 According to Abrahamian (2003, p. 529), after 9/11, »the mainstream media in the USA, automatically, implicitly and unambiguously adopted Huntington's paradigm to explain September 11«.

2 For a historical analysis of the frustration and resentment that fuels Muslim extremist movements, see Lewis 2003. Also, see Ahmed 2003.

ducts of different social, cultural, economic and historical forces. Treating these as if they were the same political phenomenon provides for a fundamentally flawed conception of terrorism and the role of Islam in Western and Islamic countries.

Al-Qaeda, a shadowy network of Islamic militants and terrorists, which emerged out of the war against the Soviets in Afghanistan during the 1980s and the 1990s (those days, they were supported and trained by the US, Pakistan and Saudi Arabia and celebrated in the West as freedom fighters), sees itself engaged in an epic battle for the re-establishment of the Islamic Caliphate.³ Those engaged in Jihad against the foreign troops in Iraq and Afghanistan, misguided as their efforts might arguably be, justify their mission in terms of resistance to foreign occupation of their land. Finally, domestic terrorists and Islamic extremists, consisting mainly of British-born Muslims, are engaged in constructing an ethnic identity based on a common cause.⁴ We shall not be able to grasp the aims and functions of their anti-Western sentiments and anti-democratic projects as long as we refuse to acknowledge their experience of political alienation and socio-cultural marginalisation in Britain.⁵ Their resort to terrorism, which amounts to their rejection of democratic means for achieving political ends, is inseparable from their experience of exclusion from mainstream cultural and democratic processes. UK law distinguishes between foreign nationals and British citizens suspected of terrorism. However, the political discourse that underpins the UK's anti-terrorism policy and justifies the draconian legal measure taken to pre-empt the threat of terrorism, treats national and international terrorism as having the same roots, i.e. Islam. Thus, all Muslims – and Muslim is used as a racial marker (Goodall 2007, p. 98) – become potential suspects of terrorism (see, for example, *Norwood v DDP*). Moreover, it is politically convenient to label various militant groups and individuals suspected of terrorism in Britain as agents of al-Qaeda, i.e. as alien evildoers. By regarding British-born Muslim extremists as alien elements controlled by an invisible evil hand from Qandahar, one exonerates the British society and the UK government of having any moral responsibility in respect of the radicalisation of young British Muslims.

3 This is, admittedly, an oversimplified description of al-Qaeda which is often employed by the media. Although al-Qaeda has a very small group of hardcore activists, it is not an organisation but a worldview; it is an idea, a style or a formula. As Jason Burke (2007) explains, many local groups, which are labelled as subsidiaries of al-Qaeda, have their own leaders and agendas and despite their »supposed loyalty to al-Qaeda,« do not »recognize bin Laden as anything more than a fellow traveller« (Burke 2007, p. 11).

4 I have discussed this issue at some length in Banakar 2008b.

5 According to Akhtar (2005, p. 164), the young Muslims' return to religion is not a revival of Islam as such – it does not necessarily mean »an increased adherence to the Islamic code« – but »instead refers more to individual empathy with a religious identity, an identity that provides group solidarity«.

This paper explores the effects of anti-terrorism policy and legislation on Muslim immigrant communities, in general, and British-born Muslims, in particular. *R v Malik* provides our point of entry into the discourse on counter-terrorism. The next section, Part 2, refers to Malik's conviction at the Old Bailey and the decision of the Court of Appeal to quash her conviction on terrorist charges. Part 3 places the case of Malik in relation to the development of anti-terrorism legislation in the UK, arguing that the symbolic/ideological dimension of this body of legislation is realised within a neo-liberal paradigm of managerialism which has come to dominate the criminal justice system. Thus, this paper will examine the anti-terrorism policy of the British government in the light of what David Garland termed the »culture of control«, which marks the move from a criminal policy based on »penal welfarism« to a governance of crime based on »the management of risks« (Garland 2001, p. 18; also see Lazarus – Goold 2007, pp. 4-5). Part 4 discusses the identity politics of the »war on terror« by examining the selective enforcement of anti-terrorism laws. Part 5 asks if the modern liberal law can be a medium for dispensing justice in the »war on terror« and safeguarding the rights of those who are affected by this »war«. The paper concludes in Part 6 by arguing that managerially inspired counter-terrorism measures aggravate the social conditions that give rise to terrorism.

2 An Unsafe Conviction

Samina Malik, a 23-year-old British-born Muslim who worked as a shop assistant at Heathrow Airport, became the first woman convicted under the Terrorism Act 2000. The police arrested Malik at home, where she lived with her parents and siblings, in October 2006 after searching her room and finding her in possession of records likely to be used for terrorist purposes. This material, which included *The Al-Qaeda Manual*, *The Mujahidin Poison Handbook*, *Encyclopaedia Jihad* and *How to Make Bombs*, all downloaded from the Internet, became the basis for the prosecution's prima facie evidence. Some of these »had been downloaded, opened, then deleted« (*R v Malik* {2008} All ER (D) 201 (Jun)). On the basis of this evidence, Malik was charged with two counts of offences contrary to Sections 57 and 58 of the Terrorism Act 2000:

Count one alleged that the defendant had had »in her possession an article, namely, a computer hard drive with a collection of documents on it, in circumstances which gave rise to a reasonable suspicion that her possession of it was for a purpose connected with the commission, preparation or instigation of an act of terrorism«, contrary to s 57 of the Act. Count two alleged that she had had »in her possession a record, namely, a computer hard drive with a collection of documents on it, which contained information that was likely to be useful to a person committing or preparing an act of terrorism«, contrary to s 58 of the Act. (*R v Malik* [2008] All ER (D) 201 (Jun))

At the Old Bailey, the court heard that Malik had posted poems on extremist websites under the screen name »Lyrical Terrorist«, »praising Bin Laden, supporting martyrdom and discussing beheading« (*The BBC News* 8 November 2007). In addition, she had written on the back of a WHSmith receipt, »The desire within me increases every day to go for martyrdom« (*The Sun* 8 November 2007). She told the court that her poems were »meaningless« and she had used the nickname »Lyrical Terrorist« because she thought that it sounded »cool« (*The Independent* 11 November 2007). According to the Court of Appeal:

Following her arrest, the defendant wrote several pages of notes in which she gave an account of how, two or three years earlier, she had been influenced by radical Islamic preachers and, as a result, had downloaded articles, books, talks and videos from the Internet and had started to write poetry about killings and beheadings. That was something she had come to regret and, for around two years, had had no further dealings with extremist material. (*R v Malik*)

In response, the prosecution argued that the records Malik had in her possession strongly indicated that she »was deeply involved with terrorist related groups« (*The BBC News* 8 November 2007). The prosecution also argued that »she was an 'unlikely yet 'committed' Islamic extremist, with a library of material which she had collected for terrorist purposes« (*The Guardian* 9 November 2007). The head of the Metropolitan Police Counter Terrorism Command supported the prosecution by pointing out that:

Malik held violent extremist views which she shared with other like-minded people over the Internet. She also tried to donate money to a terrorist group...She had the ideology, ability and determination to access and download material, which could have been useful to terrorists. Merely possessing this material is a serious criminal offence. (*The BBC News* 8 November 2007)

The jury deliberated 19 hours before reaching its verdict. Malik was found not guilty of an offence under Section 57 of the Terrorism Act 2000 which criminalises the possession of an article for terrorism purposes, but guilty under Section 58, according to which an offence is committed if a person (a) collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) possesses a document or record containing information of that kind. The maximum sentence at Crown Court is 10 years.

The judge bailed Malik on »house arrest« and ordered reports into her family background ahead of the sentencing on 6 December 2007. He told Malik that her »crime was on the 'margins' of the offence of which she was found guilty« and admitted that she »was of 'good character' and from a 'supportive and law-abiding family who are appalled by the trouble that you are in'« (*The Guardian* 6 November 2006). The judge also admitted that Malik was in many ways »a complete enigma« to him (*ibid.*). Malik, who had already spent five months in custody, was sentenced

to nine months imprisonment, suspended for 18 months, under Section 58 of the Terrorism Act 2000.

However, on 17 June 2008 the Court of Appeal quashed her conviction after the Crown conceded that it was unsafe. In his judgement, Lord Phillips explained:

There had been a case to answer, based on the seven documents identified by the prosecution; however, the problem was that the case had been left to the jury on the basis that the other documents were also capable of forming the basis of the conviction. In relation to the issue of »practical assistance« to a person committing or preparing an act of terrorism, the jury had not received a direction as to the issue of practical utility. There was not a great deal of difference in directing the jury that the document or record had to be likely to be useful, and directing them that it was likely to be of practical utility. In the right context, that direction might be unexceptionable. However, the primary problem in the instant case was that the jury had considered not merely documents which were capable of practical utility but also a large number which were not. There was scope in the instant case for the jury to have become confused. In all the circumstances, the conviction was unsafe. (*R v Malik*)

The »other documents«, which were presented to the jury as »capable of forming a conviction«, included Malik's poetry and other personal records.

Sue Hemming, Head of the Crown Prosecution Service's Counter Terrorism Division, responded by explaining that Malik had not been prosecuted for her poetry, but for possessing documents that could provide practical assistance to terrorists. In addition, while working at Heathrow Airport, she had supplied information about airport security procedures to Sohail Qureshi, who later pleaded guilty to a terrorism offence and, subsequently, was jailed for four and a half years for »planning to travel to Afghanistan on a mission of 'revenge' against British troops« (*The Telegraph* 17 June 08). Hemming also added that since Malik's conviction, the meaning of Section 58 of the Terrorism Act 2000 had been clarified in a Court of Appeal decision.⁶

This case raises several interrelated questions: Firstly, it remains unclear whether Malik is a danger to national security. The Court of Appeal has clarified the law, but the prosecution and the Police Counter Terrorism Command remain adamant that it was right to prosecute Malik on terrorism charges. Why were Malik's terrorist connections not emphasised when she was prosecuted at the Old Bailey in 2006? Why does Hemming not explain the nature of Malik's involvement and the type of security information she passed on to the 29-year-old Qureshi who had been

6 According to the Crown Prosecution Service (CPS), in *R v K* in February 2008, the Court of Appeal »ruled that an offence would be committed only if the document or record concerned was of a kind that was likely to provide practical assistance to a person committing or preparing an act of terrorism. A document that simply encouraged the commission of acts of terrorism was not sufficient«. See CPS response to Samina Malik appeal.

prosecuted for planning to travel to Afghanistan to fight the British troops? Is the CPS dropping Malik's case because there is no »public interest« in pursuing a conviction? I am using the term »public interest« in two senses here: 1) in the sense of public safety and, 2) in a broader sense of attracting the attention of the general public and the media. Secondly, there is more than a hint, in particular in the media, that Malik's poetry was sufficient grounds for her conviction. Notwithstanding Hemming's clarifications that Malik was not prosecuted for her poetry, her posting of poems on extremist websites was used by the prosecution to prove that she was »deeply involved with terrorist related groups« (*The BBC News* 8 November 2007). Thirdly, why was Malik »an enigma« to the judge? Had the court not been told that Malik was »20 years old when she 'first started to consider Islam' and was 'like most teenagers, somewhat rebellious'«? (*The Guardian* 6 November 2006) Finally, what does this case say about the relationship between law, justice and politics in today's Britain and in the wake of 9/11 and the 7 July bombings in London? Should we understand Malik's actions in terms of how the British society views its Muslim communities, or should we attribute them to the influence of anti-Western terrorist networks external to Britain?

3 The Law

3.1 The Anti-Terrorism Legislation

The first Prevention of Terrorism (Temporary Provisions) Act (PTA 1974) was introduced in 1974 as a response to Irish terrorism soon after the Birmingham pub bombings in which 21 people died and over 180 were injured.⁷ This legislation, which was originally intended as a strictly »temporary provision«, was extended in 1984 to meet the rising incidents of international terrorism which took place in the UK.

Parliament enacted the Terrorism Act 2000 (TA 2000) following a review of terrorism legislation by Lord Lloyd. The British government agreed with Lord Lloyd that »there will be a continuing need for counter-terrorism legislation for the foreseeable future«, and that there were sound reasons for replacing the temporary provisions of the PTA 1974 with a permanent legislation (Bailey 2001, p. 567). The TA 2000 introduced, for the first time, the main body of the anti-terrorism legisla-

7 See Legislation Against Terrorism: A consultation paper, December 1998. Police arrested and charged six Irish Catholic men with 21 counts of murder for the Birmingham pub bombings. However, it transpired that police had beaten out the confessions which led to their conviction. They subsequently spent 16 years in jail before the Court of Appeal freed them in 1991.

tion in one code. It was further expanded a year later when, in a response to the 9/11 attacks, the government rushed through emergency legislation to increase powers to deal with individuals suspected of planning or assisting terrorist attacks in the UK. The 9/11 attacks became a watershed for how the UK dealt with the issue of terrorism and shaped its counter-terrorism response (Fenwick 2007, p. 1329). The UK's new approach to terrorism is reflected in the controversial provisions of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (TCSA 2001), according to which:

Firstly, the Act allows for indefinite detention without trial of certain suspected international terrorists. Secondly, it excludes the courts' customary powers of judicial review. Thirdly, in order to be compatible with the UK's international obligations under the European Convention of Human Rights (ECHR), the Government derogated from Article 5 which provides for an individual's right to liberty and security. (*Detention of Suspected International Terrorists: Part 4 of The Anti-Terrorism, Crime and Security Act 2001*)

The TCSA 2001 marked the UK's shift from a traditional, reactive counter-terrorism policy to »intelligence-based proactive methods [with] the primary aim of preventing terrorist attacks« (Whitty – Murphy – Livingstone 2001, p. 143). The new provisions enabled the authorities to »target and control the activities of suspected terrorists« and more effectively manage the risk of terrorism and protect public safety by intervening earlier (Fenwick 2007, p. 1332). However, in *A and Others v Secretary of State for the Home Dept.*, the House of Lords declared the key provisions of Part 4, which allowed detention without trial, as incompatible with Articles 5 and 14 of the European Convention of Human Rights (ECHR).⁸ To remedy this incompatibility, the government introduced the Prevention of Terrorism Act 2005 (PTA 2005), in which Parliament repealed the key provisions of Part 4 and, instead, gave the Home Secretary powers to impose the so-called »control orders«, restricting the freedom of terrorist suspects. The orders issued in 2005 often amounted to house arrests and »several were subsequently struck down by the courts as incompatible with Article 5 of the ECHR« (Walker 2007b, p. 183). The Terrorism Act 2006 (TA 2006) did not introduce further proactive measures, but gave the police the powers to detain terrorist suspects up to 28 days without charge.

3.2 Symbolic Effects of the Anti-Terrorism Legislation

Fenwick (2007, p. 1333) points out that »one of the most striking aspects of these provisions is their under-use«. Although they apply to a wide variety of groups and

8 *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 ALL ER 169.

individuals, from »freedom fighters« to terrorists and to ordinary people who might unknowingly come into contact with terrorists, the executive applies these measures with discrimination. This is partly due to difficulties that security services face in relation to producing evidence that can endanger, for example, their informants. However, Fenwick means that there are other reasons for the »under-use« of these counter-terrorism sanctions:

The counter-terrorism provisions... appear to be intended to have an effect that, to an extent, is more symbolic than actual. They are viewed by the government as playing an important role in signalling this society's rejection of the message of certain groups – to isolate and marginalise them, to deny them some legitimacy on the basis that they have refused to use democratic methods, restoring instead to an anti-democratic course of creating terror by using violence targeted at civilians. (Fenwick 2007, p. 1333)

Fenwick's insight can be supported by numerous cases where British Muslims have been arrested and charged for terrorist offences with maximum publicity and under the media's watchful eye, but eventually found innocent. However, their acquittal as a rule fails to attract much media attention.⁹ Fenwick's hypothesis also throws light on some of the unusual circumstances of the Malik case and provides tentative answers to some of the questions we raised earlier in the previous section. It explains, for example, why the Crown Prosecution Service (CPS) was not willing to pursue the case further; the CPS had succeeded in what it set out to do, namely to make an example of Malik. It also explains why there was so much emphasis on Malik's poetry by the prosecutor and the press; they represented the type of ideas and thoughts that »this society« does not tolerate. In this sense Malik, arguably, was prosecuted for thought crime. I should hasten to add that there is no conspiracy between the government, the courts, the law enforcing agencies and the press to depict the Muslim communities in a negative light in order to stigmatise them as terrorists. As we shall see in the next section, there is no need for such conspiracy; a large section of the public opinion already regards Muslims as a continuing threat to security and implicated in terrorism.

Zedner related this sense of continuing threat to the conflation of three meanings of the word »security«, as a »condition of being without threat«, a »neutralisation of

9 The so-called »Ricin case« is a case in point. Police raided a flat in North London with maximum publicity, arrested several people and, on 6 January 2003, Scotland Yard issued a press release that ricin had been found. The Daily Mail carried the headline: **POISON GANG ON LOOSE: huge hunt for terrorists armed with deadly Ricin**. Three years later, on 8 April 2005, the jury found those accused of the ricin plot innocent. Their acquittal, however, failed to make the headlines. In the meantime, Moulmoud Sihali, one of those arrested on suspicion of being involved in planning a ricin attack, spent two years and seven months in a high security prison. See Atkins 2007, pp. 120-30.

threats« and a »form of avoidance of non-exposure to danger« (Zedner 2003, p. 155). The conflation of these three senses of security leads to a:

...curious inversion of the usual logic of crime control. Instead of crime requiring crime control, we might say that crime control requires that there will be crime. The presumption of a continuing threat is an important factor in keeping crime high on a political agenda that has invested so much capital in its control. (Zedner 2003, p. 155.)

Muslims in general, and individuals such as Malik, are used in public political discourse to sustain and enhance this »presumption of continuing threat«. How the symbolic effects of the anti-terrorism legislation translate into normative ordering of social relations can be seen, for example, in the discretionary enforcement of Stop and Search Powers under the TA 2000.

3.3 Stop and Search Powers

The power to stop and search terror suspects under Section 44 of the TA 2000 provides a senior police officer with the power to authorise blanket stop and search powers in a designated area if he or she considers it expedient for the prevention of acts of terrorism.¹⁰ The »law enforcement authorities enjoy extremely wide discretion in deciding how – and in particular against whom – to use these far reaching powers« (Moeckli 2007, p. 660). Stop and Search can also be authorised under the *Police and Criminal Evidence Act* 1984 (PACE). However, it is also an important part of the TA 2000; important in the sense that it demonstrates how the discretionary powers, which allow officers to stop and search persons or vehicles »on reasonable grounds«¹¹ affect the individuals and communities which happen to find themselves at the receiving end of such policies. The official statistics collected by the police and the Home Office show that the uses of these powers have been disproportionately targeted on young black and British Asians, who »are six times more likely to be stopped by the police than white people« (*The Guardian* 31 January 2008). The Home Office revealed in 2004 that the number of Asians being stopped and searched under the 2000 Terrorism Act had gone up by more than 300 per cent: from 744 to almost 3,000 (Dodd 2008). In practice, Stop and Search powers have come to rely on racial profiling to target primarily blacks and other ethnic minorities of

10 The power conferred under the TA 2000 allows an officer to search for articles of a kind which could be used in connection with terrorism, whether or not there are grounds for suspecting the presence of such articles (sections 45(1) and (2)). See *Home Office, Circular HPAN-628GM4*.

11 Moeckli (2007, p. 669) argues that a stop and search under TA 2000 does not meet the proportionality requirement of the Article 14 of the ECHR. Also see Bowling and Phillips 2007, pp. 936-7.

colour in deprived areas of large cities (for a discussion see Banakar 2008a). As Bowling and Phillips point out, »the concept of »reasonable suspicion« is frequently absent in many instances of the use of police stop/search powers«, and instead are often based »on generalisations and stereotypes, particularly where levels of discretion are highest« (Bowling – Phillips 2007, pp. 936-7).

3.4 The Culture of Control

Not only the application of stop and search powers, but also the enforcement of counter-terrorism legislation in general, as in Malik's conviction at the Old Bailey, should be studied against the background of the recent development of crime control strategies and the debate on the rise of punitiveness in contemporary Britain and other Western nations. In the face of rising criminality and the failures of criminal policies of the 1960s and 1970s, which were based on rehabilitation and reform, penal-welfarism has been, according to Garland, replaced with a new form of repressive and managerial crime control strategy:

The penal-welfare approach proceeded as if the interest of society and the interest of the offender could be made to coincide. Rehabilitating offenders, reforming prisons, dealing with the roots of crime – these were in the interest of everyone... today the interests of convicted offenders in so far as they are considered at all, are viewed as fundamentally opposed to those of the public. If the choice is between subjecting offenders to greater restrictions or else exposing the public to increased risk, today's common sense recommends the safe choice every time. In consequence, and without much discussion, the interests of the offender, and even his or her rights, are routinely disregarded. (Garland 2001, p. 180)

The basic assumption of this new strategy is that significantly high levels of criminality should be regarded as permanent features of social life (similarly, the introduction of the TA 2000 was justified by arguing that »there will be a continuing need for counter-terrorism legislation«). The question is no longer how the levels of criminality can be brought down, for all such attempts have failed, but how to manage the risks that criminality poses to the public (similarly, we are told that we must live with the continuing threat of terrorism). The general approach to criminality, whether it is the traditional forms of crime against person and property, or the more recent forms of terrorism, is to minimize its risk of happening. Judging from the evidence, this can also mean detaining those who, for whatever reason, have come under suspicion without charge. Admittedly, the detention of all those who fit the terrorist profile and/or draw suspicion of authorities might reduce the short-term risk of terrorism. It also sustains and enhances what Zedner meant by the »presumption of continuing threat« (Zedner 2003, p. 155). The problem with such a policy is that it concentrates on the symptoms rather than the causes of the problem, and it is nonchalant towards the rights of those who happen to fit the autho-

rities' profile of a terrorist. In addition, as the incidents that led to Jean Charles de Menezes, a Brazilian immigrant living in South London, being gunned down mistakenly by the anti-terrorist police officers showed,¹² the Police's profiling method is essentially based on ethnic categories (De Schutter – Ringelheim 2008). Counter-terrorism policies, which fail to ensure that the state's response to terrorism is »limited, well-defined and controlled«, will pose »greater threat to the political and civil traditions that are central to the liberal democratic way of life« (Chalk 1988, p. 373).

The text quoted above from Garland's *Culture of Control*, would give us a description of the UK's anti-terrorism policy, if we replaced the word »offender« with »terrorist suspect«. There is, however, a significant difference between »offender« and a »terrorist suspect«: the latter has neither been charged, nor tried, nor convicted of any crime. Yet, his/her rights are disregarded in the same way – a fact that has caused several clashes between the judiciary and the UK government. The fact that the most draconian anti-terrorism measures, such as Control Orders¹³ and Stop and Search powers, are imposed on ethnic minorities, and Muslims in particular, racialises the legislation as a whole.

The judicial system is often criticised for being oblivious to the racial aspects of law's internal operations (see, for example, Tuit 2004 and Shute et. al. 2005). This said, and in respect to issues rising out of the government's anti-terrorism policy and legislation, the judiciary generally regards itself bound by the principles of human rights and the doctrine of the rule of law. The government, on the other hand, publicly portrays the judiciary's emphasis on the rights of the suspects as an obstacle in the way of ensuring the safety of the public.

3.5 The Human Rights Act

Over the last few years, the Human Rights Act 1998 (HRA), which has enabled UK courts to adjudicate directly on the basis of the ECHR, has been a source of increased tension between Parliament and the judiciary. It has, at the same time,

- 12 This event took place two weeks after the London bombings of 7 July 2005. Police shot Jean Charles de Menezes seven times in the head at the Stockwell Tube station after officers identified him by mistake as a terrorist. De Menezes just happened to live in an area under police surveillance and, being of dark complexion, fit police's terrorist »profile«, i.e. he looked Middle Eastern.
- 13 The Secretary of State needs only reasonable grounds to impose a Control Order, such as house arrest, on anyone who is suspected of, or has been involved in, terrorism-related activity. Control Orders were created by PTA 2005 as a response to the House of Lords ruling against the detention powers in Part IV of the TCSA 2001. See Explanatory Memorandum to the Prevention of Terrorism Act 2005 (Continuance in Force of Section 1 to 9) Order 2008 No. 559.

given rise to a growing public perception that the HRA 1998 »protects only the undeserving, such as criminals and terrorists, at the expense of the law abiding citizens« (*Joint Committee On Human Rights, Thirty-Second Report*). Subsequently, because of the HRA, which is also said to prevent the democratically elected government of the UK »from responding effectively to serious challenges that threaten the country«, there has been recommendations that the government withdraws the UK from the ECHR (*ibid.*). Public misgivings about the effects of the HRA, in turn, threaten the independence of the judiciary who are blamed for the failure to effectively deal with problems related to organised crime and the threat of terrorism.

In 2006, a cross-party group of senior MPs and peers criticised Tony Blair and his senior ministers for using the HRA to conceal their own administrative failings (see *Joint Committee on Human Rights Act: the DCA and Home Office Review, Thirty-second Report of Session 2005–06*). According to this joint human rights committee, »every senior minister« fuelled widespread public misunderstandings and myths about the HRA, which will persist as long as they fail to retract their »unfortunate comments« and continue to use it to cover up administrative failings in their departments (*The Guardian* 14 November 2006). The committee looked into three high profile cases during 2006, which had triggered calls for the HRA to be repealed or amended and found that:

In each case, senior ministers, from the Prime Minister down, made assertions that the Human Rights Act, or judges or officials interpreting it, were responsible for certain unpopular events when in each case those assertions were unfounded. Moreover, when those assertions were demonstrated, there was no acknowledgement of the error, or withdrawal of the comment or any other attempt to inform the public of the mistake. (*Joint Committee on Human Rights Act: the DCA and Home Office Review*)

The government, indeed, does make a point of clashing with the judiciary at every opportunity in order to demonstrate that it is constantly struggling to protect the public against the risk of crime and terrorism. To give two recent examples, the government rushed through Parliament a new law allowing anonymous witnesses in criminal cases following a House of Lords ruling against anonymous evidence, which led to a murder trial collapsing. According to Jack Straw, the Justice Secretary, the government had to act quickly to fill in the gap that was created by their Lordships' judgements: »anonymous evidence is ... fundamental to the successful prosecution of a significant number of cases, some of which involve murder, blackmail, violent disorder and terrorism« (*Metro* 27 June 2008). The second recent development concerns the government's proposal to extend the period of pre-charge detention of terrorist suspects from 28 to 42 days, despite the lack of any evidence supporting that 1) the law enforcement agencies require such an extension and 2) that such an extension will allow a more effective approach to combat the threat of terrorism. In

addition, as the *Joint Committee on Human Rights Counter-Terrorism Policy and Human Rights* pointed out:

[The] proposals are in breach of the right of a detained person to be informed »promptly« of any charge against him; are an unnecessary and disproportionate means of achieving the aim of protecting the public; and fail to provide sufficient guarantees against arbitrariness. As such, they are incompatible with Articles 5(1), 5(2), 5(3) and 5(4) ECHR (paragraphs 10-21). (*Joint Committee on Human Rights Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill, Ninth Report of Session 2007–08*)

The new Counter-Terrorism Bill that allows terrorist suspects to be held up to 42 days, scraped through the House of Commons by the small majority of nine votes. This again paves the way for a renewed clash with the judiciary, in which the government will be portraying itself as the defender of public safety. In contrast, the judiciary will be depicted as disconnected from reality and unconcerned with the safety of ordinary law-abiding citizens.

4 Islamophobia

»The post-9/11 climate«, McGhee writes, »is both a culture of fear and a culture of indignation in which established and asylum seeker migrant communities are viewed with suspicion« (McGhee 2005, p. 100). In this climate, complex historical and global conflicts are described in simplistic terms which fit into the ideological scheme of »the clash of civilisations« (Huntington 1997): the terrorists belonging to the Islamic culture are on the one side and law abiding citizens of Western democracies on the other. It is, thus, hardly surprising if we read in a report by the Muslim Council of Britain that »Muslims in the United Kingdom feel particularly vulnerable, insecure, alienated, intimidated, marginalised, discriminated against and vilified since the 11 September tragedy« (*The House of Lords - Select Committee on Religious Offences* 2003: parag 1.4). Since 9/11, »...attacks on Muslims, Sikhs and other Arab and Asian communities in the UK have increased four-fold in some areas« (McGhee 2005, p. 102). Shahid Malik, Britain's first Muslim minister, means that there is a growing culture of hostility against Muslims in the United Kingdom which allows them to be targeted in the media and political discourse in a way that would be unacceptable for any other minority. As a result, »many British Muslims now feel like aliens in their own country« (*The Independent* 4 July 2008). A poll accompanying a documentary in a Channel 4 Dispatches programme, made to coincide with the third anniversary of the London bombings of 7 July, highlights:

...the growing polarisation of opinion among Britain's 1.6 million Muslims, who say they have suffered a marked increase in hostility since the London bombings. The ICM survey found that

51 per cent of Britons blame Islam to some degree for the 2005 attacks, while more than a quarter of Muslims now believe Islamic values are not compatible with British values. While 90 per cent of Muslims said they felt attached to Britain, eight out of 10 said they felt there was more religious prejudice against their faith since the July bombings. (*The Independent* 4 July 2008)

The word »Islamophobia« has been coined to capture the new social reality that confronts the Muslim communities in Britain and elsewhere in the West. It consists of eight attributes:

1. Islam is seen as a monolithic block; static and unresponsive to change.
2. Islam is seen as separate and »other«. It does not have values in common with other cultures, is not affected by them, and does not influence them.
3. Islam is seen as inferior to the West. It is seen as barbaric, irrational, primitive and sexist.
4. Islam is seen as violent, aggressive, threatening, supportive of terrorism, and engaged in a clash of civilisations.
5. Islam is seen as a political ideology, used for political or military advantage.
6. Criticisms made of »the West« by Islam are rejected out of hand.
7. Hostility towards Islam is used to justify discriminatory practices towards Muslims and the exclusion of Muslims from mainstream society.
8. Anti-Muslim hostility is seen as natural and normal.¹⁴

The post-9/11 approach adopted by Britain to meet the threat of terrorism strengthened existing ethno-cultural prejudice and legitimised racist violence against Britain's ethno-cultural groups. For many immigrants who are seen as Muslims (including Sikhs wearing turbans), Islamophobia is translated into daily violence, including murder, assaults, arson attacks and racist emails. Islamophobic violence is, admittedly, not new in Britain, but it has been on the rise since 9/11 and shows a significant increase after specific events, such as the 7 July bombing in London.¹⁵ To quote Shahid Malik again:

Somehow, there's a message out there that it's OK to target people as long as it's Muslims. And you don't have to worry about the facts, and people will turn a blind eye. (*The Independent* 4 July 2008)

14 Quoted from Muslims in the European Union: Discrimination and Islamophobia. European Monitoring Centre on Racism and Xenophobia (EUMC) 2006, at p. 61.

15 A few weeks after the London bombings of 7/7, *The Times* reported that religious hate crimes had »soared by 600 per cent in London as people attacked mosques and insulted Muslims«. See Timesonline 3 August 2005. All large police forces in Britain reported significant increases in racial violence.

The social, and by implication also the legal, status of diverse groups of people, who in the eye of the majority culture in Britain are seen, classified and treated as Muslims, adds a social psychological dimension to the »war on terror«. British society is organised in part using hierarchical racial categories (and the term »Muslim«, as mentioned before, is used in everyday discourse as a racial marker). These racial categories are, in turn, an essential part of the unarticulated, self-evident, commonplace assumptions and values that ultimately determine our conception of the social world and shape the relations of power.¹⁶ In other words, we are dealing with those basic socio-cultural assumptions regarding the nature of social relations that are taken for granted and treated as patently true. As Bourdieu explains, »the subjective and self-evidence of the commonplace world are validated by the objective consensus on the sense of the world, what is essential *goes without saying because it comes without saying*« (Bourdieu 1977, p. 167). This method of objectification of the assumptions renders the exercise of power through the force of law legitimate (Bourdieu 1987, p. 814). In the same way, the culturally embedded assumptions regarding Muslims as a racial category, justify Islamophobic sentiments and give legitimacy to the harsh treatment of terrorist suspects.

To clarify this point, we could compare the Malik case with the case of Martyn Gilleard, a 31-year-old Nazi, whose flat was raided by the police in search of child pornography. Besides some 39,000 indecent images of children, the officers found four homemade nail bombs, »along with machetes, swords, bullets, gunpowder, balaclavas and racist literature« (*Metro* 25 June 2008). The bombs were intended to be used to attack Jewish and Asian targets. The Gilleard case is of interest for several reasons. Firstly, this case failed to attract the media's attention or cause public debate. *The Times* did not even carry a report of this case in its hard copy on 25 June, which was the day after Gilleard was convicted.¹⁷ Secondly, and more significantly, Gilleard was not under police surveillance for his terrorist activities, but was caught accidentally when the police searched his flat for reasons not related to terrorism. Gilleard, a paid-up member of extreme right organisations such as the National Front and the White Nationalist Party, who had openly and publicly expressed violent racist views and his »desire to act on them« (*Metro* *ibid.*) did not draw the authorities' suspicion upon himself and was not considered a threat to national security or the public safety. Cases such as Gilleard's give support to the thesis that the UK's anti-terrorism policy and legislation operate in a racially selective fashion. They also suggest that the notion of »security« is not concerned with the security of all ethno-cultural groups.

16 Bourdieu (1977) introduces the concept of »doxa« to explain this.

17 The Times Online did, however, carry a four-line notice a few days earlier announcing the trial of Gilleard. See Timesonline 17 June 2008.

5 Liberal Law

The social psychological aspect of the Malik case – that she was disadvantaged in her defence for reasons of ethnicity and religion – is enhanced by the way modern liberal law reconstructs the relationship between the individual and society. Liberal law's conception of justice involves, according to Alan Norrie, a process of forced abstraction which differentiates justice into parts that are in practice inseparable from each other (Norrie 2005). Liberal law guides action by reference to abstract ahistorical criteria, while the institution of law remains tied up to socio-historically defined social relations. Law has to ignore and deny the relevance of its socio-historical ties if it is to appear as an internally coherent system of rules, doctrines and decisions. By overlooking the significance of the broader social and historical context out of which emerge not only legal practice but also institutions of law, law obscures and mystifies the relationship between legal practice and the societal context of law (Norrie 2005, pp. 28-31). To unpack this, Norrie refers to the idea of »legal subject as a responsible agent«, which is represented by such doctrines as *mens rea* and *actus reus*. He argues that liberal theory, which underpins the subjective principles of criminal law, »affirming the need for intention, foresight, knowledge and belief concerning actions and their consequences«, is highly individualistic and atomistic (Norrie 2005, p. 53).

Malik's actions were abstracted from the socio-historical context of her life as a British-born Muslim. Her poetry was treated as a proof of her commitment to a form of Islamic extremism, but not as a fruit of her alienation in a society where she lived; a society that treated her as a terrorist by association. Liberal law abstracts Malik, the agency, from the context of the social conflict that generated her actions and excludes »that context from the judicial gaze« (Norrie 2005, p. 30). Instead, it provides a partial and mystified image of the individual and society that allows it to justify an individualised relationship between legal and moral judgement. Hence, Malik became, as the judge admitted, an »enigma« to the court because the social and historical relations, which had created her as a social agent, were excluded from the judicial gaze. The fact that liberal law is not the arena to counterbalance the effects of Islamophobia gives free reign to the managerial approach which has come to permeate the UK's counter-terrorism policy. While liberal law operates by abstracting actions from their socio-historical contexts, managerialism focuses on coping with risk in a cost-effective way. This, in turn, often requires disregarding the rights of the accused terrorists and omitting the causes of problems from the calculation.

6 Conclusions: The War on Law

The »war on law« started long before the atrocities of 9/11, writes Phillippe Sands, but 9/11 »added spur with the argument that international rules were somehow not up to the new challenge which the world now faced« (Sands 2005, p. xii). The events of 9/11 constituted a decisive turning point not only in international politics, but also in international and national law. To borrow a phrase from John Strawson, 9/11 »turned law to Ground Zero«, revealing »international law as feeble, constitutional law as insecure«, while transforming human rights law into something negotiable (Strawson 2004, p. xi). The case of Samina Malik, the execution of Jean Charles de Menezes in the underground, and the daily experiences of those such as Zuby, the hip hop musician who was arrested and humiliated because someone had reported a black man acting suspiciously, exemplify what it means for national law to turn to Ground Zero. They show how the rule of law may be set aside in dealing with terrorist suspects, how the burden of proof is reversed, and how the presumption of innocence gives way to the presumption of guilt. This is one aspect of the new reality of law. The other aspect is the emergence of the »culture of control«, which at the expense of disregarding the rights of offenders or those suspected of terrorism, manages the risk of terrorism in what appears to be a cost-effective manner (Garland 2001). National and international terrorism, thus, are viewed as forms of individual or organised criminality existing independently of social, historical, political, cultural and economic developments or the interests of the UK and the US governments.

To sum up, the UK's anti-terrorism legislation operates in a highly selective manner, targeting members of the minority groups whose religion, ethnicity and culture exclude them from mainstream culture and politics. The new paradigm of managerialism, which informs the UK's late modern penal policy, to a great extent also shapes its anti-terrorism legislation. This new form of »penalty« disregards the rights of the offenders (and subsequently also the rights of terrorist suspects) and focuses instead on minimising the risks of crime at the expense of engaging with the causes of criminality. The judiciary, not known for its radical political views in times of emergency, clashes repeatedly with the government on human rights issues, yet fails to counterbalance the negative side effects of the rise of punitiveness in contemporary Britain. This failure also has to do with the way modern liberal law operates by abstracting the individual from his/her socio-historical context before considering his/her actions and intentions. This new managerial criminal policy, together with the *modus operandi* of liberal law, perpetuates the Islamophobic sentiments shaping the UK's anti-terrorism policy and legislation. As a result, the UK's anti-terrorism legislation contains not only some of the most draconian provisions enacted over the last few decades, but also operates in a highly racialised fashion. It al-

lows and legitimises overt over-policing of Muslim communities while legalising efforts to target and victimise Muslims.

These managerially inspired counter-terrorism measures are not part of the solution but part of the problem. They cannot ensure long-term national security or citizens' safety because they systematically aggravate the social conditions that give rise to terrorism. This will probably sound like a tune out of the »discredited« criminal policy of the 1960s, but we shall succeed neither in managing nor in resolving the threat of domestic terrorism as long as we have not acknowledged and addressed the link between marginalisation, racialisation and victimisation of British-born Muslims and their turn to Islamic extremism and anti-democratic methods. However, it is easier said than done.

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