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Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France

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"Fear is a highway for security laws."¹ With this metaphor, the German journalist Heribert Prantl analysed the mushrooming of security laws following the attacks of 11 September 2001.² He concluded that terrorists "contaminate" the law, that the fear they create leads to the adoption of "empoisoned" provisions which "sacrifice the rule of law".³ Is this assessment realistic? Is it true that when driven by the fear of terrorism the legislator ignores basic human rights? The thesis outlined here (and supported by others)⁴ is that it is indeed so, and that this is not a single phenomenon in one country, nor a fundamentally new tendency after September 11th. Quite the contrary, it is maintained that democratic legislators, when confronted with terrorism or other extraordinary criminal phenomena, are inclined to ignore basic human rights. The main objective of the present study is the demonstration of this thesis through the provision of factual proof.

In order to achieve this purpose, the impact of terrorist attacks on subsequent legislative action is analysed in depth; what effects do terrorist events have on subsequent legislation? In which direction is our law developing when facing terrorist threats? And, more importantly, what effects might this have on the general legal order, both constitutional and European, and, particularly, on the existing safeguards to human rights which are guaranteed within this order? These and related questions demand further investigation; the present study attempts to explore them. Consequently, on an

¹ "Angst ist eine Autobahn für Sicherheitsgesetze." Prantl (2002), at 17.

² In the following: September 11th.

³ Ibid at 19.

⁴ Kühne (2002); Kühne (1998); especially with respect to criminal procedure: Kühne (2006), at 231 et seq.. Barghothi (2005).

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abstract level, this thesis is concerned with the relationship of terrorism and the law (therein including both anti-terror legislation and human rights).

1. Terrorism and the law

Studies of terrorism have been conducted in all imaginable disciplines: not only by legal researchers, but also sociologists,⁵ historians,⁶ political scientists,⁷ psychologists,⁸ and even theologians⁹ and philosophers¹⁰ have explored the different aspects and facets of terrorism. The research in this field comprises of conceptual studies on the phenomenology of terrorism,¹¹ definitions, distinctions to other notions (e.g. political violence, freedom fighters), etiological studies on the root causes,¹² the historical and societal origins of terrorism,¹³ as well as research into the multiple consequences of terrorism, including the legal consequences and responses to it.¹⁴

The present study is predominantly located in the category of "legal responses to terrorism", as it contemplates and analyses legislative Acts which have been adopted for the purpose of fighting terrorism (as discussed in Parts II and III). Part I serves to the conceptualisation of terrorism, by exploring the historical development of the phenomenon and, based upon this, attempting to give a general definition. As a result of this, it is more apt to define this part as a conceptual and historical study.

Thus the research deals with mainly two subjects: on the one hand terrorism, and on the other law. The relationship between terrorism and the law is particularly interesting as it contemplates the interaction between the terrorist actor and its counter-part, the state, by analysing the tool each actor uses: the (non-state) terrorist offender uses terrorist means to achieve his goal (the weakening or destruction of the state), while the state uses, *inter alia*, the law to achieve its goal (i.e. the maintenance of power, which implies combating the terrorist offender).

⁵ E.g. Gibbs (1989); Beck (2002); Webb (2002).

⁶ See already Schmid (1984); Laqueur (2003); Chaliand and Blin (2004a); as well as the references of Part 1.

⁷ E.g. Oots (1986); see also the references at <http://library.csus.edu/guides/rogenmoserd/general/terrorism.html> (visited on 29 September 2008).

⁸ E.g. Post (2007); Bongar (2007); Jones (2008).

⁹ E.g. Stackhouse (8 October 1986); M. (September 2003).

¹⁰ E.g. Ignatieff (2004); Meggle (2005); Primoratz (2004).

¹¹ E.g. Morris (2007-11-14).

¹² E.g. Laqueur (2003).

¹³ E.g. Reich (1998).

¹⁴ See the comprehensive bibliography of the Peace Palace Library only covering the area of terrorism and international law: http://www.ppl.nl/index.php?option=com_wrapper&view=wrapper&Itemid=80 (visited on 08 June 2008).

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Against this background, it is necessary to start with some preliminary marks on the term "terrorism", and the specific laws examined.

1.1. The notion of "terrorism"

It is impossible to discuss anti-terrorism without defining terrorism clearly. However, a definition of terrorism is one of the most controversial subjects for discussion. How can we distinguish a terrorist from a revolutionary? Where does political violence end, and terrorism start? In a politically neutral manner, can we distinguish terrorism and organised crime, and if yes, how? Can state terrorism be included in the definition? Is it even possible to find a neutral, objective definition?

To attempt to define terrorism is generally considered a perilous undertaking, a "mission impossible".¹⁵ According to Nafziger, an operational definition remains the "Holy Grail of the terrorism debate".¹⁶ Why is this the case?

First of all, we must consider the utter diversity of objectives and characteristics associated with terrorism, such as religious or social movements, trans-national revolution, national self-determination, and even genocide.¹⁷ John Crank and Patricia Gregor studied terrorism as an "essentially contested concept",¹⁸ outlining that some concepts are "inherently incomplete, without being totally incoherent, and are filled out differently by individuals and groups who bring different backgrounds, beliefs and political convictions to bear on them."

When looking for a general, commonly accepted definition of the notion of terrorism, I was soon discouraged, considering the enormous amount of legal, political and social approaches already existing in academic writings on this question on the one hand, and its supposed global non-existence, on the other. It seemed that there were nearly as many different definitions of terrorism as there had been terrorist groups throughout history.

Despite the many attempts by the international community, terrorism has yet to be defined at this level.¹⁹ Academics, such as Schmid and Jongman²⁰ illustrate the

¹⁵ R. Ottenhof, *Le droit pénal français à l'épreuve du terrorisme*, Rev. Sc. Crim. 1987, at 607-19, cited by: Cartier (1995), at 228.

¹⁶ Nafziger (2005), at 64.

¹⁷ Ibid. at 62.

¹⁸ Crank and Gregor (2005), at 2 et seqq.

¹⁹ Bassiouni (2004), at 305. The first international efforts to delineate terrorist acts took place in the 1920's and 1930's. Already in 1926, Romania asked the League of Nations to consider drafting a 'convention to render terrorism universally punishable', but the request was not acted upon. Saul (2005), at 59.

The most significant early attempt to internationally define terrorism can be found in the League of Nations' draft of the "Geneva Convention for the Prevention and Punishment of Terrorism"¹⁹ from 1937, which in fact never entered into force. (India was the only country that signed this instrument.) Other subsequent and similarly unsuccessful international attempts include the 1954 ILC Draft Code, the 1972 US Draft Convention (in response to the attacks on Israeli athletes at the Munich Olympics), the 1991 and 1996 ILC Draft Code of Crimes, the 1998 Draft Rome Statute, the 1996 Draft Nuclear Terrorism Convention and the 2000 Draft Comprehensive Convention. (For more details, see *ibid.* at 57 et seq.)

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difficulty of finding a common and generalised approach to terrorism. The researchers analysed 109 different definitions of terrorism and isolated 22 different elements characterising terrorism. However not one of them appeared in all of the examined definitions. Statistically, the most common elements were: violence; force (83.5 per cent of the definitions contained this element); political (65 per cent); fear; and an emphasis on terror (however, in spite of the obvious etymological relation with the notion of terrorism, only 51 per cent of the definitions contained this element). Other important elements were threat (47 per cent); the victim-target differentiation (37.5 per cent); and a purposive, planned, systematic, organised action (32 per cent). Interestingly enough, only six per cent included a criminal aspect. Despite the obvious complexity of this issue, in 1992 Alex P. Schmid suggested in his report for the then United Nations Crime Branch a rather short and simplistic approach, namely to define acts of terrorism as "peacetime equivalents of war crimes".²¹ However, in his forthcoming *Handbook of Terrorism Research*, he develops a "revised academic consensus definition" consisting of no less than 12 elements.²²

The political and highly judgmental connotation attached to the notion of terrorism further complicates an objective approach in defining the phenomenon. There is an undeniable temptation – and likewise danger – to use the term for political ends. However, the popular cynical statement "One's terrorist is another one's freedom fighter" should not be wrongly employed to deny any possibility to objectively define terrorism. It is no more than a cliché, playing into the hands of terrorists who use this phrase to justify their actions in view of the "good" cause of freedom. Boaz Ganor makes an important point when he stresses that this statement implies, when distinguishing terrorist from liberation actions, there is the risk that one disregards the means and only focuses on the aim. It is not the specific aim that presents the enhanced criminal energy and that causes the increased damage to important legal interests, it is the terrorist method that jeopardises our society and that therefore may require reinforced legal consequences (also in the field of criminal law). One must not forget that the aim cannot justify the means; if a group or organisation chooses terrorism as their means, the aim of their combat cannot be used to justify their actions.²³

In 1996 the General Assembly of the United Nations decided to create an Ad Hoc Committee to further develop a comprehensive legal framework of conventions dealing with international terrorism (resolution 51/210 of 17 December). By the end of 2000, this Committee has started to work on a draft comprehensive convention on international terrorism which would include a definition of terrorism if adopted. For more on this see <http://www.un.org/law/terrorism/> (last visited on 18 September 2008).

²⁰ Schmid and Jongman (1988), at 5 et seq.

²¹ Schmid (1993), at 11. This definition triggered an academic discussion, cf. Scharf (2001) and (2004). Moreover, the Indian Supreme Court referred to this definition in its judgment of 2 April 2004 *Madan Singh vs State of Bihar* (Criminal Appeal no. 1285 of 2003), online retrievable at <http://indiankanoon.org/doc/1537019/> (last visited on 26 February 2009).

²² Schmid (2009).

²³ Ganor (2001), at 3 et seqq.

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In spite of these difficulties in defining terrorism, it is clear that a definition of terrorism remains a necessary precondition for the discussion of anti-terrorist legislation. Therefore, a number of historical examples of terrorism will be presented in Part I, and, in the conclusion to this Part, terrorism will be defined. Alas, it will be impossible to define terrorism in a general manner, so the definition provided at the end of Part I will only serve as a starting point for the discussion of anti-terror legislation in Parts II and III.

1.2. Scope and limitations of the examined law: anti-terror legislation and human rights

The term "Law" is certainly tremendously broad. The same is true for *anti-terror legislation*, which especially after the events of September 11th tends to cover more and more remote legal branches. Therefore, the present study will primarily focus on the legal category into which the great bulk of anti-terror laws traditionally²⁴ fall, namely in the broadest sense criminal law.²⁵ Laws from other legal fields will be taken briefly into account but only where this is deemed necessary for the general understanding of the direction that anti-terror legislation takes.

Thus, whilst it is primarily the criminal law against terrorism to be examined in this research, in the context of counter-terror legislation there still remains one particular branch of law that deserves special attention: that of *human rights*. Human rights present a set of human values and legal principles that are generally considered to be "fundamental".²⁶ Several national and international legal instruments are aimed at their protection.²⁷ According to the Preamble of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, the "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*". Similarly, the Declaration of the Rights of Man and of the Citizen describes the "rights of man" as the

²⁴ Although in recent anti-terror laws increasingly other legal branches are concerned as well, as we will see in the course of this study.

²⁵ This will include also the law governing the criminal procedure, as well as, if applicable, penitentiary law.

²⁶ Loof (2005), at 1.

²⁷ Human rights have emerged as early as in 1215 (*Magna Carta Libertatum*), when the barons forced onto the English King John the guarantee of certain rights, in an attempt to limit his powers by law. Subsequent human rights instruments include the Petition of Rights of 1628, the Bill of Rights of 1689, and, following the French Revolution, the *Déclaration des Droits de l'Homme et du Citoyen* of 1789. Among the international human rights instruments, the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights (ICCPR) should be mentioned, as well as regional instruments like the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. For a concise overview on the development of European Rights in Europe, see Kühne (2004), at 6 et seqq.

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"*natural, unalienable, and sacred rights of man*". The Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR" or "the Convention") speaks of "*those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend*". The existence of various human rights instruments and also supervisory bodies means that the scope of the guaranteed rights differs significantly from one human rights system to another. These differences may result from the instrument containing the rights itself, but they may also be related to different institutional settings or may even be the outcome of different adjudicative methods.²⁸ In view of these differences, the present study will not only consider the protection of human rights under the ECHR, but also the situation at a domestic level, i.e. the protection of fundamental or human rights by the respective national legal system of the four countries to be examined: the United Kingdom, Spain, Germany and France.²⁹

1.2.1. The ECHR

The ECHR provides a comprehensive set of fundamental rights (Arts. 1 to 18, plus additional protocols No. 1, 4, 6, 7, 12, and 13). Every one of these rights can be subject to certain restrictions. Restrictions can take place both at the level of the degree of protection (by restrictively interpreting the scope of the concerned right) and at the level of limitations following on from the consideration of countervailing public and individual interests. It follows that even the so-called 'absolute rights' (the most famous of which being Art. 3 – the prohibition of torture or inhuman or degrading treatment) only grant a relative degree of protection, which even so may be limited when interpreted in a restrictive manner.³⁰ At the second level, restrictions follow from general limitation clauses (such as Art. 15 ECHR),³¹ 'common' limitation clauses in Articles 8 to 11 of the ECHR (also known as 'qualified rights'), and, in certain Articles,

²⁸ Sottiaux (2008), at 10.

²⁹ This means that, in the case of the United Kingdom, mainly, but not exclusively, the human rights guaranteed under the Human Rights Act 1998 will be considered, for Spain, Germany and France the fundamental rights guaranteed under the respective national constitutional texts. The human rights of the ECHR were preferred over other international human rights concepts, such as the Universal Declaration of Human Rights, for instance, because breaches of the rights guaranteed under the ECHR can be challenged before the European Court of Human Rights in Strasbourg (in the following: the ECtHR or the Strasbourg Court). The human rights guaranteed under national constitutional law were additionally taken into account as violations of them can be challenged – to different extents – before the respective national courts. For further details, see also below at 3.2.4.

³⁰ E.g. Addo and Grief (1998).

³¹ Art. 15 of the ECHR confers the states the possibility to derogate from certain rights in times of "war or other public emergency threatening the life of the nation". Of the examined countries, only the United Kingdom found it necessary to make use of this provision, concerning the situation in Northern Ireland.

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'specific limitation clauses' (also called 'limited rights').³² Besides these explicit restrictions, in certain areas the Convention organs have developed 'implied' or 'inherent' restrictions.³³ For the purpose of the present study, it is important to be aware of these limitations. So long as a state authority limits a human right within the scope of what is permitted under the ECHR as interpreted by the European Court of Human Rights ("the ECtHR" or "the Strasbourg Court"), evidently it does not violate the right, but instead applies the law in a way that is reconcilable with the ECHR. It is *only* if a state exceeds its powers to limit the concerned right, and thus surpasses the limits set out by the ECHR and the case-law of the ECtHR, that it commits a violation or a breach of the concerned right. These are the cases of most interest for the evaluation of the compatibility of anti-terror legislation and human rights. If the ECtHR stipulates that the responding state limited or qualified a certain human right in a manner which was just, it is presumed here that the state acted in accordance with the applicable human rights standards.³⁴

When it comes to counter-terror legislation, of the rights guaranteed under the ECHR, not all are of the same relevance. In this respect, those rights which we predominantly affect and on which the present study will thus focus, can be categorised in three groups:

- (1) Art. 5 (the right to liberty and security of the person) and Art. 6 (the right to fair trial) can be said to be the most important rights concerned with counter-terrorism legislation. These rights are often limited in the course of the criminal procedure, and therefore naturally often touched in the field of national counter-terrorism legislation. The Strasbourg Court seems to attribute a high importance to these rights, and in particular to the fair trial principle enshrined in Art. 6(1), which seems to have crystallised to become the general test whilst simultaneously the limitation for the degree of any potential encroachment.³⁵

³² E.g. Art. 2 provides an exception for necessary police force, and Art. 5(1) lists the certain specific purposes for which the right to liberty may be limited.

³³ See Sottiaux (2008), at 47, with further references.

³⁴ This could be subject to debate, as the standard the ECtHR applies is not always identical to the one provided by other instances. See, for instance, the cases of Caroline princess of Hannover, previously of Monaco, who applied to the German Federal Court of Justice (*BGH*, Judgment of 19 December 1995, case VI ZR 15/95), and, following the dismissal, to the Federal Constitutional Court (*BVerfG*, decision of 15 December 1999, case 1 BvR 653/96), and, ultimately, to the European Court of Human Rights (Judgment of 24 June 2004, application no. 59320/00) alleging that journalists had violated her right to privacy by publishing photos of her private life. While the German courts found that the freedom of the press prevailed, arguing that the princess, as a figure of contemporary society "*par excellence*" (*eine "absolute" Person der Zeitgeschichte*) had to tolerate more restrictions on her right to privacy than 'ordinary people', the ECtHR found the privacy of the princess to be prevailing over the freedom of the press, and rejected to apply a different standard for figures of contemporary society "*par excellence*".

³⁵ Esser (2002), at 824.

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- (2) Those rights that are less frequently ruled upon by the ECtHR in the context of terrorism are the right to life (Art. 2)³⁶ and the prohibition of torture (Art. 3). The right to life can be said to have been already infringed (often in conjunction with Art. 13) if the national state fails to investigate the death of one of its citizens with adequate thoroughness; thus, the state is obliged to carry out an "effective and thorough investigation". It follows that the state does not have to directly "kill" a person in order to be responsible for a breach of Art. 2. Further, the right can also be violated if the state fails to protect its citizens adequately. As to the prohibition of torture, the Strasbourg judges have shown an increasing strictness when interpreting Art. 3.³⁷
- (3) Further, counter-terrorism legislation also often interferes with the rights protected under Arts. 8 (the right to respect for private life), 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination). However, these rights are qualified and can therefore be restrained more easily.

1.2.2. Domestic human rights protection

Those human rights safeguards which are guaranteed under national law also need to be considered, as these are not identical to those rights guaranteed under the Convention. In 2002, Esser stated that "Europe, in the third millennium *anno domini*, is on the way to a community of values."³⁸ This still holds true in 2008. However, being on the way implies that we have yet to arrive. There are still considerable national differences. Criminal law, and particularly the criminal procedure, are predominantly still governed by national law.³⁹ The European Framework Decision on Combating Terrorism of June 2002 has accelerated harmonisation efforts regarding substantive criminal law against terrorism,⁴⁰ but criminal procedure still greatly differs from country to country.

³⁶ But see the cases of the ECtHR against the UK, where the ECtHR established breaches of Art. 2 ECHR (right to life), on the basis that the state failed to protect a person from a threat posed by the IRA or its paramilitary counterparts, or when the state failed to investigate duly the death of one of its citizens: *McCann and Others v. the UK*, Judgment of 27 September 1995 (application no. 18984/91), *Kelly v UK* Judgment of 4 May 2001 (application no. 30054/96), *Hugh Jordan v. the UK* Judgment of 4 May 2001 (application no. 24746/94), *McKerr v UK*, Judgment of 4 May 2001 (application no. 28883/95), *Shanaghan v. the UK* Judgment of 4 May 2001 (Application no. 37715/97), *Finucane v. the UK*, Judgment of 1 July 2003 (application no. 29178/95), *McShane v UK*, Judgment of 28 May 2002 (application no. 43290/98).

³⁷ Esser notes that insofar, the Strasbourg judges have gained confidence. He gives the example of *Ireland against the UK of 1978*, which contrasts to more recent cases against Turkey, as well as *Selmouni against France* (Esser (2002), at 818).

³⁸ Ibid. at 1.

³⁹ For an assessment of the status of the criminal procedure in Europe, see Ibid. at 1 et seqq.

⁴⁰ The Framework Decision has led to changes in the criminal law of the UK (*Anti-Terrorism, Crime and Security Act 2001*, see above, Part II, at 1.4.1.), and Germany (Act of 22 December 2003, *Gesetz zur*

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Similarly, while all four countries of examination have ratified the ECHR, its implementation on the national level greatly differs in large part, due to the constitutional and procedural differences. As a consequence, as can be seen by their examination, the reception of the ECHR is not homogenous in all Member States.⁴¹ Therefore, we also need to consider national human rights protection instruments and mechanisms. More concretely, this means

- for the United Kingdom: to take into account the Human Rights Act 1998 and the case-law of the High Courts (in particular that of the House of Lords) in applying this Act;
- for Spain: to take into account the Spanish Constitution of 1978 and the jurisprudence of the *Tribunal Constitucional*;
- for Germany: to consider the *Grundrechte*, the basic rights granted under the German *Grundgesetz* (the German Constitution, sometimes translated as the "Basic Law") and protected and enforced by the German Constitutional Court;
- for France: take into consideration the French constitutional rights as guaranteed under the *bloc de constitutionnalité*, against which laws are tested before their promulgation by the *Conseil Constitutionnel*.

1.2.2.1. Human rights protection in the United Kingdom⁴²

The United Kingdom has guaranteed human rights for a larger period than most other countries. However, these rights were not guaranteed or granted by a single codified constitution. The situation has changed significantly, when, in 2000, the Human Rights Act 1998 (HRA) entered into force,⁴³ which served to codify most of the rights enshrined within the ECHR (which the UK ratified already in 1950).

Excursus: the development of human rights in the United Kingdom

Unlike in Ireland, Scotland⁴⁴ or in the United States, there is no codified constitution for England and Wales.⁴⁵ There are good reasons, however, why the rush of states to create constitutions during the French Revolution did not affect Britain. Besides being

Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung und zur Änderung anderer Gesetze, see above, Part II, at 3.4.5.).

⁴¹ E.g. Paul (2007); Keller (2005).

⁴² For a concise, general overview in German language, see Rivers (2001).

⁴³ However, in Scotland the HRA entered already into force in 1999 (cf. Kühne (2006), at 639).

⁴⁴ The constitution for Scotland is in effect provided by the Scotland Act 1998.

⁴⁵ However, Northern Ireland had a written Constitution from 1973 onwards, (Northern Ireland Constitution Act 1973) that was repealed (and to a large extent replaced) by the Northern Ireland Act 1998.

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an island and thus deliberately 'different' in many aspects to their continental neighbours, Britain had already recognised many of the guarantees which emerged as constitutional principles during the course of the French Revolution. For instance, the *Magna Carta Libertatum* dates back to 1215, and the so-called 'Statute of Due Process',⁴⁶ origin of the principle of due process, was adopted by Edward III in 1354.⁴⁷ In 1689, notions of due process were incorporated into the English Bill of Rights which, together with the *Magna Carta*, is still cited by courts today.⁴⁸ However, it is true that, until the adoption of the Human Rights Act 1998, the UK has not promulgated any constitutional *written* statement on human rights. Likewise, the English courts have not found it necessary within their decisions to positively create rights. The reason for this is simple: English law is founded upon the basic presumption that individuals can do what they like as long as it is not contrary to the law.⁴⁹ Thus, the absence of any legal restriction or prohibition is principally considered as sufficient evidence for the existence of a right. Further reason for the absence of codified fundamental rights might be found in the English liberal pragmatism.⁵⁰

In the last century, however, the situation significantly changed: the ECHR was adopted in 1950 and was ratified by the UK in 1951 and in fact as the first state to do so.⁵¹ In the same spirit, the UK as early as 1966 granted its citizens the right to directly lodge complaints before the European Court of Human Rights.⁵² However, in spite of this early ratification, the influence of the ECHR on UK's legal system was rather limited (though not negligible),⁵³ when compared to the influence it had in other

⁴⁶ Statute 28 Edward III c.3.

⁴⁷ Kühne (2006), at p. 638.

⁴⁸ Slynn (2005), at 479, who brings a very recent example, the case *Lewis v. Attorney-General of Jamaica*, [2001] 2 A.C. 50 (P.C. 2000), in which five Jamaican men sentenced to death appealed the constitutionality of the execution of the sentence, on the grounds that the method of execution constituted a form of cruel and inhuman punishment contrary to both *Magna Carta* and the English Bill of Rights.

⁴⁹ *Ibid.* at 480, with further references.

⁵⁰ Julian Rivers (Rivers (2001), at 128), refers to Albert Venn Dicey, who claimed in 1885 that one single *habeas corpus* proceedings was more useful for the protection of freedom than hundreds of human rights declarations following the French model. (Introduction to the Study of the Constitution (1885) 10th edition, E.C.S. Wade, 1959, at 199).

⁵¹ Spencer (1999), at 666. Also, international instruments and tribunals emerged, promoting the respect for human rights, in response to the atrocities committed in the 1930s and 1940s in places like Germany and elsewhere. Thus, the Charter of the United Nations and the Universal Declaration on Human Rights internationalised the hitherto only domestic regard to human rights (see Slynn (2005), at 481 et seq.)

⁵² Spencer and Padfield (2006), at 538.

⁵³ For instance, rulings by the European Court of Human Rights led to important changes in the law of criminal procedure. Thus, the criticism uttered in the case *Republic of Ireland v UK* (1978) 2 EHRR 25, in which the Strasbourg court condemned various interrogation techniques that had been used in Northern Ireland during the troubles for violating Art. 3 (prohibition of torture and inhuman or degrading treatment), influenced the drafting of the important Police and Criminal Evidence Act 1984, which revised the English law on criminal procedure and evidence. Section 76 was included in this Act providing that confessions should be inadmissible in so far as they were obtained by oppression (which was defined, *inter alia*, as inhuman or degrading treatment). See Spencer (1999), at 669.

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ratifying states (such as the Netherlands).⁵⁴ This was partially due to the dualist tradition in the UK: international treaty obligations do not bind the courts unless implemented into domestic statutory law.⁵⁵ This meant that courts had to apply the domestic law, supposing that it would conform to the ECHR, and, in case of ambiguity, interpreting it to conform. However, if the domestic law was clearly contrary to the Convention, the courts were still bound to apply this law.⁵⁶ Another reason for the limited application of the ECHR before 2000 – before the passage of the Human Rights Act 1998⁵⁷ – can be seen in the **concept of parliamentary sovereignty**.⁵⁸ Under this principle, the laws, which are drafted by the sovereign parliament, present the will of the people. They must be applied by the judges without questioning them or testing their validity against "higher" legal principles (such as constitutional rights, for instance). However, the concept of parliamentary sovereignty is increasingly questioned today in consideration of the global developments which have had the effect of reducing national sovereignty, such as the internationalisation of human rights, the creation of a European Court of Human Rights, as well as the emergence of the European Union to which Member States confer more and more powers.⁵⁹

The passage of the HRA in 1998 has brought about significant changes with regards to human rights in the English courts. Many guarantees of the ECHR have been elevated in the hierarchy of norms by being enshrined in statutory law, which tends to prevail over case-law in the UK. As we have seen, before the HRA came into force, in the situation of an unavoidable conflict between domestic law and the European

⁵⁴ In the Netherlands the ECHR is directly applicable. In addition, international law ranks higher than domestic law, so that courts are forced to apply the ECHR. See Swart (1999).

⁵⁵ However, it is argued that the dualism is breaking down in the area of human rights (Warbrick (2004), at 378). For an in-depth examination of the relationship between the British law and European rights, please consult: Spencer and Padfield (2006).

⁵⁶ Thus, in *Regina v Secretary of State for the Home Office, ex parte Brind* [1991] 1 AC 696, the Home Secretary banned a BBC broadcasting programme showing interviews with several representatives of certain Northern Irish organisations, among them Sinn Féin. The allegation by the journalists that the ban violated Art. 10 of the ECHR was rejected by the Law Lords on the grounds that the law which authorised the Home Secretary to ban the programme had to be applied, even if this went against the Convention.

⁵⁷ In force since October 2000.

⁵⁸ This becomes clear when noting that the Government's White Paper on human rights stated that "*the courts should not have the power to set aside primary legislation (...) on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to parliamentary sovereignty.*" Secretary of State (1997) SecretaryOfState (1997), at 2.13 (thus pointed out by Elliott (2007), at 3).

⁵⁹ Elliott (2007), at 19 et seqq, who cites the recent case decided by the House of Lords in *Jackson (House of Lords, Regina (on the application of Jackson) v Attorney General*, 13 October 2005, UKHL 56, 2006 1 AC 262, where Lord Steyn held that a "pure and absolute" conception of parliamentary sovereignty was "out of place" in modern Britain, and, similarly, Lord Hope stated that "parliamentary sovereignty is no longer, if it ever was, absolute".

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Convention, domestic law prevailed.⁶⁰ After the enactment of the HRA 1998, the courts are now obliged to apply the Act, in the same way they apply other domestic statutes. But the HRA 1998 has had a stronger impact on the courts' traditional interpretation of the law than other statutes: its s. 3(1) provides that other laws have to be interpreted in conformity with the Convention.⁶¹ This in fact means the abandonment of what is known in England as *the literal rule*, the rule that a legal text, if it is clear, must be interpreted according to its wording. By s. 3 of the HRA⁶² 1998, even if the wording is clear, the courts are still held to interpret the text in accordance with the Convention.⁶³ As a practical consequence, judges spend quite some time trying to give to their traditional law a meaning consistent with the ECHR; they do their best to make the existing law compatible with the ECHR and undertake some wide and far-reaching interpretations to this end.⁶⁴ In a case of conflict where it is *impossible* to interpret domestic law in conformity with the ECHR, two situations must be distinguished: in the case of domestic *case-law*, since the enactment of the HRA 1998 the human rights granted by the ECHR should prevail. However, in the case of conflict between domestic *statutory* law and the Convention, the domestic law, theoretically, can still be applied.⁶⁵ All that courts can do then, in order to still observe human rights, is to issue a declaration of incompatibility, which does not affect the validity of the norm in question, but is intended to draw the government's attention to the conflict so that the latter may change the law to adopt it to the HRA's requirements. There is a special 'fast track' procedure to carry out the necessary changes,⁶⁶ provided that the government is willing to change the law. The hierarchical position of the human rights provided by the Convention is thus strengthened, but does not have the same supremacy as has constitutional law in other countries such as in the United States, Germany or Spain, to name a few. Finally, it is also important to note that the HRA 1998 provides that the

⁶⁰ See the Case *Saunders* [1996] 1 CrAppR 463, in which British legislation had obliged Saunders to answer questions, and made his answers admissible in court as evidence against Saunders. This was contrary to the "fair trial" principles under Art. 6(1) of the Convention. The English Court of Appeal held that English courts could have recourse to the European Convention on Human Rights and decisions thereon by the European Court of Human Rights only when the law of England was ambiguous or unclear. Saunders lodged an appeal at the Strasbourg Court, which ruled that Art. 6(1) ECHR had been breached as the right to silence enshrined in the fair trial principle of Art. 6(1) had not been granted (*Saunders v UK* (1997) 23 EHRR 313).

⁶¹ S. 3(1) of the Act provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

⁶² S. 3(1) reads as follows: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

⁶³ Spencer and Padfield (2006), at 541.

⁶⁴ Slynn (2005), at 495 et seq.; Elliott (2007), at 4. The House of Lords confirmed this practice when it ruled that Art. 3 of the HRA 1998 demanded interpretation in conformity with the Convention, even if this went contrary to the clear wording to a domestic provision (*Sheldrake v Director of Public Prosecutions* [2004] UKHL 43 (para. 44)).

⁶⁵ Spencer (1999), at 668.

⁶⁶ See s. 10 and schedule 2 of the HRA 1998. See also Elliott and Quinn (2006), at 49, 50.

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government, when introducing new legislation, is obliged to make a statement that, in its view, the Bill is compatible with the Convention.⁶⁷

When examining the competent organs which may ensure compliance with human rights, it is important to bear in mind that, in general, the influence of the British courts on legislative decisions is extremely limited, as a result of the principle of parliamentary sovereignty (see above). There is no domestic legal prohibition on the enactment (or in fact maintenance) of legislation which is plainly inconsistent with fundamental human rights.⁶⁸ In spite of this, the rulings of the House of Lords have shown a growing recognition of human rights. These rulings have been taken into consideration by the government.⁶⁹ Although parliament is not legally compelled to pass laws which are in accordance with human rights, thus far it has shown a certain interest to adopt legislation which is consistent with human rights.⁷⁰ However, Elliott reminds us that “under the UK’s present constitutional arrangements, the jurisdiction of British courts to review executive and legislative action for compatibility with human rights norms ultimately remains vulnerable to majority rule.”⁷¹

As a necessary consequence of the absence of a codified constitution, the UK does not possess a constitutional court per se. Therefore, an individual can only challenge human rights violations before the European Court of Human Rights (under Art. 34 ECHR). The absence of a national alternative to monitor human rights violations undoubtedly contributes to the high number of cases from the UK in Strasbourg.⁷² However, the UK does possess a highest national court, the **House of Lords**, which has also occasionally ruled on the compatibility of British law and jurisprudence with the HRA 1998.⁷³ These cases will be taken into account in the present study (when referring to counter terror legislation). However, it is not to be expected that the number of cases will be comparable to the number of cases decided by constitutional courts in other states, as the requirements concerning both admissibility and merits differ substantially from

⁶⁷ S. 19(1) of the Act.

⁶⁸ Elliott (2007). at 18. Spencer drew the same conclusion already in 1999. He holds: “*If there is one matter of principle on which British politicians of all shades of opinion seem invariably to agree, it is the importance of preserving the sovereignty of Parliament.*” Spencer (1999), at 668).

⁶⁹ As the adoption of the Prevention of Terrorism Act 2005 proves, which was a clear reaction to the House of Lords’ Declaration of incompatibility of indefinite detention of foreign terrorist suspects (s. 23 of the Anti-Terrorism, Crime and Security Act 2001) with Arts. 5 and 14 ECHR (*A & Others v. Secretary of State for the Home Department*, [2004] UKHL 56).

⁷⁰ This will was manifested, for instance, by the fact that the British legislator issued derogations from Art. 5 ECHR, invoking Art. 15 ECHR, in order to prevent infringement of Art. 5 ECHR (Elliott (2007), at 6 and 7).

⁷¹ Ibid. at 19.

⁷² Warbrick (2004), at 378.

⁷³ The judgments of the House of Lords delivered since 14 November 1996 are available online at: <http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm> (last visited on 13 January 2009).

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country to country. Unlike the Constitutional Court in Germany or Spain, the House of Lords only hears a very small number of cases per year, as it has a high discretion when deciding whether to rule on a matter or not.⁷⁴ It only judges on points of law which the Court of Appeal considered as of ‘general public importance’ and has thus referred to the House of Lords.⁷⁵ Consequently, the House of Lords’ judgments are much less numerous, but at the same time more considered and elaborated, when compared to the judgments of constitutional courts of other countries, such as those of Spain or Germany.⁷⁶ The decisions of the House of Lords have binding effect for all other British courts.⁷⁷

In 2005, the *Constitutional Reform Act 2005* was passed, which will replace the House of Lords with a **Supreme Court**.⁷⁸ However, the Supreme Court is not set to open its doors until 2009,⁷⁹ and thus its presence in the UK cannot be taken into account for the present study.

As to the ECtHR, its place within the hierarchy of the British courts is not well defined.⁸⁰ Under s. 2 of the HRA 1998, a British court is only required to take account of the cases decided by the ECtHR; the latter’s decisions are not binding. In practice the British courts generally do follow the ECtHR’s jurisprudence, since if they do not they are likely to run the risk of having their judgments quashed by the ECtHR.⁸¹ However, there are exceptions where they have not followed this jurisprudence.⁸²

⁷⁴ This can be deduced from the formulation of the relevant provision (s. 33(2) of the Criminal Appeal Act 1968, which states: “*The appeal lies only with the leave of the Court of Appeal or the House of Lords; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to be considered by that House.*” The formulation “shall not be granted unless...” implies that the general rule is indeed not to grant the appeal, unless – exceptionally – the matter appears to be of general public importance or the Court of Appeal or the House of Lords deem it interesting to rule upon it.

⁷⁵ See s. 12(3) of the Administration of Justice Act 1969 (c. 58).

⁷⁶ To give an example, the House of Lords adopted only 79 decisions in the year of 2000, whereas, the German *Bundesverfassungsgericht* adopted 429 decisions in the same year, and the Spanish *Tribunal Constitucional* issued 312 decisions in 2000. The French *Conseil Constitutionnel*, however, only adopted 43 decisions in 2000.

⁷⁷ Until 1966, they also bound subsequent decisions of the House of Lords. In 1966, the Lord Chancellor issued a Practice Statement saying that the House of Lords were no longer bound by its previous decisions. In practice, the House of Lords only rarely overrules one of its earlier decision (Elliott and Quinn (2006), at 11).

⁷⁸ See Sueur (2004).

⁷⁹ See the on the website of the UK’s Ministry of Justice, (section: “what we do”, sub-section “supreme court”), online available at <http://www.justice.gov.uk/whatwedo/supremecourt.htm> (visited on 3 March 2008).

⁸⁰ Elliott and Quinn (2006), at 14.

⁸¹ Thus, in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, [2001] UKHL 23, the House of Lords held: “*In the absence of some special circumstances it seems to me the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.*” This view resembles in fact the

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1.2.2.2. Human rights protection in Spain

The Spanish Constitutional Court is the supreme interpreter of the Spanish Constitution, and, thus, the ultimate protector of human rights within Spain.⁸³ The Court's functioning is regulated by the Constitution and in through an Organic Law.⁸⁴ Some of its functions which will be seen to be relevant in the present Chapter are its ability to control the constitutionality of laws (Arts. 161(1)(a), 163 and 95 *CE*); its protection of fundamental rights and freedoms as recognised in Arts. 15-30 *CE* (Art. 161(1)(b) *CE*); and to control the constitutionality of the legislation of the Autonomous Communities (Art. 161(2) *CE*). As the European Court of Human Rights and as we will see the German Constitutional Court, the Spanish *Tribunal Constitucional* also provides a right of complaint for individuals to challenge violations of their fundamental rights: *Recurso de Amparo* (literally the "remedy of protection", subsequently it will be referred to as 'constitutional complaint').⁸⁵ This procedure is aimed to protect constitutional rights and freedoms against any act of public power. It is the last of the internal appeals available to a citizen for the protection of his rights, which is only possible once they have exhausted all ordinary procedures.⁸⁶ Any natural or juridical person who was party to the proceedings and who claims a legitimate interest, as well as the ombudsman or the attorney general, can lodge this remedy.⁸⁷ The fundamental rights and freedoms protected by this procedure are those of Arts. 14-30 *CE* (cf. Arts. 161(1)(b) *CE*, read in conjunction with Art. 53(2) *CE*). As a result of Art. 10(2) *CE*, these rights must be interpreted to conform with the European Convention of Human

view taken by most courts in continental countries. It makes the difference between case law and written legislation less rigid, as in practice also judges in continental legal systems are reluctant to deviate from High Court decisions, although they are, in theory, allowed to do so.

⁸² For instance, the ECtHR's decision in *Morris v UK* [2002] 34 EHRR 52, where the ECtHR ruled that the courts martial system breached the ECHR as it did not guarantee a fair trial within the meaning of Art. 6 of the Convention, was contradicted by a later Decision of the House of Lords (*Boyd v The Army Prosecuting Authority* [2002] UKHL 31. The House of Lords argued that the European Court was given 'rather less information than the House' about the courts martial system, and that in consideration of this additional information, there was no breach of the Convention. (see references at Elliott and Quinn (2006), at 14 et seq).

⁸³ The case law of the Constitutional Court is available online at the web page of the Official State Bulletin: http://www.boe.es/g/es/bases_datos_tc/tc.php (last visited on 13 January 2009).

⁸⁴ *Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, LOTC*.

⁸⁵ Other important procedures related to constitutional rights are the *recurso de inconstitucionalidad* ("constitutional review"), by which fifty deputies (*diputados*), 50 senators (*senadores*), the President, the Ombudsman, a regional government of a *Comunidad Autónoma* or legislative assemblies of a *Comunidad Autónoma* can challenge the constitutionality of laws (cf. Art. 162(1) *CE*), and the *cuestión de inconstitucionalidad* ("question of unconstitutionality"), by which the parties to a judicial dispute or the judge can bring doubts about the question whether a rule or an international treaty is constitutional.

⁸⁶ Arts. 43(1) and 44(1) *LOTC*.

⁸⁷ Merino-Blanco (2006), at 199 et seq.

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Rights. The Constitutional Court frequently takes not only the ECHR, but also the case-law of the ECtHR into account when applying Art. 10(2) CE.⁸⁸

1.2.2.3. Human rights protection in Germany

Before Germany ratified the European Convention of Human Rights, its Constitution already provided a powerful guard for the protection of fundamental rights: the Federal Constitutional Court (*Bundesverfassungsgericht*), the highest court of Germany.⁸⁹ Any individual can bring a matter before this court, by filing a constitutional complaint (*Verfassungsbeschwerde*) if they can demonstrate that one or more of their fundamental rights currently threatened and that they are directly concerned.⁹⁰ Provided that the requirements of admissibility are met, the Constitutional Court is obligated to decide upon any alleged violation of rights committed by the executive, legislative or judiciary power. If the *Bundesverfassungsgericht* holds that a certain law is unconstitutional, the courts may not subsequently apply this law. If the *Bundesverfassungsgericht* maintains that only a specific restrictive interpretation of a certain law complies with the Constitution, the Courts are obliged to interpret the respective provision in the way indicated by the *Bundesverfassungsgericht*. In Germany, the Constitutional Court is thus the main monitor of human rights. Individuals can only institute a procedure before the Strasbourg Court once they have unsuccessfully lodged a constitutional complaint to the *Bundesverfassungsgericht*. It is the last legal remedy at the national level. In principle, the individual cannot challenge violations of the ECHR before the Constitutional Court, because the rights of the Convention are no fundamental rights within the meaning of Art. 93(1)(4a) GG.⁹¹ However, if a person is criminally convicted, and subsequently (after the decision has become final) the ECtHR establishes that the ECHR was violated during the procedure, § 359(6) of the German Criminal Code offers the concerned person the possibility to reopen their case.

The fact that the individual does not have the ability to directly address the Constitutional Court for violations of the ECHR does not have such significant consequences in practice: first, the rights granted by the ECHR and by the German Constitution, in many cases, overlap. Second, in many cases the Federal Constitutional Court relies on the ECtHR's case-law, although this is not always explicitly stated in

⁸⁸ See Carrillo Salcedo (1994), with further references and the following examples: STC no 1083/1990, of 18 May 1993; STC no. 2457/1989, of 27 May 1993; STC no. 197/1993, of 14 June 1993.

⁸⁹ All Judgments of the Federal Constitutional Court adopted after 1 January 1998 can be retrieved online at: <http://www.bundesverfassungsgericht.de/entscheidungen.html>.

⁹⁰ 'selbst, gegenwärtig und unmittelbar betroffen', see Art. 93(1)(4a), GG, §§ 13(8a), 90 et seq. of the German Act Governing the Constitutional Court, *Bundesverfassungsgerichtsgesetz* (BVerfGG). See also *Bundesverfassungsgericht*, Decision of 18 February 1999 - 1 BvR 2156/ 98; Decision of 14 January 1998 - 1 BvR 1995, 2248/94.

⁹¹ See *Bundesverfassungsgericht*, 29 May 1974 - BvL 52/71 (BVerfGE 10, 271, 274, 'Solange I').

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the decisions.⁹² Third, not only the ordinary German law, but also the Constitution, shall be interpreted in light of the ECHR.⁹³ It is for these reasons that the *Bundesverfassungsgericht* constitutes an efficient ‘filter’ to reduce the number of cases brought to Strasbourg from Germany.⁹⁴

1.2.2.4. Human rights protection in France

In France, fundamental rights can be found in various constitutional texts (i.e. the actual text of the 1958 Constitution, the Preamble to the 1946 Constitution, and also the Declaration of 1789).⁹⁵ The competent organ to watch over the protection of constitutional rights and freedoms is the Constitutional Council (*Conseil Constitutionnel*),⁹⁶ which, as its name suggests, is not a Court, but rather a Council, in the technical sense.⁹⁷ Its judicial power is rather limited, in comparison to the Constitutional Court of Germany or Spain, since no individual complaints can be brought before the *Conseil*. President Mitterrand’s attempts to change this situation remained without success.⁹⁸ The *Conseil*’s function in protecting the French Constitution is thus limited to reviewing the constitutionality of laws *before* their promulgation. Therefore, it does not deal with ‘cases’ per se, but rather reaches ‘decisions’ about the abstract constitutionality of the law taken as a whole. Organic laws always require constitutional ex ante review (Art. 61 (1) of the Constitution), whereas other laws can be reviewed, if so requested by the President of the Republic,

⁹² Zippelius and Würtenberger (2005), at 154; similarly: Kühne (2006), at margin no. 39; Decisions of the *Bundesverfassungsgericht*: Decision of 12 October 1978 – 2 BvR 154/74 (19, 343 (347)); Decision of 18 March 2003, – 1 BvR 329/03 (BVerfGE 64, 135 (150)); Decision of 13 January 1987 – 2 BvR 209/84 (BVerfGE 74, 102 (121)); Decision of 26 March 1987 – 2 BvR 589/79 (BVerfGE 74, 358 (370)); Decision of 12 May 1987 – 2 BvR 1226/83, 101, 313/84 (BVerfGE 76, 1 (78)); Decision of 29 May 1990 – 2 BvR 254/88; 2 BvR 1343/88 (BVerfGE 82, 106 (115, 119)).

⁹³ ‘*EMRK-freundliche Auslegung*’, cf. Zippelius and Würtenberger (2005) By Judgment of 14 October 2004 (Case 2 BvR 1481/04; BVerfGE 111, 307, 317 et seq) the Constitutional Court recognised the obligation to take into account the ECHR and Strasbourg’s case law: it held that Art. 20(3) GG, which establishes that the executive and the legislative power are bound to the law, comprises the consideration of the guarantees of the ECHR and the case law established by the ECtHR, within the scope of ‘methodologically defensible interpretation of the law’.

⁹⁴ However, the ECtHR has also quashed a decision of the *Bundesverfassungsgericht*: In the Decision *von Hannover v Germany* (Judgment of 24 June 2004, application no. 59320/00), concerning the complaint of Princess Caroline von Monaco against paparazzi’s taking of photographs, the Strasbourg Court held that the German view to limit the protection for private life of contemporary public figures was contrary to Art. 8 ECHR. Subsequently, the *Bundesverfassungsgericht* adjusted its jurisprudence, taking into account Strasbourg’s case law (see, for instance, *Bundesverfassungsgericht*, Decision of 26 February 2008, case nos 1 BvR 1602/07; 1 BvR 1606/07; 1 BvR 1626/07; Decision of 13 June 2006, case no. 1 BvR 2622/05).

⁹⁵ Kortmann and Thomas (2004), at 296.

⁹⁶ In the following also referred to as the *Conseil* or the Council.

⁹⁷ All judgments of the *Conseil Constitutionnel* are retrievable at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/sommaire-2009.42028.html> (last visited on 25 January 2009).

⁹⁸ Kühne (2003), at 599.

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the Prime Minister, the President of the National Assembly, the President of the Senate, or 60 Deputies or Senators (cf. Art. 61(2)). Art. 62(2) of the Constitution of 1958 precludes the possibility to appeal against decisions of the *Conseil Constitutionnel*. Once the Council declares a law as unconstitutional, it can not enter into force (Art. 62 of the Constitution). The decisions of the Council bind all other state institutions.⁹⁹ Although the Council is not integrated into the hierarchy of the French courts, it is authoritative when it comes to the interpretation of the Constitution.¹⁰⁰ If the Council finds a statute or a provision unconstitutional, the provision(s) in question may not be promulgated.¹⁰¹ With respect to international treaties that the Council finds unconstitutional, these may only be concluded or ratified once the Constitution has been amended.¹⁰² The conformity of existing international treaties with French national laws is not reviewed by the Constitutional Council. However, the other national courts review this.¹⁰³

1.3. The paradox of terrorism, counter-terrorism and human rights

The reader should be aware of a general paradox in this context: terrorism presents a threat to the enjoyment of some of the most fundamental human rights (such as the right to life); the fight against terrorism, on the other hand, also necessarily limits, and sometimes even erodes certain human rights.¹⁰⁴ This places a double burden on the state: first, the protection from human rights violations by part of the terrorists,¹⁰⁵ and second, the protection from human rights violations committed by state authorities in their fight against terrorism. The state is faced with a dilemma: an activity of the state that aims at guaranteeing security as a precondition for the freedom of its citizens must, simultaneously and inseparably, reduce that freedom and also thereby the security of individuals.¹⁰⁶ The reconciliation of these seemingly opposed interests, protecting national security and upholding human rights, is certainly one of the greatest challenges facing democratic societies today. However, it is far from being a new phenomenon. This issue has been addressed by innumerable authors in recent years when analysing counter-terrorism.¹⁰⁷ Indeed, some argue that in order to guarantee security in certain

⁹⁹ Kortmann and Thomas (2004), at 283.

¹⁰⁰ Bell (2001), at 33.

¹⁰¹ Art. 62(1) Constitution.

¹⁰² Art. 54 Constitution.

¹⁰³ See below, Part 2, at 4.2.

¹⁰⁴ See also Sottiaux (2008), at 1, 2, with further references.

¹⁰⁵ For instance, see the cases against the UK, above (note 18).

¹⁰⁶ Kühne (2004), at 3.

¹⁰⁷ Ibid., Aoláin (2003), Bachmann (1998), Baldwin and Fletcher (2004), Bassiouni (2005), Benedek and Yotopoulos-Marangopoulos (2004), Blakesley (2006), Boyle (1986-3), Crank and Gregor (2005), Delmas-Marty (2007), Dooley Kent (2000), Duffy, Grosz and Beatson (2000), Feldman (2006), Fenwick (2002), Fenwick (2005), Freedland (2005), Gearty (2004), Goldsmith (2005-1), Eden and O'Donnell (2005), Hedigan (2005), Hoffmann-Riem (2002), Ignatieff (2004), Krekeler (1979), Lemmens (2004),

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circumstances, it is necessary to give up certain liberties and human rights (e.g. the ticking bomb scenario for the justification of torture).¹⁰⁸ Others hold the view that in times of terrorism, it is more important than ever to combat terrorism in a manner consistent with the principles of human rights law.¹⁰⁹ In support of the first view, it has to be admitted that states presently fail to guarantee absolute security for their citizens. Hence they are under public pressure to take action, in order to restore confidence and trust in their power. States have to show that they are capable of effectively dealing with the “new threat”. They have to become proactive: in order to protect society from today's terrorist attacks, it is no longer sufficient to prosecute the actors of a terrorist attack *ex post*; on the contrary, considering the devastating results of contemporary terrorist actions, it is crucial to prevent actors from even attempting a terrorist attack, thus, taking action proactively instead of repressively.¹¹⁰ For the purpose – but maybe also under the pretext – of this prevention, human rights are increasingly restricted. As criminal perpetrators, by definition, can only be identified with certainty once they have committed the harmful act, preventive measures cannot be restricted to the proven actors, but apply necessarily to a much broader group of people, including predominantly innocent citizens. Admittedly, prevention is crucial in the present case. At the same time, one cannot but realise that this current focus on prevention ultimately undermines a most basic principle of criminal law: the presumption of innocence. The conflict between counter-terror measures and the presumption of innocence is only one of the many conflicts that arise in the context of counter terrorism and human rights.¹¹¹ I argue (supported, inter alia, by the Strasbourg Court)¹¹² that the question of balancing

Loof (2005), López Garrido (1987), Martin (2003), Mestre Delgado (2007), Nolte (2002), Palazzo (2006), Pariseault (2005-3), Pious (2006), Prantl (2002), Roach (2006), Roche (1989-90), Rudolphi (1979), Sadat (2004-1), Seiderman (2004), Sottiaux (2008), Talbot (2003), Terradillos Basoco (1988), Touchot (2004), Vercher (1992), Vogel (1978), Walker (2006), Walter, Vöneky, Röben and Schorkopf (2004), Warbrick (2002), Warbrick (2004), Wilkinson (1986), Wolfgang Hoffmann-Riem (2002), Zlataric (1975), Reinisch (2006).

¹⁰⁸ Dershowitz (2002).

¹⁰⁹ To name a few: Boyle (1986-3), Goldsmith (2005-1), Pious (2006), Blakesley (2006), Prantl (2002).

¹¹⁰ For the new focus on prevention, see also the comparative study of Walter, Vöneky, Röben and Schorkopf (2004).

¹¹¹ Others include the problem of reconciling covert police observation, e.g. telephone tapping, with the right to privacy, or the prescription of associations that are considered as promoting terrorism with the right to free association, to name only a few.

¹¹² "Being aware of the danger such a law poses of undermining or even destroying democracy on the grounds of defending it, [the Court] affirms that the Contracting States may not, in the name of the struggle against (...) terrorism, adopt whatever measures they deem appropriate." *Klass and others v Germany*, Judgment of 6 September 1978 (application no. 5029/71), para. 49. Similarly, the Inter-American Court of Human Rights ruled that 'no matter how terrible certain actions may be and regardless of how guilty those in custody on suspicion of having committed certain crimes may be, the State does not have a license to exercise unbridled power or to use any means to achieve its ends, without regard for law or morals. The primacy of human rights is widely recognised. It is a primacy that the State can neither ignore nor abridge.' (*Castillo Petruzzi v Peru*, IACHR, Judgment of 30 May 1999, Series C no 52, at 204). Also national courts adopted similar rulings, see, e.g. the Spanish Supreme Court, which held that "from the perspective of the legitimacy of society to defend itself against terror, this defence can

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freedom against security cannot lead to the erosion of human rights, but that a reconciliation of counter-terror legislation with human rights is not only possible, but also necessary to effectively combat terrorism. Most human rights already provide for qualification clauses, meaning that the legislator had already foreseen the necessity to limit those rights in certain cases, in view of other fundamental rights with which they might conflict. Even extreme emergency situations, such as "time of war or other public emergency threatening the life of the nation"¹¹³ have been foreseen: thus some human rights instruments, such as the ECHR, include derogation clauses, thus it is possible, under certain narrow conditions, to derogate from certain rights.¹¹⁴ In the present study, it is maintained that, at least in the case of the four countries of examination – the United Kingdom, Spain, Germany, and France – existing human rights instruments provide sufficient limitations and derogation facilities, which show the necessary level of flexibility, to cope adequately with terrorist threats. Thus, the protection of national security is possible within the existing human rights framework. Having said this, a different question arises: do democratic legislators, when faced with terrorist threats, take the existing human rights duly into account?

2. Purpose and aim

The central question is therefore: to what extent are human rights observed when fighting terrorism? The thesis presented here is that democratic legislators, when facing terrorism or other extraordinary criminal phenomena (such as organised crime), show a growing tendency to ignore human rights. It is maintained that the democratic legislator, when confronted with terrorism, tends to surpass the limits of human rights as provided by either the national human rights protective body (such as the constitutional court) or an international or supra-national organ (for example the European Court of Human Rights). This is anything but a new observation.¹¹⁵ As a consequence, the goal of this study is not to come up with a brand-new theory on terrorism, but rather to contribute to the ongoing discussion by providing further proof to substantiate the thesis that counter terrorism measures, in general, and, in particular, legislators of anti-terror laws, show a tendency to ignore human rights. Moreover, this phenomenon can be generalised to other types of crime that are perceived as particularly dangerous, such as organised crime, recidivists, and sex offenders.

only take place within the respect of values that define a State governed by the rule of law, and thus without violating those which they claim to defend." ((*Tribunal Supremo*, Judgment of 20 July 2001, Criminal Chamber (*Sala de lo Penal*), STS 1179/2001).

¹¹³ Art. 15 of the ECHR.

¹¹⁴ This derogation mechanisms have been comprehensively analysed by Loof (2005).

¹¹⁵ Prantl (2002), Blakesley (2006), Kühne (2004).

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A common argument on the part of politicians, but also on the part of some researchers is that terrorism can only be combated effectively if we sacrifice certain human rights.¹¹⁶ Could this be true? To explore this question, the first Part of this thesis is dedicated to the history of terrorism. The historical analysis may give indications as to whether it is really necessary under certain circumstances to reduce existing human rights protection. Without anticipating too much, one of the general conclusions of the first Part should be forestalled already; the preservation of human rights is indeed of vital importance if we do not want to end up in a situation where non-state terrorism is eventually replaced by a more systematic and therefore further reaching state terrorism. This conclusion confirms Kühne's observation that *"in the history of states it was always the real or pre-textual concern of the state for security – thus also freedom – of its citizens which led to the building up of a perfect system of control, where no more space remained free from state control, and which eventually ended in totalitarianism and fascism"*.¹¹⁷ We should also anticipate that the outlined history of terrorist movements will concretely show that one type of terrorism is less desirable than any other, that being, state terrorism; its power and impact are much stronger than those of any non-state actor. From this, it is apparent that anti-terror laws may never open the door to absolute governmental power. Moreover, a state strong enough to suppress any rebel tendencies is not desirable, simply because the measures of suppression will, as history has shown, contravene basic principles of humanity, and, what is more, will create terror themselves. Another outcome of the historical overview will be the following: one of the principal goals of terrorists is to undermine a State's authority, and this is most efficiently done by coercing the State into the adoption of measures that are against the State's own very principles. More concretely, it is in the terrorists' core interest to compel the legislator to adopt martial laws that will highlight to society the weaknesses and brutality of the State. Consequently, an effective anti-terrorism policy requires that the democratic legislator will not give in to this provocation, but will rather remain proportionate and reasonable when adopting counter-terrorist measures, to preserve the rule of law and therewith its own authority within the civil society.

From these findings, it will be concluded that undue limitations of human rights, along with undue extensions of executive powers, are counter-productive in the fight against terrorism and play into the very hands of those they aim to combat.

¹¹⁶ For instance, the renowned terrorism expert Walter Laqueur argues that only two means are capable of effectively eradicating the present fanatic terrorism: one of them is massive violence, the other letting time pass, as experience has shown that the present wave of terrorism will decrease in the course of time. He finds the assumption that the terrorist threat is overestimated and that terrorists will never obtain weapons of mass destructions or at least not use them is candid and unrealistic. See Cicero - Magazin für Politische Kultur (2004a): *Candide, Kassandra und die Zukunft des Terrorismus*.

¹¹⁷ Kühne (2004), at 4.

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It is upon this foundation that the second part of the thesis is written. Part II will give an inventory of the anti-terror laws of different countries throughout different periods. These are selected and examined from the perspective of human rights, taking into account national and international case-law, as well as national academic writings. With this descriptive Part, I strive to give, by means of examples, some clarification as to the general compliance of anti-terror laws with fundamental, both European and national, human rights. A second and related purpose of this Part is to identify, if possible, common general developments in anti-terror legislation throughout the years, as well as existing national differences. Is there a growing inclination to comply or not to comply with human rights when drafting anti-terror laws? Further, the country reports will help to recognise some general characteristics and tendencies of anti-terror legislation that can be identified in the national laws of all four countries. Is it a general feature of anti-terrorism legislation that human rights are restrained? National differences and particularities need to be taken into account, and possible explanations for the differences will be sought. In addition, the effect of terrorist acts on the subsequent legislation will be analysed. The impact of these acts is vital for the present thesis because it is only if we can prove a causal relationship between a terrorist act and a subsequent law which derogates from human rights, that the thesis that the legislator *responds* to terrorist acts by derogating human rights is confirmed. It is therefore scrutinised how far terrorists indirectly change the law through their acts. In this context, the impact of September 11th on posterior anti-terror legislation will naturally receive special attention.

Counter-terrorism legislation cannot be discussed without some preliminary remarks on the very notion of "terrorism". Part I pursues, besides the argumentative purpose mentioned previously, a second goal, namely to conceptualise the term. To this end, I shall very broadly contemplate those movements and groups that have been defined, by at least one author, as terrorist movements. Thus, this Part aims to give a clearer picture of the diversity and different meanings the word "terrorism" is often associated with. A historical context is provided, social and political preconditions for the evolvement of terrorism are examined, but also some philosophical thoughts and ideas which stimulated terrorist actors are briefly explained. It will be outlined which groups or which actions have been labelled with terrorism in order to better understand the reasons and motives of the actors and the different factors which contributed to the emergence of terrorism. It will also be examined how terrorism developed throughout the years, and therefore, the focus will be on those movements which have had an impact on future actors. It is important to note that this Part is by no means exhaustive; it rather presents a selection of examples of terrorist groups, which will show the diversity, the ambiguity, and the "ungraspability" of the notion.

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The journey through the history of terrorism and counter-terrorism necessarily brings about further questions and dilemmas which one encounters on the way. To discuss these would make this thesis a never-ending story. However, some of these problems might constitute mouth-watering food for other researchers, and therefore should not be left out. They will hence be briefly presented at the very end of Part III.

3. Methodology

The method used in Part I may be described as a historical approach in which the different historic terrorist movements will be examined. This method was chosen in order to obtain a more comprehensive idea of the term "terrorism", before studying anti-*terrorism* legislation. In addition, this Part serves as an argumentative basis for the thesis defended; it provides useful arguments to underline the importance of preserving human rights when fighting terrorism.

However, the present research is first and foremost a comparative legal study. Comparative legal research seems almost unavoidable in the area of contemporary counter-terrorism legislation: terrorism traditionally used to be geographically limited to a certain territory, but this is no longer the case today. As terrorism globalises, anti-terror legislation can no longer be restricted to a regional or national level. This observation is confirmed by the enhanced international efforts in this field.¹¹⁸

¹¹⁸ There are a number of universal Anti-Terrorist Conventions, such as the Tokyo Convention for the Suppression of Unlawful Seizure of Aircraft (14.9.1963), the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (16.12.1970), the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (23.9.1971), the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (24.2.1988), the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (14.12.1973), the International Convention Against the Taking of Hostages (18.12.1979), the Convention on the Physical Protection of Nuclear Material (3.3.1980), the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10.3.1988), the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (10.3.1988), the Convention on the Marking of Plastic Explosives for the Purpose of Identification (1.3.1991), the International Convention for the Suppression of Terrorist Bombing (15.12.1997), the International Convention for the Suppression of the Financing of Terrorism (9.12.1999), and the Draft Comprehensive Convention (Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996 plus Annex I, II, III). In addition, there are several regional Anti-Terrorist Conventions: the European Convention on the Suppression of Terrorism (27.1.1977), the Council Framework Decision of 13 June 2002 on Combating Terrorism, the Inter-American Convention Against Terrorism (3.6.2002), the Arab Convention for the Suppression of Terrorism (22.4.1998), the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Organisation of American States, 23.10.1986), the SSARC Regional Convention on Suppression of Terrorism (South Asian Association for Regional Cooperation, 1987), and the Convention of the Organisation of The Islamic Conference on Combating International Terrorism (1.7.1999). Finally, several Security Council Resolutions concern the issue (e.g. United Nations Security Council Resolutions 1368, 1373, 1377, 1390 and 1441). Most of these instruments are provided as annexes in Walter, Vöneky, Röben and Schorkopf (2004). An online collection of the world's laws against terrorism is available at: <http://jurist.law.pitt.edu/terrorism/terrorism3a.htm> (visited on 8 June 2008).

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Nevertheless, large parts of anti-terror legislation are predominantly still national, although European and international influences are constantly growing.¹¹⁹ In view of this still prevailing, though diminishing, dominance of national law in the field of anti-terror legislation, a look at the differing national responses may generate valuable insight as to where Western European states presently stand. Further, it is only through comparison that one may assess whether a certain measure is taken individually by the legislator of one state or whether it is of more general nature. A comparative analysis of anti-terrorism legislation in the area of criminal law of the four countries was thus chosen with the aim of gaining a more general and a more "global" perspective on the question of how much Western European legislators take into account human rights when adopting anti-terror legislation. If in all four justice systems some common elements can be identified, it can be presumed that these elements may also exist also in other legal systems, at least in those that are similar to the ones examined.

However, the comparative perspective brings about another aspect: as Nijboer pointed out, when comparing law, "a historical dimension will naturally come along".¹²⁰ This becomes evident when thinking of the most prominent example – the laws adopted in the aftermath of September 11th. How can we understand the enormous mushrooming of anti-terror laws by the end of 2001 and the beginning of 2002, without taking notice of the 'historical' attacks of September 11th? Thus, not only the laws after this date, , but also those adopted before will be described.

Some remarks on the used methods – a justification of choice, concrete scope, as well as limitations and pitfalls of the applied methods – should not be omitted, before we can delve into the history of terrorism and then find our way through the dense forest of anti-terror legislation, in order to reach our final destination – a confirmation or rejection of the aforementioned thesis.

3.1. The historical approach – justification and methods

This historical approach is followed in the first Part, but also to a degree in the second Part. With respect to Part I, the historical approach was utilised for several reasons: first,

¹¹⁹ See previous note. On a European level, important instruments include the Council Framework Decision of 13 June 2002 on Combating Terrorism, the Council of Europe (COE)'s Convention on the Suppression of Terrorism of 27.01.1977 with the amending Protocol of 15.5.2003, as well as the COE's Guidelines on Human Rights and the Fight against Terrorism (2002), and the Guidelines on the Protection of Victims of Terrorist Acts (2005), *inter alia*. For more EU action in the area of counter-terrorism, please consult http://ec.europa.eu/justice_home/doc_centre/criminal/terrorism/doc_criminal_terrorism_en.htm; relevant instruments of the COE are retrievable at http://www.coe.int/t/e/legal_affairs/legal_co%20operation/fight_against_terrorism/2_adopted_texts/Relevant%20instruments%20and%20documents.asp#TopOfPage (both visited on 8 June 2008).

¹²⁰ Nijboer (2005), at 8.

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to provide a conceptualisation of terrorism. We cannot speak about anti-terrorism legislation without previously defining what terrorism means. Therefore, the historical Part will provide an overview of what people have identified as terrorism, how the notion has changed depending on time, place, and socio-political contexts, common elements of the phenomenon (if there are any), and which factors contributed to people resorting to terrorist methods. Second, a look at the history of terrorism will also serve to verify my first thesis, namely that the observance of human rights is crucial to minimise the preconditions for terrorism and to effectively combat it in the long run. I am well aware that the authority of lessons learnt from history is considerably limited. Historical preconditions that lead to one event are never the same in different times and different places. The interplay of factors that determine a certain development is too complex. Yet most will agree that there are some very general conclusions that can be drawn from history. This is also being done when formulating laws.¹²¹ Therefore, it must be legitimate to draw some general conclusions from historical experience.

As to Part II, the historical approach was utilised there because it seems inevitable in a legal comparison to include the historical origins and the historical development of the different laws. Additionally, an idea about how the law may develop in the future can only emerge when also looking from a historical perspective. Part II is structured into four chapters, each of which describes the legislation of one country. Each 'country report' is divided into three parts – laws adopted prior to September 11th, laws adopted in its aftermath, and current developments. The approach is therefore mostly chronological, and sometimes, if theme and time correlate, thematic.

3.1.1. Methods

The historical facts that will be presented in Part I are the outcome of a research based mainly on secondary sources. I relied mostly on the books I came across, driven by my own curiosity and by serendipity.¹²² I supplemented the gathered information on the basis of books that historians recommended to me. In doing so, a fairly balanced view was sought. However, in the politically-loaded field of terrorism research this is extremely difficult, if not impossible. It should therefore be stressed that the overview cannot be seen as exhaustive, but rather as a selection of examples following the specific focus of the present study.

¹²¹ Naturally, having been formed in the German legal tradition, the first example that comes to my mind for such "applied history" by the legislator is the German *Grundgesetz*, which was formulated and adopted after the outrageous experiences during the third *Reich*. It was the declared purpose of this "basic law" not to repeat the mistakes from Weimar, and so far it seems that the attempt has not failed.

¹²² Merton and Barber (2004).

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3.1.2. Scope of the historical overview

A few preliminary remarks should be made on the scope of the historical section. In particular, certain choices need to be clarified and substantiated.

a) Focus of the historical overview

It must be clarified that the focus lies not so much on a balanced account of all atrocities ever committed by terrorists in the world's history, but rather on giving a clearer idea of what terrorism may or may not be, the diversity and complexity of the phenomenon and the different ideas defended by terrorists. Further, to give a more balanced picture, state terrorism was also chosen to be included in the overview. As it turned out, this Part provided strong arguments for my first thesis. Finally, in view of Part II, special attention was given to more recent terrorism experienced in the countries subject to the comparative law study, i.e. the United Kingdom, Spain, Germany and France. Albeit these groups did not all have the same impact with regard to the number of victims and the scope of damage attributed to them, they had however one thing in common; all of them substantially led to changes of the national law, and are therefore of primal importance for this study.

b) Different notions of terrorism

Historians may reproach Part I in that it also includes groups that are selectively considered as terrorists, such as terrorism in the Bible. In choosing these groups, my opinion shall not be reflected about whom I regard as a terrorist. Quite the contrary, it was a conscious choice to especially include groups whose terrorist nature is rather debatable, but who indeed have been considered, at least by some authors, as terrorists. This may demonstrate the ambiguity of the terminology and the consequent danger of labelling. For the same reason, there may be overlaps between the notions of *terror* and terrorism, as well as between terrorism and *political violence*. Although I am aware of the importance of distinguishing these concepts, I have decided to also include situations that might be called terror or political violence, rather than terrorism, as long as *other* authors did in fact call the respective act an "act of terrorism".

c) Point of departure

Historians follow different approaches when outlining the history of terrorism. Many take as a point of departure the French Revolution, when the term "terror"¹²³ is said to have entered into European languages, describing the regime under which the Jacobins fought their political enemies (*regime de la terreur*).¹²⁴ Some authors depart even

¹²³ The term *terreur* itself derives from the Latin verb *terrere* which means "to cause to tremble". (Chaliand and Blin (2004a), at 9).

¹²⁴ Zlataric (1975) at p. 474, Fn. 2; O'Connor (2001) at p. 1; Roberts (2005) at p. 1; Piper Welt am Sonntag, <http://www.wams.de/data/2004/01/25/228231.html>, visited on 08-05-07.

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earlier, i.e. the first century A. D., when a group of Jewish resisters, the so-called “zealots”, fought against the Roman occupation in Palestine.¹²⁵ A few see the first traces of terrorism in the Bible.¹²⁶ In an attempt to give at the utmost a broad picture, I shall start at the earliest point in history, when some authors believe to have identified terrorist groups.

3.1.3. Relevance of the research

There are innumerable publications dedicated to the history of terrorism.¹²⁷ Yet the perspective chosen in this thesis is a very specific one, a perspective chosen in order to prepare the reader, and indeed author, for Part II. In this sense and only to this extent, the description strives for originality, but it does not pursue, for a non-historian the rather ambitious aim to give a significant contribution to the immense amount of already existing literature on the history of terrorism. At the most, the specific examples and the conclusions drawn at the end may in some part contribute to the general discussion related to terrorism and counter-terrorism. However, as stated earlier, the objective of this Part is more modest: Part I aims primarily at giving background information and historically-based arguments to substantiate the choice of the thesis defended in Part II.

3.2. The comparative criminal law approach

3.2.1. Some preliminary remarks on comparative research

The method of a comparative criminal law analysis of anti-terrorism legislation and its human rights limitation was chosen for several reasons. First, an “enormous potential for acquiring knowledge and creating law” can be gained by comparing different national laws.¹²⁸ Or, in the words of Anselm von Feuerbach, “the richest source of all discoveries in every empirical science is comparison and combination.”¹²⁹ Moreover, “foreign comparison broadens the perspective for decision-making, and leads to consideration of the solutions of others who have considered the problem in a world

¹²⁵ Chaliand and Blin (2004b)59; Anderson and Sloan (2002), at p. xxiii ; Harzenski (2003), at p. 140 Fn. 17; Barghothi (2005), at 57.

¹²⁶ O'Connor (2001) at p. 1; Martin (2003), at p. 4; Grob-Fitzgibbon (2004), at 98.

¹²⁷ To name a few: Laqueur (2004b), Chaliand and Blin (2004a), Harzenski (2003), Roberts (2005), Zlataric (1975), Rougeron (1979), Martin (2003), Ford (1985), Hoffman (1998), Anderson and Sloan (2002), Wieviorka (1991), Lutz and Lutz (2005), Schmid (1984), Schmid and Jongman (1988), Williams and Head (2006).

¹²⁸ Eser (1998), at 77.

¹²⁹ Eser (1997), at 81, citing: J. P. A. Feurbach, Blick auf die deutsche Rechtswissenschaft. Vorrede zu Unterholzners juristischen Abhandlungen (1810), in Anselms von Feuerbach kleine Schriften vermischten Inhalts 163 (1833).

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facing increasingly similar issues".¹³⁰ However, in order to be elevated to the level of science, comparative legal research must be conducted according to generally recognised methods and, therefore, it must be carried out purposefully and in a methodically correct manner.¹³¹ Following Eser's distinction between the different functions of comparative criminal law,¹³² the present study may best be classified as 'academic-theoretical comparative jurisprudence', i.e. it will fulfil the function to provide a better understanding of the law, in the present case, of the criminal law on terrorism. Thus, it may reveal the goals and limitations of different legal systems.¹³³ It may also help legislators when reforming the national and European/international law.¹³⁴

3.2.2. Relevance of the comparative research

No one contests the general relevance of a study researching terrorism and counter-terrorism. The events of September 11th have shocked the entire world. The Madrid Bombings in March 2004 and the London Bombings a year later in 2005 served to confirm the fear that Western Europe is far from being safe from terrorist attacks. However, counter-terrorism has also led to growing concerns. The United States especially have shown a firm determination to combat terror with means that go beyond the limits of international law, for instance the detention centre in Guantánamo Bay, where "illegal enemy combatants" are held, who enjoy neither constitutional rights nor the rights conferred to prisoners of war under the Geneva Conventions.¹³⁵ Also the wars in Afghanistan and Iraq were presented as measures of counter terrorism (although with respect to Iraq, the presumed existence of weapons of mass destruction was given as another argument), not to speak of secret service activities like the CIA's secret flights in Europe, dubious interrogation methods like "water-boarding",¹³⁶ and the so-called "extraordinary rendition" of terrorist suspects to countries where they could be subjected to torture.¹³⁷

¹³⁰ L'Heureux Dube (1998), at 39.

¹³¹ Eser (1997), at 493.

¹³² He distinguishes between legislative comparative law (consulting foreign laws to create national legislation), academic-theoretical comparative jurisprudence (comparing different legal orders to better understand law), and judicative comparative law (using comparative law in the concrete application of the law). Ibid. at 498.

¹³³ Ibid. at 507.

¹³⁴ Ibid.

¹³⁵ For details on the conditions as well as legal problems concerning Guantánamo, read: Ratner and Ray (2004).

¹³⁶ The BBC Correspondent Paul Reynolds describes this "interrogation method" as follows: "Water-boarding involves a prisoner being stretched on his back, having a cloth pushed into his mouth and/or plastic film placed over his face and having water poured onto his face. He gags almost immediately." (Reynolds (11 December 2007)).

¹³⁷ On rendition practices, for Europe, see ECCHR (2009), for the United States, cf. Ratner and Ray (2004), at 49 et seq.

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The topics of terrorism and anti-terrorism indeed enjoy particular popularity. In recent years, for obvious reasons, the literature on terrorism and anti-terrorism legislation has literally exploded. Studies have been carried out both on national¹³⁸ and international¹³⁹ levels, and increasingly included comparative analyses.¹⁴⁰ Multiple are the works on anti-terrorism legislation, ranging from critical assessments on the similarities of terrorism and anti-terrorism¹⁴¹ over problems connected with the evaluation of the effectiveness of counter-terrorism measures¹⁴² to studies analysing parts of national legislation against terrorism in further detail.¹⁴³ Also, comparative research has been done: already in 1992 Vercher published a comparative study of criminal anti-terrorism law, covering the legislation of Spain, Italy, France, Germany and the UK.¹⁴⁴ Another comparative study covering the same states even dates back to 1987.¹⁴⁵ Further comparative analyses regarding the legislation in place after September 11th have extensively been carried out by the Max-Planck-Institute for Public International Law of Heidelberg and by the Wetenschappelijk onderzoeks- en documentatiecentrum (WODC).¹⁴⁶ While there have been publications as to the legal changes that occurred after September 11th, most of them cover either the international/European legal order¹⁴⁷ or exclusively one national order.¹⁴⁸ Moreover, the failure to comply with human rights, and namely with the ECHR, has been assessed by many,¹⁴⁹ but few have undertaken to study and compare the national human rights protection of different Western European states, along with the protection provided by the Strasbourg Court in

¹³⁸ For the UK, see for instance Wilkinson (1988); Campbell and Connolly (2002). More recently: Walker (2006); for Germany, see for instance Junker (1996). For Spain, see e.g. Reinares (2003), and for France, see e.g. Moxon-Browne (1988).

¹³⁹ See e.g. the recently published comparative report of Aksu, Buruma and van Kempen (2006), Walter, Vöneky, Röben and Schorkopf (2004).

¹⁴⁰ In this respect, Sottiaux notes that both the US Supreme Court and the ECtHR have shown a willingness to cite each other's judgments, e.g. in the ECtHR's case *Appleby and others v UK* (judgment of 6 May 2003, application no. 44306/98), the Strasbourg Court quotes *Marsh v Alabama* 326 US 501 (1946), and in *Lawrence v Texas*, 123 S Ct 2472, 2483-4 (2003), the Supreme Court cited for the first time ECtHR case law, *inter alia Dudgeon v UK*, judgment of 22 October 1981, application no. 7525/76. (Sottiaux (2008), at 15 (note 51).

¹⁴¹ Blakesley (2006), reviewed by Oehmichen (2008).

¹⁴² Spencer (2006).

¹⁴³ Berlit and Dreier (1984), at 228 (Chapter 3.1: Terrorismusgesetzgebung: Überblick und Analyse).

¹⁴⁴ Vercher (1992).

¹⁴⁵ López Garrido (1987).

¹⁴⁶ Walter, Vöneky, Röben and Schorkopf (2004). However, this study focused mainly on the distinction of preventive and repressive measures. See the inventory of the WODC: Aksu, Buruma and van Kempen (2006).

¹⁴⁷ Monar (2005); Aoláin (2003), Reinisch (2006), Sottiaux (2008).

¹⁴⁸ E.g. see Brandon (2004); Junker (1996) Lamarca Perez (1985), M. Pierre Mazeaud (2006).

¹⁴⁹ Benedek and Yotopoulos-Marangopoulos (2004); Aksu (2007); Aoláin (2003); Gearty (2004); Hedigan (2005); Lemmens (2004); Loof (2005).

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the field of counter-terrorism.¹⁵⁰ It has thus yet to be examined the extent to which human rights are protected by national (constitutional) organs, and to the degree of protection provided by the ECtHR. Moreover, the development of this protection through the course of time has yet to be addressed. To analyse this development seems crucial to me in order to try and identify certain general tendencies, and again these may help to give an outlook of what is to be expected in the near future. The present study therefore attempts to fill this: it will give a historical account of terrorism and anti-terrorism legislation in the UK, Spain, Germany and France, focusing on those laws of criminal law and criminal procedure which have an impact on European human rights as guaranteed by the ECHR or nationally guaranteed fundamental rights of the respective state. Thereby, supportive proof will be found to confirm the aforementioned thesis; that legislators indeed show a tendency to ignore human rights when faced with terrorism.

3.2.3. The object of comparison: national anti-terrorism legislation

As has already been stated, the present work pursues the examination of the relevance of human rights in anti-terror legislation. The object of comparison is thus legislation against terrorism; the focus lies on the criminal and criminal procedural law adopted in this field, with particular attention to those laws that are likely to infringe human rights. However, it seemed vital to me to also include more remote areas of law, for two reasons: first, in any comparative legal study one must go beyond the limits of one's own system's classifications. The categorisation of legal areas is not identical in different countries; some specific measures, such as solitary confinement, for instance, may qualify in one country as penitentiary law, while in another country the same measure is only applied in relation with detention on remand and thereby regulated in the systematic context of criminal procedural law. In order to avoid that a similar measure escapes one's notice, it is therefore crucial to have a look not only to the legal area in which this measure is adopted in a specific country, but also to other areas.¹⁵¹ Second, specifically with respect to terrorism combat, the issue of terrorism itself can only be addressed in a multi-disciplinary fashion. Had I restricted myself to consider the anti-terror legislation adopted in the field of criminal procedure, the more general common developments in all four countries might have escaped my view. In contrast, had I restricted myself to consider the strictly legal aspects, important political developments which influenced both legislator and terrorist would have passed unnoticed. It is for these reasons that I chose a rather overarching approach, giving preference to generality rather than completeness.

¹⁵⁰ See, however, the recently published doctoral thesis of the Belgium Sottiaux (2008), who does not compare European constitutional law, but the US Constitution with the ECHR.

¹⁵¹ See de Groot (1989).

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Given the broad scope of this study, I had to limit myself to national laws. I did not focus on the developments at the European or International level. Admittedly, these developments are of great significance, also for the evolution of national law. However, the present research aims at studying the *national* reactions to terrorist events. Therefore, European and international legal changes will be only taken into account insofar as they change national legislation.

3.2.4. Applied test for compatibility with human rights: national and European case-law, academic writings

In order to assess whether a certain law complies with human rights, it is necessary to use an objective test applicable to all compared countries. As all four countries have ratified the ECHR, the case-law of the Strasbourg Court may give indications as to whether a law is compatible with human rights or not.

In this context, the human rights which most often conflict with counter-terror legislation are the right to liberty and security of the person (Art. 5 of the Convention), and the fair trial principle (Art. 6, ECHR). Less often, we can observe violations of the right to life (Art. 2, ECHR) and the prohibition of torture (Art. 3, ECHR).

However, the Strasbourg Court does not judge the *abstract* compatibility of a law with the ECHR, but only the compatibility of the *application* of a law in the concrete case.¹⁵² Therefore, not only the ECtHR's case-law but also national case-law concerning human rights is taken into account.

The national human rights protection mechanisms show, at least on a formal level, significant differences in the respective countries. In France, for instance, the *Conseil Constitutionnel* is exclusively judging the abstract compatibility of a bill with national constitutional law (therein included fundamental rights), prior to its adoption, whereas in Spain and Germany individual complaints can be raised before the Constitutional Court for concrete violations of a (constitutional) human right by the legislative, executive or judicative power. In England, the House of Lords can declare that a certain provision is incompatible with the Human Rights Act 1998, without this respective provision automatically losing validity.¹⁵³ In spite of these differences, in all countries there have been examples of cases where a piece of anti-terror legislation was quashed by a national organ, mostly a court, on the grounds of incompatibility with human rights and subsequently changed by the legislator. In this sense, I consider that the

¹⁵² See ECtHR, e.g. *Fox, Campbell & Hartley v UK*, judgment of 30 August 1990 (application no. 12244/86), *John Murray v UK*, judgment of 8 February 1996 (application no. 18731/91), *Magee v UK*, Judgment of 6 June 2000 (application no. 28135/95); see also Nijboer (2000a), at 439.

¹⁵³ However, in most cases the legislator will change a law which has been declared as incompatible with the Human Rights Act 1998. But it is important to note that it is by no means *obliged* to do so.

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decisions taken by the respective competent bodies give an indication of the quantity of anti-terror laws incompatible with human rights.

The additional survey on the cases of the ECtHR against the respective countries in the context of counter-terrorism will complement the outcome of the study and broaden it not exclusively to take into account legislative human rights abuses, but also human rights abuses committed by the executive authorities. More concretely, this Part will present a collection of selected anti-terror laws from the four respective countries, tested against human rights standards provided for by the ECHR and by the national law. With regards to this, it should be reiterated that the present study is limited to those ECtHR cases that were brought against the UK, Spain, France and Germany. It was limited to these cases in order to focus on cases where the application of British, Spanish, French or German counter-terror legislation was at stake.¹⁵⁴ To further complement the picture, academic writings related to the compatibility of a law with human rights will also be taken into account, when and where applicable.

In order to give a broader picture, I deemed it necessary to not only look at the presently applicable laws, but also include former anti-terror legislation adopted in response to former terrorist threats. Thus, I chose as a starting point for each country the historical moment in which the latest national terrorist movement before the emergence of international terrorism, and was responded to by the law. More concretely, this means that for the UK, I started with the emergence of the Provisional Irish Republican Army in 1969, for Spain, the emergence of ETA in 1959, for Germany, the creation of the Red Army Faction (RAF) in 1971, and for France, the Algerian conflict (1954-1962). Further, not only the laws but also preceding terrorist acts are mentioned in this section in order to identify a potential cause-effect relationship between a terrorist act and a subsequent anti-terror law (or even vice-versa, a terrorist act following a specific counter-terrorist measure). While the focus of the study is clearly on legislation, I also include other counter-terrorist measures where I consider them important for the understanding of the general context.

Finally, it should be reiterated that the goal in Part II is not to be complete, but rather to give an account of the most relevant anti-terrorism laws and measures, in terms of their impact on human rights.

3.2.5. Justification for selecting the United Kingdom, Spain, Germany and France

In a comparative study, one is inevitably confronted with the question "why these countries, and why not others?" Most people think that the anti-terror legislation of the

¹⁵⁴ A general analysis of Strasbourg's case law in terrorist cases is provided by Aksu (2007).

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United States is worthwhile to be studied, more than the law of any other country. I do not disagree that the United States of America has an anti-terror policy that is indeed astonishing from a human rights' point of view (mind only the recent scandals concerning the use of 'water boarding', CIA's extraordinary renditions, and the legal vacuum in Guantánamo Bay). At the same time, my argument against the abuse of human rights in the fight against terrorism can only become more powerful if I accomplish to prove that even the comparably 'mild' laws of Western European countries adopted in the fight against terrorism do not comply with human rights. If we presume that US anti-terror legislation gives even more leeway to human rights abuses than the legislation in Western Europe, we do not need to address the US laws anymore if we can already prove that the relatively 'mild' laws in Europe do not comply with the there existing human rights standards (*argumentum a majore ad minus*).

However, in the context of Western Europe, it might require some justification not to discuss Italian legislation, as Italy had significant experiences with national terrorism (*brigata rosse* or Red Brigades).¹⁵⁵ To include Italy in the survey might indeed have proven instructive. I must admit there were mainly practical reasons that impeded me from doing so: first and foremost, I do not speak Italian. Further, I had already chosen four other countries for comparison, and was confident that should suffice to prove my thesis.

As I wrote the main part of my thesis in the Netherlands, I was often confronted with the question why I did not write about Dutch legislation. In practical terms, the same reasoning applies as to that of Italy. Additionally to this practical aspect, the Netherlands did not have any anti-terror legislation prior to September 11th. This would have made the comparison with the other countries difficult.

It is mainly for these reasons why I did *not* choose the United States, Italy or the Netherlands for comparison. The positive selection criteria for the chosen countries were comparability and, at the same time, sufficient diversity: it is necessary to note that I chose the United Kingdom (excluding Scotland, and hence including legislation of England, Wales and Northern Ireland), Spain, Germany (excluding Eastern Germany before 1989), and France. Referring to the UK, I chose to limit myself to England, Wales and Northern Ireland,¹⁵⁶ thus excluding Scotland, since the legal system of Scotland differs considerably from the one that governs the rest of the UK, whilst, in terms of anti-terror legislation, the differences do not seem strong enough to require

¹⁵⁵ See below, Part I, at 2.5.1.

¹⁵⁶ For Northern Ireland, see: Dickson (2005).

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special attention to Scottish law.¹⁵⁷ In consequence, allusions made to the UK should be understood restrictively as relating primarily to England, Wales, and Northern Ireland. Eastern German legislation was not considered as the German Democratic Republic, at the time of its existence, was not a Member State to the Council of Europe and had not ratified the ECHR.

The United Kingdom, Spain, Germany and France have a number of features in common which make them capable of comparison. First, they all belong to the same geographical region, i.e. Western Europe, and therefore share a similar cultural and historical background. Second, the laws of these countries are adopted in a democratic legislative process. Third, they are all members of the Council of Europe and have all ratified the ECHR. Consequently, they are all subjected to the jurisdiction of the European Court of Human Rights. In addition, they are also all member states of the European Union. With respect to terrorism, they have in common that they have all had experiences with terrorism prior to September 11th. Further, they all responded with special legislation. Considering their similar cultural background and the similarity as to their declared commitment to human rights, it can be expected that they will show a comparable interest in upholding human rights in the fight against terrorism.

At the same time, there are considerable national differences which make the comparison interesting: while the United Kingdom follows a common law tradition, Spain, Germany and France are traditionally civil law countries. Obviously this influences the justice system as a whole and thus the formulation and the application of the law. Another difference consists in the kind of terrorism the different countries experienced: while the United Kingdom and Spain had to struggle predominantly with regional separatism (IRA and ETA, respectively), Germany faced mainly left-wing extremism (RAF). France had experienced a bit of both – Breton and especially Corse separatist movements, but also left-wing terrorism by *action directe*. Additionally, terrorism arose in France, and Algeria, which was then still a French colony, when the latter fought for its independence. Further, the intensity of the terrorist threat varied greatly: the Northern Irish conflict cost the lives of over 3,000 people, whilst the conflict with the Basque country 'only' led to an estimated 800 killings. In Germany and France, the number of fatalities was much smaller. With respect to the protection of human rights, there are national differences in how this is implemented: Germany and Spain have a constitution which includes a list of fundamental rights, the enjoyment of which can be enforced by means of a constitutional court *in senso stricto* on an individual basis. In France, the situation is somewhat more complicated: France has several constitutional texts which also guarantee human rights, and which are all in

¹⁵⁷ In any case, the vast majority of UK anti terror legislation (with the exception to the special Northern Ireland Acts) applies to the whole of the UK, thus also to Scotland.

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force (the so-called *bloc de constitutionnalité*), but in France, not a court, but a constitutional council, the *Conseil Constitutionnel*, has the power to check the constitutionality of certain laws prior to their adoption. In the United Kingdom, the most important written text of fundamental laws applicable today is the Human Rights Act 1998. The UK has no special organ to watch over the compliance with human rights, but all of the courts can render "declarations of incompatibility" if they find that a certain law is not compatible with the Human Rights Act. Thus, although all countries have ratified the ECHR, the protection mechanisms of human rights on a national level are dissimilar in the four countries. As a consequence of all these differences, it can be expected that the reactions to terrorism will differ significantly in the alternative countries, and that this will also affect the protection of human rights therein.

One last remark should be added on the chosen order of countries. The order corresponds to the intensity of terrorism faced by the countries and the legislative reactions to it. The United Kingdom undoubtedly deserves first place in this sad inventory of terrorist experience. Spain follows with the still topical threat from Basque terrorism. The terrorism confronted by Germany in the 1970s may seem minimal from an English/Irish or Spanish/Basque perspective, yet the threat, despite the relative low number of deaths, was taken very seriously by national politics, particularly by the legislator, and had a considerable impact on society triggering the adoption of a series of anti-terror laws. France comes last as it experienced different forms of terrorism (regional and left-wing) and, in this sense, is used as overarching example to be shown at the end. Moreover, terrorist activity in France was actually less intense than in the other countries.

3.2.6. Limitations in comparative law

It is a characteristic and a common pitfall of comparative legal research that it is often impossible to gather all of the appropriate documentation.¹⁵⁸ This especially applies to a broad subject like the present one. It is therefore indispensable to indicate some of the limitations of the investigations, and the consequent limits of the conclusions drawn from it in the present study:¹⁵⁹

3.2.6.1. Similarities rather than identical concepts

When comparing the law of different countries, it is deluded to think that we might discover identical concepts. One will come across "look-alikes"¹⁶⁰ which resemble each other in some ways, but will also show considerable differences. An example of this is

¹⁵⁸ Eser (1998), at 103.

¹⁵⁹ See also *ibid.*

¹⁶⁰ Nijboer (2000b), at 399 et seq.

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the substantive criminal law concept of terrorism. In the four countries of examination, there was not one specifically defined crime called "terrorism"; mostly, reference was only made to "terrorist" crimes, or "terrorist organisations", without any further explanation. Obviously, this made the selection of laws to be compared difficult. The most obvious selection criteria was that in the definition of the crime, the word "terrorist" was used, but even then different national laws described different acts as terrorist acts. Finally, there were even laws in which a reference to terrorism or the like was completely absent, but which were clearly adopted in view of the perceived terrorist threat. In the present study, it was decided to include all of these laws, as long as the legislator's intention to combat terrorism with the regulation in question could be traced. It must be noted that these and other differences between the compared countries' legislation necessarily limit the level of comparability.

3.2.6.2. *Cultural and structural elements*

The cultural and structural elements of the legal systems have to be taken into account.¹⁶¹ For instance, the fact that France has a centralised counter-terrorism prosecution parquet and a centralised group of specialised counter-terrorism judges may be indicative of the general high level of centralisation in France. Another example may be the restrictions imposed on the right to defence in Germany during the times of the RAF. This can only be understood against the background that in Germany, unlike in common law countries, the prosecution and defence are not treated equally in various respects.¹⁶² This imbalance is even visibly apparent in the court room, where the judge and prosecutor are sitting on higher chairs than the defendant and his lawyer.¹⁶³ The special laws against defence lawyers show certain mistrust towards the profession as a whole. Reasons for this may be found in German legal culture, for instance in the fact that whilst prosecutors are supposed to present the case *objectively* to the judge, including both incriminating and exculpatory evidence, the defence lawyer is solely concentrated on defending his client, thus presenting inevitably a more subjective view. In principle, the judge should be able to adopt a fair decision based only on the assessments of the prosecutor. In that respect, the presence of the defence lawyer is only required to ensure that no important exculpatory facts escape the prosecutor's notice.

3.2.6.3. *Common law and continental (civil) law*

Scholars of legal comparison generally divide national legal systems into legal "families" (e.g. common law, continental or civil law, Islamic law, etc.).¹⁶⁴ This is

¹⁶¹ Ibid. at 404 et seq.

¹⁶² The same applies to other continental countries. For The Netherlands, see Malsch and Nijboer (1999), at 239.

¹⁶³ The same is true in The Netherlands. See *ibid.*

¹⁶⁴ See, e.g. Nijboer (2000b), at 406.

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based on the idea that some countries have more things in common than others. The reasons may be found in their geographical proximity or in similar historical, social and/or political developments, as well as in common philosophical foundations on which society and the law are built. The countries of the present study can be seen to belong to two legal families – the common law system (United Kingdom), and the continental or civil law system (Spain, Germany and France). The fact that the UK is embedded in a different legal system than the other three countries makes comparison at some points difficult. The common law system is characterised by being more flexible and dynamic than the civil law system; the first is based predominantly on cases that change according to the needs of society, the second relies on more principle-like legal rules that only reluctantly change over the years. This difference, together with the fact that the UK faced most of the time a more imminent and serious terrorist threat than the other three countries, made the development of anti-terror legislation in the United Kingdom relatively harder to track than in the other countries. In view of this, a different structure was chosen for the legislation adopted prior to September 11th. There were too many amendments, albeit sometimes very slight ones, throughout the course of time which would have exhausted the reader and author likewise. In order to give a more general idea about the most relevant measures adopted, a thematic approach seemed therefore more appropriate. Thus, in the case of the UK, the part on anti-terror legislation prior to September 11th was structured slightly differently, namely thematically instead of chronologically, from the respective part in the other three countries of examination.

3.2.6.4. Soft law and legal practice

When comparing criminal procedure, different levels of procedural law need to be taken into account.¹⁶⁵ Ideally, one should consider written law, case-law of the leading courts, soft law in terms of guidelines, standing court practices etc. and daily practice. Due to the broad scope of the present study, it was impossible to give the deserved attention to all of these levels. It was practically not feasible in the provided time to observe daily practice, and therefore, the admittedly important practical aspect, the real day-to-day application of the law, is only considered insofar as it has been discussed in literature by practicing lawyers. Similarly, soft law is only taken into account where it appeared to be of particular relevance.

3.2.6.5. Broad scope of the research

It may have become apparent that throughout this study broadness was preferred over narrow profundity. This choice is based on the general aim to give an utmost broad picture both of the phenomenon of terrorism and of the legislative reactions to it. It was

¹⁶⁵ Ibid. at 402; see also Nijboer (1998), at 394.

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considered that an appropriate account of the diversity and the complexity of the different forms of terrorism as well as of the multifaceted legislative responses to it can be presented. A broader view on the phenomenon and on legislative reactions appears indispensable if we want to gain a more universal insight, and thus be able to draw more general conclusions. At the same time, one has to be aware of the limitations inherent in this approach: it will be impossible to compare the different concrete responses in detail, for example those of detention on remand, telephone tapping, etc. Advantages of one national response over another one, on this concrete level, cannot be identified. Yet, these specific differences or commonalities may be important to consider when drafting new legislation. Insofar, the present study attempts to only fulfil a "referring" function, i.e. to give references to laws and articles where more information can be found. Another risk entailed in the broad comparison is that one may fall into the trap of simplifying and generalising too much. It should be reiterated that the general conclusions drawn in the present study are no more than indicative and may, on a more substantial level, encounter contradiction.

4. Summary: Research questions and structure of the study

The present study entails one preliminary thesis, namely that the preservation of human rights is vital in the fight against terrorism, and, based on this presumption, the main thesis that democratic legislators show a tendency to ignore human rights when confronted with terrorism or other extraordinary criminal phenomena (e.g. organised crime), to be substantiated by a variety of examples from different times and places. In a final assessment the possibilities to reduce excessive human rights limitations in counter-terrorism legislation will be explored.

Part I, the **historical overview** on terrorism, pursues a double goal: first, it conceptualises the notion of 'terrorism', by exploring its different appearances in history, the related changes of perception, as well as historical socio-political preconditions for terrorism. The second goal is to draw some general conclusions from the historical experience, in particular with respect to the role of human rights.

The main questions examined in Part I are thus:

- (a) What actions have been classified by people as 'terrorism'? Which factors were pre-conditional for the emergence of terrorism?*
- (b) Considering the historical development of terrorism, what is the role of human rights therein?*

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The observations made at the end of the Part will, at the same time, present the point of departure for Part II: having concluded that it is indeed vital to preserve human rights even, and especially, for the purpose of fighting terrorism, the following question will be explored in Part II:

To what extent do legislators observe human rights standards when confronted with terrorism?

The use of the quantitative notion makes comparison inevitable, only by comparison will it be possible to contextualise the scope of the extent. A comparison will therefore take place in two directions: time and space. Part II will thus comprise an inventory of the anti-terror legislation adopted in the different countries at different times, from the point of view of national and European human rights. However, the aforementioned limits of comparison must not be disregarded.

In Part III the results of the comparison of anti-terrorism legislation from different times and countries will be presented. It will be scrutinised whether the presented thesis can be confirmed.

For this purpose, a few preliminary sub-questions will be explored beforehand. First, the influence of a terrorist incident on the legislator must be established. Thus, the question to investigate is:

1. *Do legislators show a different concern for human rights after a terrorist incident has taken place? What is the relationship between a terrorist act and subsequent anti-terror legislation, e.g. is the reaction proportional to the attack, i.e. does a relatively mild attack provoke relatively mild laws and devastating attacks lead to draconian laws? Is the terrorist the actual legislator behind the scene?*

Subsequently, a global assessment of the situations of human rights in the area of anti-terror legislation must follow. How far are human rights being respected in general in counter-terror legislation? For this purpose, we shall discover:

2. *What are the characteristics of anti-terror legislation, with respect to and aside from human rights?*
 - *Are there general characteristics, and if yes, what are they?*
 - *What national particularities can be identified in the different countries? How can the differences be explained?*

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Finally, to understand where we stand as of today, we must scrutinise the general development of anti-terror legislation, from a European and national human rights perspective. In doing so, the following questions will be addressed;

3. *How has the anti-terror legislation of the countries in question developed within the last 30 years with respect to (European and national) human rights?*
 - *Which common general developments can be observed?*
 - *What effects did the incidents of September 11th have on subsequent anti-terror legislation? Can it be considered as a turning point?*

Once these questions are answered, the concrete limitation of human rights – will be assessed, by comparing the case-law and academic assessments on the compatibility of anti-terror legislation and human rights on a national and a European level. Formulated as questions, it will thus be asked:

4. *How have national courts and the European Court of Human Rights assessed the compatibility of anti-terror measures with human rights?*
 - *What is the role of national protection bodies, such as constitutional courts, and what role does the European Court of Human Rights play?*
 - *Are there national differences and/or commonalities? How can these be explained?*

In the final assessment and outlook, the current situation will be discussed, taking into account the outcome of the study. Some ideas for possible improvements of the identified problems will also be presented.

Last but not least, the present study may serve to identify a number of other legal problems in one way or another related to the research topic, but that are too remote to be discussed in-depth within this work. For this purpose, the study will close with a general outlook, containing assessments as to future developments, as well as recommendations for further research.