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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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Part III

Comparison & Analysis

In all four countries, we have seen that several years before the devastating attacks in New York and Washington in 2001, special counter-terrorism legislation was adopted in response to concrete terrorist attacks. We have seen that many of these laws were subjected to either domestic or European judicial review, and that some of them were subsequently declared as incompatible, be it with a national constitutional text (or, respectively, for the UK: the Human Rights Act 1998), or with the ECHR. The conclusions of the previous sections bring us closer to our research question, i.e. in how far the legislators of today take into consideration human rights when drafting legislation in response to a concrete terrorist attack, and in turn what might be expected in the future.

To this end, it will be first established in which way legislators are influenced by both real and potential terrorist attacks. Do they adopt different laws in reaction to a terrorist incident? How do these laws differ from laws adopted independent of a 'shocking' event? Thus the impact of terrorist events on subsequent legislation will be analysed. Second, an attempt will be made to give a more global assessment on the observance of human rights in counter terror legislation. With this in mind, general characteristics of the legislation will be identified. Subsequently, an analysis of how anti-terror legislation has developed in the course of time will follow. Both commonalities between the four countries and national differences will be examined. This will help us to identify possible, common or diverging, future developments. Further, the national and European case-law concerning anti-terror laws and their compatibility with human rights will be analysed and compared. Based on these results, it will be possible to present in the conclusion an assessment of how far today's legislators observe human rights when faced with terrorism, and how legislation can be expected to develop in the future.

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1. Relationship between a Terrorist Attack and Subsequent Legislation

All countries found it necessary to adopt special legislation in response to a terrorist attack committed on their territory.¹ While not every single anti-terror law was adopted in reaction to a specific terrorist incident,² the vast majority of anti-terrorist laws can be seen to have been done so. Some of these laws addressed a particular problem revealed by the attack,³ but many were of a more general nature, globally enhancing police powers and restricting individual rights and freedoms.⁴

As to the relationship between the gravity of the terrorist attack and the intensity of the interference of the subsequently adopted law with human rights, there is no identifiable proportionality. We could maybe speak of 'proportionality' between the levels of public alert caused by a specific terrorist incident and the subsequent legislative reaction to it (although the level of public alert is difficult to measure). If there is an outcry in society after a terrorist act, legislators tend to react very quickly with laws which considerably limit basic human rights.⁵ In this context, it should be noted that the alarm is caused not so much by the real intensity of the act, but rather by the media coverage it receives, which, of course, is directly linked with the society's perceptions, but which is also influenced increasingly by political decisions.⁶ This becomes obvious when considering that in Germany during the kidnapping of Schleyer, the gravity of this terrorist act was by no means comparable to what happened at the same time in Northern Ireland, but the legislative reaction – the adoption of a law allowing for the incommunicado detention of a suspect with no contact to the defence council during thirty days or more – reflects the level of alarm present in German society during that time.

Having noted that many laws were adopted in reaction to a certain terrorist attack (ad hoc legislation), it is conspicuous that the geographical link between a terrorist attack and the national legislative response is increasingly remote. Before September 11th, the attack had to be linked to the respective nation, but since September 11th, acts also committed on another country's territory lead to national legislative changes. This is because the target group of international terrorists is much wider than the target group of "classical" terrorists used to be.⁷ Globalisation, world-wide mobility, international

¹ E.g. see above, Part II, 1.2.1.1., 1.2.1.12., 1.3.6. (UK), 2.2.6.5. 2.3.7. (Spain), 3.2.1.4., 3.2.1.6. (Germany), 4.2.2., 4.2.4., 4.2.8. (France).

² Cf., e.g. the Terrorism Act 2000 in the UK.

³ E.g. airport security, or, in Spain, the *kale borroka* and subsequent amendment on juvenile criminal law

⁴ E.g. see above, Part II, 1.3.3., 1.3.4, 1.3.7. (UK); 2.3.1. – 2.3.4. (Spain); 3.3.1.6., 3.3.1.7. (especially note 622), 3.3.3.1., 3.3.3.2., 3.4.7. (Germany); 4.3.2.1., 4.3.2.3., 4.3.3.3., 4.4.1. (France).

⁵ E.g. the abduction of Hans-Martin Schleyer in Germany, responded to with the *Kontaktsperregesetz*, or the London Bombings 2005, responded to by the TA 2006.

⁶ It is, in fact, the reception by the media that makes the terrorist incidents so powerful. "Terrorism is not simply what terrorists do, but the effect (the publicity, the alarm) they create by their actions." Jenkins (1978).

⁷ To give an example: the RAF presented no danger to England, they were not interested in changing English politics and therefore, their acts did not lead to any legislative changes in England. However, the

connectivity through telephone, television, and especially the world-wide web, brought about cross-border delinquency as well as international criminal prosecution.

Part 2 has also shown that the action-reaction-play between terrorist actors and state actors can end in a vicious circle, in which one terrorist act is answered by repression, the repression responded to by an even more violent terrorist act, which in turn is followed by more repressive measures, and so on.⁸ The only way to avoid such a spiral of violence is to refrain from overreactions on both sides. Obviously, it is hard to argue that governments must restrain themselves, whilst terrorists do not. However, if governments start to use the very same or similar methods as the terrorists themselves, they pose a much higher danger to the population than the comparatively small group of non-state terrorists. I am not implying that the governments of the United Kingdom, Spain, Germany and France combated terrorism with terrorist methods. However, the methods they used were not always legal (e.g. secret wire tapping without any legal basis, or the paramilitary activities of the GAL in Spain), and in some cases their proportionality may be seriously questioned (e.g. in shoot-to-kill cases,⁹ or in the *Rasterfahndung*,¹⁰ as applied after September 11th in Germany). The illegality and the excessiveness of these methods served to fuel popular support for the terrorists' cause.

2. Characteristics of Anti-Terror Laws

2.1. General characteristics

2.1.1. Human rights implications

There are some general characteristics identifiable amongst most, if not all of the examined legislation:

First, many anti-terror laws necessarily entail a *limitation* of fundamental human rights. The following rights turned out to be at a special risk to be limited:

- right to liberty of movement (extended police custody and detention on remand);¹¹
- inviolability of the home (house searches, bugging operations);¹²
- right to privacy (telephone tapping etc.);¹³

London bombings in 2005 also influenced the French legislator to change the (national) law, as it seemed likely that a similar attack could also be committed on French soil.

⁸ E.g. for France: see the dismantling of the Chalabi network (above, Part II, 4.3.3.2.); for Germany: the abduction of Schleyer, the subsequent Act blocking all contact of terrorist prisoners, followed by the hijacking of the airplane Landshut by Palestinian terrorists to press the RAF prisoners and others free, see above, Part II, 3.3.1.6.

⁹ See above, Part II, 1.3.10.

¹⁰ See above, Part II, 3.4.3.

¹¹ UK: e.g. indefinite detention of foreigners, detention without trial, exclusion orders; Spain: Incommunicado detention; Germany: *Kontaktsperre*, France: *Garde à vue*, solitary confinement and extended detention.

¹² In all four countries: house searches, bugging operations; in France especially night searches, e.g. Law 96-1235 of 30 Dec. 1996.

¹³ All countries have multiple examples where privacy is further restrained, from telephone tapping over data storing and sharing, to grid search etc.

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- freedom of association (e.g. banning of certain associations);¹⁴
- freedom of conscience (e.g. incitement to terrorism);¹⁵
- prohibition of discrimination / equality before the law (e.g. special treatment of foreigners).¹⁶

Moreover, the following **basic procedural human rights** have been limited in anti-terror laws:

- Right to defence;¹⁷
- right to ordinary judge;¹⁸
- right to legal remedy;¹⁹
- equality of arms;²⁰
- right to remain silence and not to incriminate oneself;²¹
- contradictory hearings, i.e. that witnesses are heard in court so that both the prosecution and the defence can put question to them (in Germany

¹⁴ UK: proscribed organisations, Spain: prohibition of political parties; Germany: Change of law on associations in 2002, thereby allowing prohibition of religious associations.

¹⁵ UK: glorification of terrorism, Racial and Religious Hatred Act; Spain: *apología* or glorification of terrorism as introduced by Decree 3/1979, on Security of the Citizen, Germany: abolition of the so-called religious privilege.

¹⁶ UK: ATCSA 2001 part IV, regulating indefinite detention of foreign terrorist suspects; Spain: discrimination of Basque prisoners; Germany: more intrusions of privacy of aliens in Security Package II; France: the laws extending a special regime of criminal procedure to offences against state security, as proposed in the law of 1986, was rejected by the Constitutional Council for being contrary to the principle of equality. Moreover, problematic with respect to equality before the law is the possibility to gain sentence reductions or remissions for helping the authorities (*pentiti* laws), a possibility that is possible in all four countries under certain circumstances.

¹⁷ UK: no access to defence lawyer during first 48 hours of detention after arrest, even during police interrogations; Spain: reduced defence rights under incommunicado regime; Germany: exclusion of defence; control of contact with defence lawyer (§§ 138a, 138b, 148(2), 148a *StPO*); France: Law 93-2 of 4 January 1993 providing that terrorist suspects in police custody could not see their defence lawyers during the prolonged custody – this provision was found unconstitutional by the French *Conseil Constitutionnel*.

¹⁸ France: *Cour de sûreté de l'état* (the English diplock courts and the Spanish *audiencia nacional* is considered conform to this right).

¹⁹ Spain: Political parties that are prohibited have no legal remedy against the prohibition; Germany: §§ 100a and 100b *StPO*, as introduced by the Eaves Dropping Act 1968, did not provide any legal remedy against the decision of wiretapping; France: in the case of solitary confinement, the prisoner had no right to challenge the decision on prolonging solitary confinement (see case *Ramirez-Sanchez* before the ECtHR loc. cit.).

²⁰ Spain: Art. 174 bis (b) of Organic Law 2/1981 of 4 May on the Protection of the Spanish Constitution and Terrorist Matters of 1981, which allowed to punish a collaborator with a higher punishment than the main *perpetrator of the act*; Germany: First Act for the Reform of the Criminal Procedure of 1974 (extension of powers of the prosecution to the detriment of the rights of the accused), leniency programme of 1994; France Law of 9 March 2004, which enhanced powers of the prosecution to the detriment of the defence.

²¹ All countries have provisions allowing sentence reductions or even exclusions of sentences for criminals who collaborate with justice; by these provisions, charged people are pushed to declare against themselves as it seems the only way to profit from a sentence reduction. Moreover, the use of undercover agents to combat terrorism as used e.g. in Germany goes against the principle not to incriminate oneself if people give self-incriminating information in the belief that the undercover agent is their friend or associate. Further, in the UK, negative inferences from silence are admitted. In Spain, the sometimes for more than ten days lasting incommunicado detention severely increased the pressure on the prisoner to incriminate himself (and was therefore declared, if it superseded 72 hours, as unconstitutional by the Constitutional Court in its judgment no. 199/1987 of 16 December 1987).

known as principle of immediacy – *Unmittelbarkeit*, in common law known as the rule against hearsay).²²

With this enumeration, I only aim to remind the reader of the relevance that counter-terror legislation has for human rights. I am *not* arguing that the bulk of the anti-terror legislation examined in this study *violates* these rights, but rather most of the examined laws *restrict* them, and the question whether these restrictions are justified or not is another one. Admittedly, the limitation of the rights mentioned above was in many cases necessary and justified. Most human rights are not granted in absolute terms; they can and must be restricted if the restriction is justified. Sometimes a limitation is necessary because they conflict with another human right (e.g. the right to life of the potential victims of terrorists). It is generally accepted that human rights can be limited for the purpose of fighting terrorism. As long as the limitations are clear and proportional, and the state authorities apply the law the way it is meant to be applied, this does not cause any problems, from a human rights' point of view. But alas, anti-terror laws in particular are far from being clear. Mind only the very wide and general definition of terrorism provided by the British Terrorism Act 2000.²³ Moreover, it must not be forgotten that even limitations of human rights have their limits. If these limits are surpassed, the limitation is no longer justified. In some cases it is even euphemistic to speak of a "limitation" of human rights, since the concerned right is limited to an extent that makes it practically nonexistent.²⁴ In some cases, the limitations were excessive to a degree that was difficult to justify even by the increased level of threat posed by terrorism. A prime example of such legislation is Part IV of the ATCSA 2001 allowing indefinite detention of foreign terrorist suspects, which was rightfully quashed by the House of Lords in 2005. Similarly, the *Kontaktsperre* under German law in its version of 1977²⁵ clearly undermined the fundamental right to an effective defence. Also, the measures adopted in Spain by Decree 21/1978 (indefinite prolongation of police custody, house searches without any judicial authorisation etc.) can hardly be regarded as justified, and were indeed declared as unconstitutional by the Constitutional Court in 1982. Similarly, the prolonged detention on remand (up to more than four

²² In France, this principle was violated as witnesses were not heard in court in trials connected to the Chalabi network in the 1990s.

²³ Above, Part II, 1.3.14.

²⁴ In the case of the UK, this is reflected, *inter alia*, in the fact that the UK deemed it necessary to make a declaration under Article 15 ECHR and thereby allowed itself to suspend certain rights, e.g. the right to liberty (Article 5 ECHR), in certain situations (see above, Part II, 1.2.1.2.). Moreover, the right to silence is practically undermined if, as happened in Northern Ireland and later also in mainland UK, negative inferences can explicitly be drawn from the silence of the accused (see above, Part II, 1.3.3. and 1.3.11.). In Spain incommunicado prisoners are totally deprived from their right to inform a family member or another person of their choice about the fact that they have been detained and the place of the detention (see above, Part II, 2.2.5.2.). In Germany the right to free access to a defence lawyer was completely undermined in the case of prisoners held incommunicado, at least until 1985 (see above, Part II, 3.2.1.6.). Further, the shooting of a hijacked airplane, as proposed by the Air Security Act in Germany in 2005 ignored entirely the right to life of the unlucky passengers of such a plane (see above, Part II, 3.4.6.). France's several condemnations by the ECtHR for excessive detention on remand substantiate the presumption that the right to be brought before a trial "within a reasonable period of time" is more than just restricted (see above, Part II, 4.3.6.).

²⁵ In 1985 the situation was improved since a contact person was appointed to the incommunicado detainee, ensuring the observance of his or her fundamental rights.

years in one case), as applied in France in several cases,²⁶ cannot be considered as justified and was consequently repeatedly condemned by the ECtHR. In consideration of these cases it is very important to critically question the compatibility of counter-terror laws (including their application in practice) with human rights. In order to avoid repetition, I will not elaborate again in detail the cases in which the Strasbourg court or a national court or council considered that human rights or constitutional safeguards were not duly respected. These cases were discussed in the respective sections of Part II. The quantity of cases that could be collected, however, clearly indicates that legislators often do not fully respect human rights when adopting legislation against terrorism. The risk that a law violates human rights is increased if the law is adopted quickly after a terrorist action.

Besides the established relatively strong risk that anti-terror legislation breaches human rights, there is also an enhanced risk that less attention than necessary is given to **general criminal law principles**.²⁷ In particular, the following principles proved to often be ignored:

- the principle of legal clarity and certainty,²⁸ as enshrined in the principle of legality;
- prohibition of analogy of criminal laws;²⁹
- the principle that only the more favourable law may be applied retroactively;³⁰
- the presumption of innocence (e.g. by reversing the burden of proof);³¹
- principles of minimal intervention (*ultima ratio*) and proportionality.³²

²⁶ *Debboub alias Hussein Ali v France*, Judgment of 9 November 1999 (application no. 37786/97), see above, Part II, 4.4.7.

²⁷ The principles of criminal law are thoroughly discussed by Ashworth (2006).

²⁸ This principle is jeopardised in all countries, since already the very notion of 'terrorism' or 'terrorist' is not further defined. For Spain, see also Art. 174 bis (b) of the Organic Law 2/1981 of 4 May on the Protection of the Spanish Constitution and Terrorist Matters of 1981, criminalising 'any other act of collaboration'. See also Art. 574 CP, which criminalises 'any other crime' that 'has the same conditions and the same goals as expressed under Art. 571 CP'. For Germany, see § 129a StGB criminalising the membership to a terrorist organisation without defining such an organisation. The compliance with the requirements of legal certainty was also doubted in the case of the French Law no. 86-1020 of 9 September 1986. For France, see (Art. 421-2-1 CP): the '*participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles*'.

²⁹ In the Spanish Criminal Code of 1944, Art. 260 criminalised the commission of 'other similar acts' (*otros hechos análogos*).

³⁰ For Spain, see above, Part II, 2.3.1. and 2.3.3.

³¹ For France, see Art. 421-2-3 CP, introduced by Law no. 2003-239 of 18 March 2003, which provides punishment for up to seven years imprisonment for persons '*unable to account for resources corresponding to one's lifestyle when habitually in close contact with a person or persons who engage in one or more of the activities provided for by articles 421-1 to 421-2-2*' (see above, Part II, s. 4.4.3.). For the UK, see e.g. s. 57 (3) of the Terrorism Act 2000.

³² For the UK, cf. Part II, 1.4.6. See also above, Part II, 2.4.5. (Spain); 3.3.3.1. 3.4.2. and 3.4.3. (Germany); 4.4.4. (France).

These principles have been developed in all of the examined countries³³ to promote trust in the criminal justice system and ensure the certainty and stability of the law. They are of utmost importance for the proper functioning of criminal justice. The first three of these principles (the principle of legal certainty, the prohibition of analogy, and the principle of non-retroactivity of unfavourable criminal laws) are crucial as they guarantee that citizens know what they are and are not allowed to do, and the consequences if they break the law. If these principles are violated, people are no longer able to foresee what penal consequences their actions may entail, and this insecurity will generate a general fear and mistrust in the law and law enforcing agencies. The presumption of innocence is the only means we have against wrongful convictions. The general acceptance of this principle shows that our society has made the choice that it rather accepts to free ten actual offenders than to wrongly convict one innocent person.³⁴ The reason for this assessment is the immense effects criminal law has on the concerned person. No other branch of law goes so far as to decide upon the fate of a person, by expelling him from society for many years. As a result of these severe consequences of criminal law, its application can only be justified if we are as certain as possible that the person who will suffer these consequences is the one who actually broke the law. In conclusion, the more severe the penal consequences are, the more attention must be given to the principle of innocence.³⁵ For the same reason the principle of minimal intervention and proportionality must be rigorously obeyed. Otherwise the role of criminal law as the last means of intervention will be perverted. Excessive criminal measures can cause dissatisfaction, frustration and aggression in society. These reactions are counterproductive; they only encourage further criminal behaviour and diminish confidence in law enforcement bodies. The steady departure from these principles is destabilising the criminal justice system, which will eventually lead to its destruction. It is to be feared that the legitimate use of force by the state will be replaced by arbitrary uncontrolled abuse of powers, which, in its worst form, may turn into state terror.³⁶

2.1.2. Other characteristics

The limitation of human rights is concurrent with the extension of the powers of the police, prosecution, and, increasingly, the secret services.³⁷ Sometimes even the military is granted special powers.³⁸ As a consequence, the balance between prosecution and defence is shifted more towards prosecution, to the detriment of the

³³ For the UK, see e.g. Ashworth (2006); for Spain, see e.g. Quintero Olivares and Morales Prats (2007), at 45 et seqq and 124 et seq, for Germany see Tröndle/Fischer (2004) before § 1; for France, see e.g. Guinchard and Buisson (2008), 259 et seq.

³⁴ On the ten to one – rule with respect to the presumption of innocence, see in particular: Slidregt (2009).

³⁵ The same view is defended by van Slidregt (2001), at 82, in the context of illegal detentions of war criminals.

³⁶ See also, critically, Albrecht (2003).

³⁷ See above, Part II (for the UK, e.g. 1.3.3, 1.3.4; for Spain, e.g. 2.3.2; for Germany, e.g. 3.4.2.; and for France, e.g. 4.4.1.

³⁸ E.g. in Northern Ireland, or in France during the *plan vigipirate*.

defence and thus jeopardising the equality of arms; in addition, many measures are no longer subject to judicial control, which increases the risk of abuse of power.³⁹

It can be further observed that anti-terror laws often have a rather *symbolic* character, used by the government to show the alarmed public that they are acting and that they are ‘doing something’ against the threat.⁴⁰

With regards to the legislative process, we have noted that laws were often adopted rather speedily, in the direct aftermath of a terrorist attack. Especially those laws adopted in a very short time stand out as the most draconian ones.⁴¹ In this context, it is remarkable that some of the adopted anti-terror laws were apparently already prepared in advance, before the terrorist attacks actually took place. They are too long and complicated to have been drafted in only a few weeks.⁴² It seems that they were promoted immediately after the attacks, not earlier, because at an earlier point of time, they most likely would not have found parliamentary consent.⁴³

Another general tendency of anti-terror laws is that many of them initially only apply to terrorism, but subsequently are extended to other sorts of delinquency.⁴⁴ Thereby, other branches of law are “infiltrated” by the special counter-terrorist law. This tendency is enforced by a rather extensive than restrictive interpretation of the law by police during pre-trial investigation.⁴⁵

³⁹ E.g. for France: the Law no. 81-82 of 2 February 1981 which allowed abbreviated criminal proceedings without intervention of the investigate judge (above, Part II, 4.3.2.1.); for Spain: under Decree 21/1978 police custody could be prolonged indefinitely under the presumption of the judge's *tacit* approval, had he not reacted within seventy-two hours to the police's request for prolongation (above, Part II, 2.3.2.); see also the incommunicado detention depriving the prisoner of his right to talk to his lawyer in privacy (above, Part II, 2.3.5.2.) and the German version of incommunicado detention (above, 3.3.1.6.).

⁴⁰ On this, see also Albrecht (2002), 650 et seq.

⁴¹ See, e.g., the Criminal Justice (Terrorism and Conspiracy) Act 1998 and the ATCSA 2001 in the UK, the Kontaktsperregesetz and the two ‘Security packages’ in Germany, the Spanish Organic Law 2/1981 of 4 May on the Protection of the Spanish Constitution and Terrorist Matters, and the French Law No. 2001-1062 of 15 November 2001.

⁴² This concerns, e.g., the German Security Package II, which brought about substantive changes in many different areas of law, and was adopted in less than two months. The same is true for the lengthy ATCSA 2001 (UK), which had been drafted in little more than two months.

⁴³ See Bigos and Camus (2006), at 52.

⁴⁴ UK: e.g. the trials without jury, which applied originally only to terrorist cases (Diplock courts), were recently extended, under part VII (ss. 43 et seqq.) of the CJA 2003, to complicated fraud cases or in situations of jury tampering; for Spain, e.g. the Decree 21/1978 extended the jurisdiction of the *Audiencia Nacional* also to other crimes; for Germany, e.g. the leniency programme was extended to organised crime in 1994; for France, cf. e.g. Art. 78-2-2 *CPP*, concerning the police power to search moving or parked vehicles, which first required a terrorist suspicion, and was extended in 2003 to other investigations than terrorism, such as theft or the receiving of stolen goods.

⁴⁵ This is because police is responsible for maintaining public order, and protecting society from crime. As a consequence, if there is the slightest indication that a certain person could be a terrorist, a reasonable police man will suspect this person to be one and apply the respective laws that require a terrorist suspicion. He has to always depart from the ‘worst case scenario’, because he will not want to bear the responsibility of having facilitated the commission of a terrorist act for being too candid.

Furthermore, terrorism laws tend to *expand* rather than to diminish, and this expansion is not necessarily correlated with the actual threat.⁴⁶ Legislators are quick in adopting a law, but very reluctant when it comes to its abolition. This has been evidenced by the multiple "temporary provisions" Acts in the UK which were continuously re-enacted. Even less flexible is continental law in this respect – the bulk of anti-terror legislation adopted in Germany, France and Spain rarely provide for sunset-clauses. Even if a sunset clause exists (like in the German Security Package II, or in the French Law of 15 November 2001), it is often later abolished.⁴⁷

In addition, we note that terrorism is often used as a pretext, for the adoption of other measures actually unrelated or only remotely related to terrorism. E.g. the German regulations concerning passports and identity cards introduced by the second Security Package mainly affect illegal immigration rather than terrorism. Similarly, the French laws adopted in the aftermath of September 11th are so-called security laws, but also concern a number of other areas which have little if not nothing to do with terrorism.

When looking at the concrete measures adopted by the different countries, it is conspicuous that several measures were applied in the majority, if not all of the examined countries (although the regulation in detail, as well as the application of the law in practice, do differ in each place). These common anti-terror measures are:

- specific rules for detention on remand (extension of the duration, terrorism as a specific ground for detention)⁴⁸ / detention without charge;⁴⁹
- prolonged police custody;⁵⁰
- incommunicado detention⁵¹ / solitary confinement;⁵²
- covert investigation methods such as telephone tapping, bugging operations, video surveillance, the use of private informers and under-cover agents;⁵³

⁴⁶ UK: most laws of provisional character were continuously reinforced (the quasi-permanent character of the temporary Acts in the UK was thoroughly discussed by Donohue (2000); Germany: special anti-terror laws not abolished after terrorism had stopped; for France, see the extension of DNA storage (Art. 22 of Law of 15 Nov. 2001 and Art. 31 of Law of 18 March 2003; see above, Part II, 4.3.2.).

⁴⁷ In the German case, this was done in 2007 by Act Complementing the Act for the Fight against Terrorism; in France, Art. 22 of the Law of 15 November 2001 limited temporarily Arts. 22-30 of the law to 31 December 2003. Art. 31 of the Law of 18 March 2003 extended this provision as follows: now only Arts. 24, 25, and 26 were temporarily limited, and in any case their validity was extended to 31 December 2005 (see above, Part II, 4.4.1.). However, in Spain the sunset clause of the Organic Law 9/1984 of 26 December 1984 was kept, in 1987 the concerned provisions lost their effect (see above, Part II, 2.3.5.2.).

⁴⁸ E.g. see above, Part II, 2.3.5.2., and also 2.4.5. (Spain); 3.3.1.5. (Germany); 4.3.2.3., 4.3.3.2., 4.3.3.3., and 4.4.7. (France).

⁴⁹ See above, Part II, 1.3.4., 1.3.5., 1.3.7. (UK).

⁵⁰ See above, Part II, 1.3.5. (UK); 2.3.2., 2.3.4., 2.3.5.2. (Spain); 4.3.1., 4.3.2.1., 4.3.2.3., 4.4.4. (France). Criminological research has shown that prolonged detention can put immense psychological and social pressure on detainee, similarly to torture, this pressure might provoke detainee to give false confession or incriminate people he or she knows in the mere hope that this way he or she might be released earlier, or receive less punishment. (Mc Colgan and Attanasio (1999), at 14.

⁵¹ See above, Part II, e.g. 2.3.2., 2.3.4., 2.3.5.2., 2.3.5.3., 2.4.5. (Spain); 3.3.1.6. (Germany).

⁵² See above, Part II, e.g. 1.3.11. (UK); 4.3.3.4., 4.4.6. (France).

- gradual extension of police powers.⁵⁴

Also, there are several similarities with respect to substantive criminal law:

- possibilities to ban terrorist associations and criminalise the mere membership;⁵⁵
- focus on suppressing financial sources of terrorists (e.g. by freezing of assets, oblige financial institutions to report suspicious transactions etc.);⁵⁶
- criminalisation of preparatory acts.⁵⁷

Similarly, we observe commonalities also on the level of sentencing:

- aggravated sentences for terrorism;⁵⁸
- sentence reductions or remissions for collaborators with justice.⁵⁹

This brings us to three conclusions.

(1) With respect to the changes in the criminal procedure, the freedom of movement and the right to privacy are especially restricted.

(2) A general shift to the preventive phase rather than the repressive one can be observed. This means, for procedural criminal law, that the vast majority of anti-terror laws concern police powers during preliminary investigation (or, in the case of Germany, general police powers conferred in the situation of an imminent danger or risk), thus before the actor of a crime has been identified, and before any charges have been issued. For substantive criminal law, the shift towards prevention is evident in the growing tendency to criminalise preparatory acts and instigations to terrorism rather than the harmful acts themselves. As Spencer notes for England, this shift of emphasis towards the preliminary stages is also evident in general in the English criminal procedure.⁶⁰ We also note a similar development in German law, where "*Vorfeldermittlungen*" have become increasingly pertinent.⁶¹ The focus on prevention clearly originates from the nature of terrorism today: unlike earlier terrorist movements, Islamic terrorists deliberately aim at killing a large number of people (including themselves). Considering the great damage they cause, it is clear that intervention after

⁵³ See above, Part II, e.g. 1.3.14., 1.4.5. (UK)

⁵⁴ UK: e.g. The pre-charge detention was first restricted to seven days, then extended to fourteen, subsequently to 28, and currently 42 days are being discussed. France: e.g. night searches were initially restricted to places where nobody lives, but the provisions were extended in 2003 to places where people live. Moreover, the searches were first restricted to flagrancy inquiries, but then, by the Law of 2001, extended to preliminary police inquiry; Germany: first biometric data was introduced into German passports, then the digital fingerprint was added. Further, gradually more and more powers are conferred to intelligence agencies and to the Federal Office of Police Investigation.

⁵⁵ See above, Part II, e.g. 1.3.8. (UK); 2.4.1. (Spain); 3.4.1. (Germany); 4.3.2.3. (France).

⁵⁶ See above, Part II, e.g. 1.4.1. (UK); 2.4.2. (Spain); 3.4.2. (Germany); 4.4.1. (France).

⁵⁷ See above, Part II, e.g. 1.4.6. (UK); 2.3.4. (Spain); 3.5. (Germany); 4.3.3.3. (France).

⁵⁸ See above, Part II, e.g. 2.3.1.; 2.3.4. and 2.4.4. (Spain); 3.4.5. (Germany); 4.4.5. (France).

⁵⁹ See above, Part II, e.g. 1.3.9. (UK); 2.2.6.3. (Spain); 3.3.2.2. and 3.5. (Germany); 4.4.4. (France).

⁶⁰ Spencer (2004), at 177.

⁶¹ See Kühne (2006), at 221.

the event is accomplished would not be of great help. Police and prosecution have no other way but to try to prevent the harmful act from even happening. They cannot arrest a person for preparing a bomb, unless by itself the preparation already constitutes a criminal act. On the other hand, the focus on prevention has the consequence that not only the presumption of innocence of concrete suspects is reduced, but that increasingly the vast majority of the population is targeted, and thus generally suspected of planning a terrorist act. This can eventually lead to the perversion of the traditional "presumption of innocence" into a "general presumption of guilt", leaving it to the citizen to prove his or her innocence.

Some of these described features have been identified by Jakobs⁶² as *Feindstrafrecht* (the criminal law of the enemy), such as:⁶³

- the threshold of criminal liability has been shifted to an earlier stage, to acts that would qualify as mere preparatory acts for other offences;
- this shift into the preparatory phase does not go along with any diminishing culpability, but:
- quite the contrary: the expected sentences are increased excessively;
- several disadvantages for the offender on the procedural level are introduced, e.g. incommunicado detention, extended detention on remand, etc.

This development is very worrying. It will lead, in its last consequence, to the introduction of a law of war within the domestic law. By introducing legal measures into our domestic law which are usually only applicable during times of war, we eventually concede that terrorism is not a usual crime, but indeed one of war. Thereby, we legitimise not only martial methods of our own government, but, at the same time, we also legitimise those methods used by the very terrorists we try to combat.⁶⁴

(3) The changes on the level of sentencing are also disturbing. The introduction of longer sentences for terrorist offenders is short-sighted. Terrorists, who are perpetrators through conviction, are less likely than anybody else to be impressed by long prison sentences. Second, long prison sentences will not resolve the real problem, but rather postpone it.⁶⁵

As far as sentence reductions or remissions for collaborating offenders are concerned, the accuracy and reliability of the information obtained must be seriously questioned, since the offenders are motivated to talk for other than ethical reasons. Moreover, such a measure unfairly benefits those criminals who have the best information, who will often be the actual ringleaders or at least those strongly involved in criminal activity, thus those with the relatively highest criminal energy. Such a measure thus sacrifices justice (in the sense of equality before the law) for the sake of successful criminal prosecution. In addition, the offering of sentencing advantages in

⁶² Jakobs (2000), at 52 et seq.; Jakobs (2004).

⁶³ See also on the criminal law of the enemy in Spain: García-Montes and Ibáñez López-Pozas (2007)

⁶⁴ Oehmichen and Saux (2007).

⁶⁵ See already above on this, Part II, 2.4.4.

return for information or other active collaboration with the authorities has also proven to be counterproductive; the PIRA and ETA reacted with severe retaliation killings, and the Irish terrorist organisation also introduced a special amnesty system for collaborators who, retrospectively, withdrew their statements and confessions, with the consequence that most information obtained by the leniency programmes could eventually not be used. Even if the information was indeed admitted in the first instance, it was often rejected on appeal.⁶⁶ When the introduction of this measure was discussed in Germany, many reasons were raised against it:

- (1) Constitutional reasons: the impunity or mitigating punishment contravenes the rule of law (*Rechtsstaatsprinzip*) and the principle of equality;
- (2) Procedural reasons: the principle of legality and of publicity were violated;
- (3) Criminal theoretical reasons: the destabilisation of the legal order and shattering of the legal conscience;
- (4) Legal-ethical reasons: a state collaborating with severest delinquents is immoral;
- (5) Pragmatic reasons: not efficient as evidence obtained is of questionable reliability.⁶⁷

2.2. Specificities of the different countries

2.2.1. UK

The United Kingdom has the longest and most gruesome experience with national terrorism, and, in addition, its territory has repeatedly been the soil for international terrorism. Therefore, a comparison of the legislation must take into account that the terrorist problem the UK has had to struggle with was of a different dimension than terrorist problems on the continent. The situation was especially difficult in Northern Ireland, which explains why many special laws were adopted which were restricted to this territory. Under these circumstances, it is not particularly surprising that UK legislators in some cases decided for more drastic measures than the other examined countries.⁶⁸ However, the extreme measures taken after September 11th are rather surprising, considering that the UK already disposed of elaborated legislative framework against terrorism. In parallel, the UK stands out as the country which has authorised the longest durations of detention without charge. However, it must be noted that unlike in the continental countries examined here, in the UK system witnesses can no longer be heard once the suspect is charged, so that charging hampers criminal investigations more than in continental Europe. It is evident that the main purpose of this detention, in which in some cases contact to the solicitor was postponed for up to forty eight hours after arrest, was to obtain information. In many cases, the detainees were released after a few days without ever having been charged. A similar aim is

⁶⁶ See above, Part II, 1.3.9. (UK), 2.3.5.2. (Spain).

⁶⁷ See Amelung, Hassemer, Rudolphi and Scheerer (1989), at 79 et seq. See also the references given by Kühl (1987), at 744 (above, Part II, 3.3.2.2., with further arguments).

⁶⁸ For example, only the UK issued derogation orders under Article 15 ECHR, in order to evade reproaches from Strasbourg on basis of Article 5 ECHR (right to liberty and security of the person).

pursued with the special laws that restrict the right to silence of the accused; these laws are also designed to encourage the detained person to speak, to the detriment of his right not to incriminate himself.

The wide (and continuously extended) police powers in terrorist affairs, including random stop and search powers, might be connected to the role of the police in general in the UK. Compared to continental countries, English police have many more powers. Unlike in Germany, France or Spain, where the public prosecutor makes the decision on opening an investigation, in England, Wales and Northern Ireland the police are in charge of this. Police act with much more independence in the preliminary investigations (until investigations are formally instituted and the case is handed over to the public prosecutor).

The Diplock courts (courts without jury) are a specialty to Northern Ireland. These courts were installed to avoid the intimidation or manipulation of jury members. Usually, under common law (unlike under German law, for instance) juries play a decisive role in deciding upon the guilt or innocence of the accused. If their objectivity cannot be guaranteed, the trial can no longer be considered as fair. At the same time, it was noted that jury trials generally lead to "softer" judgments as compared to those only presided over by a professional judge. Therefore, one can argue that terrorists are not equally treated if they are not entitled to a jury trial, i.e. a milder trial. However, in practice a trial by jury for terrorists meant many acquittals out of fear or reprisals. Under these circumstances, it seems that the Diplock system provided the preferable solution.

Diplock trials were an invention of Lord Diplock, who was in charge of reviewing the existing anti-terror legislation prior 1972. This brings us to another particularity for the UK: The special anti-terror legislation has always been reviewed by an independent Law Lord. The government is not forced to take the respective reviews into account, but on many occasions they do. This review system has been successful in the past, and it would be good if other countries followed the example.⁶⁹

Another apparent specialty of UK legislation is a number of provisions that reverse the onus of proof in certain cases (e.g. crimes of possession). However, these provisions, which also apply to other serious crime than terrorism, must be considered in the context of the comparatively strict common law rules regarding the exclusion of evidence (e.g. rule against hearsay, rule against evidence of bad character, exclusionary rules concerning illegally or improperly obtained evidence), which make it harder for the prosecution to prove their case than in continental Europe.⁷⁰

Moreover, it should be noted that the past counter-terror legislation in the UK consisted of temporary laws (the PTAs and the EPAs), which were adopted in view of an emergency situation, and supposed to only last for strictly the time necessary. However, they were prolonged for a quarter of a century. Donohue mentions a number of factors which, in her view, contributed to the retention of the emergency measures in

⁶⁹ In other countries legislation is also subject to reviews, especially with regards to its effectiveness, but the reviews seem to have less weight as in the UK, and they are not always conducted by an independent legal expert, as is the case in the UK (e.g. in Germany the evaluation was carried out by a parliamentary control panel of the *Bundestag*, see above, Part II, 3.4.2.).

⁷⁰ Spencer (2004), at 162 (note 87).

the United Kingdom. As primary factors, she mentions the seeming efficaciousness of the provisions, the long history of the Northern Ireland conflict, Britain's previous use of emergency law in Ireland, perceptions in Parliament that such measures were both necessary and acceptable outside of Great Britain, and the symbolic importance of 'anti-terrorist' measures.⁷¹ While the measures indeed may have been necessary, it proved to be wrong to justify their adoption by their temporary duration. Thus the former British Home Secretary, Roy Jenkins, who introduced the PTA 1974, wrote in 1991: "I think that the Terrorism Act helped to both steady opinion and to provide some additional protection. I do not regret having introduced it. But I would have been horrified to have been told at the time that it would still be law nearly two decades later. ... [I]t should teach one to be careful about justifying something on the ground that it is only for a short time."⁷²

Finally, the impact of the Human Rights Act 1998 in the UK should once more be reiterated. It is clear that the UK courts' interest for human rights has considerably increased since this instrument has entered into force.

2.2.2. Spain

When drafting its Constitution in 1978, Spain was aware of the present terrorist problem. Therefore, it included, unlike any of the other three countries, a special provision, Article 55(2) CE, which was particularly directed at terrorist groups, allowing for the suspension of certain fundamental rights, such as the right for liberty of the person, in particular (Article 17 CE). However, the suspension of these rights should be regulated by another organic law. This Spanish constitutional specialty allowed the subsequent legislation of *incommunicado* detention. Similarly to the UK, where the right of an arrested person to see the solicitor could be postponed for forty-eight hours, by holding a person *incommunicado* several days after his or her arrest, the primary goal was to obtain information during these first hours of arrest. The Constitutional Court did not question the constitutionality of the *incommunicado* detention, but reiterated that the respective provisions need to be interpreted particularly strictly.⁷³ It should be noted that the time period during which a person can be held *incommunicado* is longer than in the UK: it has been recently raised to thirteen days. This is not compatible with the case-law of the *Tribunal Constitucional*.⁷⁴

⁷¹ Donohue (2000), at 6 ff.

⁷² Jenkins (1991), at 397.

⁷³ See STC 7/2004 of 9 February 2004 (*recurso de amparo*): "II. Fundamentos jurídicos 4. Nuestra doctrina en relación con las exigencias de motivación de las resoluciones judiciales que acuerdan la incomunicación de los detenidos, aparece contenida en STC 127/2000, de 16 de mayo, FJ 3. En esta Sentencia afirmamos, apoyándonos en lo declarado en STC 196/1987, de 16 de diciembre, y ATC 155/1999, de 14 de junio, que siendo la incomunicación algo más que un grado de intensidad en la pérdida de la libertad, dadas las trascendentales consecuencias que se derivan de esta situación de incomunicación para los derechos del ciudadano y, en concreto, las limitaciones del derecho a la asistencia letrada (art. 17.3 CE), la adecuación a la Constitución de las resoluciones judiciales que la autorizan han de analizarse desde la perspectiva de un especial rigor."

⁷⁴ See above, Part II, 2.3.6.

Another particularity of the Spanish legislation is that it did not rush through a special counter-terror Act following the events of September 11th. Spain also adopted anti-terror laws, but not immediately after September 11th, and not focussed on international terrorism, but rather on Basque terrorism.⁷⁵

After 11 March 2004, Spain drastically increased the sentences for terrorism. This is no particularity for Spain as in all four countries sentences were increased. Moreover, the European Framework Decision on Terrorism of the Council of Europe even imposed the member states to provide for legislation with higher sentences for terrorism. However, special for Spain is the length of the maximum sentences: forty years. Against the Spanish background, this is exceptionally long. Unlike in other countries (e.g. Germany, France, and the UK), Spanish criminal law does not provide for life sentences. The decision of imposing these high maximum penalties was clearly motivated by the public outcry following the expected release of a non-repentant terrorist. However, as we have seen already above,⁷⁶ longer sentences are no real solution, but only postpone the problem.

More than in the other countries, Spain has concentrated on penitentiary law to fight terrorism. Thus, it has dispersed the convicted ETA members to different prisons all over the country (and, in particular, outside the Basque country). It has also made the enjoyment of privileges and benefits much more difficult for terrorist offenders. The dispersion policy was clearly adopted in order to break the ties between imprisoned ETA members and those outside the prison walls. One reason why this policy was only adopted in Spain is that domestic terrorism was restricted to the territory of the Basque country. However, Northern Irish terrorism was also geographically restricted, and still no similar measure has been in place for Northern Irish prisoners. Maybe the travel distance between Northern Ireland and mainland UK was considered too long and hence the limitation of the Northern Irish detainee's right to communicate with his family unacceptable. The stricter penitentiary regime for terrorist prisoners might be explained as follows: The respective law was only recently adopted (2003), thus about twenty-five years after the Spanish transition to democracy. It is likely that this date coincides with the first releases of terrorist convicts. The release may have raised public awareness of the terrorists in prison and provoked criticism as to the benefits terrorists receive, especially if they show no remorse for their acts.

Further, Spain is the only country that grants universal jurisdiction in terrorist cases since 1985.⁷⁷ A reason for this may be that Basque terrorists often went to France, where in 1985 they still enjoyed sanctuary as "political refugees". Therefore, Spain deemed it important to also be able to prosecute Basque terrorists on French territory.

Finally, Spanish substantive law is special in that it also criminalises terrorists as individual actors, without any link to any terrorist organisation required.⁷⁸ This provision was adopted to respond to the new kind of street violence that emerged in 1998, following the public demonstrations against ETA. Young teenagers were

⁷⁵ See the Act on Political Parties adopted in 2002 (Part II, 2.3.2.).

⁷⁶ See above, Part II, 2.4.4.

⁷⁷ See above, Part II, 2.2.5.3.

⁷⁸ See above, Part II, 2.2.6.5.

instigated by ETA to harass citizens violently on the street on weekends. These teenagers had often no or only very loose connections to ETA, so that it was deemed necessary to respond to the specific situation by adopting certain laws.

2.2.3. Germany

A very striking particularity of German anti-terror legislation is the large amount of laws restricting the rights of the defence. It seems that in no other country a comparable mistrust towards the profession of defence councils is present. These laws were adopted because some connections between defence councils and terrorist organisations were found. Yet, at the same time, considering the difficulty of political defence, one wonders why in Germany defence lawyers should be less trustworthy than in other countries.

Of these special laws restricting defence, the most far-reaching measure is the Act governing the blockage of contacts (*Kontaktsperre*), also adopted in response to the RAF terrorism. This Act allows for *incommunicado* detention for up to thirty days, thus even longer than in Spain. And, also unlike in Spain, during this time any contact to the defence lawyer of the prisoner is completely blocked. Since 1985 a contact person (who is also a lawyer) can be appointed to the prisoner, but this person is no adequate replacement for the defence attorney.⁷⁹ It is hard to understand why the legislator deemed it necessary to limit the right to defence so excessively. At least in the case of lawyers appointed *ex officio*, the mistrust seems absolutely unjustified. In any case, a temporal limitation of such a far-reaching measure would have been reasonable. Yet, the law still exists today.

Another legislative reaction to terrorism of the 1970s was particularly special for Germany: the famous grid search (*Rasterfahndung*), at the time of its invention, seems to have been unique as a counter-terror measure, and, in the concrete case of the RAF, proved to be successful. At the same time, it opened the door to a very dangerous development: Increasingly a large number of civil citizens could become subject of coercive police investigation measures. It started with the grid search but other measures followed (*Schleppnetz* *fahndung*, strategic monitoring, and nowadays biometric data in everybody's passports, to give just a few examples).

At the same time, the German Constitutional Court developed a special fundamental right that does not exist, in this form, in any other country: the right to informative auto-determination, as a right deriving from the right to privacy. It encompasses the right to decide autonomously which personal data is disclosed to whom. The announcement of this right has led to several declarations of unconstitutionality on intrusive laws of criminal procedure.

Finally, there is another special principle under German law which does not seem as fundamental as in the other examined countries, and which is repeatedly mentioned in relation to recent anti-terror legislation: the principle of separation between the police and secret services (*Trennungsgebot*). The principle is based on historic experience, and it has been recognised by the German Federal Constitutional

⁷⁹ See Oehmichen (2008).

Court, although it is debated whether it has constitutional status. This principle is continuously restrained in contemporary German counter-terror legislation, but not only in Germany. It is one of the principles established to prevent the creation of a state of absolute control. Hence, it would be desirable if this principle also received more attention in other countries.

2.2.4. *France*

For France, a particularity is the centralisation and specialisation of judges and prosecutors dealing with terrorist cases, as well as of penitentiary institutions. At first sight, it seems that this particularity is a reflection of the general French tendency to centralise public institutions. At the same time, the centralisation of prisons, for instance, leads to a similar policy as that in Spain – prisoners from Corsica, for instance, are not held in Corsica but in Paris, which places a considerable burden on friends and family to visit. However, the reason behind this measure seems to be a different one than in the case of Spain: French facilities in general are all centralised, and as a consequence, the high security prisons for terrorist offenders are also located in Paris.

Another special feature of French counter-terrorism is the *plan vigipirate*, a plan to mobilise civilians and also the military, designed to multiply controls in security-sensitive areas (e.g. metro stations, airports). This plan has been repeatedly adopted in France in response to terrorist incidents, and it has been in place since 12 September 2001. The plan imposes several restrictions on everybody (in particular: identity checks, searches) and thereby has a strong impact on the every-day life of the whole population. Related to this measure is the use of private security agents in counter-terror measures, who are authorised to conduct searches at security-sensitive areas. The measure presents a serious interference with the presumption of innocence as whole parts of a population are checked under the general suspicion that they might commit a terrorist act.

Admittedly quite some time ago, France's anti-terror laws during the Algerian crisis were exceptional from a human rights point of view: fundamentally basic procedural rights, such as the right to remedy and the right to be tried by an ordinary judge (thus by an objective, independent tribunal) were not granted in terrorist proceedings, as the *Cour de Sûreté d'Etat* was installed for trials of terrorist offences.⁸⁰ These measures must be seen against the background that Algeria, at that time, was a *département* of France. Many French people lived in Algeria. France applied the measures that countries typically applied in their colonies for the maintenance of powers. We have already seen in Part 1 that in a colonial situation, the human rights of the colonised people were never of great importance for the ruling power. Put into the context of colonialism, the French measures during the Algeria crisis were thus rather common. However, they differed in that the laws also applied in mainland France (as Algeria and France was considered as one country at that time), while, in the case of colonies of

⁸⁰ See above, Part II, 4.2.1.

other countries, the special anti-terror laws dedicated at suppressing any uprisings from the colonised population were applicable only to the territory of the respective colony.

It is further remarkable that France, especially after September 11th, is following the United Kingdom in several measures related to counter-terrorism: besides the continuous extension of offences for which DNA data can be stored, France has also considerably extended video surveillance and prolonged the duration of police custody. It has been the declared purpose of some of the laws to follow the United Kingdom's policy, especially after the London Bombings of 2005. Collaboration between the two countries was also enhanced. It is therefore possible that this development can be attributed to the political need to show solidarity with the UK after the incidents. But with respect to defence rights during police interrogation, France's recent laws go even further than those of the UK: the meeting with a lawyer can be delayed up to the 120th hour after arrest, whereas in the UK forty-eight hours is the maximum delay.⁸¹

France's reaction to terrorism is further characterised by excessive police actions. Mass detentions took place several times during the last few years, lastly to counter the *banlieue* violence at the end of 2005. This is a most worrisome development as it shows how police apply similar methods as terrorists in their attempt to restore public order (i.e. spreading fear among the targeted population by arresting many of its members).

In addition, the French legislator shows an interest in mixing different purposes in one law. Thus, under the impression of the suburban riots of 2005 another anti-terrorism Act was adopted, in parallel with the declaration of a state of emergency. Similarly, the Law of November 2001 not only addressed the problem of terrorism, but also treated a number of other fields.⁸²

Worrying is the recent development, in particular the creation of the two databases Edvige and Cristina, by which personal data of a great number of people can be collected and retrieved. Both databases are currently reviewed by the State Council, so there is reason to hope that in the present form (Edvige allows for the storage of personal data including sexual orientation and health of people under 13, and, the database called Cristina is actually based on a secret decree, the purposes, scope and nature of which are currently not disclosed to the public) both decrees will not stand up to legal scrutiny.

3. General Historical Evolution of Anti-Terror Legislation

⁸¹ See above, Part II, 4.3.4. (new Art. 706-88 CPP, introduced by the *Law no. 2005-1425 of 18 November 2005*).

⁸² See above, Part II, 4.4.1.

3.1. Common and diverging developments in the examined countries

The anti-terror legislation of the examined countries prior to September 11th has developed similarly in several aspects, although some national differences cannot be overlooked:

Most laws were initially aimed at domestic terrorism, and subsequently extended to international terrorism (France is an exception to this rule as it adopted legislation against international terrorism as early as in 1986);

In the 1960s, prior to the outbreak of terrorist movements, in Spain, the UK, and Germany criminal law was reformed liberally, enforcing equality of arms and the rights of the defence; In France, the situation was different; here, the then still colonised Algerians fought with terrorist methods for their independence, and France, in exchange, applied a very strict and martial anti-terror legislation. Thus, while in other countries criminal law was successively liberalised at that time, the same was not true for France. This difference is still reflected in today's legislation;⁸³

Whilst in Spain, the UK and Germany, special anti-terrorism laws emerged particularly in the 1970s, in France the first special anti-terror legislation, besides the one related to the Algerian crisis, was adopted in 1986; unlike in the other countries, the law of 1986 in France was not directed at national, but mainly international Islamic terrorism.

In the 1980s and 1990s, another type of serious delinquency emerged, next to terrorism, and became the focus of criminal policy: narco-trafficking and organised crime. Similar investigation methods were then used to combat both terrorism and organised crime, including, in particular, intrusive covert investigation tools (police observation, telephone tapping, bugging, under cover agents etc.). The application of such measures often interfered with the privacy of suspects or even third parties. Until the 1980s, in most countries these measures were carried out without any legal basis. However, a growing attention to the right to privacy by national courts and by the ECtHR led to several condemnations and subsequent legal amendments. Therefore, the 1980s and 1990s in all four countries are also marked by many 'legalising Acts', by which the special investigation measures were given a legal basis, outlining the scope and limits of their application;

Since the 1990s, the fight against organised crime has become more important; laws have been adopted now addressing the two issues – terrorism and organised crime – simultaneously.

After September 11th, all countries passed new laws, although the different countries vary in how fast these laws were enacted and in the measures they comprise. However, there are a few commonalities identifiable:

⁸³ E.g. unlike any of the other countries, French legislation did not provide for a right of an arrested person to be informed about his or her charges. See above, at 4.3.4.

- Many laws now focus on **prevention rather than repression**;⁸⁴
- While before September 11th, most laws (at least in continental Europe)⁸⁵ concerned criminal law and the law of criminal procedure, after September 11th, other branches of law, in particular administrative law, including foreigner's law, law of associations, secret services, and also military law have increasingly become involved in the fight against terrorism. This brings about a **net-widening effect**: the fight against terrorism no longer concerns a small part of the population which is 'reasonably suspicious'; quite the contrary, a number of measures purposefully affect many people indiscriminately or even the whole population;⁸⁶
- As a consequence of the general concentration on preventing future terrorist attacks, new laws are increasingly oriented at **information gathering** and **information sharing**, both inter-institutionally and internationally. This development is parallel to a worrying curtailing of privacy, recalling scenes from an Orwellian state of surveillance;
- Along with the internationalisation of terrorism, the legislative reactions have also been increasingly **internationalised** (e.g. legislators adopt new laws in response to terrorist acts committed abroad);
- The **quantity of laws adopted after September 11th** has increased dramatically in many countries. Admittedly, already before September 11th the UK passed counter-terror Acts in high frequency; however, the purpose of the Terrorism Act 2000 was in fact to change this development and replace the previous so-called provisional legislation by one permanent legal instrument. This purpose was undermined by the events of September 11th, which again pushed the UK's legislator to enact new legislation;
- With respect to the protection of **human rights**, we note in general two diverging developments: on the one hand, legislators show a growing tendency to ignore human rights, while, on the other, courts increasingly rule out laws for being not reconcilable with human rights. It seems that the more the legislation

⁸⁴ See above at 2.1. This characteristic was already inherent in the laws before September 11th (see, e.g., the Spanish crime of *apología*, or the German grid search) but it has been particularly reiterated after September 11th, also because the dimension of harm done by terrorists – the indiscriminate and intentional killing of large parts of the population – make it indispensable to intervene before the commission of the act.

⁸⁵ As we have seen, in the UK, especially Northern Ireland, emergency laws were already in place before 9/11.

⁸⁶ E.g. *Rasterfahndung* in Germany, in particular as applied after September 11th, plan *vigipirate* in France; passport changes in Germany, air security controls, electronic data storage in all countries, etc.. Moreover, in all countries, foreigners are affected in many ways by the new laws, the most far-reaching of which can be found in ATCSA 2001 s. 23.

deviates from ordinary human rights standards, the more judges are inclined to quash this legislation (provided that it is in their power to do so).

In general, we note that national differences diminish more and more. However, it is conspicuous that the recent Spanish legislation is diverging from the general trend of steadily limiting human rights. It seems that this country, maybe due to its recent experience under Franco, but also because it is already used to a certain level of terrorism by ETA, is less susceptible to the global fear of terrorism, and more conscious of preserving human rights.

3.2. Assessment of the impact of September 11th

It is true that the events of September 11th reshaped the legal framework against terrorism in most countries. Even Spain, which initially did not react to the events as other countries did, eventually followed the general trend by adopting harsher legislation (increased period of incommunicado detention, longer sentences to up to 40 years for terrorism, reduction of penitentiary benefits during prison, etc.). Furthermore, there seems to be a growing interest in legal comparison; legislative solutions of other countries are considered when drafting new legislation. For instance, the French legislator based its recent legislative projects regarding video surveillance and DNA database explicitly on the experience in the UK. One general trend that already started in the 1990s has swiftly intensified after September 11th: the tendency to give police and security agencies more and more powers to collect, store and search personal data of citizens. The storage of data of those presumably innocent has stopped being a taboo. Quite the contrary, there are possibilities of gathering and saving personal data that twenty years ago would not have been imaginable. Obviously, technology has developed at high speed in recent years, and it would be strange to deny police and secret services to use this technology. Simultaneous to this development, the value of privacy seems to have fallen at an equal speed. The collection of DNA and other personal data including illnesses and sexual orientation of teenagers in France,⁸⁷ the special notification procedure for convicted terrorist offenders in the UK, as well as the large DNA database of arrested people there,⁸⁸ and the anti-terror database in Germany⁸⁹ show that the gathering of information has become one of the main instruments used against terrorism. Not only suspects', but, with a few exceptions, practically anybody's data can be stored for the purpose of a criminal investigation. Similarly, the privacy of the home becomes more and more restricted, increasingly including the possibility to enter the private homes of third parties not suspected in any way, the presence of a suspected terrorist being enough. Examples of this tendency to increasingly restrict the privacy of the home are the stop and search powers that already existed in Northern Ireland in the 1980s,⁹⁰ in Spain the possibilities of house searches

⁸⁷ See above, Part II, at 4.4.3. and 4.5.

⁸⁸ See above, Part II, at 1.5. and 1.4.3.

⁸⁹ See above, Part II, at 3.4.7.

⁹⁰ See above, Part II, at 1.3.3.2.

based on executive authorisation during the Franco era⁹¹ as well as extended powers for house searches in terrorist cases as allowed by the Spanish constitution⁹² and subsequent police powers to detain terrorist suspects 'wherever they search refugee',⁹³ in Germany first increased powers to bug private homes,⁹⁴ the legalised use of undercover agents,⁹⁵ as well as the recently discussed online search of personal computers from terrorist suspects.⁹⁶ The growing intrusion of privacy is alarming if one considers how these masses of data could be abused by the wrong people. We would not want to imagine what would have happened if Hitler had had at his disposal the same information gathering instruments as police and security agencies have today...

4. Human Rights Protection and Counter-Terrorism

In this section it will be scrutinised to what extent counter-terrorist legislation has been declared as incompatible with human rights. Counter-terror measures other than legislative will also be taken into account. Further, the different roles played by national high courts⁹⁷ and the ECtHR will be compared. As a result, we shall be able to better assess the level of human rights observance in counter-terror legislation, as well as the importance of the national courts and Strasbourg in this respect. This will give us a clearer idea of the level of observance of human rights in contemporary counter-terror legislation, and it will help us to better assess future developments with regards to this, and, possibly, to develop strategies to prevent human rights abuses from happening.

4.1. Comparison of domestic human rights protection

In order to compare human rights protection on a national level, it is necessary to begin by comparing the constitutional systems in general, and, subsequently, compare the concrete protection as evident in the case-law of the respective courts (for France, respectively, the decisions of the *Conseil Constitutionnel*).

4.1.1. Some general comparative observations

It is important to point out certain difficulties related to the comparison of constitutional preconditions in different countries. States have different constitutional backgrounds, a different history of human rights protection, and different organs designed to ensure protection, leaving alone the differing legal cultures.

Thus, the UK stands out as the country with no formal written constitution at all. At the same time the UK has a tradition of ensuring safeguards and human rights protection (e.g. the fair trial principle and the equality of arms, which were developed originally in

⁹¹ See above, Part II, at 2.3.1.

⁹² Art. 55(2) CE; see above, Part II, 2.3.3.

⁹³ Art. 16 of the Organic Law 9/1984; see also above, Part II, 2.3.5.2.

⁹⁴ See above, Part II, 3.3.3.2.

⁹⁵ See above, Part II, 3.3.3.3.

⁹⁶ See above, Part II, 3.5.

⁹⁷ When reference is made to all four different institutions – House of Lords, *Tribunal Constitucional*, *Bundesverfassungsgericht* and *Conseil Constitutionnel* – I shall refer to them as 'the national high courts'.

the UK). Here the principle reigns that people are allowed to do anything as long as it is not prohibited, the most recent, but also worrying materialisation of this principle being the recent introduction of anti-social behaviour orders. In consequence, more than just *fundamental* rights are generally guaranteed in the UK; basically any right is guaranteed, as long as it is not specifically restricted.

The continental countries examined in this study each have their own written constitution, and their constitutional texts partially guarantee the same or similar fundamental human rights. For instance, the constitutional texts of all three countries include the human right to personal liberty, the freedom of conscience and religion, and privacy, *inter alia*.⁹⁸ However, the different rights are not weighted equally in all countries, which is already evident when comparing the different orders. Further, some rights are granted by one country, but not the others.⁹⁹ In France, the pioneer country of civil rights, the situation is rather complex, since human rights do not only derive from the Constitution of 1958, but also from other constitutional texts (*'bloc de constitutionnalité'*).¹⁰⁰ Spain and Germany relied on their respective negative historical experiences of a totalitarian, fascist regime when drafting their constitutions. Spain's constitution, the youngest of all, stands out in terms of precision and concretisation of human rights. Thus, for instance, it does not only provide a right to liberty of the person, as the French or the German Constitution do, but it even specifies that this right entails that police custody (*detención preventiva*) may only last as long as strictly necessary, and that the arrested person must be brought before a judicial authority no later than seventy-two hours after the arrest.¹⁰¹ Moreover, Art. 25(2) of the Spanish Constitution guarantees that prisons shall be oriented towards social reinsertion and reintegration. Under the German Constitution, the importance of fundamental rights is emphasised by their systematic position: the fundamental rights (above all, the dignity of the human being, Art. 1 GG) are placed at the very beginning of the constitutional text. Moreover, it is important to note that Germany and Spain are the only countries of the examined ones that allow constitutional complaints of *individuals*, similar to the procedure before the European Court of Human Rights (cf. Article 34 of the Convention).

As to the comparison of the different domestic mechanisms available for the protection of fundamental rights, the absence of a constitutional court in the UK makes this country difficult to compare to the others. Unlike the constitutional courts in Germany and Spain, the House of Lords does not rule on individual complaints but only on

⁹⁸ The right to personal liberty is protected by Art. 17 of the Spanish Constitution, Arts. 2(2) and 104 of the German Constitution, and Art. 7 of the French Declaration of 1789; the freedom of conscience and religion is protected by Arts. 16(1) and 20 of the Spanish Constitution, Art. 4(1) of the German Constitution, and Art. 10 of the French Declaration of 1789; the right to privacy is protected by Art. 18 of the Spanish Constitution, Art. 2(1), read in conjunction with Art. 1(1) of the German Constitution, and Art. 2 (right to private life) of the French Declaration of 1789.

⁹⁹ E.g. the German human dignity (Art. 1 GG), the French specific right to be member of a trade union (see preamble of the Constitution of 1946), the Spanish right to education manifested in Art. 27 of the Spanish Constitution.

¹⁰⁰ See above, Part II, 4.1.1.

¹⁰¹ Art. 17(2) CE.

‘points of law of general public importance’.¹⁰² Furthermore, the French *Conseil Constitutionnel* does not hear constitutional complaints by individuals either, but only decides upon the general constitutionality of a law before its enactment. Moreover, the compatibility of laws with human rights has only started to be tested by the House of Lords very recently, namely with the coming into force of the Human Rights Act in 2000. In this context, it should also be noted that the UK looks back at a tradition of parliamentary sovereignty. The possibility that the courts can control and restrain legislation adopted by Parliament is thus a very recent development in the English system; it can be attributed to the growing foreign (in particular European) influences. Notwithstanding, as we have seen, the primacy of parliamentary sovereignty is still reflected in the drafting of the Human Rights Act, which only gives courts the power to declare a law as incompatible if an interpretation compatible with human rights is by no means possible. This is a major difference between the UK system and those of the other examined countries: if the Spanish or the German Constitutional Court rules that a law is contrary to the Constitution, it is generally void or, exceptionally, simply cannot be applied. If the French Constitutional Council in its *ex ante* revision declares a provision as contrary to the Constitution, it does not even enter into force. In the UK, it still exclusively lies in the hands of the legislator whether a law which has been declared as incompatible with the Human Rights Act will subsequently be amended or abolished. (However, in practice the British legislator has so far readily amended a law following a declaration of incompatibility).¹⁰³

Similarly, the French *Conseil Constitutionnel* can also not be put on a par with an ‘ordinary’ constitutional court. This is already evident by its name; it is a council rather than a court. It does not rule on concrete cases but on abstract laws. It provides an *ex ante* constitutional review. As the House of Lords, it does not hear individual complaints about human rights violations. New organic laws have to be submitted to the *Conseil* prior to their promulgation, and other laws may be reviewed as well, if required so by the president, the prime minister, a president of the senate or of the national assembly, or sixty deputies/senators. Thus, with respect to the *legislative procedure*, the *Conseil Constitutionnel* has more influence on the making of the law than the constitutional courts of Germany and Spain or the House of Lords in the UK. In this sense, the parliamentary sovereignty is more restricted than in the other countries. At the same time, once the law is adopted, the *Conseil Constitutionnel* no longer has a power to review it. And, since not every law must be submitted to the *Conseil* for review, this means that laws may be in force in France which are in fact unconstitutional, but which the *Conseil* cannot test, because they have been adopted without prior submission to the CC. An example would be the Law No. 2001-1062 of 15 November 2001,¹⁰⁴ the main parts of which had been drafted and also submitted before 11 September 2001, but which subsequently had been significantly amended. After the devastating events of September 11th, the legislators saw the urgency to

¹⁰² See s. 12(3) of Administration of Justice Act 1969 (c. 58).

¹⁰³ Cf. The House of Lord's Decision of December 2004 and the subsequent abolition of Part IV of the ATCSA 2001.

¹⁰⁴ See above, Part II, 4.4.1.

quickly adopt the law, without again subjecting the amendments to the lengthy procedure of constitutional review. Therefore, with respect to the possibilities to test the constitutionality of *existing* law, the other three examined countries offer more safeguards than France to ensure the observance of human rights.

The Spanish and the German Constitutional Courts, on the other hand, are relatively similar; they are the more ‘classical’ models of a constitutional court. They both have the task to watch over the observance of constitutional precepts, above all, the compliance with fundamental rights. Both are thus testing legislative, judicative and executive acts against their compatibility with constitutional rights. Both have the power to declare a law as unconstitutional, with the consequence that the law in question is null and void.¹⁰⁵ Both provide for different mechanisms to guarantee that constitutional rights are observed, including the possibility of individual complaint procedures.

In spite of the outlined differences particularly in the French system and the system of the UK, the four organs, i.e. the House of Lords, the *Conseil Constitutionnel*, the *Tribunal Constitucional* and the *Bundesverfassungsgericht* have three important things in common:

- they all test domestic legislation against its compatibility with domestic fundamental rights;
- their decisions are binding for national courts; and
- if they rule that a law violates a fundamental right, the national legislators, at least in practice, usually react by amending the law accordingly (although theoretically they might not always be obliged to do so).

It is for these reasons that a comparison seems not only possible (to a certain extent) but also desirable.

4.1.2. Comparison of the cases decided with respect to counter-terrorism legislation

As observed previously, in all four countries the respective organs have in some cases quashed legislation for infringing human rights recognised under domestic law, and thereby provoked subsequent legislative changes. However, this has only happened in the **UK** after the adoption of the Human Rights Act. Before, the House of Lords refrained from assessing whether domestic legislation complied with the ECHR. Insofar, the Human Rights Act 1998 actually presents a turning point in the history of the UK’s human rights protection, and also in its history of parliamentary sovereignty. Ever since the adoption of this Act, the House of Lords has shown a stronger will to test and also quash counter-terror laws when it considered that these violated the human rights protected under the Act, without any legitimate justification. Only after the

¹⁰⁵ For Germany, see the Act concerning the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*), § 95(2); for Spain, see the Spanish Constitution of 1978, Art. 164(1).

adoption of this Act, s. 21 of the ATCSA 2001 was considered incompatible with the rights guaranteed both under the Act and under the ECHR.

However, parliamentary sovereignty is still reflected in the House of Lords' case-law, even after 2000 (when the HRA 1998 came into force). Even after the adoption of the HRA 1998, the House of Lords showed some reluctance to declare a law as incompatible; it admitted that control orders under s. 3(13) of the PTA 2005 might produce a result which was incompatible with Art. 6 of the ECHR but that it remained possible to interpret the norm conform to the ECHR. At the same time, the impact of the Lords' decisions on the legislation is considerable – when the House of Lords quashed part IV of the ATCSA 2001, the legislator promptly replaced the respective provisions.

The **Spanish Constitutional Court** on several occasions ruled on the compatibility of anti-terror laws with several constitutional rights. In many of its Decisions, it further concretised the right to liberty enshrined in Art. 17 *CE*.¹⁰⁶ Moreover, it ruled on the interpretation of Art. 55(2) *CE*, which allows to derogate from certain rights in connection with terrorist investigations. A landmark decision was STC 199/1987, in which the *Tribunal Constitucional* ruled on several anti-terror laws, declaring some of them as unconstitutional and setting authoritative guidelines as to the interpretation of others. Unlike in the other countries, no recent decisions concerning anti-terror legislation were found. Consequently, it is difficult to make an assessment as to the current development. The decisions in which the Spanish Court declared a certain law as unconstitutional brought about the modification or abrogation of this law. However, recently laws have been adopted prolonging *incommunicado* detention to thirteen days, a provision incompatible with the case-law of the *Tribunal Constitucional*.¹⁰⁷

Another particularity can be observed with respect to Spain, namely the very political nature of the fight against domestic terrorism. It is conspicuous that it is mostly the Basque parliament or Basque government which challenges counter-terror legislation before the *Tribunal Constitucional*. The strong level of politicisation also became obvious when contemplating the recent trial proceedings against the 11 March bombers.

A similar development as in the UK can be observed in the case-law of the **German Constitutional Court**: During the 1970s the German Court sanctioned most of the laws adopted to fight the RAF, whereas more recently, i.e. after 2001, it quashed several laws for being unconstitutional. In most decisions adopted after the Census Decision¹⁰⁸ of the *Bundesverfassungsgericht*, the right to privacy (*Recht auf informationelle Selbstbestimmung*, Art. 1, 2(1) *GG*) was infringed.

¹⁰⁶ Thus the court demanded that the law provided a maximum duration of extended police custody, that *incommunicado* detention was subject to judicial intervention also within the first seventy-two hours, that the decision about the liberty or custody of a person had to be taken by a judge, that detention on remand was adopted for a constitutionally legitimate reason, that this reason was mentioned in the order explicitly, and that the adoption of detention on remand was proportional (see above, Part II, 2.4.5.).

¹⁰⁷ See above, Part II, 2.3.6.

¹⁰⁸ See above, Part II, 3.2.2.1.

With respect to the German Constitutional Court's case-law, another observation can be made: The *Bundesverfassungsgericht* has repeatedly shown its sovereignty with respect to the European Union. Thus, it quashed the German law implementing the European Framework Decision on a European Arrest Warrant. Similarly, the Court quashed a regional law which authorised police to gather, for preventive purposes, personal data by intercepting and recording telecommunication. While it has not had occasion to rule on the implementation of Directive 2006/24/EC which foresees similar powers, the Constitutional Court's judgments of 27 July 2005¹⁰⁹ and of 11 March 2008¹¹⁰ suggest that it might also condemn the law implementing the Directive as unconstitutional. This development reflects the German judges' high opinion of their *Bundesverfassungsgericht*, the creation of which is considered as one of the main achievements on the way to democracy and the rule of law after the collapse of Germany in 1945. Because of the negative historic experience, German judges are extremely cautious when it comes to the fundamental rights guaranteed under the German *Grundgesetz*. The same cautiousness is also reflected on the level of the European Community in the Decisions *Solange I* and *Solange II*,¹¹¹ where the Federal Constitutional Court only reluctantly accepted the general supremacy of EC-law, making several reservations to ensure that the level of protection of the German fundamental rights could not be lowered.

There are several potential explanations for the development in Germany and in the UK of increasingly quashing the legislator's attempts to restrain human rights in anti-terror legislation. With respect to the UK, there is reason to believe that the adoption of the Human Rights Act 1998 was a decisive factor. As to Germany, however, we have to look for another explanation. The events of September 11th, and, in particular, the subsequent US-led 'global war on terrorism' may, in an ironic way, have raised public awareness towards human rights: the detention centre of Guantánamo Bay, the CIA's secret prison, extraordinary rendition, in a nutshell, the unconcealed human rights violations in the name of fighting terrorism have shown the world more illustratively than anything else where concessions to limitations of human rights can bring us, and how counter-productive such an evolution can in fact be. Sometimes a shocking example can be instructive to become aware of the danger inherent in granting too much power to the authorities with too little control.

In **France**, many of the anti-terror laws were submitted to the Constitutional Council before being adopted, in order to assure their constitutionality. In fact, the quasi-totality of laws adopted after September 11th were submitted to the *Conseil*,¹¹² with one conspicuous exception: the Law adopted in November 2001 on daily security. It seems worrying that this one particularly evaded constitutional review. With respect to the laws adopted after September 11th, two things are striking: first, the Law adopted in the

¹⁰⁹ Case no. 1 BvR 668/04 (see above, Part II, 3.4.5.).

¹¹⁰ Case nos. 1 BvR 2074/05 and 1 BvR 1254/07 (see above, Part II, 3.5.).

¹¹¹ Decision of 29 May 1974, case BvL 52/71 (*BVerfGE* 37, 271) - *Solange I*, and Decision of 22 October 1986, case 2 BvR 197/83 - *Solange II*.

¹¹² M. Pierre Mazeaud (2006), at 1.

direct aftermath of September 11th escaped any constitutional scrutiny, and second, the *Conseil* not only confirmed the constitutionality of the Law of 18 March 2003 on internal security, but even reiterated that its power of controlling the legislator was limited, that it was the legislator's task to appropriately balance the interests of public order against the constitutionally guaranteed rights and freedoms. Against the background of the French system; such a statement is quite astonishing, since the French Constitution provides for an obligatory constitutional review of any organic law (cf. Article 46(5) of the Constitution of 1958). Insofar, the ruling of the Council in 2003 might reflect the general tendency in French politics to increasingly follow the English approach with respect to terrorism. A similar observation can be made with respect to the case-law concerning preventive car searches: while in 1977, the *Conseil* did not allow these, it changed its view in 2003.¹¹³

The outlined results allow an assessment as to the impact of domestic courts on human rights protection: in all four countries, court decisions declaring the incompatibility of a law with a certain human right have caused subsequent legislative changes. This is not surprising for the continental European countries, where the decisions of the respective constitutional bodies are authoritative. It is, however, remarkable for the UK, where the legislator has no formal obligation to follow the declarations of incompatibility. We can thus conclude that the absence of any constitutional review body in the UK does not lead to significant differences in practice. However, an important difference between the UK and the other three countries was that prior to the adoption of the Human Rights Act 1998, the Law Lords showed little interest in Strasbourg's case-law.¹¹⁴

When comparing the type of fundamental rights that the domestic courts protect, it must be observed that the Spanish Court mostly emphasised the right to liberty (Article 17 CE),¹¹⁵ and contributed by its case-law to its further concretisation and limitation, whereas the German Court focused rather on privacy issues, in particular on the "right to informative auto-determination", i.e. the right to decide autonomously about which personal information may be shared with others, and to which extent.¹¹⁶ The House of Lords was the only court to rule on derogations under Art. 15 ECHR, as the UK was the only country among the four which had made use of this Article.¹¹⁷ The French *Conseil Constitutionnel* showed concern for equal treatment before the law in several decisions.

¹¹³ See above, Part II, 4.3.2.

¹¹⁴ See, in particular, the Decision in *Brind and others v Secretary of State for the Home Department*, 7 February 1991, [1991] All ER 720, [1991] AC 696 as referred to above, Part II, 1.3.8., in which the Law Lords rejected to apply the proportionality test as developed by the case-law of the European Court of Human Rights.

¹¹⁵ STC 159/1986, of 16 December 1986 (*recurso de amparo*), STC 199/1987, of 16 December 1987 (*recurso de inconstitucionalidad*), STC 47/2000, of 17 February 2000 (*recurso de amparo*).

¹¹⁶ Judgment of 15 December 1970, case nos. 2 BvF 1/69, 2 BvR 629/68 and 308/69 (BVerfGE 30, 1); BVerfG, judgments of 3 March 2004, case nos. 1 BvR 2378/98 and 1 BvR 1084/99; Judgment of 4 April 2006, case no. 1 BvR 518/02; Judgment of 27 July 2005, case no. 1 BvR 668/04; *Bundesverfassungsgericht*, Decision of 11 March 2008, case no. 1 BvR 256/08.

¹¹⁷ See above, Part II, 1.2.1.2.

In spite of these differences, all the courts have it in common that they are carefully checking the laws against one ultimate test: **proportionality**. It is maybe the underlying principle of the conciliation of counter-terrorism measures with human rights: while most rights are not granted in absolute terms, their limitations may only be justified if these seem proportional.

4.2. Impact of the ECHR and of Strasbourg's case-law

4.2.1. *The ECHR and the ECtHR's case-law in the respective national legal systems*

Although the ECHR has been ratified in all of the examined countries, there are some differences in how these countries have received the ECHR and the Strasbourg Court's case-law within their domestic legislation. This partially depends on their legal tradition with respect to international law (either being monist or dualist) but there are also national peculiarities to be considered, in particular the hierarchy of norms and the position of the ECHR therein. Finally, the effects of the ECHR and of the ECtHR's case-law depend on the interpretation of Strasbourg's case-law by national courts.

The ECHR was ratified first by the UK (1951), shortly followed by Germany (1952). Much later France (1973) and Spain (1979) ratified the Convention. While Spain and France have a monist tradition, the UK and Germany are dualist countries. Thus in Spain and France, the ECHR is directly applicable, while Germany implemented the Convention into national law in 1952 and the UK in 1998.¹¹⁸ However, more important than the way of its implementation is actually the hierarchical position of the ECHR in the domestic legal system: under Spanish and German constitutional law, the national courts, including the constitutional court, must interpret ordinary law and the higher ranking constitutional law in accordance with the ECHR and with Strasbourg's case-law, while in France the ECHR prevails over ordinary law but not over constitutional law.¹¹⁹ In the UK the situation is similar to Germany and Spain: both national case-law and statutory law shall be interpreted in conformity with the Convention.¹²⁰

The conformity of national law with the ECHR is not checked by the domestic organs. However, individuals can complain indirectly in Spain and Germany about violations of their constitutional rights *as interpreted* in the light of the ECHR and the Strasbourg Court's case-law. In France and the UK this is not possible, but the courts¹²¹ are held to interpret the national law, including fundamental rights, in conformity with the Convention.

As a result, the effect of the ECHR on the case-law and on the respective domestic protection of the human rights under the ECHR of the respective countries is relatively similar:¹²² in all countries, the national laws are to be interpreted in

¹¹⁸ Until 1998, individuals from the UK could already lodge complaints to the ECtHR but within the domestic legal system the ECHR ranked lower than statutory law.

¹¹⁹ Art. 55 of the Constitution.

¹²⁰ However, if this is not possible, the courts can make a declaration of incompatibility and thereby suggest to the legislator to change the law accordingly, see s. 3(1) HRA 1998.

¹²¹ In France all courts but the *Conseil Constitutionnel*.

¹²² At least since 2000, the year in which the Human Rights Act came into force.

accordance with the ECHR. However, while in Spain and Germany even constitutional rights have to be interpreted in the light of the ECHR and the Strasbourg Court's case-law (and in the UK, statutory law is to be interpreted conform to the ECHR), this is not the case in France, where constitutional law still prevails over international treaty law.

The most significant difference in practice is that Germany and Spain provide their citizens with the possibility to raise individual complaints before their national constitutional court, while in France and the UK such a possibility does not exist once the law has been adopted.

4.2.2. Comparison of ECtHR/ECmHR cases in relation to counter-terrorism

When looking at the cases decided in Strasbourg in relation to counter-terrorism legislation, one must take into account that the ECtHR and the Commission do not assess the law in the abstract but only its application in the concrete case before it. Therefore, the conclusions to be drawn from the rulings are of limited use when assessing the compatibility of abstract legislation with human rights. At the same time, in order to get a more complete picture of the question of how far anti-terrorist laws are reconcilable with human rights, the practical application of the law is more important than the black letter law. It is for this reason that the rulings of the ECtHR and of the ECmHR must be taken into account for the present study.

The Strasbourg cases against the **UK** reveal that the ECtHR and the ECmHR have always accepted the UK's decision to derogate under Article 15 ECHR. Bonner remarks that "where Art. 15 has come into play with respect to political violence connected with Northern Ireland affairs, the Court and Commission have granted such a wide margin of appreciation that European supervision has been diluted to a barely intrusive level."¹²³ He attributes this to the relative youth of the European system of protection, its dependence on state consent and support, and the fact that the emergency measures used in the Northern Irish conflict responded to a degree of political violence not experienced in any other Western European states. On the other hand, when no derogation order was in place, the UK was condemned for violating Article 5(3) (excessive length of pre-trial detention) several times.¹²⁴ The UK often responded to these rulings by issuing another derogation order.¹²⁵ In relation to the Northern Ireland conflict, the UK was further condemned repeatedly for violating the right to life (Article 2). In the Court's view, the authorities had not thoroughly enough investigated certain deaths, and insofar had failed to comply with the requirements under Art. 2 ECHR. In one case against the UK,¹²⁶ the ECtHR even stated that the relevant domestic law required a lower level of suspicion than the ECHR. Thereby, the Court *indirectly* showed that it deemed the domestic law incompatible with the ECHR. The UK

¹²³ Bonner (2000), at 48.

¹²⁴ See above, Part II, 1.3.4.

¹²⁵ See above, Part II, 1.3.4.

¹²⁶ *Fox, Campbell & Hartley v UK*, Judgment of 30 August 1990 (application no. 12244/86) (cited above, Part II, 1.3.12.).

responded to this judgment by repealing the relevant Act (the Northern Ireland [Emergency Provisions] Act 1978). Similarly, the UK legislator also reacted to a ruling from Strasbourg establishing breaches of Art. 3 of the Convention.¹²⁷ This case concerned deportation orders of foreign terrorist suspects who had not sufficient domestic remedies against the orders. Following the ECtHR's decision, the UK created the Special Immigration Appeals Commission.

There have been relatively few cases against **Spain** before the ECtHR in relation to terrorism. This may be explained by the fact that Spain is one of the youngest members of the Council of Europe – it only accessed to the Council in 1979, whilst the UK, France and Germany had already been members for many years. Moreover, the *Tribunal Constitucional* filters many cases so that they need not be treated in Strasbourg. With only two judgments it is not enough to allow any conclusions. However, it remains both conspicuous and alarming that torture was still an issue, and a violation was stated by the ECtHR in *Martinez Sala and Others v. Spain*.¹²⁸

As far as **Germany** is concerned, it is apparent in that most cases preceding a (dismissing) judgment of the German Constitutional Court, the EComHR and/or the ECtHR agreed with the national court's decision and also dismissed the applications. Only in two cases (*Erdem v Germany* and *Vogt*), the ECtHR established a breach (of Article 5(3) ECHR and 10 ECHR, respectively). But like in Spain, it is difficult to make a general assessment for Germany, due to the low number of judgments identified in relation to terrorism.

The Strasbourg Court has issued several judgments against **France** for infringing the right to privacy, in relation to telecommunications monitoring.¹²⁹ The legislator reacted to this criticism by adopting a law regulating the interception of telecommunication (Law no. 91-646 of 10 July 1991). France has also been repeatedly condemned for violating the right to be brought before a judge within reasonable time (Article 5(3) ECHR, in particular: excessive durations of pre-trial detention).¹³⁰ France has reacted to this criticism by adopting the law of 15 June 2000 on reinforcing the presumption of innocence. However, criticism from Strasbourg did not cease after its entering into force.¹³¹ Further, condemnations from Strasbourg were related to *in absentia* trials, which are under certain circumstances possible pursuant to French law.¹³²

As a result, we note that Strasbourg has had occasion to rule on the application of terrorist laws (or the application of ordinary laws to terrorist cases) in all four countries, and that it has established human rights violations in all four countries. However, the quantity and quality of violations differ considerably from one country to another.

¹²⁷ See the cases cited above, Part II, 1.3.13.

¹²⁸ Judgment of 2 November 2004, application no. 58438/00 (see above, Part II, 2.4.6.).

¹²⁹ See above, Part II, 4.3.3.1.

¹³⁰ See above, Part II, 4.4.7.

¹³¹ See above, Part II, 4.3.4.

¹³² *Karatas v France*, Judgment of 16 May 2002 (application no. 38396/97) (see above, Part II, 4.4.7.).

Further, we note that these rulings from Strasbourg have occasioned the legislators sometimes, but not always, to amend the existing law.

When comparing the number of judgments adopted by the ECtHR in the different countries in relation to terrorism, it is conspicuous that very few cases have been lodged against Spain. One reason is certainly that Spain ratified the ECHR relatively late. Hence, all draconian laws adopted under Franco's rule could not be challenged in Strasbourg. Another reason might be that Spain has a constitutional court so that only those cases reach Strasbourg which the Constitutional Court dismisses. The filtering function of a national constitutional court with a procedure for individual complaints of human rights violations becomes evident when looking both at the very few cases in Spain and the relatively low number of cases in Germany.

The largest numbers of cases were brought against the UK and France. With respect to the UK, this is not astonishing since the UK was the first country to sign the ECHR. Moreover, the terrorist threat in the UK reached scales far beyond those experienced in any of the other countries, including Spain.¹³³ However, the high number of cases in France is more surprising. Most cases in France concerned the length of detention, but also procedural rights were violated (e.g. right to legal assistance, right to be present during trial). It is conspicuous that in the French cases, it was not a specific anti-terrorist law which was applied in a manner that amounted to a violation of human rights, but rather the ordinary law applied in a very rigid way under the pretext that the accused or convicted persons were terrorists. This shows that even without special anti-terror laws, the presence of a terrorist suspicion during the investigations already provokes police and judges to interpret the ordinary law more restrictively with respect to human rights.

4.2.3. Violations of the ECHR in relation to terrorist cases per Article

To summarise, the ECtHR considered a number of rights granted by the ECHR to be breached in the respective countries (in the context of terrorist cases):

4.2.3.1. Art. 2 – Right to life

In relation to terrorism, the right to life was considered to be violated by the United Kingdom, where the ECtHR in a number of cases found that the UK had failed to comply with the requirements of Art. 2 as to the investigations concerning a death of a person, and that this failure constituted a breach of Article 2 ECHR.¹³⁴

¹³³ More than 800 deaths are attributed to ETA, as opposed to over 3,000 attributed to the PIRA (see above, Part I, 4.1. and 4.2.).

¹³⁴ See above at Part II, Chapter 1, Section 1.3.10 (referring to the cases *Kelly and Others v UK* (application no. 30054/96); *Shanaghan v the UK*, Judgment of 4 May 2001 (application no. 37715/97); see also EComHR, *Farrell v UK*, Decision of 11 December 1982 (application no. 9013/80); *Finucane v the UK*, Judgment of 1 July 2003 (application no. 29178/95); *McShane*, Judgment of 28 May 2002 (application no. 43290/98); *McCann and Others v UK*, Judgment of 27 September 1995 (application no. 18984/91); *Hugh Jordan v the UK*, Judgment of 4 May 2001 (application no. 24746/94); *McKerr v the UK*, Judgment of 4 May 2001 (application no. 28883/95).

4.2.3.2. Art. 3 – Prohibition to torture

With relation to terrorist cases, Art. 3 of the ECHR was considered as violated in two cases against the UK,¹³⁵ one case against Spain,¹³⁶ and one case against France.¹³⁷ The case of *Chahal v UK* stressed the principle of non-refoulement, whereas *Ireland v UK* concerned the treatment of arrested people during the troubles, which the ECtHR considered to amount to degrading or inhuman treatment or punishment, within the meaning of Art. 3 ECHR, but not to torture. In *Martinez Sala and Others v Spain*, the Court established that Art. 3 ECHR was breached because the authorities had failed to hold an effective official investigation into the torture allegations brought up by the applicant. In the case of *Frerot v France*, strip searches of a prisoner were considered to constitute degrading treatment, within the meaning of Art. 3 of the ECHR.

4.2.3.3. Art. 5 – Right to liberty and security

No other right has been breached as much as Art. 5 (mostly paragraph 3 thereof), in relation with terrorist investigations. As the UK three times derogated from the rights under Art. 5, invoking Art. 15 of the ECHR,¹³⁸ the ECtHR could naturally only examine violations of this provision during the times when no derogation order was in place. During such times the ECtHR found in two cases related to terrorism that Art. 5(3) was violated, as the applicants were not brought promptly before a judge.¹³⁹ Moreover, Art. 5(1) of the ECHR was found to be breached in the case of *Fox, Campbell & Hartley*, as a person was arrested without the requirement of "reasonable suspicion" to be established.¹⁴⁰ Moreover, in two of the named cases, the right to compensation under Art. 5(5) of the ECHR was also breached.¹⁴¹

Violations of Art. 5 of the ECHR were also recognised in cases against France and Germany. In France, detention on remand was considered in three cases as excessive, thus breaching Art. 5(3) of the ECHR, as it amounted in one case to more than two years,¹⁴² in another one to over three years,¹⁴³ and in a third one over four years.¹⁴⁴ In Germany, detention on remand lasted even longer (five years and eleven months) in the case of *Erdem v Germany*.¹⁴⁵ Likewise, the ECtHR found that Art. 5(3) of the ECHR was violated.

¹³⁵ *Chahal v UK*, Judgment of 15 November 1996 (application no. 22414/93); *Ireland v UK*, Judgment of 18 January 1978 (application no. 5310/71).

¹³⁶ *Martinez Sala and Others v Spain*, Judgment of 2 November 2004, application no. 58438/00.

¹³⁷ *Frerot v France*, Judgment of 12 June 2007 (application no. 70204/01).

¹³⁸ See above, Part II, Chapter 1, Section 1.3.4.

¹³⁹ E.g. in *Brogan and others v the UK*, Judgment of 29 November 1988 (application no. 11209/84; 11234/84; 11266/84; 11386/85); *O'Hara v UK*, Judgment of 16 October 2001 (application no. 37555/97).

¹⁴⁰ *Fox, Campbell & Hartley v UK*, Judgment of 30 August 1990 (application no. 12244/86).

¹⁴¹ *O'Hara v UK* and *Fox, Campbell & Hartley v UK* (loc. cit.).

¹⁴² *Gérard Bernard v France*, Judgment of 26 September 2006 (application no. 27678/02).

¹⁴³ *Morgani v France*, EComHR, Report of 30 November 1994 (application no. 17831/91).

¹⁴⁴ *Debboub alias Hussein Ali*, Judgment of 9 November 1999, (application no. 37786/97).

¹⁴⁵ Judgment of 5 July 2001 (application no. 38321/97).

4.2.3.4. Art. 6 – Right to a fair trial

Violations of the fair trial principle have been denounced in many cases by the ECtHR in relation to terrorism. Especially in France, this principle was considered to be infringed in five cases, namely, where criminal proceedings against terrorist suspects lasted longer than two,¹⁴⁶ respectively, nine years,¹⁴⁷ where the administrative complaint procedure against treatment in prison had taken more than six years (violations of Art. 6(1), respectively),¹⁴⁸ where the applicants were convicted *in absentia* without their lawyers being heard although the latter were present during trial (violation of Art. 6(3)(c)),¹⁴⁹ and where the applicant was convicted *in absentia* while actually serving a prison sentence for a terrorist offence already in Italy (violation of Art. 6(1), (3)(c)(d)(e)).¹⁵⁰

The UK was also criticised in three cases for violating the fair trial principle, namely in the case of *Condron*,¹⁵¹ in which the judges had not informed the jury properly about the requirements which permitted them to make inferences from the silence of the accused (violation of Art. 6(1)), or in the case of *Magee*,¹⁵² in which the applicant had not been given access to a solicitor at the initial stages of police interrogation, and in which he was considered particularly vulnerable as he had been cautioned that the court might draw adverse inferences from his silence (violation of Art. 6(1), 6(3)(c)). The right to effective exercise of his defence rights was also considered to be breached in the case of *Brennan*¹⁵³ who had only been permitted to meet with his solicitor for the first time after arrest in the presence of a police officer within hearing distance.

In Spain, one case was decided in Strasbourg regarding the fair trial principle in relation to terrorism: the case of *Barberà, Messegué and Jabardo v Spain*,¹⁵⁴ in which several irregularities during the trial did not meet the requirements of a fair and public hearing, within the meaning of Art. 6(1), ECHR.

4.2.3.5. Art. 8 – Right to respect for private and family life

The UK and France received criticism from the ECtHR for infringing the right to privacy and respect for family life in several cases related to terrorist affairs (cf. *Malone*,¹⁵⁵ *Khan*,¹⁵⁶ *Lewis*,¹⁵⁷ and *McVeigh, O'Neill and Evans*,¹⁵⁸ for the UK, and *Huvig*¹⁵⁹ and *Kruslin*,¹⁶⁰ for France).

¹⁴⁶ *Mouesca v France*, Judgment of 3 June 2003 (application no. 52189/99).

¹⁴⁷ *Association Ekin v France*, Judgment of 17 July 2001 (application no. 39288/98).

¹⁴⁸ *Frerot v France*, Judgment of 12 June 2007 (application no. 70204/01).

¹⁴⁹ *Karatas v France*, Judgment of 16 May 2002 (application no. 38396/97).

¹⁵⁰ *Mariani v France*, Judgment of 31 March 2005 (application no. 43640/98).

¹⁵¹ *Condron v UK*, Judgment of 2 May 2000 (application no. 35718/97).

¹⁵² *Magee v UK*, Judgment of 6 June 2000 (application no. 28135/95).

¹⁵³ *Brennan v UK*, Judgment of 16 October 2001 (application no. 39846/98).

¹⁵⁴ Judgment of 6 December 1988 (application no. 10590/83).

¹⁵⁵ *Malone v UK*, Judgment of 2 August 1985 (application no. 8691/79).

¹⁵⁶ *Khan v UK*, Judgment of 12 May 2000 (application no. 35394/97). See also Kühne and Nash (2000).

¹⁵⁷ *Lewis v UK*, Judgment of 25 November 2003 (application no. 1303/02).

4.2.3.6. Art. 10 – Freedom of expression

The ECtHR found in two cases related to terrorism, concerning France (*Association Ekin v France*)¹⁶¹ and Germany (*Vogt v Germany*),¹⁶² that the freedom of expression was limited in an unjustified manner, thus leading to a breach of Art. 10 of the ECHR.

4.2.3.7. Art. 13 – Right to an effective remedy

The ECtHR found that France violated Art. 13 of the Convention in the case of *Ramirez-Sanchez v France*, as French law did not provide for a legal remedy to challenge the decision to prolong detention in solitary confinement.¹⁶³

From the above, it follows that the rights protected under Arts. 5, 6, and 8 of the Convention are those most often infringed in relation to terrorist cases. Arts. 2, 3, 10, and 13 are also affected, albeit less frequently. The UK and France were most often criticised by the ECtHR, followed by Germany and Spain. This observation coincides with the general statistics of the ECtHR's case-law.¹⁶⁴

5. Summary

We have seen that legislators are indeed affected by previous terrorist events. However, what influences them more than the actual level of the threat seems to be the media coverage the incident receives. The more media attention a terrorist incident obtains, the quicker the legislator reacts to it; and the quicker an Act is adopted, the less attention is given to human rights.

Moreover, a number of general characteristics of anti-terror laws have been identified. Most of the laws restrict certain human rights (in particular, basic procedural human rights). Besides these restrictions, which are in some, but not all cases, justified, general principles of criminal law are also ignored sometimes.

Furthermore, a number of peculiarities of the different countries could be identified. Thus, the UK stands alone as the only state examined that derogated under Art. 15 of the ECHR from its obligations of Art. 5, ECHR. Moreover, the adoption of the Human Rights Act 1998 has considerably strengthened the value of the ECHR in domestic case-law. At the same time, after September 11th the longest periods of detention without warrant were adopted in the UK. With respect to Spain, a general focus on penitentiary law is conspicuous, as well as the phenomenon that Spain, in contrast to the other countries, has not reacted to September 11th with a speedily enacted special anti-terror law. When comparing the situation in the Spain of the 1980s

¹⁵⁸ Application nos. 8022/77, 8025/77, 8027/77.

¹⁵⁹ Judgment of 24 April 1990 (application no. 11105/84).

¹⁶⁰ Judgment of 24 April 1990 (application no. 11801/85).

¹⁶¹ Judgment of 17 July 2001 (application no. 39288/98).

¹⁶² Judgment of 25 February and 2 September 1995 (application no. 7/1994/454/535).

¹⁶³ Grand Chamber Judgment of 4 July 2006 (application no. 59450/00).

¹⁶⁴ E.g. see the ECtHR's survey of activities 2007, at 62, which enlists the violations by State and by Article of 2007. According to this statistic, 39 judgments which found at least one violation were issued against France, 19 against the UK, seven against Germany, and only two against Spain.

with that of today, we note a considerable improvement in the protection of human rights. A peculiarity of Germany was that diverse laws were passed in the 1970s, which mainly focused on restricting the rights of the defence during trial. Moreover, the right to privacy has been particularly restricted in Germany, e.g. by introduction of the *Rasterfahndung*, or, more recently, by the planned online-search. France's specialty in counter-terrorism legislation is the extreme concentration and centralisation of specialised judges, prosecutors, and the execution of sentences, in Paris. Furthermore, in practice the *plan vigipirate*, as well as mass detentions were a common reaction to terrorist incidents or civil unrest.

With respect to the historical evolution of anti-terror measures, we noted all countries, except for France, faced terrorist threats in the 1970s and adopted special laws against it. In the 1990s a similar development in all countries could be observed, tending towards the legalisation of special covert investigation methods, extending these methods, and using them not only against terrorism, but increasingly also against organised crime, in particular drug-related delinquency. After September 11th all countries except for Spain have reacted to international Islamic terrorism by adopting new and increasingly far-reaching laws.

The impact of domestic courts is in all countries notable and, mostly, positive. In all four countries court decisions declaring the incompatibility of a law with a certain human right have caused subsequent legislative changes. The impact of the Constitutional Courts of Spain and Germany seem, however, relatively larger. The UK's tradition of parliamentary sovereignty impedes courts from declaring a law as unconstitutional, and similarly, the French *Conseil Constitutionnel* has ruled that it leaves decisions concerning the balancing of individual freedoms and security to the legislator. Also the impact of the ECHR and of Strasbourg's case-law are remarkable in all four countries. Increasingly the case-law from Strasbourg is recognised. At the same time, it is worrying in how many cases the ECtHR found that the application of special anti-terror legislation violated rights of the Convention. It is also worrying that the legislators reacted to such negative rulings against their own country only sometimes, but not always, by improving their existing law.