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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Conclusion

The results of this thesis will be briefly summarised. Subsequently, the thesis will be concluded with a final assessment and outlook.

1. Summary

In the present thesis, the role of human rights in counter-terrorist legislation was examined. As a point of departure, in Part I the evolution of terrorism throughout history was explored. It was found that the term 'terrorism' has been applied to a large diversity of different movements, making it impossible to find one common definition that fits all of these. An attempt of finding a legal definition was made (the disproportionate use of violence which causes *intimidation and terror* among parts of or the whole of a civil population), but the attempt showed that the developed catch-all definition was far too broad to be of any use in criminal law. Further, the historical overview demonstrated that state terrorism has had extremely devastating consequences that go beyond any attack imaginable by non-state actors. It was shown that the emergence of state terrorism was facilitated by legislation gradually granting more and more powers to the authorities whilst successively reducing the citizens' human rights. This legislation was adopted in the pretext to fight terrorism or any other "common enemy". It was concluded that against this background, we must not allow human rights to be reduced and eventually abolished, particularly not in the fight against such an undefinable abstract phenomenon as 'terrorism'.

In the second Part the different anti-terror laws of the United Kingdom, Spain, Germany and France were examined. Past and present legislation was taken into account. In order to assess their compatibility with human rights, the case-law of the respective highest national courts and of the European Courts of Human Rights were taken into consideration, as well as academic writings where applicable.

In Part III, the results of Part II were summarised and analysed. In the analysis, the impact of terrorist incidents on the law was explored, the general characteristics of anti-terror legislation crystallised, and general developments were identified. Also particularities of different countries were considered and explanations for these specificities were sought. Further, the contents and the impact of national and European case-law regarding the compatibility of counter-terror laws and measures with human rights were comparatively analysed. It was concluded that human rights have often been ignored by legislators in the respective countries, already prior to, but particularly after September 11th. At the same time, courts have shown a growing interest in human rights, and court decisions in which a certain provision was considered incompatible with a human right have in most cases motivated the concerned legislator to change the law. In this regard, it can be expected that two polarising tendencies may also be identified in the future: on the one hand, a growing tendency of legislators to suspend

human rights, especially in the immediate aftermath of a terrorist attack, and, on the other, an enhanced sensitivity and consciousness of courts regarding the reconciliation of anti-terror legislation with human rights.

2. A Final Assessment and Outlook

The results allow us to give a general, albeit cautious, assessment of the status of human rights in today's counter terror legislation. In all four countries there is a tendency, on the part of the respective legislators, to ignore human rights in recent counter-terror legislation. With the exception of Spain, where we observe a growing concern and protection for human rights, all countries increasingly push their limitations to human rights further. This evolution is, to a certain extent, retained by the case-law of national and European courts, which watch over the compatibility of the law with basic human rights and denounce some excessive measures. In this respect, the growing influence of the Strasbourg court must not be disregarded.[1]

We have seen that countries have adopted a plethora of legislative measures targeting international terrorism. Many of these measures are problematic when viewed from a human rights perspective, some of them even unacceptable. However, most of these have been condemned by the courts and were subsequently abolished. A growing awareness of the importance of human rights is notable. At the same time, legislators show an increasing interest in drastic measures, and even issues that have long been considered as obsolete have re-entered the discussion, such as the absolute prohibition of torture, the presumption of innocence, or the right to silence. On account of these developments, the apparent fragility of basic human rights principles causes concern. Seeing how legislators react to terrorist events, the prospects for the future are not too bright, for any of the countries, with the possible exception of Spain, which shows continuing efforts to preserve human rights. It seems that we entered the spiral of violence long ago. If terrorist offenders achieve to commit once more a terrifying event comparable to September 11th, there is no guarantee that human rights will continue to be observed. It is difficult to predict how the different countries will react. The UK might again issue an order derogating from its obligations under Art. 5, ECHR, and extend pre-charge detention. An event comparable to September 11th will certainly be considered by the ECtHR as a case of emergency, threatening the life of the nation and justifying the suspension of basic human rights. Maybe this will not encounter criticism from domestic courts, since traditionally, questions concerning derogation orders have always been considered as the responsibility of the British Parliament alone. At the same time, the ruling of the House of Lords in December 2004[2] may have changed this approach more drastically than it appears at first sight. It showed how quickly British judges are able to adapt to new situations. The general flexibility of the common law,

[1] See also Esser (2002), at 817 et seq, especially 833 et seq.
[2] Cited above, Part II, 1.3.4.

combined with the British long-standing tradition of fundamental freedoms,[3] give reason to hope that the common sense of the judiciary branch will impede – at least long-lasting – legislative overreactions. In the case of an overwhelming terrorist attack and a subsequent legislative reaction, it is possible that the national constitutional courts of Spain and Germany will apply a stricter human rights test than the Strasbourg court might. Spain might introduce changes in their penitentiary law, putting additional restrictions on terrorist convicts. Considering the efforts in Spain to improve the legal regime of pre-trial detention, I doubt that detention or arrest rules will be modified there. As to Germany, it is likely that certain human rights, in particular the right to privacy, will be further limited. The online-search may finally pass legislative debate. For France, the prospects are less bright. Contrary in particular to Spain, France seems to slowly, but steadily, veer away from the values declared in 1789. The French legislator has shown itself less impressed by Strasbourg's criticism. Moreover, we have seen that the constitutional review of the *Conseil Constitutionnel* can be bypassed, as already happened in the case of the Law of 15 November 2001.[4] Even presuming that a law will be submitted to the *Conseil* prior its enactment, there are doubts whether the Constitutional Council will contradict the legislator's decision in the case of counter-terrorism. It has already explicitly limited its own review capacity with respect to the balancing of public order and human rights, so that in the delicate question of anti-terror measures it may again take this view.[5]

It must be concluded that the prospects for human rights are not too positive in the future, at least in the event that another terrorist incident comparable to September 11th would frighten our legislators. We have learnt human rights are not always observed in anti-terror legislation and its application. We cannot always rely on legislative decisions taken by legislators whose eyes are blinded by the fear of terror. However, it has also been demonstrated that courts play an important role in reconciling counter-terror legislation with human rights. They have shown a remarkable capability to correct legislative mistakes in relation to human rights, by either declaring the concerned provision as unconstitutional (France, Germany, Spain) / incompatible with a certain human right (UK), or by giving authoritative guidelines as to its (restrictive) interpretation. It might be partially the contribution of these courts that has so far impeded our democracies from turning into an Orwellian state of total control. As a consequence, judicial control should be further extended.

The different countries follow similar approaches in the vast majority of the laws. However, some lessons can be learnt from the comparison. The examples of some countries may invite to be copied by others, and mistakes committed by all countries may invite further reflection.

For instance, the system in the UK to temporarily limit legislation and subject it to continuous review by independent observers has proved partially successful because it

[3] See above, Introduction, 1.2.2.1.
[4] See above, Part II, 4.4.1.
[5] *Conseil Constitutionnel*), Decision no. 2003-467 of 13 March 2003 on the Law on Internal Security.

impeded 'bad' legislation (.e.g. internment) from lasting too long. The system of an independent reviewer, a legal expert, could be copied by other countries, as these reviews give concrete recommendations and critics to the legislator and are actually often taken into account. Moreover, a duty of evaluation presents the other side of the coin of the legislative competence to introduce new intrusive provisions, for which exists an increased insecurity about their actual application, their development or long-term consequences.[6]

Another national particularity that could be copied by other countries is the German principle of separation between the police and secret services. Although this principle seems to be on its way to distinction, it has proven to be an important principle for the balance of powers, especially when the powers of both institutions are continuously extended. It is desirable that this principle would receive more attention not only in Germany, but also in the other countries.

Moreover, the comparison has shown that the Spanish and German system with regards to the protection of human rights, i.e. the existence of an authoritative constitutional court, has been quite successful in checking and correcting the legislators' occasional mistakes. The creation of a constitutional court following the German or Spanish model might be considered by those countries which have no such court yet. This does not mean that the European Court of Human Rights is less important, but it is currently overloaded with cases, and a national filter procedure such as the one provided for by a constitutional court which offers remedies on an individual basis would therefore improve the European Court's efficiency and work capacity. In addition, the French Law of November 2001 which escaped constitutional review has shown us the disadvantage of a general *ex ante* review. If it is lengthy and cumbersome, it will be avoided in a situation of emergency.

Furthermore, the overview has demonstrated that many anti-terror laws conflict with the principles of proportionality, certainty, and clarity of the law. Abuse of powers and disproportional measures were some of the problems where human rights were unjustifiably limited. The principle of proportionality impedes excessive human rights limitations, while the principles of certainty and clarity of the law ensure that laws are not written in a way that they can be misinterpreted and abused in practice. These principles are hence particularly important for the process of drafting new legislation. Legislators should take due account of this.

As we have seen that Acts adopted in the immediate aftermath of a terrorist attack tend to be particularly restrictive on human rights, it might be useful to introduce a mandatory human rights review similar to the French model of the *Conseil Constitutionnel* of such Acts (e.g. within six months after their adoption), to ensure that they will either conform to our human rights or loose their effect. Criterion for this

[6] Roggan and Bergemann (2007), at 879.

special review could be the existence of an emergency situation justifying speedily adoption of the Act.

Another point deserves mention here (one that Clive Walker already noted in 1997): miscarriages of justice are often caused by an imbalance of the state's powers. The separation of powers is crucial to avoid an imbalance. Only if all branches of the state play a role in the governance of special powers, if executive, legislative, and judiciary check and balance each other, can we secure observance of individual rights, democratic accountability and constitutionalism.[7] It is not because I am a lawyer, but rather because I have contemplated in depth the role courts play in the development of counter-terror legislation, that I reiterate in particular the role of the judiciary in the system of checks and balances. Intrusive and coercive measures should always be explicitly authorised by a judge, and laws that are likely to conflict with human rights should be especially reviewed.

Finally, one should consider that one main reason why anti-terror legislation can be more destructive to human rights than ordinary legislation in a democratic society is the general public demand for action after a terrorist incident. The public put politicians under an immense pressure to react to terrorist incidents. To avoid overreactions, there are two possibilities: first, the pressure on political actors could be reduced if those in charge of adopting anti-terror legislation were less dependent upon public opinion. However, this option would be dangerous in the sense that it would reduce democratic oversight on legislative actions. The other option might be to promote (with the help of mass media) the importance of the values of our society, i.e. human rights and the rule of law, rather than its weakness, i.e. the vulnerability towards terrorist violence. Last but not least because focussing on the weakness makes us weak.

[7] Walker (1997), at 60.