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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Epilogue – Three essential problems

With a study as broad as this, it is difficult to conclude with satisfaction as too many legal questions have been raised that could not receive their well-deserved attention. However, the limitations of both time and space make extensive elaborations on these problems impossible within the framework of this research. At the same time, these issues are too interesting to be completely left aside. As a compromise to this dilemma, I shall briefly outline what I consider to be the most essential problems in the field of terrorism and anti-terrorism legislation, to which no satisfying answers have been found.

1. Torture and the "Ticking Bomb Scenario"

This is perhaps the most popular problem related to counter-terrorism, the discussion of which I would in fact like to consider as obsolete, since the prohibition of torture has already been absolute under human rights law for a long time.[1] However, the subject is still part of popular discourse.[2] Only recently I came across an essay in the German weekly magazine "*Die Zeit*" where the author, a renowned scholar in constitutional law, argued that torture could be justified as legitimate defence of others ("*Nothilfe*").[3] The basic underlying question is the following: Supposing we know that there is a bomb somewhere, and we have arrested the presumed terrorist who knows where the bomb is situated, should we then permit torture, in order to force him to disclose where the bomb is situated? If we could save the lives of many, would this not justify the threat or the application of torture? Dreier argues that the individual who applies torture does so in order to defend the life of others. This is indeed an interesting point of view. However, at a closer look, it is not convincing, at least not under German criminal law. The German provision regulating necessary defence, § 32 *StGB* (this provision applies the same rules to self-defence – *Notwehr* – and defence of others – *Nothilfe*) defines necessary defence as "the defence which is required to avert an imminent unlawful assault from oneself or another".[4] While we can agree that the threat of a bomb may be perceived as an imminent unlawful assault, it is much more difficult, if not impossible, to establish that the action in question, i.e. torture, is really required (*erforderlich)* to effectively defend the presumed people at risk. According to German dogmatic, a defence is 'required' if it is, on the one hand, capable to repel the attack, and, on the other, the mildest instrument for defence available. It is doubtful whether torture can be considered as capable to repel the attack. We cannot say with any certainty whether the detained terrorist will (a) give more information when tortured, and (b) give correct

[1] See Art. 3 ECHR, Article 7 of the International Covenant for Civil and Political Rights, Article 5 of the Universal Declaration of Human Rights, Article 5(2) of the American Convention of Human Rights, Article 5 of the African (Banjule) Charter on Human and Peoples' Rights.
[2] See e.g. Adam (2008), Greco (2007), Bamberger and Moll (2007).
[3] Die Zeit (6 March 2008): *Folter als Notwehr*.
[4] Translation taken from the German Federal Ministry of Justice as published at: http://www.iuscomp.org/gla/statutes/StGB.htm#32 (last visited on 28 September 2008).

information.[5] Even supposing that the defence is required, at least under German law there is yet another requirement: the defence must be *geboten* (demanded), which means that in certain exceptional cases the self-defence or defence of others is to be interpreted restrictively, based on social-ethical considerations.[6] It is debated whether the prohibition of torture constitutes such an ethical consideration that limits the right to self-defence or defence of third parties.[7]

2. Criminalisation of Preparatory Acts – how far can we go?

The increasing tendency to criminalise preparatory acts is particularly problematic. Structurally, this goes along with focusing more on the subjective (*mens rea*) than on the objective (*actus reus*) element of the crime.[8] It makes it difficult to clearly distinguish between a concluded act of preparation of a terrorist offence and an attempt to commit a terrorist act. At the same time, the legal consequences of the two are fundamentally different: in the criminal law concept of attempt, the "defect" on the objective side (i.e. that the crime has not been completed) is compensated by the possibility that the offender, if he changes his mind during the preparation of the criminal act, can still change his plans and withdraw from the intended act. The legislator rewards him for this decision by excluding his criminal liability if the perpetrator decides to withdraw and thus prevent any damage. However, if he has prepared the commission of a *terrorist* act, and if the preparation in itself is already a criminal offence, then he is criminally liable in any case. Even changing his mind could not exclude his criminal liability. The existence of the crime of preparation thus does not provide any encouragement for the offender to repent and change his plans. On the other hand, it is clear that we cannot wait until the bomb has exploded before we interfere. However, police intervention does not necessarily mean to hold the person who prepared a terrorist act criminally responsible. We could also consider alternatives. It is clear that in the case of suicide bombers, no criminal law offence will have any deterrent effect on them. They are not scared to die; much less will they be scared of going to prison. So the real reason for criminalising preparation is not deterrence, but rather the possibility to arrest the potentially dangerous offenders and put them into prison for some time, so that at least they cannot commit any terrorist act while serving their sentences. Yet does this justify that people who only engage in preparations cannot withdraw voluntarily from their plans?

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[5] This argument has already been raised over 240 years ago by Beccaria:
"(…) and that pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture. By this method the robust will escape, and the feeble be condemned. These are the inconveniences of this pretended test of truth, worthy only of a cannibal, and which the Romans, in many respects barbarous, and whose savage virtue has been too much admired, reserved for the slaves alone." (Beccaria (1764), On Crimes and Punishment).

[6] Krey (2008), at 169 et seq.

[7] Against justifying torture: Roxin (2006), at 706 et seq.; Krey (2008), at 195, with further references, differentiates: in case of police officers, torture should not justify defence of others, but for close family members of the abducted person Krey accepts at least the threatening of torture; in favour of justifying torture: Herzberg (2005); Otto (2005). See also Brugger (2000).

[8] E.g. see the French Law no. 96-647 of 22 July 1996 (above, Part II, 4.3.3.3.).

3. What to do with potential or convicted terrorists (e.g. sleepers)?

A well-known problem of today is the difficulty to find potential terrorists whose behaviour is precisely focused on being not conspicuous. In Germany, it was tried using the grid search for this purpose, by screening the data of university student lists, selecting those Muslims who were studying engineering. This attempt failed. There are other ways to identify potential terrorists (e.g. covert methods of investigations, and information gathering on a broad scale). However, once the "sleepers" are identified, what do we do with them? They have not committed any criminal act. Police only know that they think radically, and that they hence might dispose of some information regarding a planned act. How can we obtain the information they might have? And what should we do with these "radicals" to prevent them from ever committing the terrorist act? The same question applies to terrorists who have served their sentences, but who are still not "re-socialised" and who are therefore feared to again commit terrorist acts once released.[9] In the United Kingdom, between 2001 and 2005, suspected foreign terrorists could be detained indefinitely, but the House of Lord's Decision of December 2004 showed that this solution is not acceptable under the existing human rights law. Further, Guantánamo Bay only too shockingly showed how Americans thought of solving the problems of potential terrorist offenders. In addition, also under German and French law, "dangerous" people can be locked up for an indefinite time, but they must have committed a criminal act. In all countries, the sentences for terrorist offences have increased. But also long sentences only postpone the problem, without solving it. We see that the question is unsolved and requires further research.

[9] See e.g. the case of De Juana Chaos in Spain (cf. García del Blanco (2007), or Christian Klar in Germany.