

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

PROEFSCHRIFT

ter verkrijging van

de graad van Doctor aan de Universiteit Leiden,

op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,

volgens besluit van het College voor Promoties

te verdedigen

op dinsdag 16 juni 2009

klokke 13.45 uur

door

Anna Oehmichen

geboren te Tübingen

in 1979

Promotiecommissie

Promotores:

Prof. Dr. J. F. Nijboer

Prof. Dr. Dr. h. c. H.-H. Kühne (Universität Trier, Germany)

Overige leden:

Prof. Dr. C. P. M. Cleiren

Prof. Dr. R. Esser (Universität Passau, Germany)

Prof. Dr. R. A. Lawson

Dr. J. P. Loof

Dr. E. van Sliedregt (Vrije Universiteit Amsterdam)

Preface

This thesis was carried out between September 2005 and October 2008 at the Department for Criminal Law and Criminology, Law Faculty, University of Leiden, under the bi-national supervision of Hans Nijboer (University of Leiden) and Hans-Heiner Kühne (University of Trier, Germany). The study was partially funded by the German Academic Exchange Service.

The idea to write a comparative study on anti-terror legislation emerged shortly after the attacks of September 11th. The subsequent legislative activity in Germany was amazing in many ways and made me very curious of what happened in other countries. Thus in 2002 I planned to make this my doctoral subject should I ever really decide to engage in a PhD. After my clerkship at the International Criminal Court in The Hague, I had become addicted to the international air of the Netherlands and therefore decided that this would be the best place to write a comparative legal study in English language. Also, the Netherlands seemed suitable as a “neutral” territory to study from an objective external perspective the legislation of the United Kingdom, Spain, Germany and France. To this end, Leiden University has proven to be an excellent place with great research facilities in an open, disciplined, and relaxed environment.

The dissertation consists of three parts: a historical overview on selected terrorist movements in the world, an examination of human-rights sensitive anti-terror laws adopted in the United Kingdom, Spain, Germany and France within the last forty years, and a final comparison and analysis of the findings of the previous part.

I hope legal practitioners will find the present study useful, and I also hope it will be taken into account by legislators before passing new counter-terror legislation.

Anna Oehmichen

Berlin, 5 May 2009

Table of Contents

Introduction 1

Part I – Conceptualisation of Terrorism from a Historical Perspective 41

Part II - A National and Historical Comparison of Anti-Terror Legislation..... 117

1. Anti-Terror Legislation in the United Kingdom 118

2. Anti-Terror Legislation in Spain 164

3. Anti-Terror Legislation in Germany 213

4. Anti-Terror Legislation in France 260

Part III – Comparison & Analysis 301

Conclusion..... 338

Epilogue – Three Essential Problems..... 343

Detailed Summary..... 346

Bibliography..... 371

Acknowledgment 421

Detailed Table of Contents

Introduction	1
1. Terrorism and the law	2
1.1. The notion of "terrorism"	3
1.2. Scope and limitations of the examined law: anti-terror legislation and human rights	5
1.3. The paradox of terrorism, counter-terrorism and human rights	18
2. Purpose and aim	20
3. Methodology	23
3.1. The historical approach – justification and methods	24
3.2. The comparative criminal law approach	27
4. Summary: Research questions and structure of the study	38
Part I – Conceptualisation of Terrorism from a Historical Perspective.....	41
1. Examples of terrorism before 1793.....	43
1.1. Antiquity – terrorist behaviour in the Bible?	43
1.2. The roman age	44
1.3. Zealots (A. D. 66-70)	45
1.4. Assassins (A. D. 1090-1256).....	45
1.5. Indian Thugs.....	46
1.6. Gunpowder Plot (1605).....	47
1.7. Summary	47
2. Terrorist movements after the French Revolution	48
2.1. Robespierre's reign of terror (1793-4).....	48
2.2. Terrorism and anarchism in the second half of the nineteenth century	50
2.3. Early nationalist and anti-colonial groups.....	54
2.3.1. Ireland.....	54
2.3.2. Serbia.....	56
2.3.3. India.....	57
2.4. Liberation movements after World War II.....	58
2.4.1. Palestine / Israel	58
2.4.2. Cyprus	62
2.4.3. South Africa	62
2.5. The beginning of contemporary terrorism: ideological left-wing terrorism	63
2.5.1. Brigade Rosse.....	64
2.5.2. Communist Combatant Cells	65
2.6. Summary	65
3. Terrorism committed or supported by the state	68
3.1. State terrorism in the twentieth century	70
3.1.1. Russia's (soviet) terror regimes	70
3.1.2. Fascist movements	72
3.1.3. Chile and Argentina	79
3.1.4. Systematic terror under Mao Tse Tung.....	81
3.2. Vigilante terrorism: death squads in Central America and Colombia	84
3.2.1. El Salvador	85
3.2.2. Guatemalan mass killings.....	85
3.2.3. The Contras in Nicaragua.....	86
3.2.4. Colombia: Drug cartels and death squads	87
3.2.5. Death squads elsewhere	87
3.3. Wartime terrorism	88

3.4. Summary	89
4. Terrorist movements with direct impact on legislation of the UK, Spain, Germany and France	90
4.1. United Kingdom	90
4.2. Spain	94
4.3. Germany	97
4.4. France	100
4.5. The "new global threat": international Islamic terrorism (1980's until present)	103
4.6. Summary	109
Excursus: Other religions as motivators for contemporary terrorism	111
5. Conclusions of Part I	113
5.1. Conceptualisation of terrorism – a definition?	113
5.2. Lessons learnt or why we should <i>not</i> reduce human rights when fighting terrorism.....	115

Part II – A National and Historical Comparison of Anti-Terror Legislation

.....	117
1. Anti-Terror Legislation in the United Kingdom	118
1.1. Introduction	121
1.2. Relevant legal sources	121
1.3. Anti-terror legislation prior to 9/11	122
1.3.1. Early special laws	122
1.3.2. Beginning of the 'Troubles'	123
1.3.3. Special legislation in Northern Ireland.....	123
1.3.4. Wider powers of arrest, extended detention, and derogations under the European Convention of Human Rights.....	127
1.3.5. Internment and in-depth interrogations	130
1.3.6. Direct rule	131
1.3.7. PTA's and exclusion orders	132
1.3.8. Proscribed organisations	133
1.3.9. Supergrasses	134
1.3.10. "Shoot to kill" policy and the right to life	135
1.3.11. Inferences from the silence of the accused.....	137
1.3.12. Repeal of the (NI) EPA 1978 following ECtHR rulings.....	139
1.3.13. Developments in the 1990s	141
1.3.14. Human Rights Act 1998, Terrorism Act 2000, and Regulations of Investigatory Powers Act 2000	143
1.4. Post 9/11 Anti-terror legislation	148
1.4.1. Anti-Terrorism, Crime and Security Act 2001	149
1.4.2. Admissibility of evidence obtained by torture	150
1.4.3. Criminal Justice Act 2003	150
1.4.4. Prevention of Terrorism Act 2005	152
1.4.5. Serious Organised Crime and Police Act 2005	154
1.4.6. Terrorism Act 2006	154
1.4.7. Racial and Religious Hatred Act 2006	156
1.4.8. Justice and Security (Northern Ireland) Act 2007	156
1.5. Current developments	157
1.6. Summary	159
1.6.1. Main developments	159
1.6.2. General observations	162

2. Anti-Terror Legislation in Spain	164
2.1. Introduction	167
2.2. Relevant legal sources	168
2.3. Anti-terror legislation prior to 9/11	170
2.3.1. Early anti-terror laws: Era Franco	170
2.3.2. Transition to democracy	174
2.3.3. Spanish Constitution of 1978 and first years of democracy.....	176
2.3.4. Legislative activity in 1980 and 1981	178
2.3.5. The 1980s	180
2.3.6. The 1990s: Penitentiary politics, fight against organised crime, and a new criminal code	189
2.4. Post 9/11 anti-terror legislation	195
2.4.1. Prohibition of political parties	195
2.4.2. Implementation of EU and international law	196
2.4.3. Abbreviated proceedings	197
2.4.4. Legislative activism in 2003	197
2.4.5. Improvement of detention on remand (<i>prisión provisional</i>)	201
2.4.6. Torture allegations in Strasbourg	203
2.4.7. 11 March (" <i>11-M</i> ") attacks on Madrid trains	205
2.5. Current developments	206
2.6. Summary	207
2.6.1. Main developments	207
2.6.2. General observations	210
3. Anti-Terror Legislation in Germany	213
3.1. Introduction	216
3.2. Relevant legal sources	217
3.3. Anti-terror legislation prior to 9/11	217
3.3.1. Major Acts adopted against the RAF	217
3.3.2. The 1980's: Privacy constraints and leniency	228
3.3.3. <i>Fin de siècle</i> of privacy? Combat of organised crime and terrorism combined.....	233
3.4. Post 9/11 anti-terror legislation	239
3.4.1. Security Package I	240
3.4.2. Security Package II.....	241
3.4.3. More grid search and "forefront investigations" under police law	244
3.4.4. More (mobile) telecommunication interception.....	246
3.4.5. Implementations of European law.....	246
3.4.6. Air Security Act	249
3.4.7. Anti-Terror Database and Completion of the Act for the Combat of Terrorism	250
3.4.8. Rulings of the German Federal Court of Justice concerning the "Hamburg Cell"	251
3.5. Current developments	252
3.6. Summary	255
3.6.1. Main developments	255
3.6.2. General observations	258
4. Anti-Terror Legislation in France	260
4.1. Introduction	263
4.2. Relevant legal sources	263
4.3. Anti-terror legislation prior to 9/11	265

4.3.1. Early anti-terror laws.....	265
4.3.2. Terrorism combat in the 1980s.....	267
4.3.2.1. Law no. 81-82 of 2 February 1981 on Security and Liberty.....	268
4.3.2.2. Special courts and extension of police powers in the early 1980s.....	268
4.3.2.3. Law no. 86-1020 of 9 September 1986.....	269
4.3.2.4. European Convention on the Suppression of Terrorism.....	273
4.3.3. Developments in the 1990s.....	273
4.3.3.1. Privacy issues.....	273
4.3.3.2. Developments in 1993-4.....	274
4.3.3.3. Terrorist and legislative activity in 1995 and 1996.....	276
4.3.3.4. Solitary confinement.....	280
4.3.4. Football World Cup and reinforcement of the presumption of innocence.....	281
4.4. Post 9/11 anti-terror legislation.....	282
4.4.1. Law no. 2001-1062 of 15 November 2001 on Daily Security.....	282
4.4.2. Law adopted in 2002.....	285
4.4.3. Law no. 2003-239 of 18 March 2003 on Internal Security.....	286
4.4.4. Law no. 2004-204 of 9 March 2004 to Adapt Justice to the Evolutions of Criminality.....	287
4.4.5. London Bombings of 2005 and urban riots in Paris' <i>Banlieues</i>	290
4.4.6. Solitary confinement decrees.....	293
4.4.7. Criticism from Strasbourg for extensive detention and violations of the fair trial principle.....	294
4.5. Current developments.....	295
4.6. Summary.....	297
4.6.1. Main developments.....	297
4.6.2. General observations.....	299
Part III – Comparison & Analysis.....	301
1. Relationship between a Terrorist Attack and Subsequent Legislation.....	303
2. Characteristics of Anti-Terror Laws.....	304
2.1. General characteristics.....	304
2.1.1. Human rights implications.....	304
2.1.2. Other characteristics.....	308
2.2. Specificities of the different countries.....	313
2.2.1. UK.....	313
2.2.2. Spain.....	315
2.2.3. Germany.....	317
2.2.4. France.....	318
3. General Historical Evolution of Anti-Terror Legislation.....	319
3.1. Common and diverging developments in the examined countries.....	320
3.2. Assessment of the impact of September 11 th	322
4. Human Rights Protection and Counter-Terrorism.....	323
4.1. Comparison of domestic human rights protection.....	323
4.1.1. Some general comparative observations.....	323
4.1.2. Comparison of the cases decided with respect to counter-terrorism legislation.....	326
4.2. Impact of the ECHR and of Strasbourg's case law.....	330
4.2.1. The ECHR and the ECtHR's case law in the respective national legal systems.....	330
4.2.2. Comparison of ECtHR/EComHR cases in relation to counter-terrorism.....	331
4.2.3. Violations of the ECHR in relation to terrorist cases per Article.....	333
5. Summary.....	336

Conclusion	338
1. Summary	338
2. A Final Assessment and Outlook	339
Epilogue – Three Essential Problems	343
1. Torture and the "Ticking Bomb Scenario"	343
2. Criminalisation of Preparatory Acts – how far can we go?	344
3. What to do with potential or convicted terrorists (e.g. sleepers)?	345
Detailed Summary (English)	346
Detailed Summary (Dutch).....	358
Bibliography.....	371
Acknowledgment	421

Für meine Eltern

"The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against terrorism, adopt whatever measures they deem appropriate."¹

¹ ECtHR, *Klass and others v FRG*, Judgment of 6 September 1978 (application no. 5029/71).