Handling the Terrorist Threat

A Critique of the UK and German reactions

Devika Khopkar* / Marek S. Schadrowski**

A. Introduction

9/11 in the USA, 7/7 in London and the 2004 attacks in Madrid all turned the spotlight onto our governments' security policy. The world became conscious of the rising threat from terrorism to our values, in particular, to our right to liberty. However, this threat comes not directly from terrorism but from steps taken by our governments in order to protect us. Studies have shown that attacks on the West mainly seek publicity, aim to create fear and thereby influence Western, particularly US, foreign policy, which is often deemed oppressive[1]. There is also an element of disgust at Western culture and values but it is not clear that this is the main driving force behind modern terrorism. On the other hand, the recent atrocities in Mumbai might indicate that this is an international phenomenon, affecting democratic states in particular. Whether the UK and German governments' measures are necessary, or whether the terrorist threat is merely used as a tool by opportunistic governments to wield greater control over the population, is a question that we must consider.

B. Counter-terrorism operations in the United Kingdom

With over four million CCTV cameras in the UK, the country is one of the most monitored in the world. Monitoring also occurs via a number of other means, as will be discussed. Closer monitoring has two main causes: developments in technology, which make it increasingly possible to gather and transmit information and the heightened threat of terrorism, which means that society places greater trust in the administration. Such unchecked trust can be dangerous. As a result of it, Parliament has already enacted increasingly intrusive measures which, in other times, might have faced greater opposition. These measures are seen by many to be eroding our long-treasured rights.

A particularly controversial proposal by the government was that of a national ID card system. The first ID cards were to be issued to foreign nationals from November 2008. Having faced much criticism, the scheme in its diluted form means that ID cards will only be issued to UK nationals on a voluntary basis. Nevertheless, individuals applying for a passport from 2011/12 will be required to enter personal information, including fingerprints, into a National Identity Register. The cards are said to intend to "lock our identity into ourselves"[2]. Yet it has been admitted that ID cards are unlikely to prevent large-scale terrorist attacks, as, for example, the presence of an ID card system in Spain did not halt the 2004 Madrid attacks. On the other hand, the risks that such a system creates, highlighted by recent incidents involving loss of data from government records, weigh heavily on people's minds. There is much potential for abuse of privacy and the financial costs of implementation are huge. Given such grave disadvantages, the potential for enhancement of security through ID cards is minimal, which might indicate that such a measure is not justifiable or, atleast, advisable.

Another counter-terrorist measure is the institution of 'control orders' under the Prevention of Terrorism Act 2005 – a power given to the Home Secretary to limit the liberty of individuals who are suspected of involvement in terrorism but who may not be put to trial because evidence which is needed to form a case against them is inadmissible in court (predominantly evidence obtained through phone-tapping) or because it would be dangerous to reveal the evidence (this might give details of intelligence-gathering methods, for example). The list of possible modes of restriction is long; it includes, *inter alia*, restrictions on movement, communication and activities undertaken, as well as surveillance. The premise of this scheme is that the restrictions would not fall within Art 5(1) (a)-(f), which allow for deprivation of liberty in certain situations. An order must therefore fall short of 'depriving' an individual of (rather than merely 'restricting') his or her liberty in order to comply with Article 5 ECHR; should it fail to do so, it would be necessary to derogate from Article 5 ECHR, which would only be permissible under Article 15 ECHR (providing for war or other public emergency).

English courts have closely scrutinised control orders for their compatibility with Art. 5. For example, in *Secretary of State for Home Department v JJ*[3], a case concerning a non-derogating control order, the House of Lords held

* The author is reading Law with Law Studies in Europe at the University of Oxford, New College.

** The author is reading Law at the University of Bonn.

1 See Pape, Robert, 'Dying to Win: The Strategic Logic of Suicide Terrorism' (2005), Chap.1

2 Jacqui Smith, Home Secretary 6 Mar 2008 - http://news.bbc.co.uk/2/hi/uk_news/politics/7281368.stm

3 [2007] UKHL 45

that an eighteen-hour curfew amounted to a deprivation of liberty; although the controlees were able to access a reasonably large area during the six hours in which the curfew was inapplicable, he was detained in an unfamiliar area and permitted little social contact so that their lives were wholly regulated by the Home Office. It is promising that the judiciary are willing to act as a check on the exercise of executive power by undertaking such a fact-specific approach. There is also some concern, however, that the regime might violate Art 6 (the right to a fair trial). The courts' only role is in judicially reviewing the control orders and even in this process, controlees and their lawyers may be excluded and, instead, a 'special advocate' used to represent their interests. The special advocate is a highly-qualified member of the Bar, who may communicate with the defendant and his lawyer before seeing the secret material but not thereafter and appears before the judge without instructions from the defendant. Moreover, he owes no duty in the ordinary sense to the controlee whom he represents. It is doubtful whether this is a sufficient protection of the controlee's right to a fair trial. Moreover, the effectiveness of the scheme has already been put into doubt given that several controlees have absconded. Nevertheless, the control order scheme is atleast temporary; it contains a sunset clause, requiring renewal each year, thus avoiding the entrenching of such a draconian measure.

Another unprecedented move was the plan to extend the period for which suspected terrorists may be detained without charge (originally 14 days, then 28 days under the Terrorism Act 2006) to 42 days under the Counter-Terrorism Bill 2008. Though passed very narrowly in the House of Commons (the lower house of Parliament), the result was fortunately a defeat for the Bill in the House of Lords (the upper house). The Bill was supported on the basis that evidence in complex cases could not be collected (and arrests cannot therefore be made) and presented in a shorter space of time due to its sensitive nature and the global span of modern terrorist networks. However, Gordon Brown, the British Prime Minister, spoke of it being "inevitable" that the extended period of detention would be necessary and emphasised the need to enact legislation to cover this eventuality in times of relative quiet so that this need not be done hurriedly in a time of emergency. Far from making the clearest case for the extension of detention-without-charge, the language used to defend the policy is such that it is evident that the 42-day period is unnecessary at present.

The purported justification of such measures is that we are facing a new kind of threat, which necessitates a new kind of counter-terrorist investigation; in order to undertake the necessary precautionary steps, our institutions require greater legal powers than before. Moreover, the proposed extended detention-without-charge period, staunchly supported by the police and rejected by the opposition parties, would have applied only in case of a 'grave and exceptional threat' and following a report by the police outlining why the power is necessary, thus ensuring that individuals' right to liberty is restricted only in the most extreme of cases.

Why, then, are such developments disturbing? Critics claim that the 42-day extension is an unjustified infringement of the long-standing right of *habeas corpus*, entrenched in UK law since the Magna Carta of 1215. This becomes even more important in a state with no written constitution and therefore no superior document safeguarding its citizens' basic rights. Furthermore, police calls for extension of the time limit has been unsupported by evidence of any particular case in which the extra time would have made a difference, that is, achieved a conviction. This raises concerns as to the necessity of such extreme measures and therefore as to the motives driving their proposal. With no guidelines for the Home Secretary as to what would constitute 'grave and exceptional' cases, it seems that the extent of power over the individual that this measure would have left in the hands of the state was unacceptable. The terrorist threat might be temporary and evolving, yet infringements upon civil liberties will remain entrenched, available to future governments whose intentions might not be quite so honourable. In fact, the UK's use of the Anti-Terrorism, Crime and Security Act 2001 in order to freeze the assets of the collapsed Icelandic bank, Landsbanki, was a shocking recent intimation that anti-terrorism legislation might be employed by the government to intrude upon other areas of life, in no way justified by the urgency of a terrorist threat. We must therefore defend our civil liberties and retreat from the fast-track to authoritarianism that we seem to have embarked upon. Although the 42-day detention measure has been struck down, the proposal may be seen as a worrying sign of the direction of government policy. Such extreme measures risk fracturing the community further, alienating individuals who feel they have been targeted and wrongly treated. Far from creating a safer environment, such an approach would only further incentivise those who teeter on the brink of society to destruct it.

The issue requires a balancing of various civil and political rights. Some strengthening of older anti-terrorism legislation may well be justified in order to combat the new techniques and ideology driving modern terrorism. Nevertheless, well-meaning steps taken hurriedly in the name of security contribute to the victory of the terrorist camp; rising fear and diminishing personal autonomy and liberty satisfy the terrorists who seek to shatter our way of life. Change may be on its way, though. A recent rejection by a jury of what may have been the strongest

terrorism case ever presented paints an unconcerned public perception of the threat from terrorism. Moreover, the judiciary continues to play an important role in safeguarding fundamental rights. For example, in the case of *A v. Secretary of State for the Home Department*[4], the House of Lords (the highest court within the English jurisdiction) held that the derogation from Art. 5 in order to detain suspected international terrorists went beyond what was 'strictly required' by the exigencies of the situation under Art. 15(1): a similar threat was posed by suspected international terrorists who were UK nationals, so if this could be adequately addressed without the need for detention, it was not clear why non-UK nationals suspected of the same did have to be detained. Furthermore, the legislative regime allowed for the suspected international terrorists to go free if there was another country to which they could go (as, in fact, two of them did), suggesting that the threat was not as serious as claimed by the Home Secretary. Such judicial intervention coupled with a change in perception may well render it more difficult for the government to introduce further security legislation, hence decelerating the erosion of our basic rights.

Yet, another large-scale attack would only leave the community fractured, feeling betrayed and hurling criticism at the government for failing to protect it. When placed in the realities of a deathly attack, it is human nature to plead for survival, for any means of escape; and so to underestimate the desire for security would be a grave mistake. Moreover, civil liberties do not amount merely to the right to exercise freedoms but the right to do so *fearlessly*. There is no single value in our society; each must be balanced with other human goods. This balancing must also be done explicitly, evoking a reconsideration and justification of how best to preserve our traditions and values. It is the incommensurability of these values that makes such decisions particularly difficult and contestable. However, as long as we ensure that the measures in place are temporary, with no long-term intrusive effects, and that these are always enacted in line with the requisite formalities, tighter security policy would be justified. The British legislative reaction to the terrorist threat has not always led to temporary measures, though; it has instead sought to introduce far-reaching state powers – a tendency which must be curbed.

[4] [2004] UKHL 56 This case concerned an appeal against a Court of Appeal decision that the appellants' detention without trial under s.23 of the Anti-Terrorism, Crime and Security Act 2001 did not breach the European Convention on Human Rights (ECHR). The appellants were all foreign nationals, some of whom could not be deported because to do so would have involved a breach of Article 3 of the ECHR (because of the risk that they would be subjected to torture or inhuman or degrading punishment in the countries to which they were deported). The detention followed their certification as suspected international terrorists by the Home Secretary under s.21 of the 2001 Act. The appellants argued that the derogation from Art 5 was impermissible (on which point they lost) and disproportionate (on which they succeeded).

C. Counter-terrorism operations in Germany

I. The situation in the Federal Republic of Germany

Like other countries, Germany, too, is exposed to the danger of attacks by terrorist groups and individual perpetrators. In the recent past, this threat became particularly clear when two bombs were placed in suitcases on regional trains in Germany. It was only thanks to both perpetrators' deficient scientific knowledge that the explosive devices did not detonate.[5]

The fact that the attacks of September 11th, 2001 were significantly prepared on German ground has further raised the question as to whether these could have been prevented by existing defence mechanisms.

All of these events make clear the vulnerability of modern states and lead to the question of how a state governed by the rule of law should counter the threat posed by international terrorism. The answer to this fundamental question poses new challenges to, and makes new claims on, governmental action as well as on any appraisal of its constitutionality.

What is certain is that it is incumbent on the state to safeguard national security,[6] although the German Basic Constitutional Law (GG) does not explicitly protect national security. However, under the prevailing situation of the time, this obvious duty was not in need of legal codification by the constitutional legislator.[7]

II. Governmental reaction and academic proposals

1. The so-called "Counter-Terrorism-Package"

Last but not least, the successful seizure of a terrorist group in Germany by the police underlined the necessity of preventive measures in the fight against terrorism.

The German legislature has passed some new laws and amendments since 2001 which have evoked different reactions from the judiciary and from academics.[8]

As an immediate answer to the novel threat level, the so-called "Counter-Terrorism-Packages I and II" were designed, which provoked surprisingly little discussion amongst the German public. These legal measures are a

[5] Preamble to the oral ruling of the 6th Criminal Senate of the Higher Regional Court in Düsseldorf.

[6] *Isensee, Josef*, Das Grundrecht auf Sicherheit, Berlin (*inter alia*) 1983.

[7] *Hillgruber, Christian*, Der Staat des Grundgesetzes - nur „bedingt abwehrbereit"?, Juristenzeitung 2007, pg. 209 (210) et seqq.

[8] In extenso *Middel, Stefan*, Innere Sicherheit und präventive Terrorismusbekämpfung (Frankfurter Studien zum Datenschutz, Vol. 31), Baden-Baden 2007

bunch of individual laws on different fields of law of the Federal Republic of Germany.

The most important changes are the "Law on Financing Counter-Terrorism", the abolition of the "Privilege of Religion" within the Law of Associations (VereinsG) and the reforming of some parts of the German Criminal Code (StGB).

According to § 2 II No. 3 VereinsG (former Edition), each group with the aim of maintaining a common religious ideology or idea could not fall under 3 I 1, 14 I 1 VereinsG because of the constitutional values provided in Art. 140 GG in conjunction with Art. 137 WRV (Weimar Constitution) and Art. 4 GG.

As a result, these rules were abused by anti-constitutional parties and the state could take no action against them. The changes mentioned above were therefore appreciated and accepted without objections by all sides.[9]

§ 129a StGB, adopted under the terrorist activities of the *"Rote Armee Fraktion"* (RAF) in order to punish the formation of terrorist groups, was expanded to § 129b StGB.[10] For this reason, terrorist groups abroad fall into the scope of application of German criminal law.

These measures were strengthened by the swift introduction of the "Counter-Terrorism-Package II" that among other things modified parts of the "Law on the promotion of the financial market" and the "Law on combating money laundering" and moreover amendments regarding the German "Aliens Law" as well as the "Law on the Federal Office for the Protection of the Constitution (BVerfSchG)".[11]

Yet the preventive dragnet investigation, the computer surveillance, the Aviation Security Act and the recently passed Law on the Federal Criminal Police Office (BKAG) fell into the spotlight of media and public discussion.

2. Dragnet investigation

The preventive dragnet investigation was originally developed as an instrument to fight the "*Rote Armee Fraktion"* (RAF) in the seventies. It aims to detect possible terrorists by checking and matching various particulars such as age, religious denomination and so forth. When faced with a constitutional complaint, the Federal Constitutional Court (BVerfG) had to decide whether the dragnet investigation was constitutional. Concluding that the dragnet investigation grossly violated the basic right to informational self-determination and could possibly stigmatise certain sections of the population, the first Senate judged that dragnet investigation was illegal when used in the forefront of a concrete danger.[12]

3. Aviation Security Act

In order to deal with the scenario of a hijacked airplane being used as a weapon by terrorists,[13] § 14 III Aviation Security Act allowed the Federal Armed Forces to bring down the airplane. However, the Federal Constitutional Court judged the Aviation Security Act unconstitutional due to its violation of the principle of human dignity, contained in Art. 1 I GG:[14] By accepting the death of the crew and the passengers on board the airplane, the State would reduce these persons to mere objects of governmental action. Balancing the dignity of those victims on board the airplane and those hit on the ground was forbidden due to the absoluteness of human dignity. Some academics argued, on the other hand, that in case of a so-called superlegal emergency (*„übergesetzlicher Notstand"*), dangers to public security had to be fended off by an analogical application of § 35 StGB.[15]

4. Online search and the Act on the Elimination of International Terrorist Hazards by the Federal Criminal Police Office (*BKA-Gesetz*)

Deep disagreement was aroused about the so-called online search which allows police authorities to access an individual's computer without informing him and to spy on data found on his hard drive. The Federal Constitutional Court did, however, rule that the personal rights contained in Art. 2 I, 1 I GG also included a right of guaranteed data confidentiality concerning IT systems, thus necessitating a judicial decree before an online search could be carried out.[16] Meanwhile, the Act on the Elimination of International Terrorist Hazards by the Federal Criminal Police Office (*BKA-Gesetz*)[17] re-established online search in cer-

---

[9] *Paeffgen, Hans-Ulrich*, Vernachrichtendienstlichung von Strafprozess- (und Polizei-) recht im Jahr 2001, Strafverteidiger 2002, pg. 226 (340) et seqq.; *Schrader, Tobias*, Die Anti-Terror-Pakete ein Jahr nach ihrer Einführung, Kriminalistik 2003, pg. 209 et seqq.

[10] For criticism therof, see *Middel, Stefan*, l.c., pg. 223.

[11] On the problem surrounding the separation between the police and the secret services, see *Roggan, Fredrik/ Bergemann, Nils*, Die „neue Sicherheitsarchitektur" der Bundesrepublik Deutschland- Anti-Terror-Datei, gemeinsamen Projektdateien und Terrorismusbekämpfungsergänzungsgesetz, Neue Juristische Wochenschrift 2007, pg. 876 et seqq.

[12] BVerfG JZ 2006, 906 et seqq.; different *Hillgruber, Christian*, l.c., pg. 209 et seqq.

[13] For detailed analysis on the legal competence, *Wilkesmann, Peter*, Terroristische Angriffe auf die Sicherheit des Luftverkehrs, Neue Zeitschrift für Verwaltungsrecht 2002, pg. 1316 et seqq.

[14] BVerfG NJW 2005, pg. 751 et seqq.

[15] Cf. *Hillgruber, Christian*, l.c., pg. 214 et seqq.

[16] BVerfG NJW 2008, pg. 822 et seqq.

[17] BR-Drs. 971/08 and BT-Drs. 16/11391, *Baum, Gerhard R. / Schantz, Peter*, Die Novelle des BKA-Gesetzes- Eine rechtspolitische und verfassungsrechtliche Kritik, Zeitschrift für Rechtspolitik 2008, pg. 137 et seqq.; *Denkowski, Charles von*, Gesetz zur Abwehr von Gefahren des internationalen Terrorismus durch das BKA, Kriminalistik 2008, pg. 410 et seqq.

tain situations. This act underwent numerous drafts before being passed in both the lower House of the German Federal Parliament (*Bundestag)* and the Upper House (*Bundesrat)*. The main point of contention was again the requirement that a judicial decree be obtained prior to the undertaking of the online search. Discussion also focused on the capacity of the decreeing court to decide whether the data obtained infringed on the core right of private life.[18]

5. Belligerency, "Hostile Criminal Law" and exceptions of the ban on torture

There are numerous other situations that challenge our legal system. How should we deal with a captured terrorist who is the only one able to prevent a nuclear bomb from exploding? Is the use of physical of psychological force legitimate in such a situation?

In these cases, some argue for an exception of the ban on torture: it is claimed that a blanket ban on torture is not suited to modern society since the state has to cater for many holders of basic rights.[19] Hence, one's human dignity must be relative to that of another individual. On balance, torture was thus legitimate in certain situations.[20]

Furthermore, it is argued that those opposing a legal order as fundamentally as a terrorist should not benefit from ordinary legal principles but should be judged by a special legal order, the so-called *Feindstrafrecht* (hostile criminal law)[21], including special methods of police questioning.

However, the prevailing opinion postulates that ideas as the *Feindstrafrecht* would be contrary to the Basic Constitutional Law. It also argues that a legal order should not be so harsh as to fulfil the most important desire of its enemies, namely, the abolition of fundamental rights.[22] The core content of basic rights is absolute if human beings are to be regarded as having sufficient self-esteem; torture must therefore be banned without exceptions.[23] The humanistic notion of human dignity as expressed in Art. 1 I GG is absolute and not relative.[24]

Another approach would be to classify the current situation as belligerency in order to justify, for example, Federal Armed Forces missions inside Germany.[25]

III. The outlook

New proposals for amendments made by the German Ministry of Justice and the Ministry of the Interior regarding Alien Law and the Criminal Code have been adopted.[26] In future, the establishment or maintenance of relations to terrorist organizations with the intent to perpetrate a seditious act of violence as well as the distribution of instructions for the same purpose should be made a punishable offense. The right of residence should be modified so that foreigners preparing seditious acts of violence may be prevented from entering or expelled from the Federal Republic of Germany.

With regard to the measures already existing within the German legal system and those now recommended, it is evident that there is a steady tendency towards criminal proceedings in the light of a concrete danger.

D. Comparison

A comparison of counter-terrorism measures within the UK and Germany makes it clear that both states have taken various measures in order to maintain peace and security. However, the regulations in the UK seem to intrude more on individual liberty than in Germany. It is argued that Germany has adopted a more balanced approach to freedom and security.

Political theorists assert that the provision of security is the final justification for the existence of a state. The state philosophy of Thomas Hobbes provides evidence for the need to transfer the monopoly on the use of force to a "Leviathan"[27], in order to overcome the natural state of circumstances and to protect the individual against self-justice - needless to say, a very far-reaching transfer of power from the modern perspective. In principle, though, it becomes clear, and is still valid to claim, that security and freedom are the premises for the internal sovereignty of the state. In Western liberal society, it is not necessarily the case, though, that the provision of security takes prior-

---

[18] Protocol of the 853rd sitting of the Bundesrat, pg. 453 f.; For criticism thereof, *Von der Aue, Gisela*, Protocol of the 853rd sitting of the Bundesrat, pg. 454.

[19] For a conclusion, see *Isensee, Josef*, Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten, Archiv des öffentlichen Rechts Vol. 131 (2006), pg. 173 (190 f.) et seqq.

[20] *Brugger, Winfried*, Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter, Juristenzeitung 2000, pg. 165 et seqq.

[21] On this idea, see *Jakobs, Günther*, Feindstrafrecht? - Eine Untersuchung zu den Bedingungen von Rechtlichkeit, Zeitschrift für höchstrichterliche Rechtsprechung im Strafrecht, 2006, pg. 289 et seqq.; also *Saliger, Frank*, Feindstrafrecht: Kritisches oder totalitäres Strafrechtskonzept, Juristenzeitung 2006, pg. 756 et seqq.; and *Sauer, Dirk*, Der strafrecht und die Feinde der offenen Gesellschaft, Neue Juristische Wochenschrift 2005, pg. 1703 et seqq.

[22] *Di Fabio, Udo*, Sicherheit in Freiheit, Neue Juristische Wochenschrift 2008, pg. 421 ff.

[23] Cf. *Hassemer, Winfried*, Erscheinungsformen des modernen Rechts (Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte, Vol. 26), Frankfurt am Main 2007, pg. 15 et seqq.

[24] *Di Fabio, Udo*, Sicherheit in Freiheit, l.c., S. 421 ff

[25] On this point, see *Blumewitz, Dieter*, Einsatzmöglichkeiten der Bundeswehr im Kampf gegen des Terrorismus, Zeitschrift für Rechtspolitik 2002, pg. 102 et seqq.

[26] Press release of the Federal Justice Ministry of December 19th 2008.

[27] *Hobbes, Thomas*, Leviathan (Cambridge texts in the history of political thoughts), ed. by *Tuck, Richard*, Cambridge 1996.

ity. Thus, John Locke postulated the liberal need of the citizen for protection against state intervention into his or her private sphere.[28]

In order to determine which measures are to be taken against terrorism, it is necessary to ascertain the cause as well as the mode of operation of terrorism. Though a unified definition of terrorism does not exist,[29] it is possible to extract the characteristics of terrorism, which follow a three-fold functional logic: the act of violence is supposed to bring about the feeling of a lack of security of the people and to provoke the action of the state. As a third consequence, the rule of law is supposed to internally disintegrate as a result of a disproportionately repressive and preventive security policy. A further aim of an act of terrorism is certainly to draw the attention of the people and on the other hand to show the state that it is open to attacks and vulnerable.[30]

A possible cause of terrorism is a supposed or actual deficit inside the structures of society that leads a minority to assume the need to forcefully overthrow the contemporary system.[31] In this context, the perpetrator is driven by (as he or she perceives them to be) altruistic motives and there exists no actual connection between the action and the aim of that action, so that the targets of terrorists are hard to ascertain and thus no all-embracing protection can be provided.[32]

In that respect, it is necessary to counter the functional logic of terrorism through an attractive democracy and lively democratic discourse. The most important thing now is to keep the process of parliamentary democracy alive and strong. Close inspection of governmental power will ensure that we react to the evolving threat that we face, yet stay true to the principles we hold dear.

The complete restructuring of the existing intelligence agencies and criminal defence authorities should not be seen as a consequence of the terror acts; rather, an improvement of prevention capabilities, focusing on the perpetrator, should be contemplated, as well as the provision of a larger number of personnel and the improvement of national and international cooperation.[33] Peace between states, and thus between different concepts of society, can in the long run only exist in collective security systems. Thus, more intensive cooperation at the international level should be called for.

On a practical level, then, how does one decide which precise parliamentary acts and measures the state must take, as well as what standards the state is supposed to thereby observe? In the course of consideration of individual parliamentary acts, it must be noted that the matter essentially comes down to the principal concept of the state and its primary tasks.[34] The question is where to draw the line between the population's right to security with its right to liberty. This is a delicate balance: if tipped too far on the side of liberty, the state would be ineffective in protecting the population but if tipped too far in the other direction, this will change the nature of our society and reduce its credibility as a democracy, where 'democracy' involves more than just elections and public participation; it holds as central civil and political rights.[35]

Freedom and security are interdependent,[36] as it is only when security is provided that an individual and a whole society can be free.[37] Though no right to absolute security exists, one reason being that it cannot be achieved,[38] lack of security leads to instability of the social and political order. Terrorist violence extends beyond borders of the state and the ideal limits of politics. Thus, in the course of adopting new regulations, it should be remembered that no law should be created that is geared towards exceptions and that regulation of all possible cases is not achievable.[39] The modern state has to act within the boundaries of the rule of law and of humanity; otherwise, it victimizes itself. Should we begin to qualify the basic values of our Western society, values that have emerged and been ascertained in the course of centuries of conflicts, in order to achieve a supposed increase in security, we would be doing precisely what terrorists aim at: we would give ourselves up!

---

[28] *Locke, John*, Second Tract of Government (Cambridge texts in the history of political thoughts), ed. by *Goldie, Mark*, Cambridge 1997.

[29] On this point, see *Middel, Stefan*, l.c., pg. 54 et seqq.

[30] *Nehm, Kay*, Ein Jahr danach. Gedanken zum 11. September 2001, Neue Juristische Wochenschrift 2002, pg. 2665 et seqq.; *Isensee, Josef* (Ed.), Der Terror, der Staat und das Recht (Wissenschaftliche Abhandlungen und Reden zur Philosophie, Politik und Geistesgeschichte, Bd. 32), Berlin 2004, pg. 83 f.

[31] *Nehm, Kay*, l.c., pg. 2665.

[32] *Nehm, Kay*, l.c., pg. 2666.

[33] On this point, see *Pitschas, Rainer*, Polizeirecht im kooperativen Staat- Innere Sicherheit zwischen Gefahrenabwehr und kriminalpolitischer Risikovorsorge, Die Öffentliche Verwaltung 2002, pg. 221 et seqq.; *Bubnoff, Eckhart von*, Terrorismusbekämpfung – eine weltweite Herausforderung, Neue Juristische Wochenschrift 2002, pg. 2672 et seqq.; *Nehm, Kay*, l.c., pg. 2666.

[34] *Frankenberg, Günther*, Kritik des Bekämpfungsrechts, Kritische Justiz 2005, pg. 370 et seqq.

[35] See further, *Schorkopf, Frank et. alt.*, Terrorism as a Challenge for National and International Law: Security versus Liberty? (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 169), Berlin (*inter alia*) 2004.

[36] *Di Fabio, Udo*, Sicherheit in Freiheit, l.c., pg. 421 et seqq.; *Kirchhof, Paul*, Der Staat als Garant und Gegner der Freiheit: vom Privileg und Überfluss zu einer Kultur des Masses (Schönburger Gespräche zu Recht und Staat, Vol. 3), Paderborn (*inter alia*) 2004.

[37] *Di Fabio, Udo*, Die Kultur der Freiheit, Munich 2005.

[38] Cf. *Hoffmann-Riem, Wolfgang*, l.c., pg. 498.

[39] *Di Fabio, Udo*, Sicherheit in Freiheit, l.c., pg. 424f.