

# National Policy in the Supra-nationalised security context



- National Policy:
  - definition? Especially in the „security“ context.
  - Idea that policy debated between Executive and Parliament, possibly boundaries set by the Judiciary
  - In Britain argument that the nation’s sovereignty in relation to these policies – considered amongst the most sensitive – is being eroded
- Legitimacy of looking at anti-terrorist policy in this respect?
  - per definition currently a globalised topic
  - actively subject to UN, Council of Europe and EU action
  - states highly co-operative
- But it is also:
  - extremely sensitive
  - an extreme example but not unique

- Expressly not considered part of criminal law
  - Policies often question its very legitimacy:
    - desire to lower evidentiary standards
    - Loose wording of substantive definitions
- Throws fundamental principles into question:
  - Protection against self incrimination:
    - new offences
    - reversal of burdens of proof
- Detention without charge - 90 days debate
- Detention without charge for foreign nationals scheme replaced by control orders
- Stop and search provisions free of reasonable suspicion requirement
- Shoot to kill policy
- Massive expansion of criminal responsibility
- Features „temporary measures“ becoming permanent features
- Seems to want to avoid criminal prosecutions

- Has been restricted by the European Convention with the Courts using Human Rights Act powers to intervene
  - see also High Court application in judgements of e.g. Sullivan J or Beatson J – MB, AM, E.
  - Keenly felt after Grand Chamber ruled on A
    - **Lord Hoffmann** „I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless I think that your Lordships have no choice but to submit ... To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.“
    - **Lord Rodger of Earlsferry** „Even though we are dealing with rights under a United Kingdom statute, in reality we have no choice: *Argentor locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.“
    - **Lord Carswell** „The Grand Chamber ... has expressly opted for an absolute rule“

## ... has a supra-national context

- EU highly active
  - Note also UK influence
  - Government arguments presented to ECtHR in *A* in line with Presidency JHA paper
- UN Resolution 1373
  - adopted pursuant to Chapter VII of the UN Charter (Threats to International Peace and Security)

*“It is frankly shocking to see that an international organization whose purpose it is to affirm the principles of peace, tolerance and justice uses itself means that do not respect the fundamental principles at the base of any restriction of individual freedom in any civilized country: the right to be heard, the right to appeal to an independent tribunal, that to a fair trial, the principle of proportionality. The Parliamentary Assembly of the Council of Europe can certainly not remain indifferent in the face of such abuses .”*

Dick Marty

- Art. 29 TEU and 61(e) TEC mandate the EU to provide „a high level of security“ for the Area of Freedom Security and Justice
- Terrorism is explicitly mentioned as a crime to be prevented and combatted by:
  - police co-operation
  - developing Europol
  - judicial cooperation also involving Eurojust
  - adoption of minimum rules „relating to the constituent elements of criminal acts and to penalties in the fields of serious crimes“
  - operative elements: Europol Threat Assessment, Joint Situation Centre
  - wide-spread information exchange
  - SIS operative support for anti-terrorist acts since 2005
  - data reporting to Europol and increased capacities (incl. counter-terror task force) there since 2001
  - data reporting to Eurojust

- Expansive –
  - substantive criminal law: e.g.
    - 2005 EU Council Framework Decision on Attacks against Information Systems (criminalising cyberterrorism)
    - EU Council FDs on Combating Terrorism 2002 & 2008 (requirements of definition of certain acts as terrorist offences focus on intent; far-reaching requirement to criminalise threats to commit a terrorist offence)
    - EU Council FD on Combating Terrorism 2009 largely replicated CofE Convention on the Prevention of Terrorism 2005 into FD of 2002 – article 3.2. requires criminalisation of public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism

# The Effects of EU policy so far

- Effecting procedure, organisational framework and practice:
  - EU Council Decision 2005:
    - requires specialist police service with access to all information on terror related investigations and prosecutions
    - and this information to be sent to Europol and Eurojust
  - JITs
  - EAW - refusal of extradition very unlikely
- Above all has massively strengthened EU institutions
  - esp. Europol and Eurojust
  - Police Chief's Task Force
  - SitCen
  - Counter-Terrorism Co-ordinator
  - Security or rather core criminal justice issues in the 2nd pillar as EU business
- Resonates with UK anti-terror policy
- Causing great problems for other member states like Germany

- Stockholm Programme: inc. Mutual recognition, „developing a core of common standards“ „in criminal matters such as terrorism ... only action at European level can deliver effective results“,
- 4.3.2. „reducing the terrorist threat“ incorporating the future group perspective which was hesitant about anything other than consolidation except in relation to terrorism (and drafted by reps of the Ministries of Interior in particular.)
- Rights a priority:  
„Respect for fundamental rights and freedoms is one of the bases for the Union’s overall counter-terrorism work. It is therefore all the more important that measures taken in the fight against terrorism cannot be challenged on grounds of a lack of legitimacy or for infringement of human rights.“

- Stockholm programme emphasises that whilst „EU tools for tackling crimes such as terrorism and human trafficking must be sharpened further“ „the rights of the individual must be safeguarded more firmly than at present“
  - Including the fundamental rights agency in the EU legislative process
  - Gradually strengthening the rights of suspects in criminal proceedings
  - Improving data protection
- Political priority is stated as: „the challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe“
  - Rights as a pre-requisite of trust amongst the MSs
  - Strict data protection when exchanging information
  - Access to justice to ensure rights can be enforced „across the Union“
  - Approximation in criminal law relating to offences including terrorism and encompassing „minimum rules with regard to the definition of offences“

- EU Counter-Terrorism Strategy refers to acts of terrorism as „criminal“
  - Commits the EU to „combat terrorism globally while respecting human rights“
  - Peer-review evaluation of counter-terrorism instruments determining EU-wide „best practices“
  - „to bring terrorists to justice“
  - Counter-terrorism training at Cefpol
  - Joint responses and reactions planned under the „respond“ strain also inside the Union
  - Also in foreign affairs
- How will this affect UK policy

# Thank you for your attention!

Dr. Marianne Wade  
Senior Research Fellow for European Criminal Law  
Max Planck Institute for foreign  
and international Criminal Law  
Günterstalstr. 73  
79100 Freiburg i.Br.  
Tel.: +49 (761) 7081-232  
Fax: +49 (761) 7081-294  
[m.wade@mpicc.de](mailto:m.wade@mpicc.de)



- Supra-nationalised context so far has certainly increased range and impact of certain national systems – those particularly affected by a problem (terrorism USA & UK) with whom solidarity is felt must be shown (so also of powerful ones) – no clearer example than UN Resolution 1373
  - AML Directives
  - Data Retention regime
  - Anti-terrorist spill over into-immigration and asylum policy (e.g. biometric identifiers)
- BUT – particularly in EU context looks posed to have another more subtle or perhaps altogether more complex affect in the future: the national of policy being shaped by international, supra-nationalised dialogue – practical problems of EAW to highest constitutional principle and this awareness alone, let alone legislative work or limiting court decisions, mean national policy can no longer be the same, in the future.