ARTICLES

Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences

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A. Introduction

Of all anti-terror-laws adopted in Germany in the last thirty years, one of the most famous measures is certainly the so-called *Kontaktsperregesetz*,[1] an Act introducing the possibility of *incommunicado* detention in the case of imminent terrorist threats. It is the prime example of how far reactive[2] legislation can go, under the pretext to fight terrorism. This form of *incommunicado* detention was adopted in 1977, by introducing a new section (section 4, Sections 31-38) to the *Introductory Act to the Judicature Act* (*Einführungsgesetz zum Gerichtsverfassungsgesetz*, hereinafter *EGGVG*). The provisions were enacted in response to a particular terrorist incident,[3] and have not been applied since. Surprisingly enough, in April 2006, a seemingly new provision was added to this regime (Section 38a *EGGVG*), however, as we will later see, this regulation is in fact not new, but has only changed its systematic position within the enormous legislative forest of Germany, and, at the same time, its legal nature (from transitory to permanent). Section 38a *EGGVG* extends the scope of application of *incommunicado* detention considerably, by allowing it to be used not only in terrorist cases, but also for other forms of criminal organizations like mafia. It thus increases the possibility of prisoners to be absolutely isolated from other inmates, family, friends, and even from their defense counsels, for up to thirty days; a period which can be prolonged for an indefinite period of time, provided that certain requirements are met.

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[1] *Kontaktsperre* literally means "Blocking of Contacts" and "*Gesetz*" may be translated as the legislative Act or Statute, so that *Kontaktsperregesetz*, literally translated, means "Act concerning the blocking of contacts".

[2] Reactive legislation is legislation that responds to particular events (also known as "ad hoc" legislation, or, in German, *Anlassgesetzgebung* adopted in view of a certain occasion).

[3] *See infra* C.I.

The legislative technique of practically[4] "extending" the applicability of *incommunicado* detention measures to organized crime, by simply reorganizing old and partially transitional provisions in a certain manner,[5] is a remarkable example for the general tendency of provisional *ad hoc* legislation to become permanent. Since the introduction of Section 38a *EGGVG* has taken place in the context of a rather tedious legislative action - the purge and re-organization of laws – the relevance of this new provision seems to have escaped everybody's notice. This appears rather worrisome, as the regime of the *Kontaktsperre* has been one of the most criticized anti-terrorism measures ever adopted in Germany. It has been criticized for being contrary to the rule of law, and for jeopardizing the highest protected fundamental right under the German Constitution, human dignity (Article 1 of the German Constitution, *Grundgesetz*, hereinafter *GG*).[6] Many have demanded to repeal the law completely.[7] Moreover, it is deemed extremely unfortunate that the wrong conduct of a few defense lawyers led to such a deep and generalized mistrust towards all defense counsel as manifested in this *Kontaktsperregesetz*.[8]

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[4] In theory, the *incommunicado* detention could already be applied to organised crime since 1977, as seen in the transitory provision of Article 2 of the *Act amending the Introductory Act to the Judicature Act of 30 September 1977*. Einführungsgesetz zum Gerichtsverfassungsgesetz, Sept. 30, 1977, Federal Law Gazette (*Bundesgesetzblatt*, hereinafter: *BGBl*.) I; *See infra* B. However, this provision has had little, if any, practical application; it was a transitory provision that the legislator of 1977 did not deem necessary to include in the section governing the *incommunicado* detention in general, namely Section 4 of the *EGGVG*.

[5] *See* First Act concerning the Clearing up of Federal Law in the Competence of the Federal Ministry of Justice, Apr. 19, 2006, *BGBl.* I at 866; *See also infra* B.

[6] Fachgruppe Richter und Staatsanwälte in der Abteilung Justiz der ÖTV Berlin, *Stellungnahme der Fachgruppe Richter und Staatsanwälte in der Abteilung Justiz der ÖTV Berlin zum Kontaktsperregesetz*, 11 KRITISCHE JUSTIZ 178-181 (1978); Dieter Göddeke, *Reform des Kontaktsperregesetzes*, 9 DEMOKRATIE UND RECHT 192-194 (1981); Heinrich Hannover, *Zum Kontaktsperregesetz,* 7 DEMOKRATIE UND RECHT 184-186 (1979); Wilhelm Krekeler, *Änderung des sogenannten Kontaktsperregesetzes,* 39 NEUE JURISTISCHE WOCHENZEITSCHRIFT 417-418 (1986); Wilhelm Krekeler, *Strafverfahrensrecht und Terrorismus - Bewährung oder Niederlage des Rechtsstaates?,* 29 ANWALTSBLATT 212-217 (1979).

[7] Thomas Bachmann, *Die Priorität der Angst vor der Freiheit. Terrorismusgesetze nach dem Ende der RAF*, 4 FORUM RECHT 133-136 (1998); STELLUNGNAHME DEUTSCHER ANWALTSVEREIN, ZUR NOVELLIERUNG DES KONTAKTSPERREGESETZES IM ENTWURF EINES GESETZES ZUR ÄNDERUNG DES EG GVG 97-100 (1983). *See* Stefan Schnorr & Volker Wissing, *Vorfeld der Gesetzgebung. Erneuter Anlauf zur Reform des Strafverfahrens*, 34 ZEITSCHRIFT FÜR RECHTSPOLITIK 239-240 (2001) (discussing the more recent the demands of the German political "green" party "*Bündnis 90/Die Grünen*", who requested to repeal several "old" anti-terror provisions); Winfried Hassemer, *Reform der Strafverteidigung*, 13 ZEITSCHRIFT FÜR RECHTSPOLITIK 326-332 (1980).

[8] HANS-HEINER KÜHNE, STRAFPROZESSRECHT - EINE SYSTEMATISCHE DARSTELLUNG DES DEUTSCHEN UND EUROPÄISCHEN STRAFRECHTS, n. 212 (7th ed. 2006).

Thirty days without ability to contact counsel frequently involves abuse, especially in the case of accused persons theoretically presumed to be innocent[9] who are thus impeded from properly preparing their defense. Additionally, the isolated facilities can be used for (concealed) tortures.[10]

Due to this recent amendment, the *Kontaktsperregesetz*, thirty years after its adoption (and thirty years after its last application) has become topical again, and hence deserves to be discussed. As today's terrorism has ceased to be a merely national or regional problem, similarly, information on national counter measures has become relevant for the whole international society. While studying anti-terrorism legislation, the author has observed that intrusive laws are often easily adopted under "special" circumstances, but most difficultly abolished, and still rather likely to be extended.[11] The example of the *Kontaktsperre* proves the best evidence for this thesis, as shall be shown in the following. Moreover, it will be demonstrated that the respective provisions do not conform to European and national human rights standards and should therefore be abolished.

The present article will start by exploring the circumstances and legislative motives that brought about the introduction of Section 38a *EGGVG*. The reader will then be introduced to the special historical and political circumstances that led to the adoption of the *Kontaktsperregesetz*. The contents of the *Kontaktsperre* regime will be briefly presented and subsequently the compatibility of the *incommunicado* regime with German and European safeguards will be examined. Additionally, the German form of *incommunicado* detention will be compared to similar measures in other countries. Finally, the potential consequences of the new provision as well as its relevance for German and foreign lawyers will be discussed.

B. Legislative Motives for the New Section 38a *EGGVG*

The new Section 38a *EGGVG* was introduced in the context of the "First Act concerning the Clearing up of Federal Law in the Competence of the Federal

[9] The Act applies to all inmates, comprising both convicts and those under detention on remand.

[10] *See infra* D.I. (discussing the compatibility of the measure with Article 3 of the European Convention on Human Rights (ECHR)).

[11] For the United Kingdom, see, for instance, the Prevention of Terrorism (Temporary Provisions) Act (PTA) 1974, which was initially of temporary nature, but was re-enacted several times with modifications and extensions (in 1976, 1984, and 1989). The same applies for the legislation adopted in Northern Ireland: the Northern Ireland (Emergency Provisions) Act (EPA) 1973 was, likewise, constantly renewed and amended (1975, 1978, 1987, 1991, 1996, and 1998).

Ministry of Justice" of 19 April 2006[12] (hereinafter, the 2006 Act). Thereby, the application of the *incommunicado* regime was extended to detainees suspected of founding, participating in, advertising for or supporting a *criminal* organization (Section 129 of the German Criminal Code, *Strafgesetzbuch,* hereinafter *StGB*), thus to organized crime suspects.[13]

At first sight of this new provision, one may wonder: Why this sudden extension? And why by means of this "Clearing up"Act? The question becomes even more striking when considering that about 80 per cent of the Act's articles in fact do not extend, but rather dissolve or abolish a former law. What motives drove the legislator, when cleaning the German legislation from obsolete laws, to consider that the *Kontaktsperre* provisions were not at all obsolete, in spite of their little, if not absent use in practice, and in spite of all the criticism[14] brought against them, but that they needed to be extended instead?

The general aim of the "Clearing up" Act was indeed to identify those provisions that did not have any practical effects any more, and to repeal them, in order to improve the clarity and thereby the functioning of the existing law.[15] However, in the special part of the then proposed bill, governing the individual amendments, the modification of the *Kontaktsperre* rules is justified as follows: By introducing Section 38a *EGGVG*, the legislator claims that in fact no new provision has been introduced, but rather that an already existing provision has only been moved from its former place to a place more consistent with the systematic context.[16] And indeed, Article 2 of the *Act amending the Introductory Act to the Judicature Act of 30 September 1977* (hereinafter the 1977 Act)[17] had already regulated that the *incommunicado* detention could also apply to organized crime suspects and convicts. Thus, the "Clearing up" Act, by virtue of its Article 16, only repealed Article 2 of

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[12] Erstes Gesetz über die Bereinigung von Bundesrecht im Zuständigkeitsbereich des Bundesministeriums der Justiz, Apr. 19, 2006, BGBl. I at 866, *available at* http://217.160.60.235/BGBL/bgbl1f/bgbl106s0866.pdf (May 27, 2008).

[13] Pursuant to Sections 31 – 38 *EGGVG*, before the introduction of Section 38a, *incommunicado* detention could "only" be applied to prisoners suspected of founding, participating, advertising for or supporting a *terrorist* organization, thus, to terrorist suspects. Sections 129a, 129b *StGB*.

[14] *See supra* notes 6-8.

[15] *See Gesetzesentwurf der Bundesregierung, 16. Wahlperiode, Bundestags-Drucksache 16/47*, of Nov. 3, 2005, *available at* http://dip.bundestag.de/btd/16/000/1600047.pdf (May 5, 2008).

[16] *Id*. at 49.

[17] Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz, Sept. 30, 1977, BGBl. I, 1877.

the Act of 1977, and, eager not to accidentally lose an important provision, reintroduced this provision to where it seemed to belong- the *Kontaktsperre*-regime (Sections 31-38 *EGGVG*). However, the German legislator was still not thorough enough, since it introduced the provision as a new Section 38a *EGGVG*, completely ignoring (accidentally or deliberately) the *transitional* character of the previous norm.

Article 2 of the 1977 Act was indeed a mere transitional provision. The offence of terrorism (then Section 129a *StGB*)[18] was at that time relatively new,[19] and therefore some suspects were in fact held in custody before terrorism had been criminalized. Consequently, they were charged not with a terrorist offence, but with an offence related to organized crime (Section 129 *StGB*). Article 2 of the 1977 Act thus only aimed to extend the application of the *incommunicado* detention to those suspects for whom a high probability existed that they were actually involved in terrorist activities, but for whom the investigations had been opened (or who had been convicted already) on the charge of organized crime (cf. Section 129 *StGB*). It concerned crimes which had been committed before the more specific offence, Section 129a *StGB* (formation of a terrorist organization), had come into effect (i.e. in autumn 1976). As the motives of the legislator of 1977 clearly state, in all cases it was required that the purpose or the activity of the criminal organization in question aimed at committing one of the offences that were now listed in Section 129a (1) *StGB*.[20] The transitional nature of this Article and its consequent restrictive interpretation have been further reiterated by the German Constitutional Court.[21]

Article 2 of the 1977 Act was thus a *transitional* provision that applied to prisoners charged or convicted before autumn 1976. Although it is hard to imagine that there

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[18] Since 2002, terrorism is also criminalised under 129b *StGB*, concerning terrorist acts committed abroad.

[19] It had been introduced in 1976, by the Anti-Terror Act, Aug. 18, 1976, BGBl. I, 2181.

[20] See *Bundestag* prints *(Drucksachen)* ,8th legislative period *(Wahlperiode)*, of 28 September 1977, at 7, *available at* http://dip.bundestag.de/btd/08/009/0800935.pdf (Feb. 28, 2008), which call Article 2 explicitly transitional provision (*Überleitungsregelung*).

[21] See *Judgment of 1 August 1978*, Official Collection of the Decisions of the Federal Constitutional Court (*amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts*, hereinafter *BVerfGE) 49, 24*, para. 22, *available at* http://www.servat.unibe.ch/dfr/bv049024.html (Apr. 27, 2008), which confirms that Article 2 of the Act is a transitional provision. See also para. 129, which clarifies that only those prisoners concerned were those whom had been convicted or were under strong suspicion for either a crime under Section 129a *StGB* [terrorism] or for an offence under Section 129 *StGB*, under the requirements set out by Article 2 of the Act for cases of transitional character, or for whom there existed a context with organized terrorism as required under Section 31 *EGGVG* in any other way.

would still be cases today to which it could apply, there might, of course, still be a few convicts of the 1970s charged under the organized crime provision who had connections to the terrorist organization RAF, and who are still serving life sentences. Currently there are two RAF terrorists still imprisoned: Christian Klar and Birgit Hogefeld. Christian Klar was charged and convicted with murder (Section 211, *StGB*) in nine cases, and attempted murder in eleven cases. Birgit Hogefeld was found guilty of three murders (Section 211, *StGB*), two attempted murders (Sections 211, 22, 23, *StGB*), causing of an explosion (Section 308, *StGB*), destruction of a building (Section 305, *StGB*), and membership to a terrorist organization (Section 129a *StGB*). None of them was convicted for belonging to a criminal organization under Section 129 *StGB*. Thus, Article 2 of the 1977 Act has, according to its declared legislative motives, become completely obsolete by now. But even supposing that there were still prisoners convicted before 1976 and to whom the provision might apply, this would not justify changing the character of Article 2 of the 1977 Act from transitional to permanent. Yet this is precisely what the German legislator did by introducing Section 38a *EGGVG* in 2006.

C. Historic Origins and Contents of the *Kontaktsperre*

I. History

The 1970s in the Federal Republic of Germany were shadowed by left-wing terrorism of the Red Army Fraction (*Rote Armee Fraktion*, hereinafter *RAF*). The so-called *Baader-Meinhof-Gang*[22] led an urban guerrilla war against the "system" of capitalism.[23] Even after their main leaders, Ulrike Meinhof, Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe, were arrested in 1972, terrorist activities continued in Germany. Several attempts were made to force authorities to free the *RAF* leaders, including the abduction of Israeli players by the Palestinian terror group "Black September" during the Olympic Games in Munich in 1972, abductions[24] and killings[25] of public officials, and the occupation of the German

[22] Named after their alleged ringleaders, Andreas Baader and Ulrike Meinhof.

[23] This group originated from the students' peace movement. Some of the students started to radicalise as their aims to change the world by demonstrations were frustrated. When Benno Ohnesorg, a demonstrating student, was shot by the police in an uprising and the responsible police man was subsequently acquitted, protest grew and some of the extreme left-wing students decided that only violence would be capable of changing the current unsatisfying situation. Thus the *RAF* was formed on 14 May 1970. *See* STEFAN AUST, DER BAADER MEINHOF KOMPLEX (8th ed. 1998) (the book was also translated into the English language, under the title "The Baader-Meinhof Gang"); Pieter H. Bakker Schut, *Politische Verteidigung in Strafsachen,* doctoral thesis (1986)(discussing the anti-terror laws of the 1970s and its impact on defence lawyers).

[24] Peter Lorenz, candidate for the Christian Democratic Party *CDU.*

Embassy in Stockholm in April 1975. The climax of the general atmosphere of terror was reached in Germany when the employer representative Hanns-Martin Schleyer was abducted by the *RAF,* and his driver and the accompanying police officers were killed. The kidnapping received wide media attention. Politicians were under high public pressure to act, as the life of the president of the employer's association was at stake. In this tense situation, the prosecuting authorities believed that the detained terrorists had maintained close contact with the *RAF* members outside the prison, and that they in fact directed and coordinated many of the on-going activities from within the prison walls. As the detainees had contact with their lawyers only, they too fell under the suspicion of collaborating with the *RAF* by passing on information to the members outside the prison. To impede such collaboration between detained *RAF* members and their lawyers, the legislator had already adopted several anti-terrorism Acts[26] restricting the contacts between prisoners under terrorist charges and their defense lawyers. In spite of all these restrictions, the prosecution authorities were still convinced that the *RAF* prisoners had frequent contact with the Schleyer's abductors via their lawyers. Therefore, during the night of 5 September 1977, only a few hours after Schleyer had been abducted, the detained *RAF* members were completely isolated from the outside world, in order to impede any potential communication with any potential collaborator.[27]

While the investigative judge of the Federal Court of Justice (hereinafter *Bundesgerichtshof*) as well as the General Attorney Kaul, director of the terrorism unit, had ordered the isolation of the prisoners, they still permitted contact with defense lawyers, as such a restriction of this contact was deemed unlawful. Then

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[25] President of the Berlin Regional Court, Günther von Drenckmann (killed in 1974), Attorney General Siegfried Buback and Jürgen Ponto, Manager of the Dresdner Bank (both killed in 1977).

[26] *See* Hanns Dünnebier, *Ausschließung von Verteidigern und Beschränkung der Verteidigung*, 29 NEUE JURISTISCHE WOCHENZEITSCHRIFT 1-7 (1976) (discussing changes in the Anti-Terror-Act of 20 December 1974 [providing for the exclusion of defence counsel (Section 138a, b of the German Code of Criminal Procedure (*Strafprozessordnung*), the restriction of a maximum of three chosen defence counsels per accused (Section 137(1) *StPO*), the prohibition for defence counsels to defend more than one person accused of the same criminal act (Section 146 *StPO*), and the possibility of *in absentia* trials under certain circumstances (Section 231(2) *StPO*]); Dr. Hans-Jochen, *Strafverfahrensrecht und Terrorismus - eine Bilanz*, 31 NEUE JURISTISCHE WOCHENZEITSCHRIFT 1217-1228 (1978) *(*regarding the development of anti-terror laws during the 1970s, particularly the Second Anti-Terror-Act of 18 August 1976 which further reduced the rights of the accused the defence by introducing judicial control of written communication between the accused and his lawyer in the case of terrorist charges [Sections 148(2) *StPO*, in conjunction with Section 148a *StPO*]; Hans Dahs, *Das "Anti-Terroristen-Gesetz" - eine Niederlage des Rechtsstaats*, 29 NEUE JURISTISCHE WOCHENZEITSCHRIFT 2145-2151 (1976).

[27] *See Dokumente und Materialien zur Kontaktsperre für Verteidiger. Kontaktsperre ohne Kontaktsperre-Gesetz,* 10 KRITISCHE JUSTIZ 395-400 (1977); Bakker Schut, s*upra* note 23, at 478.

the German Federal Police Office (*Bundeskriminalamt, BKA*), in accordance with the German Minister of the Interior, issued direct orders to the justice administrations of the respective federal states (*Länder*) to impede any contacts between the prisoners and their lawyers.[28] All regional justice administrations except for Berlin[29] agreed to the measure. The respective lawyers were not informed.[30] As a legal basis, the authorities invoked Section 34 of the German Criminal Code, a provision that served as a justification (thus excluding criminal liability) in the case of necessity (*rechtfertigender Notstand*). This was not the first time Section 34 *StGB* served to justify otherwise unlawful governmental actions.[31] It remains highly questionable whether Section 34 *StGB* in fact applied in the case of isolation detention;[32] however, the legality of its application was confirmed by the Highest German Court, the *Bundesgerichtshof*.[33] Similarly, the Federal Constitutional Court dismissed

[28] Bakker Schut, *supra* note 23, at 479.

[29] The Berlin justice administration was in fact the only *Länder* justice ministry arguing that the *incommunicado* detention lacked a legal basis and was contrary to other regulations.

[30] *Id*. at 485.

[31] Other examples are the so-called eaves-dropping affair on the nuclear physicist Traube as well as the secret recordings of conversations between prisoners and their defence lawyers in the prison of Stuttgart-Stammheim. *See* Rudolph Augstein, Adolph Arndt, Hermann Borgs-Maciejewski, and others, *Verfassungsschutz bricht Verfassung – Lauschangriff auf Bürger T*, DER SPIEGEL, February 28, 1977 (title story) 19-34; Hans-Joachim Rudolphi, *Die Gesetzgebung zur Bekämpfung des Terrorismus - Versuch einer kritischen Würdigung*, 11 JURISTISCHE ARBEITSBLÄTTER 1-9, 4 (Jan. 1979).

[32] The application of this justifying norm requires an imminent danger for a number of enumerated strong legal interests (like life and limb, physical integrity…) and that, when balancing the interest at risk against the interest which will be restricted by the relevant action, that the first one will substantially (*wesentlich*) prevail. When weighing the interest in the given case, life and limb of the abducted person, against the interests of the detainees, such as the right to free communication with the defence, to effective defence, to physical and psychological integrity, a substantial prevailing of the one over the other is not at all evident. Further, there is an (on-going) academic debate as to whether Section 34 *StGB* can serve at all to justify encroachments from the public authorities, or whether it is only applicable to private persons. *See* Reinhard Böttcher, *Vierter Abschnitt, Kontaktsperre. Vorbemerkungen zu §§ 31 ff EGGVG, in* LÖWE/ROSENBERG. DIE STRAFPROZEßORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ GROßKOMMENTAR 25 (2003)(Böttcher *EGGVG, Vor § 31)*; Knut Amelung, *Nochmals: § 34 StGB als öffentlichrechtliche Eingriffsnorm*, 1/31 NEUE JURISTISCHE WOCHENZEITSCHRIFT 623-624 (1978). However, the *Bundesgerichtshof* held in its decision of Sept. 23, 1977 that in the present case, the human life, the highest interest of our justice system, was at stake. Balanced against the only temporarily restricted right to free defence, the latter one was much less important. *Bundesgerichtshof* [BGH] [Federal Court of Justice] Sept. 23, 1977, Decisions of the Federal Court of Justice in Criminal Matters (*Entscheidungen des Bundesgerichtshofs in Strafsachen,* hereinafter BGHSt) *27, 260, 262*.

[33] *Id*.

applications for injunctive relief that had been lodged by detainees in pre-trial detention.[34]

When the Higher Regional Court (*Oberlandesgericht*) of Frankfurt allowed applications of prisoners against the measure on the grounds that concrete indications for a collaboration of the defense lawyers with their clients were missing,[35] the government realized that a legal basis for the on-going practice needed to be enacted most urgently.[36] The legislator reacted quicker than ever, and the Act was adopted in the record time of only three days.[37] The Act was applied on the day of its enactment by the Minister of Justice, on 2 October 1977,[38] and (as of today, May 2008) has never been applied again. In account of the exceptional situation, the *Bundesverfassungsgericht* dismissed constitutional complaints against the Act, declaring it as compatible with the German Constitution.[39] Similarly, the

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[34] The Federal Constitutional Court argued that the negative consequences of suspending the contact blockage (i.e. that the terrorist kidnappers would receive additional indications and orders from the imprisoned *RAF* members, which would present an additional threat to the life of the abducted persons, and which would considerably hamper the authorities' efforts to free the abducted person) would outweigh the consequences of the temporary restrictions of the rights of the defence. In the Court's view, the fact that this general measure concerned indiscriminately all defence lawyers was considered as unavoidable and had to be temporarily accepted. BVerfGE 46, 1.

[35] *Oberlandesgericht Frankfurt, Decision of Sept. 16, 1977, case no. 3VAs 57, 62, 63/77,* 30 NEUE JURISTISCHE WOCHENZEITSCHRIFT 2177 (1977).

[36] The Government gave three main reasons for the necessity of this law: (1) the use of the underlying principle of the justifying state of emergency under Section 34 *StGB* should not be of longer duration than absolutely necessary, (2) a uniform application of the measure within the Federal Republic of Germany was only possible by legislative act, and (3) the situation where in particular cases judicial decisions and the actions of the executive branch were not in conformity had to be terminated as soon as possible. (Böttcher *EGGVG, Vor § 31 supra* note 32).

[37] A bill was presented by the factions of the political parties represented in the Federal Parliament, the *Bundestag* (CDU/CSU, SPD, FDP), on 28 September 1977. The bill was discussed by the *Bundestag* the very same day (in the first reading). The next day, the committee on legal affairs (*Rechtsausschluss*) read and modified the draft. Their version was adopted by second and third parliamentary reading on 29 September with high majority. The Federal Council of Germany (representing the interests of the *Länder*), the *Bundesrat* gave its consent one day later. The Act was promulgated on 1 October and entered into force the following day. Böttcher *EGGVG, Vor § 31; See supra* note 32 at n.7-9.

[38] *See* Section 32 *EGGVG*.

[39] *Supra* note 21; Thomas Henne, *Das Bundesverfassungsgericht und die RAF. Die Entscheidungen des BVerfG zum Kontaktsperregesetz und zur Schleyer-Entführung zeigen, wie das Gericht einen Teil-Ausnahmezustand akzeptierte*s, 40 KRITISCHE JUSTIZ 30-35 (2007).

European Commission for Human Rights dismissed the applications of some concerned prisoners as "manifestly ill-founded".[40]

EXCURSUS: REPURCUSSIONS:[41]

On 13 October, the pressure on politicians to free *RAF* detainees was increased, when the German Lufthansa airplane "*Landshut*" was hijacked on its way from Palma de Mallorca to Frankfurt by four Palestinian terrorists. The hijackers demanded to free the German *RAF* members, and, additionally, two Palestinian rebels who were imprisoned in Turkey. After four days of hijacking, the airplane landed in Mogadishu, Somalia. In the night from 17 to 18 October, the plane was stormed by a special anti-terror group of the German police (*GSG9*). Three of the hijackers were killed, the fourth severely injured. During the same night, three of the detained *RAF* members imprisoned in the high security prison of *Stuttgart-Stammheim* – Jan-Carl Raspe, Andreas Baader, and Gudrun Ensslin –died. Another *RAF* inmate, Irmgard Möller, was found in her cell with severe stabbing wounds in her chest the following morning. She survived. The following day, the dead corpse of the abducted Schleyer was found in a trunk of a car in the Alsatian city of Mulhouse. The deaths in the prison of *Stammheim* occurred during the *incommunicado* detention. Subsequent investigations showed that in spite of the strict isolation and high security measures, the *RAF* members must have found ways to communicate with each other in prison, and to even smuggle weapons into their cells. According to the investigations, the terrorists committed a "collective suicide" when they found out that both of the liberation actions – the abduction of Schleyer

[40] *G. Ensslin, et al v. Federal Republic of Germany*, App. No. 7572/76, Eur. Comm'n H.R. Dec. &Rep. 14, 64-116 (1978).

[41] *See* Aust, *supra* note 23, at 592 et seq.

> and the hijacking of the German airplane – had failed. This has become the official version of the incident, and is generally accepted. However, the surviving member, Irmgard Möller and a few other *RAF* members have maintained until now that the *RAF* prisoners did not commit suicide. The latter thesis is also supported (with further arguments) by the Dutch lawyer and former defense counsel of the *RAF*, Pieter Bakker Schut who deceased on 13 October 2007.[42] In September 2007, the affaire about the prisoners of *Stammheim* has again entered into public and political discussions. In a documentary on the *RAF*[43] shown in the first public television channel of Germany ("*Das Erste*"), the producers Stefan Aust and Helmar Büchel collected many indications which suggest that the prisoners were eavesdropped during the kidnapping of Schleyer. If this thesis should prove to be true, it would imply that German security services were aware of the planned suicide. Following the documentary, politicians have uttered the need to further investigate the matter.[44]

II. Contents of the Kontaktsperre *Regime*

The 1977 Act[45] introduced Section 4, governing the "blockage of contacts", i.e. Sections 31 to 38 into the *EGGVG*.

The declared aim was to provide a legal basis to guarantee absolute interruption of communication between terrorists in detention and those still in freedom, in view of "recent events which had shown that communication between detained terrorists

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[42] *See* Bakker Schut, *supra* note 23.

[43] Stefan Aust & Helmar Büchel, *Die RAF - Teil I,* Germany, Das Erste. Teil I: 21:45 Uhr, 09.09.2007; Stefan Aust & Helmar Büchel, *Die RAF - Teil II,* Germany, Das Erste. Teil 2: 20.15 Uhr, 10.09.2007.

[44] *See Diskussion um Abhöraktionen bei RAF-Häftlingen. SPD verlangt Klarheit über "Nacht von Stammheim"* (2007), *available at http://www.tagesschau.de/inland/meldung494224.html (May 27, 2008).*

[45] See *supra* note 16.

and those that were in liberty could directly jeopardize life, health and freedom of persons and considerably affect the margin of decision of the authorities".[46]

Incommunicado detention can be ordered if the following three substantive requirements are met (as established by Section 31 *EGGVG*):

(1) imminent danger for life, limb or freedom of a person

(2) suspicion that this danger derives from a terrorist organization (as defined in Section 129a *StGB*)

(3) the interruption of all communication between the inmates and the external world (including written and oral communication with the defense counsel) must be necessary (*erforderlich*)

Formally, the *Kontaktsperre* shall be, in principal, ordered by either a regional (*Länder*) government or by the highest *Länder* authority, if so appointed by the *Länder* government (Section 32 *EGGVG*, first sentence). If several *Länder* are concerned, the Minister of Justice may as well formally order the *Kontaktsperre (*Section 32 *EGGVG*, second sentence). On basis of this order, the competent *Länder* authorities have to take the necessary measures, Section 33 *EGGVG*. The order is to be confirmed, within two weeks, by the competent criminal court. In absence of such confirmation, the order looses its effect after the elapse of the two weeks, Section 35 *EGGVG*. The measures are to be repealed as soon as their preconditions have ceased to exist; at the latest, after the elapse of thirty days. However, the isolation order may be renewed after this time period for another thirty days, and such prolongation can be repeated as often as deemed necessary, provided that the requirements are still met (Section 36 *EGGVG)*. The provision ordering the renewal (Section 36 *EGGVG*) does not provide a maximum duration of *incommunicado* detention, so that in principle, the *incommunicado* situation could last for years, provided that the requirements are always met.

[46] See *Bundestag* prints (*Drucksachen*), 8th legislative period (*Wahlperiode*) 8/935 of 28 September 1977, at 5, *available at* http://dip.bundestag.de/btd/08/009/0800935.pdf (May 27, 2008) (stating that "the events of recent times have shown that a communication between detained and still free terrorists can jeopardise directly the life, the health and the freedom of persons. It can also considerably affect the scope for discretion of state authorities. For the prevention of these risks and for the protection of the highest legal interests it can become necessary to interrupt any connection of prisoners among each others and with the exterior world*").*

The concerned person has the possibility to challenge the decision on *incommunicado* detention, by written application, Section 37 *EGGVG*. However, even in that case, until 1985, no kind of legal assistance was provided.[47]

Section 34 *EGGVG* regulates the restrictions the detainee and his or her lawyer are subjected to, in relation with the *Kontaktsperre*. In particular, it should be noted that the presence of the defense counsel is practically eliminated; thus, for example, the concerned person may only be interrogated if he or she and his or her defense lawyer agree that the defense counsel will not be present during interrogation.

In December 1985, the *Kontaktsperre* was amended: Section 34a *EGGVG* was introduced, providing a "contact person" (a lawyer, but neither the detainee's lawyer, nor a lawyer of the detainee's choice, cf. Section 34a(2) and (4) *EGGVG*) for the isolated prisoner. The prisoner has to be informed of his right to have such a legal representative, at the moment when the *incommunicado* detention is ordered. The contact person is supposed to provide legal advice to the detainee, but also safeguard the aims of the *incommunicado* order, cf. Section 34a(1) *EGGVG*. The contact person may assist in the criminal investigation by lodging applications and making suggestions which indicate such exonerating facts and circumstances requiring immediate clarification (Section 34a(1), last sentence, *EGGVG*). The contact person is further authorized to participate in interrogations with the detainee in those situations where a legal representative may not be present (cf. Section 34a(2) EGGVG read in conjunction with Section 34(3)(3), (4) and (5) *EGGVG)*. The legal representative is chosen by the president of the Higher Regional Court competent for the respective penitentiary centre, within 48 hours following the prisoner's application (Section 34a(3) *EGGVG).* Even with the contact person, the prisoner may only talk via an installation that impedes the handing over of items (e.g. a separating glass panel), cf. Section 34a(5) *EGGVG*. This latter restriction is remarkable as it shows the dimension of distrust towards lawyers – even lawyers appointed by the judge. Concerns were raised as many issues remained still unclear, e.g. with respect to the cooperation between the contact person and the defending lawyer. Moreover, it was difficult to comprehend why a contact person would be more trustworthy than an assigned defense lawyer.[48]

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[47] *See infra* D.I.1. (discussing the situations after 1985).

[48] *See* Krekeler, *supra* note 6.

D. Compliance of the *Kontaktsperre* with the European Convention on Human Rights (ECHR) and with National Constitutional Law

The *incommunicado* detention, as regulated under German law, is problematic from several perspectives. The compatibility of the Act with the ECHR, as well as consistency with the German law, will be discussed.

I. Compliance with the ECHR

European Human Rights law might preclude the *incommunicado* detention. Until today, the European Court of Human Rights (hereinafter ECtHR or Strasbourg Court) has not yet decided upon the matter. The following considerations can therefore only be speculative, albeit taking into account the hitherto existing case law of the ECtHR. The *Kontaktsperre* regime may indeed conflict with several human rights guaranteed under the ECHR. In particular, Articles 3 (prohibition of torture), 5 (right to life and security of the person), and 6 (fair trial) deserve closer examination.

1. Article 3 ECHR – The Prohibition of Torture

The ECtHR has ruled on isolation detention or solitary confinement in several cases. It stated that indeed strict conditions of detention, including isolation, *per se* do not suffice to constitute torture.[49] Likewise, the European Commission for Human Rights considered that isolation of *RAF* prisoners was justified since there were pressing reasons for the solitary confinement.[50] Further, the level of isolation matters, of course (e.g. whether they still have access to radio and TV or may even receive visits, or whether they are subject to entire sensual deprivation), as well as the duration, the objective pursued and the effects the detention has on the

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[49] *G. Ensslin, et al v. Federal Republic of Germany*, App. No. 7572/76, Eur. Comm'n H.R. Dec. &Rep. 14, 64-116 (1978); *McCallum v. United Kingdom*, App. No. 9511/81, 183 Eur. Comm'n H.R (1990); *Kröcher and Möller v. Switzerland, A*pp. No. 8463/78, Dec & Rep. 34 (1983). *See* D.J. HARRIS, M.O. BOYLE, & C. WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 68 (1995); Colin Warbrick, *The Principles of the European Convention on Human rights and the Response of States to Terrorism ,3* EUROPEAN HUMAN RIGHTS LAW REVIEW 287, 295 (2002).

[50] *G. Ensslin, et al v. Federal Republic of Germany*, App. No. 7572/76, Eur. Comm'n H.R. Dec. &Rep. 14, 64-116, at 109 (1978) (stating "the applicants were dangerous ; they had used firearms at the time of their arrest; Baader had previously been released by the use of weapons ; members of the Red Army Fraction had repeatedly organised armed attacks in order to bring about their release ; there were indications that they had themselves contributed to those attacks (cf. also Decision on Application No . 6166/73, D&R . 2, 66). The Commission is convinced that in this particular case there were pressing reasons for subjecting the applicants to arrangements more directly based on security measures.").

person.[51] In view of these considerations, at first sight the *Kontaktsperre* regime seems not to infringe Article 3 ECHR, as it may only be applied under very narrow conditions, when there are concrete reasons that justify its (temporal) application. However, the notion of "torture, inhuman or degrading treatment or punishment", established by the ECtHR, is rather wide, embracing mental or psychological ill-treatment as well as physical abuse. Also, continued conditions of treatment as well as discrete incidents affecting an individual may fall into the scope of Article 3 ECHR.[52] Generally, prolonged solitary confinement is undesirable, particularly in cases of remand detention.[53] If the isolation lasts too long, this will bring about psychological disturbances for the detainee, and, at least in this case, the long-term *incommunicado* detention will indeed constitute a continued condition of treatment affecting an individual, thus torture, inhuman or degrading treatment. It is recognised that complete sensory isolation coupled with complete social isolation can destroy the personality.[54] In this case, Article 3 is infringed regardless of how strongly the segregation may be justified.[55]

Following these considerations, *Kontaktsperre* as provided under German law does not necessarily constitute a breach of Article 3 ECHR, but can amount to a violation under certain conditions. The following are two scenarios where *Kontaktsperre* will certainly constitute a breach of Article 3 ECHR:

First, supposed that the *Kontaksperre* is applied in a very intrusive manner amounting to sensory deprivation for a prolonged period of time, it will certainly amount to an unjustified breach of Article 3 ECHR. While it may be necessary, in exceptional cases, to isolate terrorist prisoners from the outside world, it seems extremely worrisome to allow such a situation to last for up to thirty days, and to be even prolongable indefinitely. The introduction of the contact person in 1985 has not changed this situation in substance as the contact person may not be able to

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[51] *Id*.: "(…) However, in assessing whether such a measure may fall within the ambit of Article 3 of the Convention in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."; *See also* Jochen Frowein, *Artikel 3 (Folterverbot) in* EUROPÄISCHE MENSCHENRECHTSKONVENTION (2nd ed. 1996).

[52] *See* Warbrick, *supra* note 49, at 294 et seq.

[53] HARRIS, BOYLE & WARBRICK, *supra* note 49, at 69; *X. v. Federal Republic of Germany*, Case 6038/73, Eur. Comm'n H.R.,

44 CD 115 (1973).

[54] *G. Ensslin, et al v. Federal Republic of Germany*, App. No. 7572/76, Eur. Comm'n H.R. Dec. &Rep. 14, 64-116 (1978).

[55] HARRIS, BOYLE & WARBRICK, *supra* note 49, at 69.

prevent prolonged *incommunicado* detentions, if sufficient justification for the detention is provided.

A second situation where *Kontaktsperre* amounts to torture concerns predominantly the situation prior to the introduction of Section 34a *EGGVG*, thus, from 1977 to 1985. The denial of any contact with a defense lawyer implied that whatever happened to the prisoner during his *incommunicado* detention could hardly be proven in the aftermath. An independent account on the treatment of prisoners requires not only police reports, but also regular contacts of the accused with his defense counsel. It remains incomprehensible to me why the *Kontaktsperre* regulations did not permit contacts between the prisoner and his lawyer in the *presence* of a police officer or judge.[56] After the introduction of the contact person in 1985, this situation has been considerably improved.

In conclusion, the *Kontaktsperre* regime *per se* does not constitute a breach of Article 3 ECHR. However, it may facilitate torture under certain circumstances, in particular with respect to the length of detention and the restricted legal representation, offering possibilities to abuse. We can only hope that the competent authorities will not abuse of this regime in such a manner amounting to torture. At the same time, it must be admitted that a law allowing for such a possibility clearly encourages abuses. Hence, in order to comply with Article 3 ECHR, Section 36 *EGGVG* needs to be interpreted extremely restrictively, allowing isolation of prisoners only for very short time periods, and only if the isolation order is well justified, in account of the concrete circumstances of the case. Considering this, the practice of the competent authorities ignoring Sections 31 to 38 *EGGVG* can be only welcomed and further encouraged.

2. Article 5 ECHR – The Right to Liberty and Security of the Person

Article 5 ECHR regards exclusively the fact of detention, not the conditions of it. As to the conditions, Article 3 ECHR applies.[57] According to Colin Warbrick, *incommunicado* detention is never compatible with Article 5 of the ECHR.[58] Taking into account the different provisions of Article 5 ECHR, as well as the particularities of the *Kontaktsperre*, it seems necessary to further differentiate before assuming a global incompatibility. Differentiations will be necessary with respect to the different provisions entailed in Article 5 ECHR, and also with regards to the

[56] *See infra* at E V. (discussing the situation under Turkish law).

[57] *See Ashingdane v United Kingdom*, App. No. 8225/78, Eur. Comm'n H.R.(1985).

[58] Warbrick, *supra* note 49, at 296.

different situation of the *Kontaktsperre* before and after 1985 (the year when a contact person was introduced[59]). In the case of the *Kontaktsperre*, sections 3 and 4[60] of Article 5, ECHR, could be at stake.

Article 5(3) ensures the right to a trial within a reasonable time. This norm is infringed if the detention is prolonged beyond a "reasonable time" because the proceedings have not been conducted with the required expedition.[61] Factors that need to be considered when assessing compliance with Article 5(3) ECHR include the complexity of the case, the conduct of the accused, and the efficiency of the national authorities.[62] The *Kontaktsperre* may interrupt trial proceedings for up to thirty days (Section 34(3)(6) *EGGVG)*. Thus, the trial can be considerably delayed due to the *incommunicado* regime. The introduction of a contact person in 1985 may have increased the legal possibilities of the detainee to prevent such delays, and, in that aspect, it may have had an influence on the length of *incommunicado* detention. However, delays will be regarded, in most if not all cases, as justified in view of the emergency situation in which *Kontaktsperre* exclusively applies. Thus, an infringement of Article 5(3) ECHR is rather improbable.

However, the *habeas corpus* guarantee of Article 5(4) ECHR may be infringed. Under this provision, "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court (…)". It thus guarantees every prisoner the possibility to challenge his detention before a court. This right includes guarantees of judicial procedure.[63] It hence also covers legal assistance in the pursuit of the prisoner's claim to release, where this is necessary for the remedy to be effective.[64] Moreover, it is essential that the concerned person is given adequate opportunities to bring arguments before the court that speak against the continuation of the detention.[65] In

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[59] *See* Section 34a *EGGVG.*

[60] As far as Article 5(4) incorporates the principle of adversarial proceedings, the matter will be discussed under Article 6(1) (fair trial), where it has been further developed.

[61] HARRIS, BOYOLE & WARBRICK, *supra* note 49, at 143.

[62] *Id*. at 223.

[63] *De Wilde, Ooms and Versyp v. Belgium*, App. Nos. 2832/66; 2835/66; 2899/66, Eur. Comm'n H.R. (1971)

[64] HARRIS, BOYOLE & WARBRICK, *supra* note 49, at 149; *See also Woukam Moudefo v. France*, App. No. 10868/84, Eur. Comm'n H.R. (1988).

[65] Wolfgang Peukert, *Artikel 6 (Verfahrensgarantien), in* EUROPÄISCHE MENSCHENRECHTSKONVENTION (2nd ed., 1996).

a particularly complex case, legal representation may be necessary.[66] Again, the situation before 1985 (introduction of a contact person) must be distinguished from the legal situation thereafter: The *Kontaktsperre* regime prior to 1985 did not provide for any legal representation during the time of *incommunicado* detention, although the cases - exclusively terrorist cases - certainly reached a level of complexity where legal assistance was indispensable. Therefore, from 1977 to 1985, Article 5(4) ECHR was clearly violated in those cases, considering that the *Kontaktsperre* denied legal assistance in all circumstances. After the possibilities of legal assistance have been extended by introducing a contact person in 1985, the *incommunicado* detention certainly comes closer to a compliance with the judicial guarantees required under Article 5(4) ECHR. However, the contact person still cannot be put on pair with the defense counsel. As a person exclusively assigned for the duration of the *incommunicado* detention, this person will not have the same amount of information as the prisoner's lawyer. Further, effective defense is significantly hampered by the fact that any exchange of documents between the contact person and the prisoner is forbidden, so that they can only communicate orally, Section 34a (5) *EGGVG* . Article 5(4) ECHR indeed does not guarantee the over-all right to defense as such (this is guaranteed in Article 6 ECHR), but only requires legal assistance for the specific purpose of challenging the decision regarding the detention decision. It remains doubtful whether even such a concrete part of the legal assistance can be properly provided if the prisoner cannot exchange documents with his legal representative during their meetings. This may unduly prolong the defense efforts. Whether the measure is consistent with Article 5(4) ECHR will depend on the concrete case, the concrete amount of documents and papers needed to lodge the respective claims, as well as the abilities of the prisoner to draft the applications himself.

In conclusion, while the *Kontaktsperre* regulations before 1985 constituted clearly a breach with Article 5(4) ECHR, the situation has improved after Section 34a *EGGVG* has been introduced. Nonetheless, it will still depend on the particular case whether effective defense can be provided for the *habeas corpus* guarantee.

3. Article 6 ECHR – Fair Trial

Article 6 ECHR guarantees the accused a fair and independent trial, entailing important procedural rights such as, *inter alia,* the right to be heard, the right to an independent judge and a trial within reasonable time, the presumption of innocence, and equality of arms. One of the issues discussed in the context of

[66] *Id*. at 139-140.

Article 6 ECHR is whether it applies also to the pre-trial stage.[67] As to the third section of the provision (only this section may be relevant in the case of *incommunicado* detention), at least subsections (b), (c) and (e) apply fully to the pre-trial stage, and subsection (a) may apply in certain cases,[68] while subsection (d) generally has no application in pre-trial proceedings.[69] In consequence, in the case of the *Kontaktsperre* (concerning both convicts and charged persons), the defense rights guaranteed under Article 6(3)(b) and (c) ECHR could be at stake.

Under subsection (b), the accused is entitled to adequate time and the facilities for the preparation of his defense. This requires that the accused can consult his defense lawyer in oral or written form in a way that seems adequate to him and his defense lawyer.[70] However, the contact with the defense counsel may be subject to temporary restrictions, provided that the accused is given enough time to prepare his defense in spite of these restrictions.[71] This seems to suggest that the *Kontaktsperregesetz* is compatible with Article 6(3)(b) ECHR, as it is only a temporary measure that may imply the interruption of trial proceedings or the postponing of relevant deadlines.[72] However, in the case decided by the Strasbourg Court (*Kröcher and Möller v Switzerland*)[73], the Court found that an initial complete ban on lawyers' visits for three weeks was justifiable for security reasons while the applicants were in solitary confinement. In this case, German *RAF* members were held in a Swiss prison. However, the Commission noted that, unlike in the case of the German *Kontaktsperre*, confer Section 31 *EGGVG*, written communication with the lawyer was still permitted. This is a significant difference, considering that the right to communicate with one's lawyer extends to both written and oral communication.[74] Further, it does make a difference whether communication is interrupted for three weeks or for up to thirty days or possibly even longer. Taking these differences between the German *Kontaktsperre* regime and the Swiss case into account, the following conclusion can be drawn: While some restrictions

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[67] *See* ROBERT ESSER, AUF DEM WEG ZU EINEM EUROPÄISCHEN STRAFVERFAHRENSRECHT 452 (2002).

[68] *See* HARRIS, BOYOLE & WARBRICK, *supra* note 49, at 250.

[69] *Id.* at 249 et seq.

[70] Peukert, EMRK Art. 6 *supra* note 63, at 297, 298.

[71] *Kröcher and Möller v. Switzerland, A*pp. No. 8463/78, Eur. Comm'n H.R. Dec & Rep. 34 (1983); *Schertenleib v. Switzerland*, App. No. 8339/78, Eur. Comm'n H.R. Dec &Rep. 17, 180 (1980); *Cf. Bonzi v. Switzerland*, App. No. 7854/77, Eur. Comm'n H.R. Dec & Rep. 185 (1978).

[72] Peukert, *supra* note 63, at 299 (providing confirmation).

[73] *Kröcher and Möller v. Switzerland, A*pp. No. 8463/78, Dec. & Rep. 34 (1983).

[74] HARRIS, BOYOLE & WARBRICK, *supra* note 49, at 255.

concerning this communication may well be allowed, extensive restrictions such as those permitted under the *Kontaktsperre* regulations, including no written or oral contact at all to the defense counsel for a period of thirty days or more, seem to rather exceed the restrictions allowed under Article 6(3)(b) ECHR and thus constitute a breach. In so far, the presence or absence of a contact person within the meaning of Section 34a *EGGVG* is irrelevant, as this person, in any case, cannot substitute completely the defense lawyer, for having not the same quality and quantity of information.

The right to effective legal assistance in Article 6(3)(c), ECHR, enshrined in the principled of fair trial[75], comprehends a right of private access to a lawyer, both at the pre-trial stage and later.[76] This puts a duty upon the state to ensure that the accused has a fair trial, including appropriate legal assistance.[77] Thus, Article 6(3)(c) was infringed when the accused who was in detention on remand was not allowed to consult with his lawyer out of the hearing of a prison officer.[78] But again, the access to a lawyer may be subject to restrictions in the public interest.[79]

With respect to the access to a lawyer, there is an overlap with Article 6(3)(b) ECHR as the latter one also includes the right of access within the "adequate facilities" guaranteed in that provision. However, Article 6(3)(c) ECHR is considered wider, as not only referring to the preparation of the trial, but to a more general right to assistance and support by a lawyer, throughout the proceedings.[80] When considering the *Kontaktsperregesetz*, similarly as in the case of Article 6(3)(b) ECHR, the lack of any private access to the accused person's lawyer for a significant period of time may amount to an infringement of Article 6(3)(c) ECHR. Again, the assigned contact person cannot substitute this essential right to effective legal assistance.

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[75] ESSER, *supra* note 66, at 451.

[76] HARRIS, BOYOLE & WARBRICK, *supra* note 49, at 264.

[77] ESSER, *supra* note 66, at 451.

[78] *S. v. Switzerland*, App. Nos. 12629/87 and 13965/88, Eur. Comm'n H.R. (1991).

[79] HARRIS, BOYOLE & WARBRICK, *supra* note 49, at 264. *See also Can v. Austria,* App. No. 9300/81, Eur. Comm'n H.R. (1985); *Egue v. France,* App. No. 11256/84, 57, Eur. Comm'n H.R. Dec & Rep. 47 (1988); Esser. *supra* note 66, at 453.

[80] HARRIS, BOYOLE & WARBRICK, *supra* note 49, at 265; ESSER, *supra* note 66, at 456.

As a conclusion, the *Kontaktsperre* can amount to a breach of Article 6(3)(b) and (c), ECHR, both before and after the inclusion of Section 34a *EGGVG*, provided that written and oral access to a lawyer is denied for a long period of time.

II. Consistency with German Constitutional Law

Although the *Bundesverfassungsgericht* held that Sections 31-38 *EGGVG* were constitutional[81], not all legal professionals shared this view. For instance, the Professional Group of Judges and Prosecutors of the Department of Justice of the German Syndicate for Public Services, Transport and Traffic (*Gewerkschaft öffentliche Dienste, Transport und Verkehr, ÖTV*) declared several legal objections against this new Act, for undermining, in essence, the rule of law.[82]

Thus, the legally guaranteed right to a defense lawyer in every moment of the procedure (Section 137(1)(1) of the German Code of Criminal Procedure (*Strafprozessordnung*, hereinafter *StPO*) was completely undermined since the Act also applies to pre-trial detainees.[83] The importance of the right to defense at any procedural stage was already reiterated by the *Bundesverfassungsgericht* in the decision of 8 October 1974, holding that the accused could call his defense attorney at any time of the procedure.[84]

Further, the *Kontaktsperre* also undermines the authority of judges who are in principle responsible for any issues concerning the longer-lasting deprivation of liberty of prisoners who have not been convicted (yet). Not judges, but executive authorities are competent to order isolation detention and make decisions related thereto.[85]

In addition, the right to be heard as guaranteed under Article 103(2) of the German Constitution is violated, since legal remedies against the isolation measures are extensively carried out without the detainee's or his lawyer's participation.

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[81] *BVerfGE 46, 1.*

[82] *See* FACHGRUPPE RICHTER UND STAATSANWÄLTE, *supra* note 6.

[83] In this regard, it has to be taken into account that the critics were uttered in 1978, thus before the introduction of the contact person (Section 34a *EGGVG*). However, a contact person is in any case not equivalent with a defence lawyer. It is only concerned with the rights of the accused during the *incommunicado* detention, thus does not provide any assistance with respect to the general preparation of the defence. Thus, even after the introduction of a contact person in 1985, the right to a defence lawyer at any moment of the procedural stage is still not guaranteed in the *Kontaktsperre* regime.

[84] *BVerfGE 38, 105 (111).*

[85] FACHGRUPPE RICHTER UND STAATSANWÄLTE, *supra* note 6, at 179.

Thereby, also the guarantee of effective legal protection (*effektiver Rechtsschutz*, Article 19(4) *GG*)) is undermined.[86]

Finally, doubts were raised with respect to the human dignity, the highest protected interest under the German Constitution (Article 1 *GG*).[87] This fundamental right guarantees that a human being cannot be considered as a mere object of the State, but has the right, as an individual, to be heard when a decision regarding his or her rights is concerned. As the *Bundesverfassungsgericht* stated, to ensure the human dignity to be preserved, the person should principally be able to resort to the services of a defense lawyer at *any* procedural state.[88]

It can be concluded that the practical application of the German rules governing *incommunicado* detention can lead to serious human rights violations, both under the ECHR and under the German constitution. Also, international human rights law generally precludes incommunicado detention.[89] At the same time, it must be admitted that there are cases well imaginable in which *incommunicado* detention may be consistent with human rights requirements. Yet, the main argument, from a human rights' point of view, against the legal provisions of Sections 31 et seqq. *EGGVG* is not so much that the provisions *per se* violate human rights, but rather that they *facilitate* severe human rights abuses, i.e. that the limited judicial control and the limited access to the defense attorney do not suffice to *guarantee* the observance of human rights.

E. *Incommunicado* Detention Elsewhere - Some Comparative Considerations

When looking at other Member States to the European Convention of Human Rights, we see that Germany is – alas – not the only country permitting absolute isolation of prisoners from the outside world. A few examples from the law of the United Kingdom, Spain, Italy, France and Turkey may suffice to show the relevance of this topic also for other countries.

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[86] *Id*. at 180.

[87] *See id*.

[88] *Id*. at 181 (citing *BVerfGE 38, 105 (112-113)*.

[89] *See* CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 141 (2001) (referring to the Human Rights Committee's General Comment 7 (Art. 7), para. 1 and stating that doctors, lawyers and family members need to have access to detainees).

I. United Kingdom

Under Section 23 of the Anti-Terrorism, Crime and Security Act 2001[90] (adopted in the immediate aftermath of 9/11), the United Kingdom introduced the possibility to detain foreign terrorists suspects for an indefinite period of time. In order to avoid a conviction by Strasbourg, the UK notified the Secretary General of the Council of Europe of a derogation from Article 5 of the ECHR (under Article 15 of the ECHR).[91] The UK government also derogated from Article 9 of the International Covenant for Civil and Political Rights.[92] However, the Derogation Order concerning Article 5 of the ECHR was quashed by the House of Lords in their Decision of 16 December 2004.[93] Subsequently, the relevant position was replaced by "control orders".[94] The UK law provides currently the longest duration for

[90] Section 23 of the Act reads as follows:

"Detention

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by—

(a) a point of law which wholly or partly relates to an international agreement, or

(b) a practical consideration.

(2) The provisions mentioned in subsection (1) are—

(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and

(b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)."

Anti-Terrorism, Crime and Security Act, Sec. 23, *available at* http://www.opsi.gov.uk/acts/acts2001/ukpga_20010024_en_1 (May 27, 2008).

[91] Human Rights Act 1998 (Designated Derogation) Order 2001, No. 3644, *available at* http://www.legislation.gov.uk/si/si2001/20013644.htm (visited on 27-05-08).

[92] This second derogation seemed necessary not only to forestall a possible breach of the UK's obligations under the Covenant, but also in order to protect the derogation under the ECHR from challenge: under Article 15 ECHR derogation measures are only allowed, among other things, if they are consistent with the other obligations of the Member State under international law.

[93] *A & Others v. Secretary of State for the Home Department,* [2004] UKHL 56. The House of Lords made a declaration under Section 4 of the Human Rights Act 1998 that Section 23 of the ATCSA 2001 was incompatible with Articles 5 and 14 of the European Convention insofar as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.

[94] *See* Prevention of Terrorism Act 2005, *available at* http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1 (May 27, 2008).

detention without charge. It has been continuously extended after 9/11.[95] The latest changes by the Terrorism Act 2006 (adopted in the aftermath of the London Bombings in July 2005) led to a detention duration of 28 days for terrorist suspects, after the government's proposals of a 90-day-detention were rejected by vote. As far as incommunicado detention is concerned, there is no direct equivalent to the German provision under written law. Under the prison rules, it is possible to detain a person segregated from other prisoners.[96] Although the detainee is in principle entitled to consult a solicitor at any time, if he so wishes (see Police and Criminal Evidence Act (PACE) 1984, Section 58(1)), it is possible, under exceptional circumstances, to delay the access to a solicitor after arrest for up to thirty-six hours (PACE 1984, Section 58(8)). However, if the person is suspected of *terrorism*, it is possible to postpone access to the solicitor after arrest for a period of forty-eight hours, and even then, a direction may provide that the suspect may consult his solicitor "only in the sight and hearing of a qualified officer" (cf. Terrorism Act 2000, Section 41, in conjunction with Schedule 8, paragraphs 8 and 9). This provision is

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[95] The Terrorism Act 2000 provided for a detention of seven days. This time period was doubled by the Criminal Justice Act 2003, to fourteen days. In 2006 the detention period was extended to 28 days. Currently, it is again being discussed to extend the detention of terror suspects, to forty-two days.

[96] *See* Prison Rules 45, 53(4), 55(e), *available at* http://pso.hmprisonservice.gov.uk/pso1700/Prison%20Rules.htm (May 27, 2008) (stating that "Removal from association

45. – (1) Where is appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for the prisoner's removal from association accordingly.

Close supervision centres

46. – (1) Where is appears desirable, for the maintenance of good order or discipline or to ensure the safety of officers, prisoners or any other person, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the Secretary of State may direct the prisoner's removal from association accordingly and his placement in a close supervision centre of a prison.

Disciplinary charges

53. – (4) A prisoner who is to be charges with an offence against discipline may be kept apart from other prisoners pending the governor's first inquiry.

Governor's punishments

55. – (1) If he finds a prisoner guilty of an offence against discipline the governor may, subject to …, impose one or more of the following punishments:

(…)

(e) cellular confinement").

difficult to reconcile with the requirements of Article 6(1) ECHR. Thus, in the case *Brennan*[97] the ECtHR found that the presence of a police officer within hearing during the applicant's first consultation with his solicitor infringed his right to an effective exercise of his defence rights, which amounted to a violation of Article 6(3)(c) read in conjunction with Article 6(1), ECHR.

II. Spain

Articles 520 to 527 of the Spanish Criminal Prosecution Act (*Ley de Enjuiciamiento Criminal, LECrim*) are especially dedicated to the conditions of arrest (*detención preventiva*) and the prisoners' rights. Article 520bis (2) *LECrim*, read in conjunction with Article 384bis *LECrim*, provide that the police can formally request from the competent judge an order to hold a prisoner *incommunicado*. While in general, *incommunicado* detention (*incomunicación*) is only applied in case the concerned person is suspected to be "integrated in or related to armed groups or terrorist or rebel individuals"[98] (thus in the case of "terrorist suspects"), it can additionally also be ordered "to avoid that the suspects evade justice, that they act against interests of the victim, that they hide, change or destroy proofs related to their criminal actions, or that they commit new crimes."[99] The judge has to make a motivated decision in the subsequent twenty-four hours. Once the *incommunicado* detention is solicited by the police, the prisoner will in any case be held *incommunicado* until the judicial decision is issued. The *incommunicado* detention can last for up to thirteen days for investigations within Spain.[100] In this situation, the prisoner is deprived of certain rights:[101] he may not choose his own lawyer, but is only entitled to an assigned lawyer *ex oficio*. His relatives or his friends (or, if he is a foreigner, his embassy) do not have to be informed about his arrest. Moreover, he may not discuss with his assigned lawyer in privacy. Finally, the prisoner can only be

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[97] *Brennan v. United Kingdom*, App. No. 39846/98, Eur. Comm'n H.R. (2001).

[98] Article 384bis *LECrim* speaks of a crime "cometido por persona integrada o relacionada con bandas armadas o individuos terroristas o rebeldes."

[99] Article 509 (1) *LECrim* reads as follows: "El Juez de Instrucción o tribunal podrá acordar excepcionalmente la detención o prisión incomunicadas para evitar que se sustraigan a la acción de la justicia personas supuestamente implicadas en los hechos investigados, que éstas puedan actuar contra bienes jurídicos de la víctima, que se oculten, alteren o destruyan pruebas relacionadas con su comisión, o que se cometan nuevos hechos delictivos."

[100] Initially the detention is limited to five days maximum. However, in the case of a terrorist crime (for the purposes of Article 384bis), or in case of a crime which requires a certain level of organisation and the participation of two or more actors, this period can be prolonged by another five days and, ultimately, by another three days. *See* Article 509(2) *LECrim*.

[101] *See* Article 527 *LECrim*.

examined by a forensic medical examiner, not by a medical doctor of his own choice.[102] While neither the Spanish Constitutional Court (*tribunal constitucional)* nor the European Court of Human Rights have ruled on this issue up to now, non-governmental organizations have urged the Spanish government to repeal the provisions governing *incommunicado* detention, since this form of detention facilitates torture, and since prolonged *incommunicado* detention as such constitutes cruel, inhuman, or degrading treatment, if not torture.[103]

We see that unlike in Germany, Spain is still struggling with regional terrorism, and in consequence, *incommunicado* detention is being frequently applied to suspected members of *ETA*. However, considering that the 9/11 bombers actually planned their attacks in the German city of Hamburg, and that more and more international terror networks are being identified also on German ground, the probability that Sections 31 *et seqq*. *EGGVG* will be applied in practice is now considerably high. Compared to the Spanish law, the German *Kontaktsperre* appears particularly problematic in view of its potential indefinite duration – the maximum limit of thirteen days under Spanish law seems relatively short when compared to the German law, which does not provide a maximum length.

III. Italy

In Italy, since 1975 special legislation allows for the suspension of regular prison conditions in mafia and also terrorist cases, i.e. to subject terrorist and mafia detainees under a stricter prison regime, for public order or security reasons (see, in particular, Article 41-bis of the Law on the Execution of Punishment n. 354 of 26 July 1975).[104] The Minister of Justice can adopt this harsher prison regime in order to impede the detainee from maintaining contacts to criminal or terrorist organisations (see Article 41-bis, para. 2). The application of this strict regime has to be decided by the Minister of justice **(**by means of a *decreto ministeriale*); it is thus an administrative decision, taken on the basis of the information provided by the judge and by the anti-terrorism forces (the *Direzione nazionale antimafia*), see para. 2-bis of Article 41-bis. It can be adopted for a minimum of one year and a maximum

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[102] José Martínez Soria, *Country Report on Spain, in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 169, 551 (Christian Walter, Silja Voneky, Volker Roben, Frank Schorkopf, 2004).

[103] Human Rights Watch, *¿Sentando ejemplo? Medidas antiterroristas en España*, *available at* http://www.hrw.org/spanish/informes/2005/spain0105/ [Spanish]; http://www.hrw.org/reports/2005/spain0105/ [English]), at 25 (May 27, 2008); Human Rights Commission of the United Nations, Apr. 23, 2003, Res. 2003/32, para. 14.

[104] *Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà*, Gazz. Ulff., n. 212 (Aug. 9, 1975).

of two years. The minister revokes the measure earlier if the conditions justifying its adoption have diminished (para. 2-ter of the same Article). Likewise, the measure can be successively prolonged if the capacity of the detainee to maintain contact with the criminal or terrorist organisation is still the same.

The suspension of the ordinary prison regime pursuant to Article 41-bis of the Law n. 354 entails, *inter alia,* the adoption of elevated security measures, mainly aimed at preventing contact with the criminal organisation, the restriction of contact with family members to between once and twice a month (in a manner that impedes the handing over of objects, e.g. conversation through a glass window), restrictions on the possession of objects, as well as visual control of correspondence (see para. 2-quater of the provision). However, unlike in Germany, the rights of the defence lawyer are, explicitly, unaffected (see para. 2-quater b last sentence). This causes some embarrassment for a German lawyer: Seeing that Italy, a country which during the 1970s faced much more serious terrorist threats by the Red Brigades than Germany, and which, in addition, has constantly struggled with mafia delinquency, found it, despite these challenges, not necessary to restrict the rights of the defence in the case of detained terrorists and mafia members, one becomes aware of the real dimension of Germany's legislative action in 1977.

IV. France

Article D. 283-1 et seq. of the French Code of Criminal Procedure (*Code de Procédure Pénale, CPP*) regulate solitary confinement (*l'isolement*). According to Article D. 283-1 *CPP*, any adult detainee can be placed in solitary confinement as a security measure, either on his request or by official decision. This detention can last for up to three months maximum, but can be prolonged for the same duration several times. During the confinement, the detainee keeps his rights concerning information, visits, correspondence, and religion (Article D. 283-1-2 *CPP*). As to the duration of solitary confinement, Article D. 283-1-7 *CPP* provides that it should not last longer than two years in total, although exceptional prolongations are possible.[105]

[105] According to Article D. 283-1-7, once the prisoner has spent one year in solitary confinement, the minister of justice can, by derogation from Article D. 283-1, decide to prolong solitary confinement for a duration of four more months. This decision again can be taken several times. The solitary confinement may last, in exceptional cases, longer than two years, namely if the placement in solitary confinement constitutes the only means to assure the security of persons or of the establishment. In this case, the decision on prolongation must be especially motivated.

French solitary confinement was challenged before the Strasbourg Court in the case *Ramirez-Sanchez v France*.[106] The applicant, who had been prosecuted in connection with investigations into several terrorist attacks carried out in France, had been convicted to life imprisonment for the murder of three police officers. He spent over eight years in French prisons in solitary confinement. The Strasbourg Court considered that this form of solitary confinement, which allowed the prisoner to receive frequent visits by his lawyer and his cleric, did not reach the threshold of gravity required by Article 3 of the ECHR (torture and inhuman or degrading treatment), as the prisoner had not been subjected to sensory isolation or total social isolation, but 'only' to relative social isolation (the applicant had indeed received visits by his lawyer, who was also his fiancée, and by his doctors, on a very regular basis).[107] When the case was referred to the Grand Chamber of the ECtHR under Article 43 ECHR, the Grand Chamber confirmed the former Decision, recognising the possible long-term effects of the applicant's isolation, but having regard in particular to the character of the prisoner and the danger he posed, as well as the fact that since 5 January 2006 he had been held under the ordinary prison regime.[108]

We see that French law provides for comparatively long isolation detention, but does, unlike the German regime, not amount to total social isolation.

V. Turkey

Under the Turkish Anti-Terror Legislation[109], *incommunicado* detention is possible and is unfortunately of significant practical relevance as well.[110] According to

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[106] *Ramirez-Sanchez v France*, Eur. Ct. H.R., App. No. 59450/00 (2005).

[107] Notwithstanding, the Strasbourg Court found that the French Government had violated Article 13 of the Convention, as the then applicable French law did not provide a remedy for the applicant to contest the decision to prolong his detention in solitary confinement.

[108] *Ramirez Sanchez v. France* (Eur. Court H.R., Grand Chamber Judgment of 4 July 2006, app. no. 59450/00).

[109] *See* Necla Güney, *Country Report on Turkey, in supra* note 102, 557.

[110] In the case of *Demír and Others v Turkey,* Eur. Ct. H.R., App. Nos. 21380/93 ; 21381/93 ; 21383/93, 1998-IV (1998) (holding that the applicants' *incommunicado* detention for at least sixteen or twenty-three days, without any possibility of seeing a judge or other judicial officer, amounted to a breach of Article 3 ECHR); *Aksoy v. Turkey,* Eur. Ct. H.R., App. No. 21987/93, 1996-VI, at para. 84 (1996) (expressing that the court was not persuaded that the situation necessitated holding Mr Aksoy on suspicion of involvement in terrorist offences for fourteen days or more in *incommunicado* detention without access to a judge or other judicial officer). *See also Orhan v. Turkey,* Eur. Ct. H.R., App. No. 25656/94 (2002); *Elci and Others v. Turkey,* Eur. Ct. H.R., App. Nos. 23145/93 and 25091/94 (2003); ,*Mamatkulov and Askarov v. Turkey,* Eur. Ct. H.R., App. Nos. 46827/99 and 46951/99, 2005-I (2005); *Sarı and Çolak v. Turkey,* Eur. Ct. H.R., App. Nos. 42596/98 and 42603/98 (2006); *Taş v. Turkey,* Eur. Ct. H.R., App. No. 24396/94 (2000).

Article 16(2) of the Turkish Anti-Terror Law,[111] contacts between imprisoned convicts and communication with other convicts "may be prevented". The same applies to prisoners held in detention on remand (Article 16(4) of the Law). Pursuant to Article 10(b), the prisoner may have contact with a lawyer under the supervision of a detention centre or prison official. The conditions of the solitary confinement are not further regulated; a maximum duration of the detention, for example, is missing. Moreover, the only requirement that needs to be fulfilled in order to hold a prisoner *incommunicado* is that the prisoner is detained on terrorism charges or convicted for terrorism. Also, it is important to note that this Anti-Terror Law defines terrorism, terrorist organizations and terrorist offences in an astonishing broadness.[112]

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[111] Act No. 3713, Art. 1-4, Law to Fight Terrorism (Apr. 12, 1991), *available at* http://www.icj.org/IMG/Turkey1991law.pdf (Feb. 27, 2008). Article 16 of the Act reads as follows: "(1) The sentences of those convicted under the provisions of this law shall be executed in special penal institutions built with rooms each capable of holding between one and three persons.

(2) In such institutions, free visits may not be allowed. Contacts between the convicts and communication with other convicts may be prevented.

(3) Those convicts who have served at least one third of their sentences with good conduct and have less than three years to serve before becoming entitled to conditional release may be transferred to other closed penal centres.

(4) Those held in pre-trial detention for crimes within the scope of this law shall be kept in detention centres as described in paragraph 1. The provisions of paragraph 2 shall also apply to pre-trial detainees."

[112] "Definition of Terrorism:

Article 1. (1) Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal,

social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat.

(2) An organization for the purposes of this Law is constituted by two or more persons coming together for a common purpose.

(3) The term "organization" also includes formations, associations, armed associations, gangs or armed gangs as described in the Turkish Penal Code and in the provisions of special laws.

Terrorist Offenders:

Article 2. (1) Any member of an organization, founded to attain the aims defined in Article 1, who commits a crime in furtherance of these aims, individually or in concert with others, or any member of such an organization, even if he does not commit such a crime, shall be deemed to be a terrorist offender.

While the German conditions under which *incommunicado* detention can be ordered are rather narrow, the Turkish law stands out with its extreme broad scope of application. Many legal uncertainties as to the duration of the measure, its further conditions, and the prisoners' rights contribute to a situation where the human rights of detained persons are prone to abuse. The fact that contact with the lawyer is only possible under supervision severely affects the right to effective defense, and is therefore, like the equivalent provision for England, Wales and Northern Ireland, is probably not reconcilable with Article 6(1), ECHR.[113]

VI. Comparison

The comparison reveals that Germany is not the only country whose legislation provides for *incommunicado* detention. Other countries have adopted similar measures. We see that in some countries, the duration of isolation detention can last longer, but, at the same time, defense rights are rarely as restricted as under the German legislation. Also, the conditions of detention vary considerably, from complete deprivation of any contacts to the exterior world (e.g. Germany until 1985) to moderate isolation allowing regular visits (e.g. France), which explains the ECtHR's flexible case law on the subject. In the present US-led "global war against terrorism", it must be presumed that similar provisions (and practices) exist in numerous States. If we consider that even in a relatively secure and democratic *état de droit* like Germany, where human rights generally enjoy vast protection, the fight

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(2) Persons who are not members of a terrorist organization, but commit a crime in the name of the organization, are also deemed to be terrorist offenders and shall be subject to the same punishment as members of such organizations.

Terrorist Offences:

Article 3. Offences defined in Articles 125, 131, 146, 147, 148, 149, 156, 168, 171 and 172 of the Turkish Penal Code are terrorist offences.

Offences committed for terrorist purposes:

Article 4. In applying this Law offences defined in:

a) Articles 145, 150, 151, 152, 153, 154, 155, 169 and the second paragraph of Article 499 of the Turkish Penal Code and

b) offences defined in Article 9, part (b), (c) and (e) of Law 2845 on the Foundation and Criminal Procedure at State Security Courts

are terrorist offences if they are committed for terrorist purposes as described in Article 1." *See* Act No. 3713, Art. 1-4, Law to Fight Terrorism (Apr. 12, 1991).

[113] *See supra* E. I.; *Supra* note 96.

against terrorism triggered the adoption of measures facilitating gross human rights violations, it is extremely worrisome to imagine what may happen in states where the rule of law and human rights are not as privileged as here, and where terrorism is a more serious threat to the integrity of the state than the Red Army Faction ever was to Germany.

F. Perspectives

I. Outlook: Potential Consequences of the Legal Amendment for Germany

Considering that evidently contrary to the legislator's original intention, the transitional Article 2 of the 1977 Act has been replaced by the permanent Section 38a *EGGVG*, the *Kontaktsperre* can now permanently apply also to members of a "mere" criminal organization with no terrorist intentions at all. It is to be hoped that the German courts will interpret this norm restrictively in account of the legislative motives (i.e.: not apply Section 38a *EGGVG*!). There is reason to believe that the *Bundesgerichtshof* will, in any case, interpret the norm at least restrictively in the sense that it will only apply Section 38a *EGGVG* in cases where a link to a terrorist organization exists. Although it is hard to imagine a case where a link to a terrorist organization exists, but where still the prisoner is not charged or suspected under Section 129a *StGB*, such a case has actually already been decided by the *Bundesgerichtshof*, when the Court held that, in the light of the purpose and the historical origins of Sections 31 *et seqq*, *EGGVG*, the prisoners named under Section 31, second sentence, last alternative[114] could only be subjected to the *incommunicado* detention if there existed, in addition, a context with the organized terrorism. In fact, such a restrictive interpretation was condition for the constitutionality of Section 31 *EGGVG*.[115] In practice, based on previous experience, a rising application rate of the Sections 31-38a *EGGVG*, and, in particular, of Section 38a *EGGVG*, is thus not to be expected. If these provisions should be applied in the future, it is likely that they will be interpreted by the courts in a restrictive manner. In any case, the number of cases in which Section 38a *EGGVG* could be applied is very limited. As

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[114] For example, those prisoners who were either convicted or arrested under the suspicion of having committed one of the offences which a terrorist organisation, within the meaning of Section 129a *StGB*, aimed to commit.

[115] With respect to those prisoners mentioned under Section 31 EGGVG that were suspected of or convicted for an offence as listed under Section 129a *StGB*, without an explicit link to a terrorist organisation needed, the German Federal Constitutional Court referred to the earlier decision of the German Federal Court of Justice of 13 October 1977, where on basis of the purpose and the legislative history of Sections 31 et seq. *EGGVG* it was decided that also for this group of prisoners that as an additional – unwritten – requirement a context with organised terrorism had to be established. The Constitutional Court precised that when interpreted this way, Article 31 (second sentence) *EGGVG* was compatible with the German Constitution. *See BVerfG supra* note 20, at para. 130.

we have said earlier, there remain very few cases in which there is a context with organized terrorism, but in which the prisoner himself is not charged or convicted under Section 129a *StGB*.

Considering that German executive authorities have proved to be most reluctant to order the *Kontaktsperre* regime at all, and, taking into account that if they did apply it the interpretation by the German courts was rather restrictive, there remains hope that the *Kontaktsperre* will continue to be of little more than historical relevance, in spite of the recent introduction of Section 38a *EGGVG*.

II. Concluding Remarks

From these last remarks, one might fall into the trap of deducing that this article is "much ado about nothing". If the recent amendment will indeed not bring about any change, why bother writing so much about it? There are (at least) three reasons for this: first, in spite of the on-going practice, the legal and factual possibility that the *Kontaktsperre* might be ordered in Germany again, and that other countries might copy this measure, has become more imminent than ever, considering the present threat of international terrorism and the measures taken in Germany and other countries so far. Regrettably, the fact that there have not been any cases of application in recent years does not deprive us of the possibility that *incommunicado* detention might again be adopted.[116] Secondly, introduction of the new Section 38a *EGGVG* serves as an example *par excellence* of the legislator's willingness to adopt intrusive measures and its simultaneous unwillingness to remove them, even if their practical relevance amounts to zero. As such example, the case may be instructive also for other fields of law, e.g. intrusions on privacy. Thirdly, the matter is not only relevant for Germany, but also for other countries such as Spain or Turkey, where *incommunicado* detention is frequently applied in practice.

We have seen that *incommunicado* detention, even when regulated in a rather restrictive manner as is the case with the German *Kontaktsperregesetz*, contravenes general human right principles established under the ECHR or the German Constitution. Even if we accept that the temporary, absolute deprivation of prisoners from any contacts to the outside world was necessary in this particular situation, considering that the life of a person was at stake, there is no justification why the law did not put a temporary limit on this intrusive measure (knowing that prolonged *incommunicado* detention can amount to torture). If the legislator in 1977 was not able to provide for this, under the shock of the recent events, it is still

[116] This becomes even more probable, following the recent discussions in Germany, instigated by the German home secretary Wolfgang Schäuble who proposed *inter alia* preventive custody for terrorist suspects. *See* Thomas Darnstädt, *Im Vorfeld des Bösen,* DER SPIEGEL, July 9, 2007, at 18-30.

difficult to comprehend why subsequent legislators did not then amend (if not abolish) the laws respectively. One hope remains: While new anti-terror laws are discussed and adopted at high speed in Germany, the *Kontaktsperre,* as ancient as it is, might simply continue to be overlooked.