Is the Judiciary under Pressure? Judicial Independence in an Age of Terrorism

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Abstract

Over the past several decades, terrorist threats in western liberal democracies have grown substantially. But the level of threat went higher after the September 11, 2001 (9/11) terrorist attacks on the U.S. soil. The present paper examines the effect of terrorist threats on the judicial independence before the 9/11 and after the 9/11. Judicial independence is analyzed by modeling a constitutional ideological issue space analytical framework and drawing on relevant case law data involving litigations on terrorism-related human rights violations through court proceedings. The present paper argues that there is a variation in courts' decisions on terrorism-related human rights violations before the 9/11 and after the 9/11. The level of terrorism threat is likely to help us understand this variation and to enable us to assess whether the level of terrorism threat could provide reliable theoretical explanation that can effectively be applied to different judicial systems across democracies. Employing small-N design and using case law data from four different western democracies (U.S., UK, Germany and France), results indicate that there are variations in court decisions involving similar cases on terrorism-related human rights violations adjudicated before the 9/11 and after the 9/11.

1. Introduction

Are there threats to judicial independence arising from terrorist threats? The present paper examines judicial independence during periods of national security threats. In particular, it pays considerable attention to the influence of terrorist threats on the independence of the judiciary in western democracies. Although western liberal democracies are known to have a strong judicial independence, the changing world of a complex global terrorism poses a considerable challenge to the courts and the rule of law. Responses to high-level national security threats by governments often tend to take a big ideological distance from ordinary freedom, respect for human rights and the rule of law that the constitution guarantees. Indeed, threats to judicial independence are very likely to arise whenever there is a broader assaults on the rule of law and the institutions that are designed to protect it. The essence of this article is not to challenge a centerpiece of judicial independence orthodoxy that accounts for the tenure of judges, the budget autonomy of the judiciary, and the merit selection of judges as stronger predictors of judicial independence. Rather the analysis herein is to explicate the relationship between judicial independence and terrorist threats by modeling a constitutional ideological issue space. This is a directional and proximity model that provides a generic analytical framework for understanding the behavior of the courts during periods of national security threats. This model is useful in expanding the literature in this area of study and, thus deepening our appreciation of threats to judicial independence.

The concept of judicial independence as articulated in this article is conceptualized in two different phases. The first phase examines judicial independence during periods of low-level terrorist threats, while the second phase explores the judicial independence during periods of high-level terrorist threats. The low-level and high-level refer to terrorist threat levels with low-level suggesting that terrorist attack is possible but not likely and the high-level denoting terrorist attack is highly likely. These two contextual differences have important implications for understanding judicial decision-making during periods of national security threats. The primary aim of the present paper is to provide a fresh perspective in understanding how terrorist threats can potentially trigger actions that lead to undermining the independence of the judiciary by both the executive branch and the legislative branch. The analysis of the constitutional ideological space model produces a strong argument that the judicial protection of rights and fundamental freedoms tends to weaken during periods of high-level national security threats on account of the diminished judicial power. More succinctly, the efficacy of judicial protection of liberty in western liberal democracies is conditioned by a measure of national security threat.

Just as Marx Weber stresses nature and timing of social revolution as an important historical cause, the September 11, 2001 (hereinafter 9/11) terrorist attacks on the U.S. soil became an important historical cause of national security revolution in many western democracies. This marked the beginning of the global war against terrorism. Soon after the 9/11, western liberal democracies realized that all was not well in terms of national security preservation. Immediate drastic measures needed to be undertaken in order to preclude any future catastrophe designed by the ‘evil’ and criminal acts of Islamist extremist terrorists. Both the executive arm and the legislative arm of government made concerted effort to craft new security legislations aimed at preventing terrorism. By so doing, the third arm of the government – judiciary was only left with the role of interpreting

the new counterterrorism laws and policies. It should be borne in mind, however, that even before the 9/11, western democracies had been experiencing terrorist attacks and had some legal framework of prosecuting criminal offenses related to terrorism. However, the impact of the 9/11 terrorist attacks led to new legislations being enacted with tougher measures aimed at not only preventing terrorism, but also pre-empting its formation.

The implications of implementing the new counterterrorism laws and policies have, however, been broad and have received myriad criticisms including violations of rights and fundamental freedoms protected by the constitution. Some of these violations include detention without trial, the right of *habeas corpus*, torture and ill-treatment, notions of guilt by association, extraordinary rendition, and undue constitutional avoidance in some cases. These violations not only affect the rule of law, but also serve as impediments to fair trial. This phenomenon has the potency of triggering interbranch tensions, particularly between the executive and the legislative arms on the one side, and the judicial arm on the other side. Apparently, the actual conflict that pit the executive/legislature against the judiciary derives from motivational struggles and contradictory imperatives. While the state is motivated to make security preservation as its top priority, the judiciary must struggle to make constitutional protection of rights and fundamental freedoms as its cardinal priority. It is therefore imperative to examine whether terrorism-related human rights litigations founded on very different contextual meanings, low-level threats (i.e. before the 9/11), and high-level-threats (i.e. after the 9/11) are influenced (moderated) by the level of national security threat.

The primary aim is to able to understand whether high-level terrorist threats after the 9/11 put judicial actors (judges) in situations that pressurize them to act in certain directions perceived to be contrary to the legal and constitutional norms. It is only by examining terrorism-related human rights adjudications (case laws) that we are able to understand and determine the motives behind the courts' decisions. The idea here is to be able to understand the real context forming the court's decision. We are also able to tell if the judge's decision is sincere and guided by the law or driven by other external influence. The external influence as used in this article denotes the counterterrorism laws and policies produced by the concerted effort of both the executive and the legislature. The new counterterrorism laws and policies are thus being imputed as the primary external influence acting negatively on the independence of the judiciary. Independent courts have no option, but to administer the law impartially, promote human rights, and ensure that individuals are able to live securely under the rule of the law.

The present article provides a comparative framework for assessing the effect of terrorism threats on the independence of the judiciary in western liberal democracies with specific attention to the U.S., UK, Germany and France. In particular, the role of courts in responding to terrorism-related human rights challenges posed by the global war on terror is adequately explicated. It is well argued herein that the more appropriate way to examine the independence of the courts is by observing whether or not they hesitate to check the legal and constitutional limits on executive action, especially in the context of terrorism-related human rights litigations. It is important to understand whether or not the judicial process is likely to be characterized by undue constitutional avoidance and great judicial deference to the executive and legislative security policies. When

Judges perceive security matters as properly within the ambit of the executive determination, but become reluctant to address the rights violations occasioned by executive actions, then the judiciary would appear weaker in its role of checks and balances. This is because courts have inherent constitutional responsibility to protect not only the rule of law, but also procedural fairness against government powers.

The rest of this article is organized as follows. Section two terrorist threats in western liberal democracies, section three ideological issue space model, section four state power in security preservation, section five judicial power in liberty protection, section six US, section seven UK, section eight France, section nine Germany, and section ten is the conclusion.

2. Terrorist Threats in Western Liberal Democracies

Terrorist threats have evolved over the years to become a complex global threat. The assumption being made here is that terrorist attacks after the 9/11 have been of proportional magnitude and, hence lend a significant impact on the independence of judicial systems in liberal democracies. This proposition is a plausible depiction, but requires robust probing for validation. It is this change in the magnitude of terrorist threats and how it affects the autonomy of judiciary in respect of adjudications of terrorism-related human rights cases that this article endeavors to investigate. Considering observations before 9/11 and after 9/11 provides a possible cross-temporal dimension to account for the fact that pressure on the judiciary tends to build under the influence of security legislative and policy transformation processes and in this case, new counterterrorism legislations. It shall be illustrated later on in this article that different contexts affect judicial outcomes in different judicial systems.

Western liberal democracies now face immense difficulties in modern times, particularly in protecting their citizens from terrorist violence. Terrorist threats can lead to rapid changes in national security policy that are often guided by politics and rhetoric at the expense of the rule of law. The scale of the danger posed by global terrorism cannot be underestimated. In Western Europe, German like the US, UK and France has a history of terrorism and national security jurisprudence. All these countries are constitutional democracies and have for a long time encountered terrorist movements. It can be said that for a long time, they have been endowed with a wealth of constitutional experience in balancing security and liberty. For instance, the Germany Constitutional Court has often used proportionality and balancing analyses to resolve national security and human rights related disputes.[1] However, the terrorist attacks on the 9/11 traumatized not only, the American people, but also the rest of European democracies. Just a few years later, Britain also suffered lethal terrorist attacks on July 7, 2005. In France, the Terrorism Situation and Trend Report (TE-SAT), which Europol produces each year since 2006, the European Union (EU) member states experienced 151 deaths and more than 360 injuries in 2015 only. This includes the November 2015 terrorist attacks in Paris, France.

However, how the executive and the legislative branches respond to such threats have important implications for the independence of the judiciary. The interference with the judicial role has been

[1] MILLER, A. Russell. Balancing Security and Liberty in Germany. *Journal of National Security Law and Policy*. Vol. 4, 2012.

more dramatic in effect, particularly during periods of high-level terrorist threats. For instance, there have been cases whereby the state resorts to 'special' or military courts as trial fora for terrorist-related offences, instead of allowing such cases to be tried in the ordinary open courts. Moreover, there have been instances where the state adopts unlawful measures that seek to curtail judicial engagement in the administration of justice. The effect of such unlawful measures have resulted in undermining the rule of law and the interference of fair trial. In the adjudication of terrorism-related human rights litigation, the principle of fair trial would be materially compromised if the state arbitrarily subjects terrorist suspects to torture and ill-treatment in extracting evidence, longer detentions without trial, *habeas corpus* denial, and extraordinary rendition. These are serious impediments to the administration of justice. Such moves by the state is a manifestation of undermining the cardinal principle of judicial independence. Thus, the judiciary should never be denied its role of judicial oversight to authoritatively examine the legality of any action of a person or authority in accordance with the provisions of the constitution or any law of a country.

Measuring judicial independence could be very challenging. Legal scholarship on this topic opines that measuring the degree of judicial independence in a specific jurisdiction or legal system is not easy as there is no uniform methodology and that, assessment requires more than quantitative and qualitative data. But even once data are collected, the validation of those data still lacks an exact methodology.[2] Indeed, while it might be easy to identify case laws where a court clearly did not act according to the law, it would not be very easy to determine the reasons motivating the judge to decide a particular way in a single case. Even though assessing the legal safeguards provided for in a given country is relatively simple, detecting the actual motivation of an individual judge would be much more complicated. It is thus impossible to have data on judicial independence without possible deficiencies. The implication therefore is that it is difficult to establish a precise and reliable score on judicial independence.[3]

Despite the deficiencies and considering the fact that it might not be easy to accurately assemble an effective method of measuring judicial independence, there are nonetheless widely used methods to establish an approximate picture of what an independent judiciary entails. One of the less disputable methods involve checking whether a given legal framework complies with the principle of judicial independence and provides for the necessary safeguards. This method ensures that there are standards that are to be followed, as set out, for example, in the Council of Europe Recommendation (2010)12 'Judges: independence, efficiency and responsibilities.' In this article, a different angle is employed as one alternative way for determining judicial independence.

The model presented in the section below provides a universally applicable analytical framework of how an independent judiciary should work in liberal democracies. It is a theoretical functioning of institutional arrangements found in a majority of democracies in the administration of justice. The idea behind functionalism is to look at the way practical problems of solving conflicts of interest are undertaken in different legal systems. Societal problems such as terrorist threats are to

[2] WINTER, Lorena Bachmaier. *Judicial independence in the Member States of the Council of Europe and the EU: evaluation and action.* (2019).
[3] Ibid 2.

be experienced in many democracies today. But these democracies have some legal framework which helps to resolve such problems. Although legal concepts, legal rules, legal systems, and legal procedures may sometimes be different, the legal solutions to such problems may, however, be similar. In examining the responses of the U.S., UK, Germany, and France to the problem of terrorist threats, the model provides a functional process based on functional equivalents of relevant institutions that are charged with providing solutions to practical problems and in this case, balancing between security preservation and liberty protection.

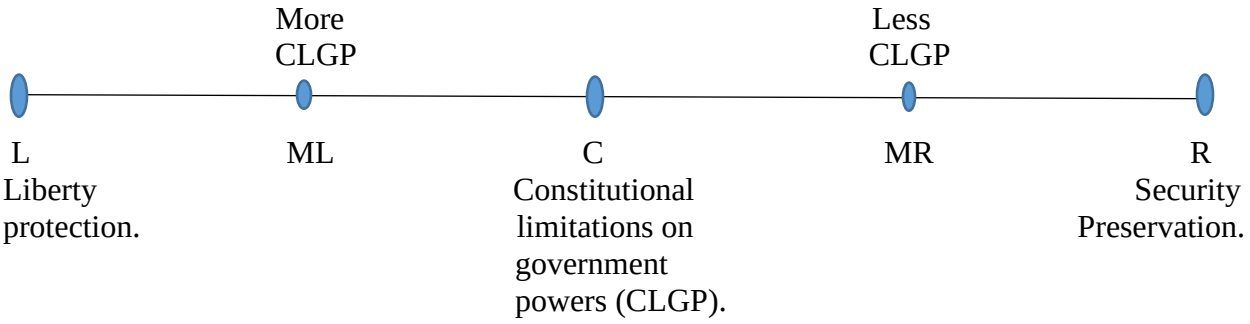
3. Ideological Issue Space Model - Analytical Framework

To advance research on the relationship between terrorist threats and threat to judicial independence, that is, the influence of terrorism on judicial independence, this article directly models the ideological issue space for analytical framework. It takes the form of "Security and Liberty Ideological Framework" (hereinafter SLIF). This is done using a one-dimensional (unidimensional) continuum, which ideologies are placed, ranging from "very liberal" on the extreme left to "reactionary" or "very conservative" on the extreme right. This framework not only provides most analyses of security and liberty ideologies, but also characterizes the standard ideological constitutional provisions. This framework bears the concept of conventional ideological spectrum.

The concept of constitutional ideology as used in this article refers to a system of ideas and ideals, which form the values and principles of a liberal democracy. Essentially, it carries the norms of western liberal democracies. These norms draw on constitution ideologies, which are either codified or uncodified. In this case, the constitutional ideologies captured include, the separation of powers into different branches of government, the independence of the judiciary, judges as protectors of rights, a system of checks and balances, the rule of law, and the equal protection of liberties. The terms liberty, rule of law, liberal democracy, low-level national security threat, high-level national security threat, and judicial independence are all ideological labels. These constitutional ideologies may also be referred to as 'ideal types', meaning constitutional elements common to western democracies (U.S., U.K, German, and France) under study. Ideal types are not meant to refer to perfect, or moral ideals of democracies, but rather to stress common characteristics of those democracies.

The ideological space model below determines the power function of the executive vis-à-vis the judiciary in a constitutional democracy during the low-level and high-level national security threats. From this model, we are able to examine the behavior of the judiciary and to determine its independence in two-time periods (low-level and high-level) of national security threats. The unidirectional model is fashionably (deliberately) labelled as briefly described: from extreme left to extreme right on the continuum have points L, ML, C, MR and R. Point L on the extreme left denotes liberty protection, point ML denotes middle left, point C denotes constitutional ideologies, point MR denotes middle right, and point R denotes security protection. Then the constitutional limitations on government powers (CLGP) is fixed at C in the middle of the continuum and is assumed to strike the balance between the executive power and the judicial authority, thus satisfying the checks and balances principle.

Firstly, it is assumed that the CLGP position on the unidirectional continuum is fixed (enshrined) in the constitution (C) and should not change even during times of national security threats. Secondly, it is assumed that the government is very likely to violate the CLGP position at point C and try to shift it to point MR during national security threats. Thirdly, it is also assumed that whereas the government will prefer position MR as opposed to position C during times of national security threats, the liberty proponents would still prefer either point C or point ML during security threats. Moving the CLGP to the right, shrinks the enjoyment of liberty. As the distance between L and CLGP moves further to the right, then the judiciary becomes under pressure to pull back the CLGP back to point C in order to satisfy the principle of checks and balances.



Individuals tend to enjoy more liberty when the CLGP position moves more from the center to the left side. This implies that individuals feel that the government's interference in their lives is very limited and the courts have a constitutional obligation to protect those rights. However, when the CLGP position shifts more to the right, it implies that the government is assuming (clawing back) more powers and defying its constitutional limits on powers. When this happens, individuals lose more liberty and turn to the courts for protection. At this point, the courts are more likely to feel the pressure to pull back (restore) the CLGP to the center and, thus satisfying the principle of checks and balances. When the courts are able to pull back the CLGP to the center, the rule of law is thus restored.

Based on this analytical framework and applying it to terrorism-related human rights violations adjudications, judicial independence can then be determined on the basis of the ability of the courts to restore the CLGP from any space on the right of C to C- the center. Liberty protection by the judiciary could be a good measure of judicial independence. This is because it is emphatically the province and duty of an independent judiciary (autonomous courts) to interpret what the law is and not to unduly defer to the executive policy if that policy runs afoul of the constitutional provisions. Indeed, courts in liberal democracies are imputed a special responsibility for ensuring that individuals do not suffer unjust treatment at the hands of the government. In this article, it is illustrated that as the level of terrorist threat changes from low to high, the enjoyment of liberty

and its protection inversely changes from high to low. It then becomes the onus of the judiciary to restore that change to its original position.

In determining judicial independence again it is important to pay considerable attention to how both legal rules and legal principles are being applied by the courts. In other words, it is necessary to consider reasons for judicial decisions because they are the ones that play an important role in legal justification. For instance, in cases where judges defer to national security preservation over the liberty protection even if the legal rules supporting liberty protection make reasonable sense to the context of the case, there must be a reasonable justification as to why the court is unable to apply the legal rules. In the absence of that justification, then it would be reasonable to conclude that there must be some external influence acting on the case.

As a basic tenet of the Madisonian democracy, the concentration of power by the government poses a great threat not only to the decisional autonomy of judges, but also to individual autonomy and freedom. The government should adhere to the constitutional principles (ideologies), and ought not to have the totality of power in liberal democracies. Liberty can only be protected by the judiciary when it is capable of pulling back the CLGP from any space to the right back to point C. This model provides an illustrious argument that terrorist threats present greater risk to judicial independence, especially when threat level is high (i.e. substantial, severe, and critical) in democracies. Conversely, a period of low-level terrorist threats is likely associated with lower risk to judicial independence in democracies. The model is therefore capable of providing a plausible account of the relationship between judicial independence and national security threats in democracies that have been harmed by terrorist attacks in recent period.

4. State Power in National Security Preservation

The state usually has the most interest in securing order in society. The state therefore must executively ensure and realize order in society. In so doing, it must centralize and monopolize force. According to the social order theory, in any democratic society, the social order is imperative and, indeed societies must be held strongly together by collective morality. But because of the complexity of modern society, collective morality might become weaker and, thus giving way to social disorder or pathologies. This social disorder may be caused by some social facts. As Emile Durkheim correctly observed, social facts emanating from non-shared moral beliefs are likely to shape individual behavior in society. Those who join terrorism to inflict harm on innocent people, for example, must be subscribing to other social facts that are morally unpopular. When the social order is not well balanced in society (i.e. lack of equilibrium) it calls upon state authorities to restore normalcy or equilibrium. This is exactly the case with the terrorist attacks that increasingly cause harm to innocent lives and property. Such attacks cause disorder through the use of illegal force to an otherwise orderly society.

The executive is more likely to expand its powers when its legitimate use of force is being threatened, when its constitutional obligation of protecting lives and property is being challenged, when its legitimate power is being contested by illegitimate power, and when its ability to provide security is being defeated through unlawful means. Since it is only the government that can exercise legitimate force or coercion in a democracy, there is no other person or entity with such

right to take the government's constitutional responsibility of exercising force. In such cases, the state must act to preserve itself and to protect its citizens by dehumanizing those individuals that are inclined to social disorder. Threats to national security can be effectively mitigated if all the branches of government (executive, legislature, and judiciary) exercise their constitutionally mandated functions. This requires optimal practice of functions within the separation of powers doctrine. This has been the case for several years, especially in liberal democracies. However, the current landscape of terrorist threats have probably challenged the traditional optimal functions of governmental powers. The traditional security apparatus appear weak to guarantee security and protection in democratic societies. This phenomenon calls for extra-ordinary measures in extra-ordinary times.

In a bid to justify state power, proponents of state-centered theories advance the argument that state has a pre-legal right, or non-positive right of natural law, and therefore it is supposed to act for its own preservation.[4] This view is purely classical. According to Klaus Stern, the state always has an unwritten, supra-positive right of necessity, which positive law cannot limit.[5] This school of thought further argues that norms cannot bind state in exceptional situations in which instead, the state, by necessity, has its own right to self-preservation. It asserts that legal norms cannot take away the right of the state due to the very abnormality of exceptional situations. In other words, the state is perceived as a pre-legal institution, whose power is originally unlimited, and only tamed by the law. This perceived right of the state is not merely alongside the constitution, but clearly against it, since the constitution cannot apply in an abnormal, emergency situation.[6] However, a moderated version views the power of state as subject to positive law. The moderated state-centered version is that although the state has the right to employ all the necessary measures to fight against intrusion and destruction of public order by state enemies, those measures should derive from the provisions of positive law.

The constitution-centered theorists, however, advance the idea that there needs to be protection of constitutional interests by the state. This school of thought articulates a prohibition on excessiveness of governmental powers. Furthermore, it demands compliance with positive law by the state. In other words, the constitution-centered theory advances the supremacy of the constitution, while the state-centered theory advances the supremacy of the sovereign (executive). How then should the liberal democratic state reconcile these opposing lines of thought? The foregoing theories pose dilemma to state authorities in liberal democracies. This is compounded by the fact that the encroachment of government on individual's rights and fundamental freedoms often fail to achieve presumptive validity. How then should governments approach this more complex problem in the face of a high-level national security threats? To be able to answer to these questions, it is important to invite more discussions on the best possible ways that state authorities

[4] KOJA Fredrich traced this view back to the Hegelian idea of the state as preeminent institution. See KOJA Fredrich: *Der Staatsnotstand als Rechtsbegriff*, Salzburg, Pustet 1979, 12.
[5] See JAKAB Andras: *European Constitutional Language*. Cambridge University Press. Cambridge CB2 8BS, United Kingdom, 2016, 315.
[6] See Kruger (n.86) 31 'Emergency law, by its very concept, implies recose to natural law as against positive law').

should act during exceptional circumstances (i.e. extraordinary times) such as during periods of war and terrorist attacks.

Immediately after the 9/11, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act was passed in the US with little debate or amendment to the legislation. This new counterterrorism legislation enabled the then US Attorney General to effectively cancel *habeas corpus* with a decree that stated the government would henceforth consider detaining aliens for a longer period without trial. However, a New Jersey Judge denounced the government's refusal of *habeas corpus* and the names of the detainees were never released by the state authority. Instead, the Attorney General responded by issuing an emergency regulation trumping the State court's decision. It can be clearly seen here that terrorist threats enables the state to gain justifiable and defensible executive powers. This phenomenon clearly illustrates the motivational struggle between the executive and the judiciary in security preservation and liberty protection, respectively. The bid by the court to try and pull the CLGP from the right side space position back to the C position as per the analytical model was clearly frustrated by the executive. This is yet a clear illustration of how the independence of the courts can be interfered with by the executive power. In this case, it can be said that the court acted fearlessly and according to the law, thus stamping its independence.

5. Judicial Power in Liberty Protection

The table below illustrates the pressure on the judiciary before the 9/11 and after the 9/11. In examining all the four liberal democracies, it can be argued that although all these democracies were experiencing terrorist threats even before the 9/11, the level of terrorist threats were low, legal frameworks against terrorism existed albeit not very strict, terrorism-related human rights violations existed although at a low level, and protection of rights and fundamental freedoms were enshrined in the constitution. However, the level of pressure on the courts in adjudicating terrorism-related human rights violations was not as great as compared with the pressure the courts are experiencing after the 9/11. The table below captures the theoretical conceptualization in the above model. The argument being made is that terrorism-related human rights adjudications after the 9/11 have put considerable pressure on the courts to pull back the CLGP back from the right side space to the C position. When the courts are not deferential to the constitutional liberty protection when it is clear that state authorities are liable for the rights violations, then it can be argued that the courts have weaker judicial power.

Table 1.1 illustrating comparisons of the four democracies before and after the September 11, 2001.

The four western liberal democracies before September 11, 2001 terrorist attacks on the U.S. soil.									
Country.	Experiencing terrorism threats?	Level of terrorism threats.	Counter-terrorism law and policy?	Tougher counter-terrorism law and policy?	Terrorism-related human rights violations?	Level of terrorism-related human rights violations.	Protection of human rights enshrined in the constitution?	Liberal democracy?	Greater pressure in adjudicating terrorism-related human rights violations?
USA	yes	low	yes	no	yes	low	yes	yes	no
UK	yes	low	yes	no	yes	low	yes	yes	no
Germany	yes	low	yes	no	yes	low	yes	yes	no
France	yes	low	yes	no	yes	low	yes	yes	no
The four western liberal democracies after the September 11, 2001 terrorist attacks on the U.S. soil.									
USA	yes	high	yes	yes	yes	high	yes	yes	yes
UK	yes	high	yes	yes	yes	high	yes	yes	yes
Germany	yes	high	yes	yes	yes	high	yes	yes	yes
France	yes	high	yes	yes	yes	high	yes	yes	yes

Source: author.

Scholarship observes that courts are likely to be deferential to the government when both the executive and the legislature are united. However, when government is fragmented, the courts are able to fight overbearing security laws and policies.[7] This argument suggests that courts adjudicate and produce outcomes depending on the dyadic consensus of both the executive and the legislature. This also implies that the courts are not able to freely stamp their own authority, but instead relies on the strength and weakness of the other two branches of government. When this happens, particularly when the proportionality of rights violation by the state is high, then it can be deduced that the courts adjudicated under some external influence.

It is important to mention, however, that in almost all liberal democracies, judges would be more careful to give the executive encouragement to continue the infringement on liberty for fear of being entrapped and acquiesced to the legitimacy of executive atrocities. Legal scholarship acknowledges that in choosing between protecting society and protecting individuals, judges may

[7] LARUE F. Patrick. Judicial Responses to Counterterrorism Law after September 11. *Democracy and Security*. Vol. 13. No.1, pp 71-95, 2017.

reflect on how to construe the law and whether they should give effect to the will of government or choose another course.[8] For instance, within the EU Member States, there is the risk that the principle of 'mutual recognition' based on mutual trust can be uncritically or blindly applied without assessing the personal and substantive circumstances of individual cases. This principle now requires that the executing Court (authority) must undertake necessary check and assessment before complying with the European arrest warrant (EAW). This means that even among the EU Member States judges, there is lack of mutual trust per se in how each Member State handles human rights cases. This principle (mutual recognition) is already severely weakened in Case C-216/18 PPU Minister for Justice and Equality v. LM. Judges must now consider judicial independence as a precondition for mutual trust. Breach of the right to a fair trial in one Member State could be a ground for putting on hold the principle of mutual recognition and for refusing to execute a European arrest warrant.

6. United States

In the United States, cases that have arisen post-9/11 are worth of attention. The arbitrary detention of 'enemy combatants' at the Guantanamo Bay in Cuba and the lawfulness of trial by the Military Commission were of great concern. This also interfered with habeas corpus. The designation of terrorist suspects in question as 'enemy combatants' and the lawfulness of their detention in military camps was of great legal and constitutional concern, particularly because some of the detainees were US nationals. In *Hamdi v. Rumsfeld,* for example, a court of appeals determined that Hamdi (Petitioner) a US citizen designated an "enemy combatant" could be indefinitely confined and had no right to challenge his designation in federal court. However, the U.S. Constitution grants citizens held in the United States as an enemy combatant the right to a meaningful opportunity to challenge the factual basis for his detention before an impartial decision maker.[9]

The petitioner was an American citizen captured and designated an "enemy combatant" by the United States Government. He was then placed into an indefinite confinement at Guantanamo Bay. He filed a federal writ of habeas corpus and the Fourth Circuit Court of Appeals found his detention legally authorized and determined that the petitioner was not entitled to further opportunities to challenge his "enemy combatant" designation. He later appealed the Court of Appeals ruling and the Supreme Court granted certiorari. The issue before the Supreme Court was whether the Constitution grant an American citizen held in the United States as an enemy combatant the due process right to challenge the factual basis for his detention before an impartial decision maker. The Court emphatically held that the Constitution grants citizens held in the United States as an enemy combatant the right to a meaningful opportunity to challenge the factual basis for his detention before an impartial decision maker. Even in times of war, the country must retain its values and the privileges of citizenship.

[8] GRAVER Hans Petter. (2015). Judges against Justice: On Judges When the Rule of Law is Under Attack. Heidelberg: Springer.

[9] US Supreme Court, Yaser Esam Hamdi and Esam Fouad Hamdi as next friend of Yaser Esam Hamdi, Petitioners v. Donald H. Rumsfeld, Secretary of Defense, et al., 542 US 507 (2004) decided June 28 2004.

On 12 June 2008 the Supreme Court of the United States decided that persons detained by the United States in Guantanamo Bay have the constitutional privilege of habeas corpus. The recognition that all detainees are entitled to this basic right, irrespective of their nationality, their designation as 'enemy combatants' or their offshore location, has been hailed as a victory for the rule of law. Jubilation is somewhat tempered by the fact that it took six years to decide that detainees are entitled to a protection that would normally guarantee judicial access within hours, days or maybe weeks. *Boumediene v. Bush*, 553 U.S. 723 (2008), was a writ of habeas corpus submission made in a civilian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, held in military detention by the United States at the Guantanamo Bay detention camps in Cuba. Guantanamo Bay is not formally part of the United States, and under the terms of the 1903 lease between the United States and Cuba, Cuba retained ultimate sovereignty over the territory, while the United States exercises complete jurisdiction and control. The case was consolidated with habeas petition Al Odah v. United States. It challenged the legality of Boumediene's detention at the United States Naval Station military base in Guantanamo Bay, Cuba as well as the constitutionality of the Military Commissions Act of 2006. Oral arguments on the combined cases were heard by the Supreme Court on December 5, 2007.

In the US case, we see a situation whereby habeas corpus constitutionally applies, theoretically guaranteeing access to a court within hours or days of arrest and detention. But one must question why it took the US courts several years to determine the question, yet habeas corpus writ constitutes an emergency remedy. Was there a meaningful judicial response to this sort of emergency remedy?

In *Boumediene*, we see that there is a far more deferential approach to the government by the US Appeals court, which is an inferior court to the US Supreme Court. One wonders why the US Appeals court would defer to the government's anti-liberty national security policy. However, it takes the courage of the superior court of the land – the US Supreme Court to rule against government's violation of the right to liberty. In this matter the lawfulness of detention was successfully challenged. The *habeas* proceedings and the outcome indicated a lack of justification for prolonged detentions by the executive. The result also indicates the importance of the judicial review function by the Superior court.

In another case involving 'extraordinary rendition', there was an incident of kidnapping and secret transfer of terror suspects without any process of law to some offshore states (detention by proxy) that have poor records of human rights protection. Such countries still allow torture, arbitrary detention and other serious human rights violation. This was the experience of Khalid el-Masri, whose case provides great insight into the practice of extraordinary rendition. El-Masri is a German citizen who was arrested by Macedonian border officials in December 2003, apparently because he has the same name as the alleged mentor of the al-Qaeda Hamburg cell and on suspicion that his passport was a forgery. After three weeks he was handed over to the US Central Intelligence Agency (CIA) and flown to Baghdad and then to 'the salt pit', a covert CIA interrogation center in Afghanistan. He was held for 14 months, allegedly mistreated and prevented from communicating with anyone outside the detention facility, including his family and the German

government. After some time, it then became apparent to his captors that his passport was genuine and that he had nothing to do with the other el-Masri. He was eventually set free in May 2004.

When a lawsuit was brought before a US court, the government invoked the so-called 'state secrets' privilege, arguing that the 'entire aim of the case is to establish state secrets'. The case was dismissed in its entirety by the US District Court, and upheld by the US Court of Appeals. In October 2007, the Supreme Court decided, without giving reasons, to refuse to review the case. This matter was never settled on by courts. It was simply the end of the line for justice in US courts for el-Masri. Despite the government's misconduct, it mounted a defense that such proceedings might per se damage its national security. But clearly, this was a travesty of justice for el-Masri. We see again US lower courts (US District Court and Court of Appeals) deferring to the government policy (security preservation) in lieu of liberty protection. The lawsuit did not, however, get to be heard by the US Supreme Court.

7. United Kingdom

In 2004, there was another terrorism-related human rights litigation in the UK. The case is framed as *A and others v Secretary of State for the Home Department.*[10] This case is also known as the Belmarsh 9 case. It involved nine appellants, six of which were detained in December 2001, and the three others were detained between February and April 2002. The case concerned the prolonged detention of non-UK nationals in Her Majesty's Prison Belmarsh, on the basis of their suspected involvement in international terrorism, pursuant to the 2001 Anti-Terrorism, Crime and Security Act. In order to allow such a measure, the United Kingdom had derogated from its obligations in respect of the right to liberty under Article 5 of the European Convention on Human Rights (ECHR). Since they were charged under the UK's Anti-terrorism, Crime and Security Act 2001, part 4 of the Act provided for their indefinite detention without trial and deportation. However, the power was only applied to non-British nationals. Under section 25 of this Act, they had the right to appeal to the Special Immigration Appeals Commission (SIAC) against their detention. But the SIAC, which is also a court in the UK, ruled against them and in favor of the government policy. Consequently, all the nine appellants took their appeals to the House of Lords to challenge the decision of the Special Immigration Appeals Commission to eject them from the country (UK) on the basis that there was evidence that they threatened national security.

The House of the Lords held that the indefinite detention of foreign prisoners in Belmarsh without trial under section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights. As a consequence, the House of Lords made a declaration of incompatibility under section 4 of the Human Rights Act 1998, and granted the appeals.

In this particular case, the right of *habeas corpus* was not, as such, in dispute. The argument in this case was the lawfulness of the derogation and of the indefinite detention of non-nationals as opposed to national, thus applying double standards and discriminating against non-nationals on the equality of justice. When the matter went before the House of Lords, which was then the Supreme Court of appeal in the United Kingdom, the court found that the United Kingdom's

[10] [2004] UK House of Lords 56.

derogation from the European Convention on Human Rights to enable it to detain people on national security grounds, potentially indefinitely, was not valid. Although the majority deferred to the government's assessment of the existence of an 'emergency' justifying derogation, they however, found that the detention of non-nationals could not be justified as strictly required by that emergency. The majority judgment notes that 'If derogation is not strictly required in the case of one group (nationals), it cannot be strictly required in the case of the other group (non-nationals) that presents the same threat.' The House of Lords thus found a violation of the rights to liberty and to non-discrimination, provided for in law in the United Kingdom via Articles 5 and 14 of the ECHR.[11]

In *Belmarsh*, we see yet another pattern whereby the Special Immigration Appeals Commission, which is a court inferior to the House of Lords, deferring to government's anti-liberty national security policy. However, it takes the courage of the superior court of the land – the House of Lords to rule against government's violation of the right to liberty. It is important to note that while the House of Lords grappled with the difficult issue of balancing between security and liberty, it did its best to strike an acceptable balance in a democratic society facing the challenge of international terrorism.

Moreover, the issue of admissibility of torture evidence also played out in the United Kingdom, in the case of *A and Others v. Secretary of State for the Home Department (No. 2).*[12] The case concerned the admissibility of torture evidence, before the UK Special Immigration Appeals Commission. This matter involved evidence that may have been obtained through torture by foreign states. The UK government advanced the argument that evidence obtained through torture at the hand of a UK official is inadmissible, whereas evidence obtained through torture at the hand of foreign officials, for whom the United Kingdom is not responsible, is admissible. This argument was strangely accepted by the court of Appeal. In its judgment of 8 December 2005, however, the House of Lords rejected this rationale, asserting that torture is torture no matter who does it, and that such evidence can never be admitted in legal proceedings. Here we see again the important role of the Superior court overruling decision of the lower court by reaffirming fundamental principles. If torture evidence were to be allowed, then definitely there would be no guarantee of fair trial.

8. France

In France, there has been an expansion of the executive branch in the war against terrorism and a consequent repression of liberty in recent years. This is in light of the terror attacks committed in France by its own citizens, and growing engagement of its young people with international Islamic extremist. Moreover, counterterrorism measures have taken the pre-emptive approach as opposed to the ordinary criminal approach. The pre-emptive criminal justice approach means that even the mere predictability of the dangerousness through interpretation of signs of behavior, belief, social habits becomes a reason for arrest by the police. By enforcing the law to punish mere suspicions

[11] DUFFY Helen. Human rights litigation and the 'war on terror. *International Review of the Red Cross*. Volume 90 Number 871 September 2008.
[12] UK House of Lords, A v. Secretary of State for the Home Department (SSHD) (No. 2) [2005] UKHL 71, Judgment of 9 December 2005.

prior to the commission of a crime, it means that the fight against terrorism challenges the foundations of the criminal law. It thus replaces the idea of prevention, with the less certain notion of pre-emption. The current matrix of terrorist attacks in France has made national security become an issue of 'political management' and this has contributed to diminishing power of the judicial system in protecting civil liberty. The other issue is that even mere association of wrongdoers in relation with a terrorist enterprise has become a terrorism-related offence in France. It perceives a terrorist act as the mere participation in a group in view of the preparation of an act of terrorism.

After the 9/11, France legislated even tougher counterterrorism laws. For instance, in 2004, there was for the first time in the legislation history of France, a participation (conspiracy) legislation that was set to prosecute as a felony, any form of association with groups or organizations perceived to be of terrorists. That kind of offense was made to attract a punishment of up to 10 years, and the leaders of the group, could get up to 20 years imprisonment. Two years later, in 2006, the punishment of the mere participation in a group with a criminal aim (such as attack on persons or the destruction of property with explosives) was raised to 20 years and 30 years for leaders. In July 2016, this harshening process reached its final peak with the punishment set at 30 years for participation and life imprisonment for directing the terrorist group. Moreover, the 2016 legislations brought about other radical procedural changes such as the prolongation of pre-trial detention.[13] This meant that those suspected of membership of an outlawed terrorist organization could now be held for up to three years prior to trial, compared to only two years for those suspected of commissioning terrorism. The idea was to prolong the investigation action in conspiracy.

9. Germany

Against the background of the global campaign against terrorism threat, counterterrorism legislation in Germany has ignited considerable debate over the relationship between public security and human rights. The latest developments in Germany's counterterrorism legislation serve to explicate whether and to what extent Germany authority provides its citizens with adequate legal protection regarding human rights.

Terrorism in Germany, just like in the United Kingdom, has brought great harm to the Germany nation. In 2017, for example, there were terrorist incidents in Germany: On July 28, a United Arab Emirates-born Palestinian refugee who had been denied asylum allegedly killed one and injured five others with a machete while shouting *Allahu akhbar* in a Hamburg grocery store. He was reportedly radicalized shortly before the attack. Even though the suspect was known to the police and assessed as mentally unstable rather than a security risk, his commission caused great harm and raised questions on how state authority should respond to foreigners suspected of terrorist activities. This incident sparked widespread calls for stronger enforcement of deportation laws and discussion of the difficulty of identifying threats. Shortly after the incident, on November 27, the Mayor of Altena in North-Rhine Westphalia was seriously injured in a knife attack. His attacker

[13] French counter-terrorism: Administrative and Penal Avenues. Report for the official visit of the UN Special Rapporteur on Counter-Terrorism and Human Rights May 2018.

said the mayor's refugee-friendly policies were the motive for the attack.[14] Following these two incidents, the German authority responded by enacting new counterterrorism legislations which were perceived to be far-reaching.

In 2017, for instance, Germany justifiably significantly increased the number of its terrorism-related investigations, arrests, and prosecutions, and to a lesser extent, increased prosecutorial and law enforcement resources to handle the increased caseload. Law enforcement targeted a range of terrorist groups including violent Islamist extremists (approximately 90 percent of cases, and the greatest threat according to German officials), the Kurdistan Workers Party (PKK), the Turkish Revolutionary People's Liberation Party/Front (DHKP-C), and domestic left wing and right wing actors. At the same time, the government enhanced monitoring of *Gefaehrder* (i.e., dangerous persons who had not been accused of crimes but had come to the attention of law enforcement), began deportations of foreign terror suspects, and actively investigated returning foreign terrorist fighters. Terrorism has become a major issue for all political parties in Germany and counterterrorism measures seems to be a top priority among political leaders. Germany is a member of the Global Coalition to Defeat ISIS and therefore continues its counterterrorism cooperation with the international community.[15]

In line with its constitutional mandate to provide security and safety, the Germany government enhanced its existing counterterrorism laws with several pieces of legislation, including: expanded use of mobile license plate reading systems to assist police and border security personnel; legalization of electronic ankle bracelet monitors; implementation of European Union (EU) Directive 2016/681 concerning Passenger Name Record (PNR) data; implementation of EU regulations to strengthen EU-wide law enforcement data sharing and align data protections with Europol regulation 2016/794; authorization of online search and source telecommunication surveillance; and enhanced prosecution tools for hate crimes and online propaganda posted by terrorist organizations. The Germany government's response to terrorism threats following the incidents of attack was reminiscent of 'scotched earth.' Probably the term "enemy penology" coined by Guenther Jakobs brings to bear the response of Germany authority to terrorism threats.

Due to increasing and unpredictable terrorism threats, Guenther Jakobs' terminology of "enemy penology" is gaining political credence in the war against terrorism in Germany. Jakobs introduced the concept of "enemy criminal law" (*Feindstrafrecht*), or enemy penology, into the legal debate, due to a concern with the increasingly anticipatory nature of criminalization in German legislation in the last decades of the 20th century. Against the backdrop of a series of terror attacks in the West and the ensuing debates on how to deal with the dangers and threats of the new millennium, Jakobs's theory gained new momentum in Germany's public discourse and beyond.[16] This concept has become a device for political intervention. Indeed, the notion of the enemy penology is

[14] See United States Department of State, Country Reports on Terrorism 2017 - Germany, 19 September 2018, available at: https://www.refworld.org/docid/5bcf1fa54.html. Accessed 15 December, 2019.
[15] id
[16] KRASMANN Susanne. *Criminological Theory, Critical Criminology*. Online Publication. Date: Jan 2018DOI: 10.1093/acrefore/9780190264079.013.36. https://oxfordre.com/criminology/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-365. Accessed on 2019. 10. 27.

"attractive" and indispensable for dealing with certain extreme crimes and notorious offenders, not only to prevent future crime and avert harm from society but also, to preserve the established ordinary criminal law. This concept advances the idea that the enemy should be isolated and excluded from the normal system in society. Enemy criminal law therefore may be a peculiar legal concept that has found its way in counterterrorism law.

The German authority has adopted a multi-agency approach to investigating terrorism threats. It is now the case that counterterrorism investigations must be conducted by both federal and state-level law enforcement agencies and coordinated through the Joint Counter-Terrorism Center, which is composed of 40 internal law enforcement and security agencies. According to a recent report by the Ministry of Justice, the report indicates that there were 1,119 active terrorism investigations during January to November 2017, a sharp increase from 238 in 2016. Some cases were offshoots of refugee processing (for example, asylum seekers claiming to be threatened by violent Islamist extremists). Law enforcement agencies significantly expanded use of the *Gefaehrder* (perpetrators) designation, used to monitor "extremists," and completed the first deportations of known terrorists. Thirty-six *Gefaehrder* were deported in 2017, the majority to Algeria, Bosnia and Herzegovina, and Tunisia.[17] It is also important to note that in August 2017, the Germany Constitutional Court upheld a law permitting expedited deportations of persons on the *Gefaehrder* list. This is important because it highlights an incident where the judiciary supports government's policy on the fight against terrorism.

It should, however, be noted that there is some similarities between Germany and France in their responses to terrorism threats. While it is apparent that the French Government created and introduced 'enemy penology,' a similar phenomenon is replicated in Germany's criminal justice system. For example, the two high profile 2017 cases highlight increased sentences for terrorism convictions. Four defendants associated with the 2012 Bonn Rail Station Bombing Plot were convicted on charges that included founding and/or membership in a terrorist organization, conspiracy to commit murder, and weapons violations. The main defendant received a life sentence with no possibility of parole, which is rare in Germany. The accomplices received between nine years and nine months and 12 years, which are atypically long sentences in Germany. This clearly illustrates the point that the state is more inclined to codify or introduce 'enemy penology' as opposed to using the ordinary penal code while fighting terrorist suspects. This also raises the issue of discrimination between criminals because both terrorist acts and other ordinary criminal acts are jointly treated as criminal offences by law because terrorism is nothing but a crime.

The other point to bring forth about Germany's authorities resolve to fight terrorism is the high suspicion regarding religious affiliation. It is interesting to note, for example, that the Germany Anti-Terror Act 2006, amended 2017 provides several requirements of personal details (data) that must be obtained from terrorist suspects. It is worrying that the "Anti-Terrorism File Act of December 22, 2006 (Federal Law Gazette I p. 3409), which was last amended by Article 10 of the Law of August 14, 2017 (Federal Law Gazette I p. 3202)" requires terrorist suspects to disclose their religious affiliation, among other requirements. For, example, § 3(hh), which mainly addresses types of data to be stored in police file asks for information on religious affiliation and

[17] https://www.refworld.org/docid/5bcf1fa54.html. Retrieved on 2019. 11. 2.

justifies this on the basis of the necessity to know an individual's religious affiliation for the purposes of clarity in combating international terrorism. This requirement increases the possibility of profiling and discrimination of foreigners based on their religious creed.

The other interesting aspect of the Germany's counterterrorism law is its security measures on surveillance laws. These laws have come under greater scrutiny. It is a constitutional obligation that the German government has to protect and respect personal privacy, which is why the country has had some of the most restrictive surveillance laws in the world. Any other deviation from this obviously falls afoul of the German constitution. However, the increased terror threat in recent years has seen the German government tighten measures on the streets and online. In June 2017, for example, the German government added an unprecedented spate of new public surveillance laws to Germany's Criminal Code. This saw a major increase in the number security cameras installed across cities and sanctioned federal police to wear body cams while on patrol. At the same time, the Germany authority mandated the BfV to be responsible for monitoring "anti-constitutional" and extremist activity by intercepting data sent through telecommunications networks, such as emails, telephones and text messages. It does this either by requesting the data from the telecom providers, or through what is known as the "Trojan Law," which allows malware to be installed on computers and smartphones. Intercepted data is allowed to be stored for up to six months.[18] This development attest to government's violation of privacy rights and runs afoul to the German constitution.

In each state of Germany with the exception of Bavaria, the law allows for detention of suspects without charge for a maximum of 14 days. However, in 2017 the southern state of Bavaria caused a huge legal drama when its regional government sought to keep suspected terrorists indefinitely detained without charge. The state's ruling party, the Christian Social Union, was actually accused by a number of opposition lawmakers and the press of seeking to undermine the rule of law. The Bavarian regional government ultimately introduced laws allowing suspects to be held without charge for up to three months at a time. However, every three months, a judge must decide whether the suspect can be released or not. In theory, a suspect could remain imprisoned for years. Terrorist attacks in the Bavarian cities of Würzburg and Ansbach; a mass shooting in Munich; and the truck attack at the Christmas market in Berlin completely ramped up security measures against terrorism in the state of Bavaria. In response to these violent incidents, the state of Bavaria passed a new law expanding the powers of the police. "The most efficient defense against dangers is to not let them emerge at all," said Bavarian Interior Minister Joachim Herrmann. "We're an open society, but in order to protect that society we need a strong state. Civil liberties will not be threatened by the authorities through laws or surveillance, but rather by extremists and chaos."[19] At the same time, electronic ankle bracelets, heightened surveillance, aggressive action against potential threats were some of the new measures taken by the Bavaria's parliament to counter extremism. The main aim was to stop imminent threats.

[18] https://www.dw.com/en/preventing-terrorism-what-powers-do-german-security-forces-have/a-40546608. Retrieved on 2019. 11. 12.
[19] https://www.dw.com/en/bavaria-ramps-up-security-measures-against-terrorist-threats/a-39829936. Retrieved on 2019. 11. 14.

Criticisms were raised following the introduction of the new counterterrorism laws. One of the criticism came from Markus Löffelmann, a judge at the Munich District Court. "We have to remember that we're dealing with a situation in which the person concerned has not committed a criminal offense," warned the judge.[20] But he was not the only one who criticized the changes introduced by the new legislation. Criticism also came from both the judges' union and the police force. The opposition in the state parliament also voiced their concern and said the law goes too far. Katharina Schulze of the Green Party, for example, said that the possibility of arresting people who haven't been convicted or suspected of a crime is a massive infringement on their rights. The Social Democrat (SPD) politician Franz Schindler who was a strong proponent of revising the security laws also voiced a concern that the freedom of citizens would be disproportionately limited in the name of security by the new measures. For this reason, the SPD abstained during the vote in parliament. Schindler was especially critical of how the vaguely defined term "imminent threat" empowered the police while possibly infringing upon constitutional rights.

It can be deduced from the discussions in this section that while some of the newly introduced counterterrorism laws are consistent with the constitutional principles that guarantee the protection of fundamental rights and freedom, others pose significant challenges to the constitution, rule of law and, of course judicial independence. The balance between national security and human rights in Germany's war against terror has increasingly tilted in favor of security.

10. Conclusion

High-level terrorism threats produce challenges that weaken the principle of judicial independence in liberal democracies. This is because the pressure on the government to preserve national security and to maintain law and order, not only affects the executive branch of government, but is a shared pressure that also affects both the legislative and the judicial arms of government. It is a pressure that often translates into the legislature and the judiciary feeling the need to support the government achieve its national security policy. This pressure creates an environment that does not make judges feel fully free to decide terrorist-related cases exclusively according to the law. This means that during trial of terrorist suspects, impartiality might not be guaranteed because of the pressure on the judiciary to support the executive achieve its national security policy objectives.

Among western liberal democracies, the level of implementation of judicial independence varies greatly between different countries due to different political and judicial systems. Because of the diversity of legal systems, constitutional positions and approaches to the separation of powers could also be different. It is also fair to assume that there could be some possible divergence in the level of protection of judicial independence between EU Member States and non-EU Council of Europe Member States. Each country would behave differently when faced with imminent terrorist threats. It is very likely that during high-level terrorism threats, the executive actions would pay little regard to the rule of law and this in turn would hamper the right to a fair trial of terrorist suspects. Since the likely breach of the rule of law and the right to a fair trial is possible, particularly

[20] https://www.dw.com/en/bavaria-ramps-up-security-measures-against-terrorist-threats/a-39829936. Accessed on 2019. 11. 10.

during periods of high-level terrorism threats, this would imply that an efficient delivery of justice by judges would not be possible.