

# Civil Liberties under Pressure Democracy in Times of Internal Insecurity

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Modern democracies find legitimacy chiefly through two key promises: They guarantee fundamental freedoms, civil and human rights, and they promise to provide security for their citizens. On the one hand, the liberal state thus restrains itself in order to protect individual spheres of freedom, and submits the execution of its monopoly of force to democratic and constitutional control. On the other hand, citizens expect the state to provide sufficient resources to ensure collective security. The legitimacy of the liberal state thus rests on two sometimes conflicting principles: self-restraint by the state and the guarantee of security.

This conflict has been particularly sharp over the past fifteen years. The 9/11 terrorist attacks in New York and Washington were a turning point in the way democratic societies handle threats to their security internally and externally. In many democratic countries, legislation was tightened and basic rights sometimes massively curtailed. However, contrary to the public impression, the curbing of civil liberties after 9/11 was by no means a sweeping phenomenon. Reactions by democratic societies to the new threats differed widely. Whereas people in the United States, France, Spain, and the United Kingdom had to accept massive losses of freedom in the immediate aftermath of 9/11, elsewhere – for instance in the Nordic countries or the Netherlands – little changed.

## A renaissance of civil liberties?

Almost no research has yet been done on how civil liberties have developed since. Based on the assumption that liberal democracies are systems particularly capable of learning and, given their rule-of-law component, committed to upholding liberal rights and freedoms, one could expect that a period of restriction on civil liberties should be followed by a renaissance of liberal rights. Recent data covering the period from 1990 to 2012 confirm this hypothesis.

A well-functioning legal system, a lively civil society, and a freedom-minded political culture ought, in principle, make it difficult for democratic lawmakers to impose too far-reaching restrictions on individual liberties. However, illiberal reactions to perceived threats, for instance of terrorist attacks, in fact often present themselves as evidence of functioning democracy: Political elites react strongly to the (actual or supposed) wishes of the population by considerably tightening security legislation – sometimes in keeping with long-cherished aims.

## Democracies rely on the capacity for self-correction

Since the rule-of-law component in democratic governance operates with a delay inherent in the system – courts do not react immediately to legislative measures but only on application – perceived threats quite often provoke excessively stringent security legislation, which can be reined in only much later in the course of democratic and constitutional discussion and reflection. What helps democracies in such situations is that free public debate, civil society engagement, a capacity for political reorientation, and even judicial intervention provide them with tools that permit a kind of self-correction that is inherent in the democratic system.

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**Summary:** After the 9/11 terrorist attacks more restrictive security legislation severely curtailed civil liberties in several Western democracies. During the following decade, civil liberties were largely restored, albeit to varying extent from country to country. Our findings suggest that democratic regimes are capable of correcting their security legislation if they are constrained by rule-of-law institutions that are embedded in a liberal political culture.

Empirical evidence shows, however, that such democratic reconsideration does not take place to the same extent or in the same fashion in all countries. Whereas in the United Kingdom, France, and Germany, for example, civil rights have recovered markedly after a period of curtailment up to 2012, this cannot be said for the United States of America and only in some measure for Spain and Italy. How do we explain these differences between democracies?

Political science research on internal security policy generally pursues three major explanatory approaches: The first attributes the differences to comprehensive trends (economic and social conditions, postmodernity/risk society, globalization); the second to the political context (political culture, path dependencies, political institutions, party competition, media system); and the third to the interests and preferences of the actors involved.

From a theoretical standpoint, three sets of explanations for the recovery of civil liberties after a period of massive curtailment seem to be particularly relevant. First, the strength of the rule of law (strong and independent (constitutional) courts render the recovery of civil liberties more likely); second, the degree of liberality of the political culture (the more liberal the political culture of a society is, the more likely liberal civil liberties are to recover even after massive curtailment); and third, the extent of direct involvement in major terrorist attacks (countries hit by major attacks – notably the United States, the United Kingdom, and Spain – can be expected to experience weaker regeneration of civil liberties. The attacks in Belgium, France, and Germany after 2012 did not occur in the period under study).

## When the experience of terror does not matter

While the first two propositions proved to be empirically correct, the third, interestingly, did not. In other words, while strong rule of law and a liberal political culture increase the chances that democratic societies in fact re-establish civil liberties even after they have been curtailed, the question whether a society has been directly hit by terrorist attacks or not has no influence on this process.

We assessed the state of civil liberties on the basis of data from the so-called Political Terror Scale (PTS). The PTS measures above all state violations of physical integrity rights and the frequency of political imprisonment, that is to say, the historical and normative core of modern civil liberties and fundamental rights. On a five-point scale, the PTS assesses the extent to which violations of habeas corpus guarantees and physical integrity rights occur in a country. Within this scale, civil liberties fare best when there are no curbs on the rule of law, no political imprisonment let alone torture of prisoners, and thus no political terror. In the worst case, state terror, torture, and the murder of citizens is widespread. Such violations of civil liberties are a particularly flagrant failure of the state.

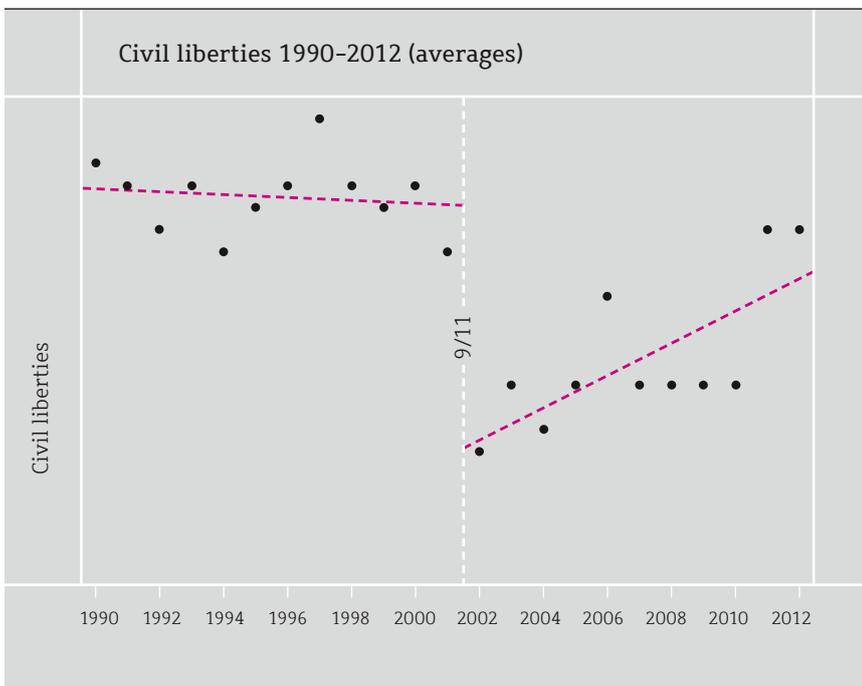
In the set of liberal democracies in the OECD world we examined for the period between 1990 and 2012, no such far-reaching violations of civil rights occurred, but variance this side of any systematic and widespread violation of rights is considerable: whereas New Zealand and Norway, for example, had the top score in the 23 years of the period under study, the United States experienced a massive curtailment of civil liberties after 9/11 from which it had not yet recovered by 2012. The United Kingdom experienced the strongest losses only after the attacks of 2005, but by 2011 had already returned to the base level. In Germany, by contrast, marked curtailment of freedoms occurred in the 1990s, while Spain has had a consistently low score since 2001.

Apart from variance between countries, developments over time are particularly interesting. For the average of civil liberties across all countries there is a clear break between 1990 and 2012 (see figure). In the 1990s, the average was close to the top of the scale. From 2002, however, it was significantly lower. Thus 2001 marks an important change. At the same time, developments after 2002 are statistically significant and positive: from 2002 to 2012 the value rose again



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The dots represent the average value of civil liberties per year. The coloured dashed lines show the regression lines for the two periods, i.e. linear convergence to average.

almost to the level of the 1990s. This means that, while reactions to 9/11 brought a significant curtailment of freedom in Western democracies, it had almost fully recovered by 2012.

Moreover, the differences between countries are much greater in the second half of the period under observation. Variance in scores between 2002 and 2012 is twice as high as between 1990 and 2000. This points to considerable heterogeneity in the way the various countries dealt with the challenges of terrorism.

How well civil liberties in a given country can recover depends on the political culture of a society and the position of the judiciary. The more strongly law-and-order thinking dominates and the more dependent and weaker the judiciary is, the weaker regeneration will be. In countries with a very thin law-and-order tradition, the situation for civil liberties improved between 2002 and 2012 by half a point on the five-point scale (all other factors being equal). By contrast, in countries that focus strongly on security policy there was no recuperation. The same is true for a strong *Rechtsstaat* and an independent judiciary: Particularly strong and independent legal systems improve the score from 2002 to 2012 by almost a whole point on the scale.

## Institutions and culture matter

Democratic societies thus differ in their capacity to correct adverse developments in the field of internal security and their ability to restore civil liberties even after massive curtailment. A well-functioning judicial system can in the medium term help restore civil liberties even if it is unable to prevent their curtailment in the short term. In turn, a liberal culture diminishes the probability that freedom is significantly curtailed at all and makes it more probable that political and legal decisions are being passed, implemented, and accepted that restore freedom. The democratic recovery effect thus has an institutional and a cultural component.

What are the consequences for democratic governance caught between freedom and security? Even more than fifteen years after 9/11, the question of how to deal appropriately with the risk of terror dominates the debate on security policy in Western democracies. However, the picture of democratic societies react-

ing to the threat of terrorist attacks with sweeping curtailment of freedom is just as selective as the impression that civil liberties are steadily declining. In fact, there are many cases in which democratic politics maintain a liberal course even under such threats or in which overreaction in security policy has been corrected in the course of time. Democracies, too, overreact from time to time in matters of internal security; but liberal democracies are frequently in a position to redress matters in due course. In times when the German government installs federal Trojans and is debating the expansion of public CCTV surveillance, this is good news for the future of liberal democracy in the twenty-first century.

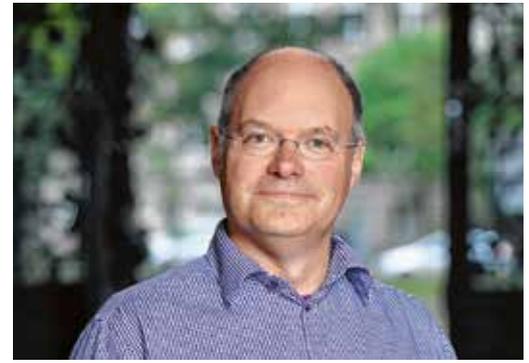
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