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Precaution in Countering Terrorism

An analysis of how politicians attempt to legitimise
indefinite preventive detention

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Abstract

Governments around the world have adopted various and diverse counter-terror measures with the primary aim being prevention. As a consequence, such measures have a strong anticipatory character. The purpose of counter-terror efforts has become to discover potential sources of terrorism, observe milieus which are conducive to radicalisation, and to detect persons whose profiles make them likely to commit an offence. However, this development is striking, as it is questionable whether all precautionary action is compatible with principles of the rule of law and human rights, which are essential building blocks of every democracy.

Consequently, this thesis seeks to discover how politicians in liberal democracies attempt to rhetorically legitimise precautionary counter-terror measures. To do so, the measure of indefinite preventive detention of terrorist suspects is taken as a drastic example of precautionary action. By looking at the parliamentary debates on the adoption of this measure, it is analysed how politicians in the UK and Bavaria attempt to legitimise it. Drawing on the governance through risk approach, it is argued that the same four rationalities underlie the politicians' justification discourses in both cases. The main concrete argumentative patterns and frames nevertheless differ in the two debates. It is therefore concluded that in order to effectively and sustainably challenge the legitimacy of precautionary measures, the underlying logic of the discourses should be tackled rather than their single elements.

Keywords: Counter-terror, precaution, legitimisation, politicians, rhetoric

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List of Acronyms

ATCSA - Anti-Terrorism, Crime and Security Act

BL - Bavarian State Parliament (Bayerischer Landtag)

CSU – Christian-Social Union (Christlich-Soziale Union)

ECHR - European Convention on Human Rights

HC - House of Commons

HL - House of Lords

MP - Member of Parliament

PAG - Bavarian Police Law (Bayerisches Polizeiaufgabengesetz)

SIAC - Special Immigration Appeals Commission

Chapter 1 - Introduction

1.1 Presentation of the problem

‘There is no priority higher than the prevention of terrorism’

John Ashcroft, US Attorney General 2001-2005, date unknown

Since 9/11, efforts to combat terrorism have become one of the top priorities for governments around the world.¹ The measures employed in this context are numerous and diverse. They include, but are not limited to, military interventions, such as the US intervention in Iraq, increased border checks, enhanced intelligence through mass surveillance, or the creation of new offences related to terrorism.² When looking at the extensive set of counter-terror measures more closely, it is striking that many have a strong anticipatory character. The attacks of 11th September 2001 and those that followed over the years in various places resulted in the perception of a continuing threat of catastrophic risk. This led many governments to think and act in a precautionary way. In trying to prevent terrorist attacks, counter-terror efforts are in many cases aimed at discovering potential sources of terrorism, observing milieus which are conducive to radicalisation, and detecting persons whose profiles make them likely to commit an offence. More practically, this means that entire populations are monitored for signs of radicalisation.³ The police can search individuals independent from suspicions and impose administrative control measures, including the wearing of electronic tags, even in the absence of concrete evidence. Those believed to be terrorists can be banned from travelling to certain countries and can be preventatively detained.⁴

Such precautionary counter-terror measures are implemented by various forms of government including democratic Western states, such as the US and the EU Member States. Given democratic governments’ declared commitment to human rights and the rule of law, the trend towards precautionary policies is striking. While precautionary action is not

¹ European Union Agency for Law Enforcement Cooperation, ‘European Union Terrorism Situation and Trend Report’ (2017) <<https://www.europol.europa.eu/sites/default/files/documents/tesat2017.pdf>> accessed 16 May

² For an overview of the concrete measures enacted in Europe, see for example: Amnesty International, ‘Dangerously Disproportionate: The Ever-Expanding National Security State in Europe’ (2017) <<https://www.amnesty.org/download/Documents/EUR0153422017ENGLISH.PDF>> accessed 20 February 2018

³ See for example Privacy International, ‘A Concerning State of Play for the Right to Privacy in Europe: National Data Retention Laws since the CJEU’s Tele-2/Watson Judgment’ (2017) <https://privacyinternational.org/sites/default/files/2017-12/Data%20Retention_2017.pdf> accessed 16 May 2018

⁴ Amnesty International (n 2)

negative per se, a number of precautionary measures heavily challenge principles of the rule of law and human rights.

The main issue with many precautionary measures is that they are based on vague suspicions, rather than evidence concrete enough to be admissible in a criminal proceeding. The measures are applied to individuals who the authorities believe might commit crime. This means that when individuals become subject to precautionary measures such as the wearing of an electronic tag, or are preventatively detained, often no concrete charges are brought against them. They receive little or no information on the grounds for being subjected to such measures. These individuals are highly disadvantaged in challenging the application of the measures and are consequently deprived of their right to a fair trial.⁵ According to the Venice Commission, ‘excessive pre-trial detention’, one example of precautionary action, ‘may be considered as prejudging the accused’s guilt’.⁶ Amnesty International therefore warns that ‘pre-crime initiatives’ would ‘undermine the presumption of innocence and leave people with fewer and weaker safeguards to challenge restrictions on their liberty than they would enjoy in the criminal justice system’.⁷ Furthermore, the definitions in the law which authorize precautionary action are in many cases considerably broad and imprecise, maximizing the group of persons which can become subject to the measures stipulated in the legislation. This undermines the principle of legal certainty, particularly the requirement that the application of legislation must be foreseeable.

Researchers at the International Centre for Counter-Terrorism conclude in their report that ‘many of the preventive counter-terror measures (...) present risks to (democratic) oversight procedures and human rights compliance that exceed their potential benefits as counter-terrorism instruments’.⁸ At the same time, they claim that the efficacy of precautionary measures ‘ranges from uncertain to distinctly counterproductive’.⁹ This also raises the question whether the measures meet the requirements of proportionality and necessity. In sum, the compatibility of precautionary counter-terror measures with rule of law and human rights principles is undoubtedly questionable.

⁵ ibid

⁶ European Commission for Democracy Through Law (Venice Commission), ‘Rule of Law Checklist’ (Council of Europe, 2016), 44

<http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> accessed 14 May 2018

⁷ ibid 48

⁸ Quirine Eijkman and Bart Schuurman, ‘Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation’ (International Centre for Counter-Terrorism - The Hague, 2011), 23 <<https://www.icct.nl/download/file/ICCT-Eijkman-Preventative-CT-and-Non-Discrimination-EU-July-2011.pdf>> accessed 4 June 2018

⁹ ibid 23

1.2 Research questions

Given that the compatibility of the trend to precautionary measures with principles of the rule of law and human rights is highly questionable, this thesis seeks to find out how politicians attempt to rhetorically legitimise precautionary counter-terror measures in liberal democracies. To this extent, it is looked at how politicians in the parliaments of the UK and Bavaria argue in favour of the adoption of legislation governing indefinite preventive detention of terrorist suspects. Furthermore, a focus is set on how these politicians, in arguing in favour of the measure, attempt to make precaution appear as a suitable means to handle the risk of terrorism.

1.3 Relevance of the work

The relevance of this research is twofold. First, there is a scientific relevance. As is explained in Chapter 2, the analysis at hand draws upon the so-called ‘governance through risk’ approach. While this analytical framework is theoretically well developed, empirical evidence is rather scarce. To this extent, the present research adds to existing scientific work by taking an empirical approach to the governance through risk concept. Finding evidence of this concept in the legitimisation discourses would provide insights into how it is concretely reflected in rhetoric and contribute to the elaboration of this analytical framework. Even if no evidence of the concept can be found, it can help to identify shortcomings and flaws in the approach.

The present research furthermore has a practical relevance. As aforementioned, the trend to precautionary measures is highly problematic. It is questionable whether all precautionary measures are compatible with principles of the rule of law and human rights. Given liberal democracies’ commitment to human rights and the rule of law, there is a strong need to analyse this trend in relation to how politicians attempt to legitimise them. Furthermore, it currently does not seem as if this trend will decline soon. In Germany, at the time of writing, discussions were ongoing regarding using the Bavarian Police Law analysed in this research as a blueprint across all of Germany.¹⁰ In this case, indefinite preventive detention would be a tool available to police officers in all of Germany, not just in Bavaria.

¹⁰ Johannes Berthoud ‘Ein Mustergesetz für Andere Bundesländer?’ *Tagesschau.de* (Munich, 15 May 2018) <<http://www.tagesschau.de/inland/polizeiaufgabengesetz-101.html>> accessed 20 May 2018

Another example is Australia where the preventive detention powers for terrorist suspects are currently planned to be extended to minors.¹¹

This research systematically looks at the argumentation and justification patterns and frames, as well as the framework conditions under which the debates took place. The findings can be helpful because in order to challenge the legitimisation discourse of politicians, it is necessary to understand their reasoning first. If one knows with which arguments and based on which assumptions politicians argue in favour of such measures, their legitimacy can be questioned in a more targeted and efficient way.

1.4 Definitions

The terms ‘precaution’, ‘detention’ and ‘suspect’ are essential for the analysis of the above identified problem. In order to avoid confusion, they are defined in this section.

1.4.1 Precaution

For the purpose of this research, the term ‘precaution’ is used to describe action over threats which have not yet emerged as determinate threats in the context of counter-terrorism efforts. As such, it requires intervention at a much earlier stage than prevention, which acts over verifiably existing threats. The term derives from the ‘precautionary principle’ which emerged in the context of European legal responses to environmental risks in the 1970s. It holds that uncertainty is no excuse for inaction against serious or irreversible risks.¹² The most cited definition of the principle can be found in the Rio Declaration on Environment and Development. It stipulates that ‘[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.¹³

There is no consistent terminology on this form of early prevention in existing literature. Many scholars use the term ‘preemption’ instead of ‘precaution’¹⁴. However, the term ‘preemption’ is considered not to be suited to describe the kind of counter-terror

¹¹ Melissa Davey, ‘Fears 14-year-olds Could be Targeted in Victoria's Counter-terrorism Laws’ *The Guardian* (London, 23 May 2018) <<https://www.theguardian.com/australia-news/2018/may/23/fears-14-year-olds-could-be-targeted-in-victorias-counter-terrorism-laws>> accessed 25 June 2018

¹² Jessica Stern and Jonathan B Wiener, ‘Precaution Against Terrorism’ (2006) 9 *Journal of Risk Research* 393

¹³ The Rio Declaration on Environment and Development (adopted 12 August 1992) UN Doc. A/CONF.151/26 (vol. I) 31 ILM 874, principle 15

¹⁴ De Goede for example uses the terms interchangeably (Marieke de Goede, ‘The Politics of Preemption and the War on Terror in Europe’ (2008) 14 *European Journal of International Relations* 161) whereas Anderson makes a distinction between both terms and chooses to use preemption for this kind of action (Ben Anderson, ‘Preemption, Precaution, Preparedness: Anticipatory Action and Future Geographies’ (2010) 34 *Progress in Human Geography* 777).

measures which are analysed in this thesis. In the field of strategic studies, preemption means ‘to strike first (or attempt to do so) in the face of an attack that is either already underway or is very credibly imminent’¹⁵. While a ‘preventive war’ is often equated with aggression, which is illegal under International Law, ‘preemption’ is not.¹⁶ The term gained renewed importance in the context of the US war on terror as it was used as a justification for the military intervention in Iraq. The counter-terror measures which are the subject of this thesis refer to policies aimed at preventing terrorist attacks, as opposed to military strikes. Therefore, the term ‘precaution’ instead of ‘preemption’ is used. This is also in line with the terminology used by Claudia Aradau and Rens van Munster who developed the governance through risk approach introduced in Chapter 2.

1.4.2 Preventive detention

There are several forms of preventive detention. In this thesis, preventive detention is defined as the detention of an individual without charge or trial in order to prevent misconduct or to protect an individual or the public. It should not be confused with the detention of individuals after they have served their sentence because they are considered at risk to commit a further crime.¹⁷

1.4.3 Suspect

It should further be clarified that the term suspect refers to a person *believed* to be guilty of a crime or offence. When the term ‘terrorist suspect’ is used in this thesis, reference is made to a person who is believed, even in the absence of admissible evidence, to have committed or was going to commit a terrorist attack.

¹⁵ Colin S Gray, ‘The Implications of Preemptive and Preventive War Doctrines: A Reconsideration’ (U.S. Government, 2007), v <<http://www.dtic.mil/dtic/tr/fulltext/u2/a470484.pdf>> accessed 25 May 2018

¹⁶ Henry Shue and David Rodin, *Preemption: Military Action and Moral Justification* (Oxford University Press 2007)

¹⁷ This form of preventive detention is practiced for example in Germany (so-called ‘Sicherungsverwahrung’) (‘Was Bedeutet Sicherungsverwahrung?’ *Tagesschau.de* (Berlin, 14 April 2011) <<https://www.tagesschau.de/inland/sicherungsverwahrung140.html>> accessed 20 May 2018).

Chapter 2 - Theory

In this chapter, the scientific framework for the research is laid out. First, a brief overview of the existing literature on rhetorical legitimisation of counter-terror measures and precautionary measures is given. Second, the analytical framework of governance through risk is outlined, which provides the conceptual lense through which the identified problem in this thesis is analysed.

2.1 Existing Work on Rhetorical Legitimisation of Counter-terror Efforts

A substantial amount of existing research looks at how politicians attempt to rhetorically legitimise counter-terror measures. As concerns concrete argumentation and justification patterns, several studies have set out to analyse how politicians use them to justify various counter-terror measures. Existing literature primarily points to the invocation of exceptionalism as a justification for counter-terror efforts.¹⁸ In her analysis, Sonia Cardenas finds that this argument is regularly used to apply various measures on ‘anyone suspected of terrorism’.¹⁹ Regina Heller and Martin Kahl emphasize that the argument of exception is often linked to necessity, claiming that exceptional measures are necessary to ensure security through whatever means.²⁰ An example of this is the ‘ticking bomb scenario’ outlined by Andrea Liese through which urgency and necessity for torture practices such as waterboarding is created.²¹ Heller and Kahl also identify this as an example of the use of normative dilemmas where one right or norm is made to compete with another.²²

Comparing the French and British political discourse in newspapers on counter-terror action, Anastassia Tsoukalas finds that the state of emergency in France is mainly justified by the gravity and exceptional nature of the terrorist threat. As regards the British discourse analysed by her, she looked at the statements made specifically in relation to the 2001 ATCSA, one part of which are the provisions on indefinite detention analysed in this thesis. She identified that the main argument in favour of the Bill was the government’s

¹⁸ See for example Andrea Liese, ‘Exceptional Necessity - How Liberal Democracies Contest the Prohibition of Torture and Ill-treatment When Countering Terrorism’ (2009) 5 *J. Int'l L & Int'l Rel.* 17; Andrew W Neal, ‘Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies’ (2012) 6 *International Political Sociology* 260

¹⁹ Sonia Cardenas, ‘Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior’ (2004) 6 *International Studies Review* 213, 223

²⁰ Regina Heller and Martin Kahl, ‘Tracing and Understanding “Bad” Norm Dynamics in Counterterrorism: The Current Debates in IR Research’ (2013) 6 *Critical Studies on Terrorism* 414

²¹ Liese (n 18)

²² Heller and Kahl (n 20)

responsibility to ensure public safety and national security.²³ Existing research has further identified empirical credibility as an argument often made to justify counter-terror measures.²⁴ In other words, actors argue that the proposed measure is effective in countering terrorism. According to Hegemann and Kahl, claiming that a measure is effective is a particularly powerful political strategy in order to create legitimacy.²⁵ Antonio Reyes analysed speeches given primarily by George W. Bush and Barack Obama with regard to how they legitimised military intervention in the context of the war on terror. He found that, in terms of concrete arguments, both leaders justified the intervention based on a hypothetical future. The arguments go along the lines that if action is not taken immediately, the same problem (eg 9/11) will occur again. In addition, they referred to voices of expertise, thereby gaining some sort of authorization for their policies. Finally, Reyes points out that altruism is used as an argument by claiming that the intervention will benefit others, in this case the people in Iraq.²⁶

While not an argument in the strict sense, Liese finds that measures are trivialised in order to get public agreement, for instance by arguing that a measure does not constitute torture but ill-treatment.²⁷ Furthermore, Philippe Sands concludes that actors like to use the notion of exemptionalism in which it is argued that the norm in question is rightful in principle, but in practice does not apply to them.²⁸ One of the most known invocations of this concept is Guantanamo, where the US held terrorism suspects in detention without charge or trial.²⁹

Besides analysing concrete argumentation and justification patterns, a number of researchers have also looked at the framing techniques used in counter-terror justification discourses. Several studies point out that frames, which are designed in a way that they resonate with representations of a theme that already exists within a community, are regularly made use of to this extent. Heller, Kahl and Daniela Pisoiu analysed the official

²³ Anastassia Tsoukala, 'Democracy in the Light of Security: British and French Political Discourses on Domestic Counter-Terrorism Policies' (2006) 54 *Political Studies* 607

²⁴ See for example Daniela Pisoiu, 'Pragmatic Persuasion in Counterterrorism' (2012) 5 *Critical Studies on Terrorism* 297

²⁵ Hendrik Hegemann and Martin Kahl, 'Constructions of Effectiveness and the Rationalization of Counterterrorism Policy: The Case of Biometric Passports' (2015) 38 *Studies in Conflict & Terrorism* 199

²⁶ Antonio Reyes, 'Strategies of Legitimization in Political Discourse: From Words to Actions' (2011) 22 *Discourse & Society* 781

²⁷ Liese (n 18)

²⁸ Philippe Sands, *Lawless world: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War* (1st American ed. Viking, New York 2005)

²⁹ Tim Dunne, "'The Rules of the Game are Changing": Fundamental Human Rights in Crisis After 9/11' (2007) 44 *International Politics* 269; Jason Ralph, 'The Laws of War and the State of the American Exception' (2009) 35 *Review of International Studies* 631

argumentation in favour of human rights challenging counter-terror measures in the US, EU and Russia. They found frame resonance in the arguments put forward by governmental actors in all three jurisdictions under investigation. Furthermore, they identified that these actors use frames which address the public's collective understanding of security and change beliefs on what legitimate and appropriate state behaviour is.³⁰

There is also ample research which highlights the importance of the creation of resonance with the (historical and cultural) identity of a society. An analysis of the US Government's discourse to legitimise the war on terror found that reference was continuously made to the identity of the civilised Western world representing values such as freedom and dignity.³¹ Jack Holland describes how discourses in North American, British and Australian foreign policy all draw on that society's specific understanding of identity.³² Along the same lines, it was found that the Australian Government shaped their arguments around national identity.³³ Richard Jackson points, among other things, to the US administration's representation of threat in the context of the war on terror, which defined and constructed identity in a particular way to legitimise military intervention and the suspension of civil liberties.³⁴ Jim Kuypers studied the US administration's justification for the war on terror. He found that the nature of the enemy and the war on terror are framed by using several dichotomies, including good vs evil, freedom vs tyranny and civilisation vs barbarism.³⁵

The literature outlined above looks at the rhetorical legitimisation of all kinds of counter-terror efforts. It places a particular focus on the rhetorical legitimisation of *precautionary* counter-terror measures, upon which little emphasis has been placed in academia so far. As Pisoiu explains, analyses of counter-terror rhetoric have mainly focussed on discourses relating to military interventions.³⁶ An example of this is the work of Reyes or

³⁰ Regina Heller, Martin Kahl and Daniela Pisoiu, 'A Coalition of Norm-Challengers? A Comparison of Official Counter-Terror Argumentation in the US, the EU and Russia' in Michael Brzoska (ed), *European Peace and Security Policy: Transnational Risks of Violence* (1st edn Nomos Verlagsgesellschaft mbH & Co. KG, Baden-Baden 2014)

³¹ Joanne Esch, 'Legitimizing the "War on Terror": Political Myth in Official-level Rhetoric' (2010) 31 *Political Psychology* 357; Ronald R Krebs and Jennifer K Lobasz, 'Fixing the Meaning of 9/11: Hegemony, Coercion, and the Road to War in Iraq' (2007) 16 *Security Studies* 409

³² Jack Holland, 'Foreign Policy and Political Possibility' (2013) 19 *European Journal of International Relations* 49

³³ Jack Holland and Matt McDonald, 'Australian Identity, Interventionism and the War on Terror' in Asaf Siniver (ed), *International terrorism post-9/11: Comparative dynamics and responses* (Contemporary terrorism studies, First issued in paperback 2012 Routledge, London 2012)

³⁴ Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (Manchester University Press, 2005)

³⁵ Jim A Kuypers, *Bush's War: Media Bias and Justifications for War in a Terrorist Age* (Rowman & Littlefield Publishers 2006)

³⁶ Pisoiu (n 24)

Kuypers cited above. Liese and Pisiu herself focussed on the legitimisation of counter-terror measures that challenge human rights norms. This thesis seeks to fill this gap in the research through a thorough analysis of the rhetorical legitimisation of a counter-terror measure with a particularly strong precautionary character: the indefinite preventive detention of terrorism suspects.

2.2 Theoretical Framework

There are several theories which look at rhetoric in order to understand the multiple and heterogeneous policies adopted since 9/11 under the label of fighting terrorism. The two most dominant schools of thought in this field are Richard Jackson's theory on the war on terror and the governance through risk approach put forth by Claudia Aradau and Rens van Munster. Jackson's theory holds that the events of 9/11 have been used by politicians as a means to legitimise political strategies that correspond to their strategic interest.³⁷ In other words, he attempts to explain *why* politicians adopt various counter-terror measures. This research, however, seeks to find out *how* counter-terror measures, despite their compatibility with rule of law and human rights principles being questionable, are adopted by parliaments in liberal democracies. In contrast to Jackson, the governance through risk approach does not focus on potential interests behind the adoption of counter-terror measures. By describing the practices of politicians, it accounts for how they make certain counter-terror measures acceptable and thereby the phenomenon of terrorism governable. Furthermore, Aradau and van Munster's approach focuses specifically on the trend of adopting precautionary counter-terror measures, of which indefinite preventive detention is one example. For these reasons, the governance through risk approach was selected to serve as a conceptual lense in this thesis.

Underlying this analytical framework is the conceptualisation of François Ewald that the risk of terrorism (and other contemporary risks) is infinite in two ways. It is infinite in its catastrophic effects and in its uncertainty.³⁸ This 'double infinity of risk'³⁹ makes the phenomenon difficult to govern. Terrorist attacks are uninsurable and incalculable. Drawing

³⁷ Heller and Kahl (n 20)

³⁸ François Ewald, 'The Return of Descartes' Malicious Demon: An Outline of a Philosophy of Precaution' in Tom Baker and Jonathan Simon, *Embracing Risk: The Changing Culture of Insurance and Responsibility* (University of Chicago Press, 2010)

³⁹ Claudia Aradau and Rens van Munster, 'Governing Terrorism Through Risk: Taking Precautions, (Un)Knowing the Future' (2007) 13 *European Journal of International Relations* 89, 21

on the Foucauldian account of governmentality,⁴⁰ Aradau and van Munster argue that a new, so-called '*dispositif* of precaution' has emerged in order to make terrorism appear 'governable'.⁴¹ A *dispositif* can be understood as 'a heterogeneous assemblage'⁴² which consists of 'discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions'.⁴³ The different elements can more generally be categorised as rationalities and technologies. While rationalities are 'ways of thinking about a social problem that will make its management practicable',⁴⁴ technologies are the means through which the rationalities are realised. Taken together, they form citizens in a way that makes them well suited to fulfil the government's policies.⁴⁵

The new *dispositif* of precaution, through which terrorism is supposed to appear manageable, consists of the four interlinked rationalities of zero risk, worst case scenario, shifting the burden of proof and serious and irreversible damage.⁴⁶ By promoting these rationalities, or ways of thinking about terrorism, citizens are formed to accept precautionary means such as preventive detention to be taken in response to terrorism. Thus, terrorism is made 'governable' in practice. The four rationalities are derived from the risk of terrorism being catastrophic and radically contingent. The idea of worst case scenarios makes any level of risk unacceptable. Given the unpredictability of another terrorist attack, surveillance begins to encompass the entire population and citizens are supposed to monitor themselves and those around them. The careful consideration of evidence is no longer necessary as the burden of proof shifts and it becomes the individual's responsibility to show that he or she is innocent.⁴⁷

⁴⁰ Michel Foucault coined the term 'governmentality' to describe the 'mentalities, rationalities and techniques used by governments, within a defined territory, actively to create the subjects (the governed), and the social, economic, and political structures, in and through which their policy can best be implemented' It is about governments trying 'to produce the citizens best suited to fulfill their policies' (Susan Mayhew, *A Dictionary of Geography* (Oxford University Press, USA, 2015))

⁴¹ Aradau and Van Munster, 'Governing Terrorism Through Risk' (n 39)

⁴² Ibid 6

⁴³ Claudia Aradau and Rens Van Munster, 'Taming the Future: The Dispositif of Risk in the War on Terror' in Louise Amoore and Marieke de Goede (eds), *Risk and the War on Terror* (Routledge, 2008) 25, citing Michel Foucault, 'The Confessions of the Flesh' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings by Michel Foucault, 1972-1977* (Pantheon Books 1980)

⁴⁴ Aradau and Van Munster, 'Governing Terrorism Through Risk' (n 39) 16

⁴⁵ Ibid

⁴⁶ Aradau and Van Munster, 'Taming the Future' (n 43)

⁴⁷ Aradau and Van Munster, 'Governing Terrorism Through Risk' (n 39)

Marieke de Goede, who analysed concrete governmental action such as the deployment of transactions data based on the governance through risk approach,⁴⁸ stresses that precautionary action requires ‘action in the present despite incomplete knowledge or unknowable threat’.⁴⁹ The aim of security becomes to ‘control and manage the future’, as Ben Anderson puts it.⁵⁰ In his research, he focused on the way in which the future is constructed in order to legitimise what he calls ‘anticipatory action’.⁵¹ Lucia Zedner refers to this development as a ‘pre-crime society’ which ‘shifts the temporal perspective to anticipate and forestall that which has not yet occurred and may never do so’.⁵² A pre-crime society is characterised by ‘calculation, risk and uncertainty, surveillance, precaution, prudentialism, moral hazard, prevention and which has the overarching goal of the pursuit of security’⁵³. In her work, she discusses the implications of the shift from a post- to a pre-crime society for criminology.

While several researchers have taken an empirical approach to the use of the *dispositif* of precaution, such as de Goede and Louise Amoore,⁵⁴ none have specifically focussed on rhetoric as one of the constituting elements of the *dispositif*. Taking the measure of indefinite preventive detention as an example of precautionary action, this research empirically adds to the governance through risk approach. Based on an analysis of the argumentation in two different parliaments in favour of this measure, it is demonstrated how the *dispositif* of precautionary risk plays out in the politicians’ speeches and terrorism is thereby made ‘governable’.

⁴⁸ Louise Amoore and Marieke de Goede, ‘Transactions After 9/11: The Banal Face of the Preemptive Strike’ (2008) 33 *Transactions of the Institute of British Geographers* 173

⁴⁹ Marieke de Goede, ‘Preemption Contested: Suspect Spaces and Preventability in the July 7 Inquest’ (2014) 39 *Political Geography* 48, 49

⁵⁰ Ben Anderson, ‘Security and the Future: Anticipating the Event of Terror’ (2010) 41 *Geoforum* 227, 228

⁵¹ Anderson, ‘Preemption, Precaution, Preparedness’ (n 14)

⁵² Lucia Zedner, ‘Pre-crime and Post-criminology?’ (2007) 11 *Theoretical criminology* 261, 262

⁵³ *ibid* 262

⁵⁴ See for example Louise Amoore and Marieke de Goede, ‘Governance, Risk and Dataveillance in the War on Terror’ (2005) 43 *Crime, Law and Social Change* 149; De Goede (n 49); Amoore and De Goede (n 48)

Chapter 3 - Method

In this chapter, it is explained with which method the research question will be answered. It is first outlined why the cases of indefinite preventive detention in the UK and Bavaria were chosen as case studies for this thesis, with each case study then presented in detail. In a second step, how the case studies are analysed and what limitations there are to this kind of methodology is explained.

3.1 Introduction of cases and case selection

3.1.1 Case selection

As has been outlined in Chapter 1, the compatibility of certain precautionary counter-terror measures with fundamental principles of the rule of law and human rights is highly questionable. It is not clear whether the principles of the presumption of innocence, legal certainty or a fair trial can always be guaranteed to those subject to precautionary action by law enforcement agencies. Therefore, there is a strong need to investigate how such measures are attempted to be legitimised in liberal democracies. In order to do so, two cases of a Bill providing for indefinite preventive detention as examples of precautionary action were chosen as subjects of the analysis. The first case is the British Anti-Terrorism, Crime and Security Act (ATCSA), adopted in 2001 and the second case is the 2017 amendment to the Bavarian Police Law (PAG). Why are they deemed to be best suited for researching the legitimisation strategies for the precautionary trend?

First, indefinite preventive detention clearly is a precautionary measure. It has a strong precautionary character because it is admissible for individuals which have not yet committed a crime, nor necessarily concretely engaged in planning activities. The police intervene based on a threat which has not yet come into existence but is predicted to do so at some point in the foreseeable future. Individuals can thus be detained based on evidence which is too weak to be used in a criminal trial. Furthermore, indefinite preventive detention is arguably the most intrusive precautionary measure. Surveillance or the imposition of administrative control measures can significantly limit the rights to privacy and liberty of an individual. However, if an individual is held in detention, their right to liberty is ultimately taken away. Being held in detention can also lead to stigmatisation of the detainee as a criminal, even if no concrete evidence exists to demonstrate that the individual has concretely planned to or already committed a crime. After the detention ends, and the detainee's right to

liberty is restored, they will therefore still be highly affected in their personal life. The chosen case studies provide no limit to the period of detention. One can expect that the longer the period of detention, the greater the effect on that individual's life will be.

Given the highly intrusive nature of indefinite preventive detention in combination with the absence of a requirement to bring any concrete evidence against that individual, it is expected that the need to justify enacting such measures in a democratic system must be very high. The guarantee of civil liberties, such as the right to liberty, form a key element for the functioning of every democracy. Limitations to one or more of the fundamental rights need to be exceptional and the government should prove that they are necessary for reaching a legitimate aim.

The British ATCSA and the Bavarian amendment to the PAG happen to be the only cases in which indefinite preventive detention has been adopted by a parliament in a liberal democracy. As such, they represent two exceptional cases in which the most intrusive precautionary counter-terror measure was adopted by parliament despite its questionable compatibility with the very foundations of a democracy. It was decided to look at the legitimisation strategies in both cases primarily to capture the whole range of argumentative patterns. Analysing both debates, however, is also interesting to the extent that the UK and Bavaria constitute two different political systems and both measures have been adopted at two very different points in time. The fact that the British debate took place shortly after 9/11 might for instance have had an influence on the British legitimisation strategy in comparison to the Bavarian one which took place 16 years later. For all of these reasons, it was decided to look at both the British debate on the ATCSA and the Bavarian amendment to its Police Law.

3.1.2 The British Anti-terrorism, Crime and Security Act

The Anti-Terrorism, Crime and Security Act was introduced in the House of Commons on 12th November 2001, two months after the 11th September 2001 attacks on the World Trade Center. After its introduction in November, the Bill was rushed through both Houses of Parliament and entered the statute book on 14th December 2001. It thereby replaced existing terrorism legislation which had just been overhauled one year earlier with the adoption of the Terrorism Act 2000.⁵⁵ The Bill includes various provisions intended to be used to combat terrorism. It grants the police and security services more extensive powers, for example on data retention and detention. The powers on checking and freezing financial assets of

⁵⁵ 'Terrorism Act 2000' *The Guardian* (London, 19 January 2009) <<https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/terrorism-act>> accessed 22 May 2018

suspected terrorists were furthermore extended and a series of new offences was created, among other provisions. David Blunkett, Home Secretary of the Labour Government at that time, furthermore intended to add incitement to religious hatred as a new category of criminal offences. However, this proposal met so much criticism in the House of Lords that he was eventually forced to abandon it. The final Act has been described as ‘the most draconian legislation [the U.K.] Parliament has passed in peacetime in over a century’.⁵⁶

Key elements of the final Bill are the provisions under Chapter 4 which enable the Home Secretary to indefinitely detain foreign nationals without charge or trial. In order to put an individual in detention, it is sufficient if the Secretary of State certifies on the basis of a ‘reasonable (...) belief or suspicion’⁵⁷ that the individual is either a ‘terrorist’ or someone whose ‘presence in the United Kingdom is a risk to national security’⁵⁸. The term ‘terrorist’ is subsequently defined very broadly, including an individual which ‘supports or assists’ an international terrorist group.⁵⁹ As this set of powers only applies to foreign nationals that are subject to immigration control, they are all theoretically free to depart the UK and end the detention, given they are granted entry into another country.⁶⁰ The powers to appeal are very limited under the Bill as they can only be brought before SIAC, a closed special immigration commission. This Commission can take appeals solely on points of law. This means that the individual can only challenge legal errors, not the information based on which he or she was detained. Detainees are thus unable to see the intelligence evidence against them at any point during their detention period. In order to have the House of Lords adopt the Bill, the government agreed to make the provisions subject to a sunset clause. The powers would thereby expire within five years, unless they were renewed by Parliament. The first foreign nationals were interned under the Act as early as 19th December 2001.⁶¹ According to a government paper, 17 individuals had been detained under the ATCSA by February 2004, two of whom ended detention through their departure from the UK.⁶²

⁵⁶ Mark Elliott, ‘United Kingdom: The “War on Terror,” UK-style—The Detention and Deportation of Suspected Terrorists’ (2010) 8 *International journal of constitutional law* 131, 133, citing Adam Tomkins, ‘Legislating against Terror: The Anti-terrorism, Crime and Security Act 2001’ (2002) *Public Law* 205

⁵⁷ *Anti-Terrorism Crime and Security Act 2001 (ATCSA)*, pt 4 sub-s 26 (5)

⁵⁸ *ATCSA 2001*, pt 4 sub-s 21

⁵⁹ *ATCSA 2001*, pt 4 sub-s 21 (4)

⁶⁰ Conor Gearty, ‘11 September 2001, Counter-terrorism, and the Human Rights Act’ (2005) 32 *Journal of Law and Society* 18

⁶¹ ‘Anti-terrorism, Crime and Security Act 2001’ *The Guardian* (London, 19 January 2009)

<<https://www.theguardian.com/commentisfree/libertycentral/2009/jan/13/anti-terrorism-act>> accessed 22 May 2018

⁶² Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper* (Cm 6147, 2004)

The provisions on indefinite detention were abolished in 2005 after a committee of nine law lords ruled that detaining foreigners without trial was in breach of the European Convention on Human Rights (ECHR) and the domestic Human Rights Act 1998. The appeal was made by nine individuals who had been detained in Belmarsh prison for almost three years without charge or trial. The Committee argued that the provisions were discriminatory as they only applied to foreign nationals and furthermore violated the right to liberty guaranteed under the ECHR and the Human Rights Act. The provisions were subsequently replaced by the Prevention of Terrorism Act 2005 based on which the former ATCSA detainees were placed under control orders.⁶³

3.1.3 *The Bavarian Gesetz zur effektiveren Überwachung gefährlicher Personen*

The years 2015 and 2016 were marked by an increased number of terror attacks in Western Europe,⁶⁴ including in Germany. In July 2016, two terror attacks were committed in the Bavarian towns Ansbach and Würzburg.⁶⁵ Five months later, 12 people were killed when a truck drove into a Christmas market in Germany's capital Berlin.⁶⁶ In this context, the *Gesetz zur effektiveren Überwachung gefährlicher Personen* ('Law for the surveillance of dangerous persons') was introduced on 4th April 2017 in the Bavarian State Parliament,⁶⁷ and entered into force on 1st August 2017.⁶⁸

The Bill essentially is an amendment to the Bavarian Police Law, extending the powers of police services in Bavaria. Bavaria has its own police law because every federal state in Germany is responsible for the activities of its own police force. The German Constitution limits federal police powers to exceptional issues including border protection

⁶³ 'Prevention of Terrorism Act' *The Guardian* (London, 19 January 2009) <<https://www.theguardian.com/commentisfree/libertycentral/2009/jan/13/prevention-terrorism-act>> accessed 22 May 2018

⁶⁴ Mark Hanharan and Jessica Wang, 'Number of Fatal Terrorist Attacks in Western Europe Increasing, Data Show' *Reuters* (London, 12 July 2017) <<https://www.reuters.com/article/us-europe-attacks/number-of-fatal-terrorist-attacks-in-western-europe-increasing-data-show-idUSKBN19X1QO>> accessed 21 May 2018

⁶⁵ Frank Jansen, 'Deutschland Sucht Nach den Motiven' *Der Tagesspiegel* (Berlin, 28 July 2016) <<https://www.tagesspiegel.de/politik/wuerzburg-muenchen-reutlingen-ansbach-deutschland-sucht-nach-den-motiven/13942412.html>> accessed 21 May 2018

⁶⁶ 'Berlin Lorry Attack: What we Know' *BBC News* (London, 24 December 2016) <<http://www.bbc.com/news/world-europe-38377428>> accessed 22 May 2018

⁶⁷ Klaus Kohnen, 'StMI: Kabinett Beschließt Gesetzentwurf von Bayerns Innenminister Joachim Herrmann für Mehr Polizeiliche Befugnisse zur Abwehr von Torgefahren' (*Bayerischer Rechts- und Verwaltungsreport (BayRVR)*), 4 April 2017) <<https://bayrvr.de/2017/04/04/stmi-kabinett-beschliesst-gesetzentwurf-von-bayerns-innenminister-joachim-herrmann-fuer-mehr-polizeiliche-befugnisse-zur-abwehr-von-terrorgefahren/#more-47668>> accessed 25 February 2018

⁶⁸ Klaus Kohnen, 'GVBl. (13/2017): Gesetz zur Effektiveren Überwachung Gefährlicher Personen Verkündet' (*Bayerischer Rechts- und Verwaltungsreport (BayRVR)*), 31 July 2017) <<https://bayrvr.de/2017/07/31/gvbl-132017-gesetz-zur-effektiveren-ueberwachung-gefaehrlicher-personen-verkuendet/>> accessed 25 February 2018

and cooperation between the federal and state level in criminal investigations.⁶⁹ The main part of police activities in Germany is therefore governed by 16 different police laws adopted by the federal state parliaments, among them the Bavarian PAG.

The main novelty of the amendment is the introduction of a new category of danger. According to the PAG, the police can now intervene if there is a *drohende Gefahr* ('threatening danger'), which exists when one can assume from the 'individual behaviour' or the 'preparatory actions' taken by a person that an attack will be committed sometime 'in the foreseeable future'.⁷⁰ While the definition is generally very vague, it is clear that it describes a danger which at that moment in time is not concrete. The term *drohende Gefahr* can also be found in the Law of the German Federal Criminal Police Office. The definition included in this law had already been the subject of a ruling of the German Constitutional Court in 2016 and was subsequently reformulated by the Federal Ministry of Interior.⁷¹ This new definition was then included in the Bavarian Police Law through an amendment in 2017.

Based on the new category of danger that now exists in the Law, the powers of the Bavarian police are significantly extended. Everyone who is considered to fall under this definition is considered a so-called *Gefährder*⁷² ('Endangerer'), and the police have various powers with regards to them. For example, they can limit the areas where such individuals are allowed to enter, or impose communication bans.⁷³ To check whether the individual complies with these measures, a *Gefährder* can be forced to wear an electronic tag.⁷⁴ Finally, a *Gefährder* can also be detained by the police. Under the former version of the PAG, it was already possible to detain individuals for a maximum period of 14 days, for instance to protect persons if they are unable to protect themselves, or if it was necessary to stop or

⁶⁹ Bernhard Frevel, 'Polizei, Politik und Wissenschaft' (*Bundeszentrale für politische Bildung (bpb)*, 14 November 2008) <<http://www.bpb.de/apuz/30820/polizei-politik-und-wissenschaft?p=all>> accessed 3 May 2018

⁷⁰ Original wording (OW): Eine drohende Gefahr liegt vor 'wenn im Einzelfall 1) das individuelle Verhalten einer Person die konkrete Wahrscheinlichkeit begründet oder 2) Vorbereitungshandlungen für sich oder zusammen mit weiteren bestimmten Tatsachen den Schluss auf ein seiner Art nach konkretisiertes Geschehen zulassen, wonach in absehbarer Zeit Angriffe von erheblicher Intensität oder Auswirkung zu erwarten sind' (Bavarian Police Law 2017 (PAG), art 11 (3)). This translation and all subsequent ones were done by the author of this thesis.

⁷¹ Heiner Busch, 'Fast Verdächtig: Die Unerträgliche Leichtigkeit der Gesetzgebung' (*CILIP*, 9 March 2017) <<https://www.cilip.de/2017/03/09/fast-verdaechtig-die-unertraegliche-leichtigkeit-der-gesetzgebung/>> accessed 4 May 2018

⁷² The term *Gefährder* not directly stated in the Bavarian Police Law or otherwise legally codified. It is a working title used by security authorities in throughout Germany (Deutscher Bundestag, 'Legaldefinition des Begriffes "Gefährder"' (27 February 2017) <<https://www.bundestag.de/blob/503066/8755d9ab3e2051bfa76cc514be96041f/wd-3-046-17-pdf-data.pdf>> accessed 11 July 2018).

⁷³ PAG 2017, art 16

⁷⁴ PAG 2017, art 32a (1)

prevent a person from committing a concrete crime. The powers of detention now include people who do not necessarily pose a concrete threat but are simply considered a *Gefährder*.⁷⁵ Furthermore, the maximum period of detention is raised to three months with the possibility for a judge to extend this period for another three months as often as deemed necessary.⁷⁶ In practice, this means that individuals can be detained indefinitely under these provisions.

In 2017, 602 individuals were categorised as *Gefährder* in Germany.⁷⁷ Unfortunately, no information on who of those currently resides in Bavaria and who is detained under the provisions of the PAG is available. In March 2018, the members of the state parliament's Green Party lodged a complaint of unconstitutionality against the amendment to the Police Law. Their main argument is that the intervention threshold for police officers is too low as a consequence of the introduction of the term *drohende Gefahr*.⁷⁸ Currently, the lawsuit is still ongoing. The amendment was furthermore criticised by Amnesty International because of the acute danger that authorities deprive the affected individuals of their fair trial guarantees, among other issues.⁷⁹

3.2 Methodology

In order to answer the question how precautionary measures are rhetorically attempted to be legitimised, a content analysis of the counter-terrorism discourse as it relates to indefinite preventive detention is conducted. The analysis considers the framework of the debate (timing, initiators and length of debate, composition of parliaments, voting results) and covers the argumentation and justification patterns as well as the argumentation (framing) techniques.

Regarding sampling, it was decided to look at the parliamentary debates on these measures as they constitute one of the major categories of political discourse. Democratic norms require that political executives are able to justify their actions to parliaments, which

⁷⁵ Birgit Müller, 'Das Gesetz zur Effektiveren Überwachung Gefährlicher Personen und die Daraus Erwachsenden neuen Befugnisse der Bayerischen Polizei' *Bayerische Verwaltungsblätter (Bay VBl.)* (Stuttgart, 15 February 2018) 109

⁷⁶ PAG 2017, art 20 (3)

⁷⁷ Maik Baumgärtner and others, 'Staatsfeind Nr. 1 bis 602' *Spiegel Online* (Hamburg, 11 March 2017) <<http://www.spiegel.de/spiegel/print/d-149997407.html>> accessed 12 May 2018

⁷⁸ Monika Ermert, 'Grüne Legen Verfassungsbeschwerde Gegen Bayerisches "Gefährdergesetz" ein' *Heise online* (Hanover, 29 March 2018) <<https://www.heise.de/newsticker/meldung/Gruene-legen-Verfassungsbeschwerde-gegen-bayerisches-Gefahrdergesetz-ein-4008119.html>> accessed 22 May 2018

⁷⁹ Amnesty International, 'Stellungnahme von Amnesty International zu den Geplanten Änderungen des Polizeiaufgabengesetzes in Bayern' (09 May 2018) <<https://www.amnesty.de/sites/default/files/2018-05/Amnesty-Positionspapier-Stellungnahme-Polizeiaufgabengesetz-Bayern-Mai2018.pdf>> accessed 09 May 2018

ultimately represent the people they govern. Therefore, it can be expected that the British and Bavarian politicians somehow needed to justify why they intend to introduce indefinite preventive detention for terrorist suspects in the respective parliamentary debate. The transcripts of the entire parliamentary debate on the bill, from the point of its introduction to the final adoption, are taken into consideration. In the case of the UK, a speech by the Home Secretary in the House of Commons, where he announces the introduction of the Bill before it is formally introduced, is considered as well. The transcripts of the UK parliamentary debate, including those in the House of Commons and in the House of Lords, were all downloaded from the 'ProQuest - UK Parliamentary Papers' database. The first and second reading of the Bavarian Bill were available in the Parliament's online archives and the transcripts of discussions in the parliamentary committees were requested from the Parliament's central information centre via email.

The available material on the debate in both Houses of Parliament in the UK is generally very extensive because the Bill itself provides for an extensive number of different legal provisions. The texts of the British debate were therefore prescreened and those passages of the debate which did not directly or remotely deal with the provision on indefinite preventive detention were deleted from the set. Nevertheless, the Bavarian debate, comprising around 16,000 words was still considerably shorter than the British debate which amounted to 230,000 words after shortening. For this reason, direct quotes of Bavarian politicians about the detention provisions of the Bill in newspapers were added to the data set. In total, quotes from four newspaper articles and one video of a press conference, in which a Bavarian politician who also discussed the Bill in Parliament was interviewed, were added to the data set. These newspaper articles were all collected from the LexisNexis database. The video was collected from the website youtube.com. Only those quotes in the newspapers and video are considered which are not taken from the politicians' speeches in Parliament in order to avoid duplication. Another difficulty faced with the transcripts from the Bavarian Parliament is that discussions of the parliamentary committees are only available as paraphrased transcripts. Therefore, these documents can only be used for the analysis of the character of the discourse and the argumentation and justification patterns. They are not taken into account for the analysis of the framing techniques as this can only be conducted based on the exact wording that politicians use.

To conduct the content analysis, two analytical systems are developed. The first is developed to analyse the argumentation and justification patterns, and the second is used to analyse the argumentative (framing) techniques. Regarding the analysis of the argumentation

and justification patterns, a combination of deductive and inductive coding is used to aggregate a list of patterns. In terms of deductive coding, a list of arguments and justifications is created based on the previously explained theoretical framework and empirical evidence from previous studies. The following four arguments are included in the initial list: (a) an exceptional threat requires exceptional measures, (b) the measure at hand is proportionate to this threat, (c) the measure is effective, and (d) a form of trivialisation of the character of the proposed detention. In the next step, additional arguments and justifications are inductively discovered by prescanning the dataset. The arguments and justifications which were not expected to be relevant based on the theoretical framework and existing research are then added to the initial list. The various arguments and justifications which are founded on the same premises are subsequently grouped together to avoid repetition. At this point, there is a comprehensive list of several argumentation and justification patterns. Each of the identified patterns is then assigned a unique identifier that is used during the coding process. The whole dataset is then coded, whereby each occurrence of an argument and justification is coded with the assigned identifier. This leaves a final count of how frequently each argument and justification is used in the debate. These findings are then used for the discussion of the results.

As concerns the argumentative (framing) techniques, they are analysed with an inductive technique. First, the whole data set is read through and identified which conceptually wider themes (such as democracy, police, freedom, etc.) are picked up. The four major themes identified are (1) terrorism, (2) risk, (3) terrorists, and (4) prevention. All parts of the debates which deal with one or more of these themes are then read again. Based on this second reading, a list of words and phrases which are used by politicians in this context is created for each theme respectively. There are then four lists of words, one for each theme. The words on each list are then ordered according to several topical clusters. These clusters give insights about the frame of each of the four themes, which are the building blocks for further analysis.

3.3 Limitations

As has been outlined in this chapter, the selected case studies represent two exceptional cases in which the most intrusive precautionary counter-terror measure, indefinite preventive detention, was adopted by parliament despite its questionable compatibility with the very foundations of a democracy. As such, they are suitable as subjects of the analysis in order to find out how attempts are made to legitimise precautionary counter-terror measures.

However, it needs to be noted that the cases are still not identical and therefore are not directly comparable. Consequently, only tentative explanations for potential similarities or differences in the two discourses can be put forward. There are too many variables which might have had an influence on single elements in the discourse. Nevertheless, explaining *why* politicians justify a measure in a certain way is not the primary purpose of this thesis. The aim of the research is to analyse *how* they attempt to legitimise the measure. Therefore, only a small section of this thesis is devoted to proposing hypotheses for explaining potential similarities and differences in the discourses and it is clearly stated that they should merely be understood as attempts for explanation.

Chapter 4 - Findings

A turn is now made to the findings of the content analysis of both parliamentary debates. In three sections, the findings will be presented as regards the framework of the discourses (4.1), the argumentation and justification patterns (4.2), and the argumentative (framing) techniques employed (4.3).

4.1 Framework conditions of the justification discourses

The framework conditions of the justification discourses outlined in this section include the timing of the debates, the length of the debate, the composition of the parliaments, the initiators of the debates, and the voting results. These facts significantly impact the course of debate in parliaments and are therefore deemed relevant for the analysis of the justification discourses in both parliaments.

Both parliamentary debates have a particular timing. The British ATCSA is an example of fast-track legislation, which passed through both Houses in merely five weeks.⁸⁰ A Bill must usually pass several stages in the British Parliament before being adopted. Each stage is separated by at least two weekends, the process therefore summing up to eight to ten weeks. Because the government has the control of the legislative timetabling in the House of Commons, it can change this convention and order to pass bills within a much smaller time frame.⁸¹ Given that the Bill was considerably extensive, comprising many different legal provisions, the chosen time schedule was very tight. Several MPs denounced this fact numerous times throughout the debate. An MP from the Conservative Party argued for instance that ‘the reckless speed with which the Government are taking through Parliament a Bill that touches on supremely important issues of human rights and individual liberties is scandalous’.⁸² Even those MPs who were members of the Labour Party, which introduced the Bill, complained that they would need more ‘time to consider the Bill carefully’.⁸³

In contrast, the Bavarian Parliament had more time to consider the Bill. From the point of introduction of the Bavarian Bill to the final adoption, the debate took 17 weeks,⁸⁴

⁸⁰ ‘Anti-terrorism, Crime and Security Act 2001’ (n 61)

⁸¹ Andrew W Neal, ‘Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies’ (2012) 6 *International Political Sociology* 260

⁸² HC Deb 19 November 2001, vol 375, col 73

⁸³ HC Deb 19 November 2001, vol 375, col 40

⁸⁴ Klaus Kohnen, ‘StMI: Kabinett Beschließt Gesetzentwurf von Bayerns Innenminister Joachim Herrmann für Mehr Polizeiliche Befugnisse zur Abwehr von Torgefahren’ (*Bayerischer Rechts- und Verwaltungsreport (BayRVr)*, 4 April 2017) <<https://bayrvr.de/2017/04/04/stmi-kabinett-beschliesst-gesetzentwurf-von-bayerns->

which is not unusual for the adoption of laws in state parliaments.⁸⁵ However, the final voting on the Bill was put on the agenda at the end of July, just before the beginning of the State Parliament's summer break.⁸⁶ The chairwoman of the Green Party denounced the CSU, saying they 'always push through constitutionally questionable legislation just before the summer break'.⁸⁷ Putting a Bill up for vote just before a several weeks long break of parliamentary sessions creates a kind of urgency to pass the Bill instead of moving discussions to the next parliamentary session. In this regard, both debates somehow took place under time pressure. In the UK, this was because the time for parliamentary discussion had been limited from the outset to merely five weeks. In Bavaria, the final voting on the Bill was subject to time pressure by the imminent parliamentary summer break.

Despite the British debate taking place within a much shorter timeframe than the Bavarian debate, the Bavarian debate itself is much shorter than the one in the UK. Whereas the Bavarian parliamentary debate comprised around 16,000 words in total, the discussions in the House of Commons and Lords amounted to 260,000 words.⁸⁸ Thus, the proposal to introduce indefinite preventive detention was discussed much more extensively in the UK.

As regards the composition of each parliament, the respective political party with the largest number of seats in Parliament at the time of debating the Bill are located at two different sides of the political spectrum. As regards the UK, those members of the House of Lords affiliated with a political party were in almost equal parts members of the Conservative or Labour Party at that time.⁸⁹ In the House of Commons, however, the Labour Party had a clear majority with more than nine percentage points more than the Conservatives. Consequently, the centre-left Labour Party led the government, with the centre-right Conservative party leading the opposition. The composition of the Bavarian State Parliament

innenminister-joachim-herrmann-fuer-mehr-polizeiliche-befugnisse-zur-abwehr-von-terrorgefahren/#more-47668> accessed 25 February 2018; Klaus Kohnen, 'GVBl. (13/2017): Gesetz zur Effektiveren Überwachung Gefährlicher Personen Verkündet' (*Bayerischer Rechts- und Verwaltungsreport (BayRVR)*, 31 July 2017) <<https://bayrvr.de/2017/07/31/gvbl-132017-gesetz-zur-effektiveren-ueberwachung-gefaehrlicher-personen-verkuendet/>> accessed 25 February 2018;

⁸⁵ There is no data on how long the legislative procedure in the Bavarian State Parliament takes on average. However, in other states, such as North-Rhine Westphalia, the procedure usually takes 'several months'. So it is expected that this is also the case for the Bavarian Parliament ('Das Gesetzgebungsverfahren' (*Landtag NRW*) <https://www.landtag.nrw.de/portal/WWW/GB_II/II.1/OeA/Land_und_Landtag/gesetzgebung_verfahren.jsp> accessed 30 April 2018).

⁸⁶ Kohnen, 'GVBl.' (n 84)

⁸⁷ OW: 'Die CSU peitscht immer kurz vor der Sommerpause noch ein verfassungsrechtlich höchst fragwürdiges Gesetz durch den Landtag'; BL ('Bayerischer Landtag') Deb 19 July 2017, plenary protocol no 109, 9

⁸⁸ Note that this wordcount refers only to the passages in the debate in which the specific provision of indefinite preventive detention was discussed. Given that the ATCSA was very extensive, the overall debate was considerably longer.

⁸⁹ House of Lords, 'Annual Report 2001-02' (2002)

<<https://publications.parliament.uk/pa/ld200102/ldb/15304.htm>> accessed 1 June 2018

at the time of discussing the Bill differs. The centre-right Christian-democratic Union (CSU) is commonly referred to as Bavaria's people's party because it has continuously been the strongest party in Parliament since 1958.⁹⁰ When the Bill was discussed in 2017, the CSU had the largest number of seats with 47.7%. The second strongest party was the centre-left SPD with about 20.6% of the seats.⁹¹ Thus, whereas the Bill on preventive detention passed through a majorly centre-left UK Parliament, the Bavarian Parliament was dominated by centre-right politicians.

In line with the composition of both Parliaments, the Home Secretary David Blunkett introducing the Bill in the UK was a member of the centre-left Labour party, while Minister of Interior Joachim Herrmann was in the cabinet of the centre-right CSU. Unsurprisingly, most members of both leading parties eventually voted in favour of the adoption of the Bill. The UK Bill was adopted in the third reading in the House of Commons with 323 votes in favour and 79 against. 322 of those 323 votes in favour of the Bill came from the Labour Party, while the Liberal Democrats were responsible for the majority of votes against. The Conservative Party abstained from voting.⁹² Likewise, the Bavarian Bill was passed with 80 votes in favour and 14 against, where all but one vote in favour came from the leading CSU. The leading opposition party, SPD, abstained from the vote and the Green Party was responsible for most of the votes against the Bill.⁹³

It has become clear that the frameworks in which the discourses took place were similar in many regards. Through limiting the British debate right from the start to five weeks and pushing the final vote on the Bavarian Bill before the summer break, both debates more or less took place under time pressure. Furthermore, both Bills were finally adopted almost entirely because of the votes of the majority party while the leading opposition party abstained. However, the major difference here is that the two majority parties are located on different sides of the political spectrum, one being centre-left, the other one being centre-right.

⁹⁰ Peter Jakob Kock, *Der Bayerische Landtag: Eine Chronik* (5th edn, Bayerischer Landtag 2006)

⁹¹ 'Wahlergebnisse für die Wahlperioden ab 1946 und für die in den Landtag gewählten Parteien' (*Bayerischer Landtag*) <https://www.bayern.landtag.de/fileadmin/Internet_Dokumente/Wahlergebnisse.pdf> accessed 25 May 2018

⁹² 'Anti-terrorism, Crime and Security Bill — Third Reading — 26 Nov 2001 at 23:57' (*The Public Whip*, 2013) <<http://www.publicwhip.org.uk/division.php?date=2001-11-26&number=86>> accessed 25 May 2018

⁹³ 'Gesetz zur Überwachung als Gefährlich Eingestufter Personen' (*abgeordnetenwatch.de*, 19 July 2018) <<https://www.abgeordnetenwatch.de/bayern/abstimmungen/gesetz-zur-effektiven-ueberwachung-gefaehrlicher-personen>> accessed 26 May 2018

4.2 Argumentation and justification patterns

This section describes the argumentation and justification patterns used in each debate respectively in favour of indefinite preventive detention of terrorist suspects. Table 1 provides an overview of the main argumentation and justification patterns employed in each debate, separated according to whether they were made by politicians in both debates or whether they were distinct to one of the debates. The numbers in brackets indicate how many times, out of the total, this argument was found in newspaper interviews.

Table 1. Frequency of argumentation and justification patterns

	<i>United Kingdom</i>	Frequency	<i>Bavaria</i>	Frequency
Same	Abuse unlikely	43	Abuse unlikely	11 (3)
	Character of threat	24	Character of threat	12
	No novelty	10	No novelty	5 (2)
Different	Proportionality	15	Effectiveness	11
	No alternatives	14	Obligation & expectation	11 (1)
	Human rights obligations	8	Authority	10 (1)
	Character of detention	8	Comparison with others	4 (1)
			Need for strong state	4 (1)

A number of arguments and justifications were identified in both debates which are not listed in Table 1. For the British debate, only those arguments and justifications which were mentioned at least eight times were considered as patterns and included in the debate. This is because all other arguments were mentioned only five times or less. Thus, there was a leap between the arguments mentioned eight times or more and those mentioned less than eight times. Given the extent of the British debate, arguments which were mentioned five times or less were considered as outliers rather than patterns and therefore not directly included in the analysis. These other arguments and justifications sporadically identified in the British debate included, among others, the citing of authority (5), the claim of an obligation to act/protect (5) and the measure enhancing the protection of rights (4), other countries adopting similar measures (4), citizens allegedly agreeing to these measures (3) that it is the better alternative to deportation (3), or that no one wants responsibility for another attack (3). For the Bavarian

debate, all arguments and justifications mentioned at least four times were considered as patterns.

Similarly to the UK debate, there was a leap with regard to all other arguments and justifications, as they were mentioned merely twice or one single time. Therefore, they were considered outliers and not included in the list of argumentation and justification patterns. Those arguments and justifications mentioned only a few times included, among others that the danger varies in how long it exists (2), that the measure will be abolished if it turns out to be ineffective (2), that there is no alternative (2), that it is irrelevant if the measure breaches the constitution (1), that they agree because they do not want to be seen as being apathetic in the face of terrorism, or that the protection of terrorist's rights should not be prioritized over the rights of citizens (1).

In the following subsection, each argumentation and justification pattern is described in detail. Due to the limits of this thesis, the presentation of each argumentative pattern relies on a selection of quotations that are illustrative of its whole coverage.

4.2.1 Argumentation of British politicians

Abuse unlikely

By far the most commonly made argument is that while indefinite detention is a far-reaching measure, it will not be abused and used against innocent persons. On the one hand, this is because various legal safeguards are provided in the Bill. These include a sunset clause, making it necessary for the measure to be reviewed by both Houses of Parliament after 15 months and thereafter every year. After five years, the power to indefinitely detain an individual under the Bill will cease and can only be reintroduced if a new Bill is adopted by Parliament. Furthermore, an individual will only be detained if the Home Secretary has issued a certificate that the person is a threat to national security. This decision can be appealed to SIAC. This Commission is chaired by a High Court judge, and two more judges will always be present. It is able to weigh all evidence brought before it, including sensitive intelligence information. A review of the certification will be carried out by SIAC every six months and the accused individual will be able to have his or her own lawyer or representative.⁹⁴ During the debate, the politicians ensured several times that SIAC is 'a very serious' and 'high-powered body'.⁹⁵ They 'believe that the Bill provides due process'

⁹⁴ See for example HL Deb 27 November 2001, vol 629, col 145

⁹⁵ HC Committee of the whole House Deb (ATCSA) 21 November 2001, col 398

although in their opinion, judicial review is in any case not ‘the solution to all ills’.⁹⁶ It is confirmed that ‘there is nothing that judicial review would do which is not going to be done by SIAC’.⁹⁷

Besides the legal safeguards, the other reason given as to why the far-reaching measure will not be abused is that the provisions will be applied carefully. It is stated numerous times in the debate that the detention powers will only be used for a small number of persons.⁹⁸ Furthermore, whenever there is sufficient admissible evidence for a prosecution in open court, this option will be preferred. People will only be detained if this option does not exist.⁹⁹ In answer to questions about how the careful application is guaranteed, several politicians argued that the government must be trusted ‘in times like these’¹⁰⁰. They ‘hope there is no doubt about the Government’s sincerity’ because in fact, those who proposed the Bill are fierce promoters of fundamental rights.¹⁰¹ ‘In fact, all of us (...) on the Government Benches; have spent our lives fighting for the civil liberties and empowerment of people who do not have access to wealth, privilege or power’.¹⁰² The assumption that those who proposed to introduce indefinite detention would want to abuse this far-reaching power ‘is breathtaking and flies in the face of (...) our commitment to protecting civil and human rights’.¹⁰³ If they were planning to abuse the powers, they would not have agreed to all the legal safeguards provided for in the Bill.¹⁰⁴

Character of threat

One of the most common arguments made in the UK parliamentary debate is that the threat faced requires stronger measures than before, such as indefinite detention. In making this argument, the politicians present the threat in two different ways. On the one hand, it is stated that the British society or the whole Western world finds itself in an increased threat situation, suggesting that the threat is not new but it has become larger than before. The situation after 9/11 is referred to as a situation of ‘enhanced risk, post-11 September which we believe warrants our taking of [such] (...) steps’¹⁰⁵. Some politicians acknowledge that

⁹⁶ HL Deb 27 November 2001, vol 629, col 256

⁹⁷ HL Deb 27 November 2001, vol 629, col 282

⁹⁸ See for example HL Committee of the whole House Deb (ATCSA) 29 November 2001, col 509

⁹⁹ See for example HL Committee of the whole House Deb (ATCSA) 29 November 2001, col 509

¹⁰⁰ HC Committee of the whole House Deb (ATCSA) 21 November 2001, col 359

¹⁰¹ HC Deb 19 November 2001, vol 375, col 31

¹⁰² HC Deb 19 November 2001, vol 375, col 31

¹⁰³ HC Committee of the whole House Deb (ATCSA) 21 November 2001, col 381

¹⁰⁴ HC Committee of the whole House Deb (ATCSA) 21 November 2001, col 381

¹⁰⁵ HC Deb 19 November 2001, vol 375, col 28

‘there has not been a new threat’, but ‘the threat has increased dramatically’,¹⁰⁶ or that ‘terrorism is not new’, but ‘the events of 11 September have brought home its ruthless dedication and destructive capacity’.¹⁰⁷

On the other hand, the terrorist threat is equally often depicted as a new threat that has not existed in this form before. This is in line with what the previous research outlined in Chapter 1 already hinted at. The country is presented as being in an exceptional situation to which it needs to react by taking exceptional measures, such as indefinite detention. This position is manifested through statements explaining that

exceptional times need exceptional measures. The 11 September attack was an exceptional attack and, since then people have been trying to come to terms with exceptional new realities. There has been a severe element of terrorism in the world, the likes of which we have never seen before.¹⁰⁸

Several politicians agree that ‘[c]learly, the world has changed since 11 September’,¹⁰⁹ and that ‘terrorist attacks in the United States on 11th September have changed our perception, our lives, and indeed the whole world’.¹¹⁰ As the terrorists ‘rewrote their rule book’, we ‘need to do the same’.¹¹¹ The new powers ‘are now needed to ensure that we are ready for this changed world and changed threat’.¹¹²

A few politicians argue that this new threat is so great that it threatens the life of the nation. According to an MP from the Labour Party, several factors, such as two UN Security Council resolutions identifying a threat to international security, the UK being an ally of the US in the fight in Afghanistan, the presence of suspected terrorists in the UK, further threats by Osama Bin Laden and their willingness to use weapons of mass destruction, make her conclude that the life of Britain is threatened.¹¹³

¹⁰⁶ HC Deb 19 November 2001, vol 375, col 30

¹⁰⁷ HC Deb 19 November 2001, vol 375, col 67

¹⁰⁸ HC Deb 19 November 2001, vol 375, col 55

¹⁰⁹ HC Deb 19 November 2001, vol 375, col 100

¹¹⁰ HL Deb 27 November 2001, vol 629, col 192

¹¹¹ HL Deb 27 November 2001, vol 629, col 143

¹¹² HL Deb 27 November 2001, vol 629, col 278

¹¹³ HC Deb 19 November 2001, vol 375, col 146

Proportionality

Given that Britain finds itself in a situation of great or even unprecedented threat and the fact that the Bill can and will not be abused, it is argued relatively often that the measure constitutes a proportionate reaction. The powers of indefinite detention are argued to be proportionate because they infringe on individual liberties only to the extent that is necessary to protect other fundamental rights. The measures have struck ‘the right balance between individual liberties and the necessary protection of the people of and in this country’,¹¹⁴ or respectively ‘a balance between respecting our fundamental liberties and ensuring that they are not exploited’.¹¹⁵ The government is confident to ‘have chosen the road of proportionality and the middle ground’.¹¹⁶

No alternatives

The detention measures are presented numerous times as the only option available for the government. Some politicians simply claim this without elaborating on why other means are not feasible alternatives. They ‘understand why people do not believe that this is acceptable, but (...) disagree with them, because it is the only way in which to deal with the current circumstances’.¹¹⁷ Detention is simply ‘the only practical alternative’.¹¹⁸ They rhetorically ask ‘What should we do? Should we allow terrorists to continue their work unchecked?’,¹¹⁹ or explain that ‘some of (...) [their] colleagues have suggested that we risk making matters worse, but what is the alternative?’¹²⁰

Others make the effort to explain why other measures are no alternative for them. They state that they ‘have the choice to do nothing or to take draconian action and give the Home Secretary powers to certificate and to remove people from the country whatever the circumstances’.¹²¹ Detention would therefore present ‘the middle route’.¹²² In some cases, deportation is presented as the preferable alternative, but in cases where this is legally impossible, they ‘need to get them off the streets’ through detention.¹²³ If detention is not used, ‘the only alternative, which has had to be used in previous cases, is to release such

¹¹⁴ HL Deb 27 November 2001, vol 629, col 278

¹¹⁵ HL Deb 27 November 2001, vol 629, col 143

¹¹⁶ HC Deb 12 December 2001, vol 376, col 918

¹¹⁷ HC Deb 12 December 2001, vol 376, col 923

¹¹⁸ HL Deb 27 November 2001, vol 629, col 190

¹¹⁹ HC Deb 19 November 2001, vol 375, col 67

¹²⁰ HC Deb 19 November 2001, vol 375, col 94

¹²¹ HC Committee of the whole House Deb (ATCSA) 21 November 2001, col 380

¹²² HC Committee of the whole House Deb (ATCSA) 21 November 2001, col 380

¹²³ HL Committee of the whole House Deb (ATCSA) 29 November 2001, col 480

people back into the community'.¹²⁴ Some present inaction as the only other option, which again leaves 'true internment' as 'the only alternatives'.¹²⁵ A member of the Conservative party explains that he believes the measure to be 'wholly inadequate in addressing the wider issue' but nevertheless supports it because he sees no other alternative, given the UK's non-refoulement obligations under the ECHR.¹²⁶

No novelty

In several cases, it is argued that the key points of the provision on indefinite detention already exist in UK law, so both Houses have already agreed to these measures in the past. It is claimed that under the new provisions, SIAC will fulfil 'the purpose that it already fulfils' and it has previously been accepted as the body it is.¹²⁷ 'It was fully debated both (...) [in the House of Lords] and in the other place [the House of Commons]; for this very purpose'.¹²⁸ Several politicians state that SIAC always had the power to examine evidence from intelligence services. Both Houses have agreed that in certain cases, the security and intelligence services operations and the accused individuals' lives are put at risk if that information was presented for evidence in normal open court.¹²⁹ It was also accepted that SIAC could decide on appeals in deportation cases 'in relation to removal on ground of security or because a person's presence is not conducive to the public good'.¹³⁰ Finally, people have already been detained 'pending examination or removal',¹³¹ and this detention was 'lawful' until the moment that no place could be found to which that person could be detained.¹³²

Human rights obligations

Linked to the previous statements about the importance attached by the government to civil liberties, it is occasionally argued that detention is necessary because the government does not want to extradite to a country where the individual is in danger. In other words, 'because of (...) [their] own insistence on human rights' they are prevented from deporting.¹³³

¹²⁴ HC Deb 19 November 2001, vol 375, col 129

¹²⁵ HL Deb 27 November 2001, vol 629, col 196

¹²⁶ HC Deb 19 November 2001, vol 375, col 135

¹²⁷ HC Deb 19 November 2001, vol 375, col 114

¹²⁸ HL Deb 27 November 2001, vol 629, col 146

¹²⁹ HC Deb 19 November 2001, vol 375, col 29

¹³⁰ HC Deb 12 December 2001, vol 376, col 919

¹³¹ See for example HL Deb 27 November 2001, vol 629, col 279

¹³² HC Deb 19 November 2001, vol 375, col 140

¹³³ HL Deb 27 November 2001, vol 629, col 280

Detention powers are ‘based on the presumption that, in normal circumstances, we would have asked people to leave our country but that we have been unable to do so because their lives would thereby be put at risk’.¹³⁴ They ‘are not prepared to send him back to a place where they will be killed, executed or tortured’.¹³⁵ The commitment to the ECHR is continuously emphasized and stated that they ‘are not prepared to dismiss that provision [art. 3 ECHR on the prohibition of torture]’,¹³⁶ but rather seek a derogation from art. 5 of the ECHR on the right to liberty.

Character of detention

As the detention powers discussed in the Parliament are only foreseen to apply to foreigners, it is argued by some politicians that if the detainee finds a country to host them, they are able to leave the UK and end the detention at any time. Therefore, the accusation that the measure constitutes internment, which is detention during war or for political reasons, without proper criminal charge,¹³⁷ is not true.¹³⁸ It is claimed that ‘the detainees will not have been convicted but will be held under a procedure whereby they can walk out of the prison any day they choose (...). To that extent, the procedure is more relaxed than being locked up’.¹³⁹ The detainees ‘will be deprived of their liberty, but in a unique situation’.¹⁴⁰ Some of those who make this argument, however, admit that ‘it is probable that that will not occur many times’.¹⁴¹ This justification presents a typical case of trivialisation which has been pointed out by other researchers to be a common strategy in attempting to legitimise counter-terror measures.

4.2.2 Argumentation of Bavarian politicians

Character of threat

The most commonly made argument in the Bavarian debate is that the current threat situation makes it necessary to equip the police with more powers, including indefinite preventive

¹³⁴ HC Deb 19 November 2001, vol 375, col 32

¹³⁵ HL Committee of the whole House Deb (ATCSA) 29 November 2001, col 497

¹³⁶ HL Deb 27 November 2001, vol 629, col 145

¹³⁷ ‘Internment’, *The Oxford Learner’s Dictionary* (2018)

<https://www.oxfordlearnersdictionaries.com/definition/english/internment_1?q=internment> accessed 14 March 2018

¹³⁸ HL Committee of the whole House Deb (ATCSA) Deb 29 November 2001, col 480

¹³⁹ HL Committee of the whole House Deb (ATCSA) 29 November 2001, col 508

¹⁴⁰ HL Committee of the whole House Deb (ATCSA) 29 November 2001, col 509

¹⁴¹ HL Deb 27 November 2001, vol 629, col 146

detention. Similar to the British debate, the threat is presented both as a new, exceptional kind of threat, and as a threat that has become greater than before.

However, Bavarian politicians only argue a few of times that (Islamist) terrorism is a ‘new crime phenomenon’¹⁴² or a ‘completely new kind of crime’.¹⁴³ In three-quarters of the cases where this argument is made, the situation is described as one of an increased threat, as opposed to a new form of threat. The politicians continuously repeat that they have to react to ‘an undoubtedly increased threat situation’,¹⁴⁴ ‘an intensified threat of terror’,¹⁴⁵ ‘a changed threat situation’,¹⁴⁶ or ‘the current security situation’.¹⁴⁷ They come to the conclusion that the threat is greater than before because the number of extremist violent acts has increased sharply in the past years¹⁴⁸ and because society, its open way of living, as well as freedom and the security of people in Germany are ‘exposed to attacks’ by terrorists.¹⁴⁹ One MP from the governing party explains that ‘meanwhile, the front lines of the battle against the malicious and cowardly murderers associating with terrorism and Islamism run within Europe’ and that Germany is ‘in the crosshairs of international terrorism’ as well.¹⁵⁰ He elaborates that after the attacks in the past decade in New York and Madrid, everyone can think of other cities in the West where terrorist attacks have happened. By now, also those living in smaller cities and towns have become vulnerable to such attacks, such as the ones in Ansbach and Würzburg.

Because of the above elaborated danger, it is necessary to monitor ‘dangerous persons’ for a longer period of time.¹⁵¹ According to the advocates of the Bill, it simply adapts police powers to current circumstances. Furthermore, several politicians outline that

¹⁴² OW: ‘Neue Kriminalitätsphänomene wie (...) islamistischer Terror (...)’; BL Deb 19 July 2017, plenary protocol no 109, 2

¹⁴³ OW: ‘(...) dieser völlig neuen Art von Kriminalität’; Interior Committee (‘Innenausschuss’) Deb 31 May 2017, Excerpt of minutes, 3

¹⁴⁴ OW: ‘(...) in Zeiten einer zweifellos erhöhten Bedrohungslage’; BL Deb 25 April 2017, plenary protocol no 102, 5

¹⁴⁵ OW: ‘[W]ir [haben] eine verschärfte Terrorbedrohung’; BL Deb 25 April 2017 plenary protocol no 102, 6

¹⁴⁶ OW: ‘(...) veränderte Gefährdungslage’; BL Deb 25 April 2017, plenary protocol no 102, 9

¹⁴⁷ OW: ‘(...) die aktuelle Sicherheitslage’; BL Deb 25 April 2017, plenary protocol no 102, 2

¹⁴⁸ OW: ‘(...) die Anzahl extremistischer Gewalttaten [ist] in den letzten Jahren stark angestiegen’; BL Deb 25 April 2017, plenary protocol no 102, 6

¹⁴⁹ OW: ‘Unsere Gesellschaft, unsere offene Lebensweise sind Angriffen ausgesetzt’; BL Deb 25 April 2017, plenary protocol no 102, 5

¹⁵⁰ OW: ‘Auch in Europa verläuft mittlerweile die Frontlinie des Kampfes gegen die hinterhältigen und feigen Mörder des Terrorismus und des Islamismus. Auch wir sind im Fadenkreuz des internationalen Terrorismus’; BL Deb 25 April 2017, plenary protocol no 102, 11

¹⁵¹ OW: ‘Gerade die nationale wie internationale Gefährdung durch verschiedene Formen des Terrorismus und Extremismus machen es aber auch notwendig, gefährliche Personen im Einzelfall länger zu überwachen’; BL Deb 19 July 2017, plenary protocol no 109, 7

the threat is so great that the police needs to have those additional powers ‘immediately’.¹⁵² The situation ‘allows for no delay’ in passing this Bill.¹⁵³

Effectiveness

In line with previous research on the issue, the second most commonly made argument in favour of preventive detention is that it is a very effective measure. It allows the police to ‘effectively take care of the people in Bavaria’.¹⁵⁴ Through introducing the new term *drohende Gefahr*, it is possible to, among other things, detain persons even when they have not yet concretely engaged in a criminal act. The new powers enable the police to stop any preparatory acts for an attack. In other words, the police are equipped with more possibilities for action and become more ‘all-seeing’, which makes their work more effective.¹⁵⁵ They can work ‘effectively in a preventive way’.¹⁵⁶

It is repeated several times that ‘the most effective defence from dangers is not to let them come into existence in the first place’.¹⁵⁷ For the government, it is self-evident that one cannot wait until the danger has come into existence and let it pass. Already when a danger is ‘threatening’, one has to intervene when lives, the functioning of the state, sexual self-determination, health or freedom are at risk.¹⁵⁸ ‘The rule of law cannot wait until crimes have been attempted or committed’.¹⁵⁹ The experiences made through past terrorist attacks are claimed to have shown that early, consequent action by the security agencies can be essential for preventing danger.¹⁶⁰

¹⁵² OW: ‘[D]ie polizeilichen Befugnisse [müssen] unverzüglich den aktuellen Bedrohungen angepasst werden’; BL Deb 25 April 2017, plenary protocol no 102, 13

¹⁵³ OW: ‘[D]ie aktuelle Sicherheitslage lässt [...] keinen weiteren Aufschub zu’; BL Deb 25 April 2017, plenary protocol no 102, 2

¹⁵⁴ OW: ‘(...) wirksam für die Sicherheit der Menschen in Bayern sorgen’; BL Deb 19 July 2017, plenary protocol no 109, 4

¹⁵⁵ OW: ‘(...) die Polizei werde dadurch in vielen Bereichen “sehend”’; Interior Committee Deb 31 May 2017, Excerpt of minutes, 1

¹⁵⁶ OW: ‘(...) Polizei [kann dadurch] wirkungsvoll präventiv (...) arbeiten’; BL Deb 19 July 2017, plenary protocol no 109, 4

¹⁵⁷ OW: ‘Vorsicht ist besser als Nachsicht. Die effizienteste Abwehr von Gefahren ist es nämlich, diese gar nicht erst entstehen zu lassen’; BL Deb 25 April 2017, plenary protocol no 102, 2

¹⁵⁸ OW: ‘(...) denn für uns ist es selbstverständlich, dass man nicht erst den Gefahren Eintritt wahrnehmen und passieren lassen muss, sondern schon beim Drohen einer Gefahr zugreifen muss, wenn Leben gefährdet sind, wenn es um das Funktionieren unseres Staates geht oder wenn sexuelle Selbstbestimmung, Gesundheit oder Freiheit in Gefahr sind’; BL Deb 25 April 2017, plenary protocol no 102, 10

¹⁵⁹ ‘Der Rechtsstaat darf eben nicht warten (...) bis Straftaten bereits versucht oder begangen worden sind’; BL Deb 19 July 2017, plenary protocol no 109, 3

¹⁶⁰ OW: ‘Die traurigen Erfahrungen der Terroranschläge (...) haben gezeigt, dass frühzeitiges, konsequentes Handeln der Sicherheitsbehörden zur Gefahrenabwehr erforderlich sein kann’; BL Deb 25 April 2017, plenary protocol no 102, 2

Obligation and expectation

As often as they claim that the measure is effective, politicians also argue that there is a need to protect citizens by equipping the police with preemptive powers for two reasons. On the one hand, the citizens expect this from the government. Citizens expect the police not to wait until a crime has been attempted or already committed. They can rightly expect that the dangers are averted or prevented as soon as there is a *konkretisierter Verdacht* ('substantiated suspicion') that the action could end up in a serious crime with severe injuries or even homicide and murder.¹⁶¹ The people do not want the politicians to only talk all the time and not take any action.¹⁶²

On the other hand, the Parliament's top priority should be the safety of the citizens.¹⁶³ This is their 'damn obligation'.¹⁶⁴ They should not protect those who are evidently ready to use violence but the people in their entirety, the country and democracy.¹⁶⁵ The politicians are obliged to do anything to put the security agencies in the position to fulfil their task in the best possible way.¹⁶⁶ As soon as they recognize a 'challenge', and know that they have to take measures, they need to use their legislative powers.¹⁶⁷ In short, they introduced the proposal for indefinite detention because they want to protect the population in the best possible way.¹⁶⁸

Abuse unlikely

Mentioned equally often as the two previous arguments, many politicians claim that the measure will not be abused, and innocent people will not be affected. On the one hand, they point to the various legal safeguards that are included in the law. The detention always needs

¹⁶¹ OW: 'Die Menschen können in einer solchen Situation zu Recht erwarten, dass die Polizei berechtigt ist, diese Gefahr auch abzuwehren, und zwar bereits im Vorfeld, wenn wir einen konkretisierten erheblichen Verdacht haben, dass jemand an einer schweren Straftat arbeitet, die mit gewaltigen Verletzungen oder gar mit Totschlag oder Mord verbunden sein könnte'; BL Deb 25 April 2017, plenary protocol no 102, 3

¹⁶² OW: '(...) immer nur parlieren, wenn etwas passiert sei, anstatt zu handeln. Die Bevölkerung wolle das nicht'; Interior Committee Deb 31 May 2017, Excerpt of minutes, 9

¹⁶³ OW: '(...) das Menschenmögliche zu tun für die Sicherheit der Menschen - das ist unsere Verantwortung'; BL Deb 25 April 2017, plenary protocol no 102, 1

¹⁶⁴ OW: 'Dazu haben wir die verdammte Verpflichtung'; BL Deb 25 April 2017, plenary protocol no 102, 9

¹⁶⁵ OW: 'Aufgabe des Parlaments sei es nicht, offenkundig Gewaltbereite zu schützen, sondern es habe die Bevölkerung in ihrer Gesamtheit, unser Land und unsere Demokratie zu schützen'; Interior Committee Deb 31 May 2017, Excerpt of minutes, 6

¹⁶⁶ OW: '[D]as rechtlich Mögliche zu tun, um unsere Sicherheitsbehörden in die Lage zu versetzen, ihrem Auftrag bestmöglich nachzukommen, ist unsere politische Verpflichtung'; BL Deb 19 July 2017, plenary protocol no 109, 18

¹⁶⁷ OW: 'Wenn wir eine Herausforderung erkannt haben, wenn wir erkannt haben, dass wir Maßnahmen ergreifen müssen, dann sind wir auch verpflichtet, diese in die Tat umzusetzen. Dann haben wir die Pflicht, die erforderliche gesetzgeberische Tätigkeit zu entfalten'; BL Deb 25 April 2017, plenary protocol no 102, 11

¹⁶⁸ OW: 'Aber wir passen es (...) an; denn wir wollen unsere Bevölkerung bestmöglich vor potenziellen Terroristen schützen'; BL Deb 25 April 2017, plenary protocol no 102, 9

to be authorized by a judge, not by the police.¹⁶⁹ This authorization is valid for only three months, as opposed to the initially proposed period of one year. Thus, they have already agreed to reduce the time between the authorization and the review or any subsequent review. The three months time frame to check whether the detention is still necessary now is actually stricter than foreseen in federal law.¹⁷⁰ The judge also does not need to issue the authorization for three months. If he or she considers that the danger ends in less than this, detention can also be authorized for only four weeks.¹⁷¹ Furthermore, the detainee themselves or the lawyer can make a request to have the decision reexamined if for instance new facts come to light.

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On the other hand, the Parliamentarians state several times that the powers will not be abused because the measure will be applied carefully.¹⁷³ The detention of dangerous persons can only be the last resort in particularly severe cases,¹⁷⁴ and the powers will only be enforced in situations of emergency, such as an Islamist threat.¹⁷⁵ The powers are to be applied only if there is danger of murder, homicide, terror attacks, or similar events. If there is a danger that a person will shoplift, this does ‘of course’ not warrant detaining someone under the new law.¹⁷⁶ As soon as the danger ends, the detainee will be released.¹⁷⁷

¹⁶⁹ OW: ‘[Die Maßnahme] kann aber nicht von der Polizei allein angeordnet werden, sondern es muss vom Richter angeordnet werden’; Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 7:46 <<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

¹⁷⁰ OW: ‘Wir haben das also stärker eingeschränkt, als der Verweis auf das Bundesgesetz es beinhalten würde’; BL Deb 25 April 2017, plenary protocol no 102, 4

¹⁷¹ OW: ‘Wenn er jetzt zunächst sagt, das ist nur eine momentane Situation und er ordnet es jetzt aus seinem Gutdünken für vier Wochen an, dann sind es eben vier Wochen, der Richter entscheidet darüber’; Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 8:30 <<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

¹⁷² OW: ‘Genauso wie sonst auch zum Beispiel bei der Untersuchungshaft, kann natürlich in der Zeit der Betroffene oder Rechtsanwalt auch wieder eine erneute Überprüfung zum Beispiel beantragen, wenn neue Sachverhalte vorliegen’; Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 8:46 <<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

¹⁷³ OW: ‘Dabei gehen wir mit Augenmaß vor’; BL Deb 19 July 2017, plenary protocol no 109, 3

¹⁷⁴ OW: ‘Die präventive Ingewahrsamnahme kann nur das letzte Mittel in besonders schweren Fällen sein’; BL Deb 25 April 2017, plenary protocol no 102, 4

¹⁷⁵ OW: ‘Nur für solche Notsituationen müssen wir die Möglichkeit dieser Haft haben’; Conny Neumann and Martin Knobbe, ‘Bei der Polizei gibt es Baustellen’ *Der Spiegel* (Hamburg, 5 August 2017) 42

¹⁷⁶ OW: ‘Natürlich nicht, wenn eine Gefahr, ein Gefährder in dem Sinn ist, dass er wieder einen Ladendiebstahl begeht, das kann kein Grund sein, jemanden entsprechend in Gewahrsam zu nehmen (...). Sondern es geht natürlich um die Gefahr von Mord und Totschlag und terroristischen Anschlägen und Ähnlichem’; Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 7:05 <<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

¹⁷⁷ OW: ‘Endet die Gefahr früher, dann muss der Gewahrsam selbstverständlich auch früher beendet werden’; BL Deb 19 July 2017, plenary protocol no 109, 15

Authority

It is also very often argued in favour of introducing indefinite detention by emphasizing that a certain authority is supporting (parts of) the measure or does at least not oppose it. This presents a typical case of reference to voices of expertise to gain authorization for an action as outlined in the literature review. First and foremost, it is argued that an expert hearing has taken place in which the constitutionality of the measure has been confirmed.¹⁷⁸ According to the experts, the measures are legally stable.¹⁷⁹

Furthermore, the introduction of the new term ‘threatening danger’, which makes it possible for the police to intervene already in the run-up to a crime, is adapted to be in line with an earlier judgment of the Constitutional Court. The court has essentially ‘ordered’ such a measure for Germany.¹⁸⁰ Thus, this part of the measure should be beyond dispute.¹⁸¹ They are simply strictly adapting to the guidelines of the Constitutional Court.¹⁸² The Constitutional Court also confirms in its 2016 Report on the Protection of the Constitution that there is a national and international terrorist threat. It states that dangerous persons therefore need to be observed for longer period of times and with new methods.¹⁸³ Finally, the new law implements what ‘the coalition’ and the federal states have already adopted as immediate measures in the fight against Islamist terrorism.¹⁸⁴

¹⁷⁸ OW: ‘Insbesondere nach den Beratungen im Innenausschuss und unserer Expertenanhörung, (...), die uns die Verfassungsmäßigkeit dieser Möglichkeiten bestätigt haben’; BL Deb 19 July 2017, plenary protocol no 109, 4

¹⁷⁹ OW: ‘Den Äußerungen der Professoren zufolge bewege sich der Gesetzentwurf auf rechtlich stabilem Fundament’; Interior Committee Deb 31 May 2017, Excerpt of minutes, 1

¹⁸⁰ OW: ‘Das Bundesverfassungsgericht habe eine solche Regelung bereits für den Bereich des Bundes angeordnet’; Interior Committee Deb 31 May 2017, Excerpt of minutes, 1

¹⁸¹ OW: ‘Die ‘drohende Gefahr’ als Begriffskategorie dürfte unstrittig sein, nachdem das BVerfG in seinem Urteil diese sehr deutlich umschrieben habe’; Interior Committee Deb 31 May 2017, Excerpt of minutes, 2

¹⁸² OW: ‘Wir passen es an die Vorgaben des Bundesverfassungsgerichts (...) an’; ‘Dabei gehen wir mit Augenmaß vor und orientieren uns streng an der Rechtsprechung des Bundesverfassungsgerichts’; BL Deb 25 April 2017, plenary protocol no 102, 9

¹⁸³ OW: ‘Gerade die nationale wie auch internationale Gefährdung durch verschiedene Formen des Terrorismus und Extremismus macht es notwendig, im Einzelfall gefährliche Personen auch länger und mit anderen Methoden zu überwachen. Auch der aktuell vorliegende Verfassungsschutzbericht für 2016 bestätigt diesen Weg und macht die Vielzahl der Bedrohungen mehr als deutlich’; BL Deb 25 April 2017, plenary protocol no 102, 13

¹⁸⁴ OW: ‘Damit setzen wir auch das um, was die Koalition und die Länder als Sofortmaßnahme im Kampf gegen den islamistischen Terror beschlossen haben’; Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 4:57 <<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

No novelty

It is argued a few times that the provision on indefinite detention does not constitute a ‘completely new field of law’, but that the existing provisions are simply further expanded.¹⁸⁵ The term *Gefährder* exists already and the detention of a *Gefährder* for two weeks is already possible according to the current Bavarian Police Law. With this Bill, the period of detention is prolonged and the definition of the *Gefährder* is defined in a more concrete way.¹⁸⁶ According to the experts at the hearing that was held, the measures could technically already currently be applied through legal manoeuvres. They are now simply codified.¹⁸⁷ Furthermore, legal safeguards of having access to a lawyer and possibility to appeal are the same as those provided for in cases of pre-trial custody.¹⁸⁸ Regarding the fact that no concrete evidence is required, it is argued that measures such as preventive detention or pre-trial custody have always been authorized based on suspicion and the analysis of probabilities.¹⁸⁹

Comparison with others

Other federal states in Germany have already adopted similar measures and there have been no problems encountered in this regard. Under the Security and police laws in Schleswig-Holstein and Bremen, indefinite detention has been legal for many years already.¹⁹⁰ No one has ever complained about these provisions and no one has ever claimed that these powers have been abused there. Consequently, Bavarian politicians do not understand why they have to face so much criticism when they adopt the same law in Bavaria.¹⁹¹

¹⁸⁵ OW: ‘Aber wir bewegen uns nicht mehr in einem sozusagen völlig neuen Rechtsfeld, sondern da sind bisher ja die Definitionen (...), das ist ja schon im Gesetz entsprechend definiert und wird jetzt noch weiter ausgeführt’ Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 6:31

<<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

¹⁸⁶ OW: ‘Jetzt wird das verlängert und die Definition noch ein Stück weiter konkretisiert’; Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 5:58

<<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

¹⁸⁷ OW: ‘Den Äußerungen der Professoren zufolge [würden] der Polizei im Vorfeld Maßnahmen ermöglicht (...), die jetzt schon mit Winkelzügen (...) denkbar seien. Jetzt würden sie kodifiziert’; Interior Committee Deb 31 May 2017, Excerpt of minutes, 1

¹⁸⁸ OW: ‘[G]enauso wie sonst auch zum Beispiel bei der Untersuchungshaft’ Interpressmedia, video ‘Pressekonferenz mit Joachim Herrmann in der Bayerischen Staatskanzlei’ 8:46

<<https://www.youtube.com/watch?v=qFSdLovlXms>> accessed 29 April 2018

¹⁸⁹ OW: ‘Wenn Richter solche Maßnahmen anordneten, seien das immer Verdachtsmaßnahmen. Das gelte für die Untersuchungshaft, (...), wie für den Präventivgewahrsam (...)’; Interior Committee Deb 31 May 2017, Excerpt of minutes, 2

¹⁹⁰ OW: ‘Eine solche unbegrenzte Dauer findet sich beispielsweise in dem Sicherheits- und Polizeigesetz in Schleswig-Holstein und Bremen schon seit vielen Jahren’; BL Deb 25 April 2017, plenary protocol no 102, 3

¹⁹¹ OW: ‘Es hat auch noch nie jemand behauptet, in den Ländern Schleswig-Holstein oder Bremen wäre es zu einem Missbrauch dieser Regelung gekommen. Interessanterweise ist es aber so: In dem Moment, in dem wir einen Gesetzentwurf vorlegen und darin auf ein Bundesgesetz Bezug nehmen – wie diese beiden Länder im Übrigen auch –, heißt es sofort: Unglaublich, was Sie da machen! (...)’; BL Deb 25 April 2017, plenary protocol no 102, 3

Need for strong state

Several politicians admit that the powers are far-reaching. However, they admit that a strong state is necessary and thus such far-reaching powers need to be adopted.¹⁹² Many do not further explain why a strong state is necessary. Other politicians go into more detail and claim that a strong state is necessary to guarantee security, and that security in turn ‘is a prerequisite for freedom’.¹⁹³ To keep the Bavarian society as open as it is, a strong state is necessary, which can ensure the security and freedom of the people in the best possible way.¹⁹⁴

4.3 Argumentation (framing) techniques

In this section, how certain themes are framed in both discourses is analysed. According to Erving Goffman, a pioneer of frame analysis, frames are ‘schemata of interpretation’ that enable individuals ‘to locate, perceive, identify, and label’ phenomena.¹⁹⁵ In framing a certain phenomenon, Robert Entman explains that the communicators ‘select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described’.¹⁹⁶ Persuading audiences to accept certain interpretations and corresponding actions can be considered as one of the functions of framing. In analysing how politicians attempt to legitimise precautionary action, it is therefore worthwhile to look at how they frame certain themes in their speeches.

Different from the analysis of single argumentation and justification patterns, an analysis of the frames allows to see the broader framework in which these statements are to be understood. Entman holds that looking at the frames helps to identify which messages are most salient and influential.¹⁹⁷ Furthermore, frames can provide hints about the unspoken premises underlying the politicians’ concrete arguments. Therefore, in the following

¹⁹² OW: ‘In dieser Situation brauchen wir einen starken Staat’; BL Deb 25 April 2017, plenary protocol no 102, 5

¹⁹³ OW: ‘Dieser Satz (...) bringt auch in der alten Sprache sehr gut zum Ausdruck, dass und warum Freiheit und Sicherheit keine Gegensätze sind, sondern warum Sicherheit geradezu die Voraussetzung für Freiheit ist’; BL Deb 19 July 2017, plenary protocol no 109, 1

¹⁹⁴ OW: ‘[Z]um Schutz dieser offenen Gesellschaft braucht es einen starken Staat, der bestmöglich für die Sicherheit und Freiheit der Menschen einsteht’; BL Deb 25 April 2017, plenary protocol no 102, 17

¹⁹⁵ Erving Goffman, *Frame analysis: An essay on the organization of experience* (Harvard University Press, 1974) 21

¹⁹⁶ Robert M Entman, ‘Framing: Toward Clarification of a Fractured Paradigm’ (1993) 43 *Journal of communication* 51, 52

¹⁹⁷ *ibid*

subsections, how the key themes are framed in the debates by politicians who want to justify the policy is analysed. The key themes in discourses on indefinite preventive detention of terrorist suspects are considered to be terrorism, risk, terrorists and prevention. Since the analysis of frames has a more general character than the analysis of concrete arguments, it is not considered to be necessary to point to specific passages in the discourses as was done for the analysis of the argumentation and justification patterns.

4.3.1 Framing terrorism

When thematizing terrorism, politicians in both jurisdictions heavily refer to publicly known examples of terrorism. Given the different points in time at which the debates took place, it is unsurprising that the named events differ. In the British debate, speakers mainly point to the events on '11th September 2001' in 'New York', the 'World Trade Centre', 'Washington', 'the US' in general and to the terrorist group 'Al Qaeda', its founder 'Osama Bin Laden' and 'the Middle East'. Occasionally, they also point to the paramilitary group 'Irish Republican Army' (IRA) and generally the situation in 'Northern Ireland'. Terrorism is furthermore associated with being 'international' and taking place 'worldwide'. In contrast, terrorism is problematised as a mainly European phenomenon in the Bavarian debate. The terrorist attacks in 'London', 'Madrid', 'Paris' and 'Brussels' are mentioned much more often than the events in New York. Furthermore, Bavaria and Germany are associated with terrorism in particular, referring to the attacks in 'Ansbach' and 'Würzburg' in Bavaria, as well as to the incident at a 'Berlin Christmas market' and the 'case of Amri'.

The consequences are portrayed similarly severe in both discourses. Terrorist attacks are referred to as 'serious', 'terrible', 'violent', 'malicious', 'gutless', 'indiscriminate', 'sad' and 'awful'. Terrorism 'targets', 'destroys', 'kills', 'shatters' 'thousands of lives', leaves 'uncertainty', 'death', 'deep scars' and brings about 'loss'. It has severe consequences because it 'threatens' 'security', 'freedom', 'life', 'well-being' and the societies' 'open way of life'. The means with which these atrocities are committed are 'bombings', 'explosions', 'acts of violence', 'gun rampages' 'criminal acts', 'organised crime' and the use of 'weapons'.

4.3.2 Framing risk

In framing the phenomenon of terrorism, politicians are somehow limited to the facts of previous terrorist incidents in the interpretation they offer for terrorism. However, when thematizing the risk of future terrorist attacks, they have more latitude since it relates to

probabilities of future events. Accordingly, politicians in both debates portray the risk of an apocalyptic future. They foresee that terrorists will commit ‘serious acts of violence’ and crimes of ‘considerable intensity’. They will ‘murder’ and ‘bomb’ with ‘explosives’, to continue their ‘fight’ and ‘warfare’. In the UK, politicians mention the use of weapons of mass destruction, including atomic, biological and chemical weapons in association with the risk of future terrorist attacks. Politicians in both jurisdictions convey the message that those acts will threaten ‘the functioning of the state’, ‘the life of the country’, ‘the lifeblood of the nation’, ‘public security and order’. Terrorism will jeopardize the fundamental values of the Western society which are ‘democracy’, the ‘security’ and ‘economy’ of the country, ‘freedom’, the societies’ current ‘way of life’, and ‘life’ itself, including that of ‘future generations’.

4.3.3 Framing terrorists

While terrorism and the risk of terrorism is framed similarly in the UK and Bavarian debate, those who stand behind terrorism, the terrorists, are framed considerably differently. In the UK, politicians refer to groups of persons when talking about terrorists, rather than individuals. Only rarely they use the words ‘someone’, ‘individual’, ‘person’, ‘suspect’, or ‘terrorist’. In most cases, it is referred to ‘associations of terrorists’, ‘organised terrorist groups’, ‘terrorist organisations’, or ‘terrorist networks’. Furthermore, being a terrorist is strongly associated with nationality. The debate revolves around ‘national boundaries’, the ‘country of origin’, ‘links with the UK’ and ‘deportation’. Potential terrorists are mentioned in the same breath as ‘immigrants’, ‘asylum seekers’, ‘foreign nationals’ and ‘refugees’. Terrorists and terrorist organisations are furthermore associated with being ‘dangerous’, ‘murderous’, ‘criminal’, ‘killing’, and the ‘enemy’.

In contrast, Bavarian politicians almost exclusively associate terrorists with individuals, calling them ‘criminal offenders’, ‘criminals’, ‘*Gefährder*’, or a ‘terrorist suspect’. Interestingly, while the word ‘humans’ is regularly used in the debate, it is never used in association with terrorists. Politicians refer to ‘humans’ only in relation to the victims of terrorist attacks or ordinary citizens. This reinforces the dichotomy of terrorists representing all evil while the rest of the society is good. Furthermore, terrorists are not linked with one specific belief or conviction but mentioned in connection to ‘extremists’, ‘slobs’, ‘islamic’, ‘left’, and ‘right’.

It should be noted that in neither of the jurisdictions, politicians strictly separate between terrorists and terrorist suspects. This means that they use the same terms for talking

about an actual terrorist whose guilt has been proven, and a terrorist suspects, who would be detained under the new law despite a lack of evidence for their guilt.

4.3.4 Framing prevention

No strong statements can be made about the framing of ‘prevention’ in the British debate as it is not addressed in particular by the speakers. The few instances in which it is addressed, it is most often associated with terms like ‘sensible’, ‘stopping’ and ‘protection’, suggesting that prevention is an effective means to combat terror. In the Bavarian debate, the conviction that prevention is a suitable and effective means in combating terrorism is pronounced very strongly. The term is mentioned in relation to ‘defence’ and ‘control’, being ‘effective’, ‘efficient’, ‘intelligent’, or simply ‘the solution’. Prevention brings ‘freedom’ and ‘security’, and is therefore ‘urgently needed’. They, however, still mention that prevention has no ‘100% guarantee for security’ and is no ‘cure-all’.

The means of prevention are similar in both debates, both suggesting an empirical approach. British politicians suggest ‘legislation’, ‘intelligence’, ‘information’, ‘expertise’, ‘detecting’, ‘testing’, and ‘reviewing’. The Bavarian politicians equally demand ‘legislation’, ‘surveillance’, ‘judges’, ‘police’, ‘authorities’, ‘tools’, and ‘capacity’ to prevent further attacks.

4.4 Conclusion of the findings

In the analysis, a focus was set on (1) the framework of the debates, (2) the argumentation and justification patterns of the politicians, and (3) the framing of key themes. The framework of the debate is similar in both case studies to the extent that the Bill was adopted under time pressure (although arguably more so in the British debate). Furthermore, both Bills were adopted almost entirely because of the votes of the majority party, while the leading opposition party abstained. A major difference, however, was that the majority parties in each debate are located on different sides of the political spectrum, one being centre-left and the other one being centre-right.

The main part of the analysis dealt with the argumentation and justification patterns put forward in the debates. While politicians in both debates make seven to eight main arguments only three of them overlapped. It is argued in both debates that the powers of detention will not be abused, as well as that similar powers exist already in the respective legal systems and are therefore no novelty. Politicians in both jurisdictions also argue that the current threat makes the measure necessary. However, while the Bavarian politicians mainly

speak of an enhanced threat, the British politicians frequently claim that the threat is new and exceptional. The other argumentation patterns differ in each debate, including for instance proportionality, effectiveness, the lack of alternatives, and the approval by an authority. However, it is worthwhile to note that while most of the main arguments in one debate do not appear among the main arguments in the other debate, they are still sporadically mentioned in the other debate in several cases. In the British debate, the politicians occasionally cite authorities, claim to have an obligation and be expected to act, and state that other countries adopted similar measures in an attempt to legitimise preventive detention. These three are among the main arguments in the Bavarian debate. Likewise, the argument that there is no alternative, a main argument in the British debate, is also mentioned twice in the Bavarian debate. In sum, while the main arguments differ in each debate, some of the main arguments made in one debate still occasionally appear in the other debate.

Finally, how politicians frame the themes of ‘terrorism’, ‘risk’, ‘terrorist’, and ‘prevention’ was analysed. British politicians frame ‘terrorism’ as a US American phenomenon while Bavarian speakers present it as a mainly Western European problem, which is unsurprising given the point in time at which the debates took place. The consequences are framed similarly severe in both debates. Furthermore, politicians in both jurisdictions construct the risk of an apocalyptic future threatening the survival of the nation. However, those who stand behind the phenomenon of terrorism are framed considerably differently. Whereas in Bavaria, a terrorist is simply a criminal individual, the terrorist threat in the UK emanates from foreign organised terrorist groups. No strong statements can be made about the framing of ‘prevention’ in the British debate as it is not addressed in particular by the speakers. However, the few instances in which it is thematized in the debate suggest that the framing is similar to the Bavarian one, where it is presented as a pragmatic, effective, and efficient way to protect the country from further attacks.

Chapter 5 - Discussion

In this chapter, the findings of the content analysis are discussed. In section 5.1, the extent to which the *dispositif* of precaution, as outlined in Chapter 2, is reflected in the debates is looked at. Subsequently, explanations are discussed for the fact that politicians in the two countries attempt to legitimise the same precautionary measure considerably differently. Finally, the scientific and practical implications that result from the findings are reflected upon.

5.1 Evidence of the *dispositif* of precaution

Coming back to Aradau and van Munster's analytical framework of governance through risk, it is discussed in this section to what extent the debates constitute evidence of the usage of a *dispositif* of precaution. As has been outlined, the governance through risk approach holds that terrorism is made 'governable' through employing a *dispositif* of precaution. This *dispositif* is composed of rationalities and technologies. While rationalities are ways of thinking about the problem of terrorism, technologies constitute the means through which rationalities are realised.

One of the technologies is for instance a law that authorizes the indefinite preventive detention of terrorist suspects. By promoting certain rationalities, or ways of thinking about terrorism, precautionary means such as preventive detention become logical steps to be taken in response to terrorism. According to the approach, the corresponding interlinked rationalities that lead to the adoption of such laws are zero risk, worst case scenario, shifting the burden of proof, and serious and irreversible damage. As part of researching the question how politicians attempt to legitimise precautionary counter-terror measures are, one of the aims of the analysis was to find evidence of these four rationalities in the politicians' speeches. Table 2 indicates whether and which rationality underlies each argumentation pattern and frame in the British and Bavarian debate respectively.

Table 2. Identification of rationalities

	<i>United Kingdom</i>	Rationality	<i>Bavaria</i>	Rationality
Arg. pattern	Abuse unlikely	-	Abuse unlikely	-
	Character of threat	D, W	Character of threat	D, W
	No novelty	-	No novelty	-
	Proportionality	D, B	Effectiveness	B
	No alternatives	R	Obligation & expectation	R
	Human rights obligations	-	Authority	-
	Character of detention	-	Comparison with others	-
			Need for strong state	D
Frames	Terrorism	D, W	Terrorism	D, W
	Risk	W	Risk	W
	Terrorist	B	Terrorist	B
	Prevention	-	Prevention	R

D=Serious/irreversible damage; W=Worst case scenario; R=Zero risk; B=Shifting burden of proof

Several elements analysed in the debates support the assumption that the four rationalities identified by Aradau and van Munster underlie the legitimisation strategies of the politicians in the UK and Bavaria. The rationality of serious and irreversible damage is reflected both in the argumentative patterns used and the way in which terrorism is framed. Among the most common arguments in both debates is the claim that the threat situation has significantly increased or rather that terrorism presents a new exceptional threat which warrants the taking of measures such as indefinite preventive detention. Speaking of an increased, new, or exceptional threat implies that the consequences of it happening must be enormous. By arguing that a threat situation is so severe that the police must be equipped with exceptionally strong powers, the politicians send the message that the threat of terrorist attacks is much more severe than the risk of ordinary criminal acts being committed.

A similar logic is behind the Bavarian argument that the measure strengthens the state's power and a strong state in turn is necessary to protect the population. A threat could harm so many individuals that it is justifiable to risk detaining an innocent individual in order to prevent it from becoming reality. Several British politicians also argue that indefinite

preventive detention is proportionate to the threat. If a highly intrusive preventive measure is proportionate, the situation that is supposed to be prevented must be extremely severe, too. Furthermore, the way terrorism is framed in both debates equally points to the irreversibility and seriousness of the terrorist threat. It is implicitly and explicitly stated that the consequences of terrorist attacks are thousands of injured and dead innocent individuals, leaving whole societies shocked and permanently changing people's way of life.

Thinking in terms of the serious and irreversible damage that terrorist acts cause is inextricably linked with considering worst case scenarios. Arguing that the threat is so exceptional that exceptional powers are required to combat it implies not only an expectation of serious and irreversible damage but also the consideration that worst case scenarios might become reality. Likewise, it is the case for framing terrorism as a phenomenon with severe consequences. The politician's thinking in terms of worst case scenarios becomes most obvious when looking at how they frame the risk of future terrorist attacks. Politicians in both jurisdictions construct the risk of an apocalyptic future threatening the survival of the nation. Especially in the British debate, politicians draw scenarios of terrorists possessing weapons of mass destruction, including atomic bombs. To this extent, a member of the House of Lords argues that

there is no question that the next generation of terrorists, rather than going for small, little dramas will go for the big one. They now understand that the way to get the world's attention is not strapping the bomb to themselves in a pizza parlour, but to do something so horrific it gets you into the Guinness Book of Records for terrorism. That takes years to plan; and it will be nuclear.¹⁹⁸

Another British MP warns that there is evidence that terrorists plan to 'load an aeroplane full of explosives and plunge it into Genoa during the G8 summit in June'.¹⁹⁹ In the Bavarian debate, politicians do not directly make use of worst case scenarios. However, they similarly create the idea that future terrorist attacks will be so severe that they can threaten 'the survival of the nation', 'public security and order', as well as 'freedom' and 'security'.

Following the idea of serious and irreversible damage and expecting worst case scenarios, it also becomes obvious in both debates that politicians wish for a situation with zero risk. One of the commonly made arguments in the British debate is that the measure is

¹⁹⁸ HL Deb 27 November 2001, vol 629, col 161

¹⁹⁹ HC Deb 19 November 2001, vol 375, col 96

the only available option for the government to take. Leaving potential terrorists roaming free in the society is unacceptable because it poses a great risk. To avoid any risk of further attacks, politicians prefer to preventatively detain, even though this may be to the detriment of innocent individuals. The Bavarian politicians also put forth an argument which implies their wish for a situation in which there is no risk. The third commonly made argument in their debate is that citizens expect the politicians to protect them and that they have the obligation to act. If indefinite preventive detention is the logical consequence of this, the underlying assumption must be that drastic prevention is one of the major means to protect. In other words, if people expect you to protect them, the risk of another attack happening must be minimized to the greatest extent possible. Along these lines, the Minister of State, who proposed the measure to the Bavarian Parliament, states that ‘no one can guarantee hundred percent safety, but it is our responsibility to do all that is humanly possible for the security of the people’.²⁰⁰ Furthermore, especially in Bavaria, prevention is framed as an effective means to combat terrorism. This suggests that, even if not eliminating it completely, reducing risk to a minimum is possible and desirable.

The rationality of zero risk, in turn, is linked with the idea to shift the burden of proof. This idea implies that by default, every single person is a potential terrorist and will be treated as such unless he or she can prove his or her innocence. Treating everyone as a potential terrorist aims at minimizing the terrorist risk to the greatest extent possible. Evidence of the rationality of a shifting burden of proof can be found in how politicians in both debates frame terrorists. They refer not only to those individuals who committed for instance the 9/11 attack as terrorists but also when talking about the future detainees. This suggests that not much importance is attached to keeping up the presumption of innocence in relation to the new provision. Furthermore, the Bavarian politicians argue that the preventive detention of individuals is effective. In other words, it is effective to detain individuals before they have been proven guilty in a trial. Similarly, politicians in the UK claim that it is proportionate to indefinitely detain potentially innocent individuals. Both these arguments reflect a mindset according to which law enforcement measures are acceptable to be imposed on individuals whose guilt has not yet been proven. It has to be noted, however, that the common argument in both debates of abuse being unlikely is somehow contradictory to the logic of a shifting burden of proof. In arguing that abuse is unlikely, politicians in both debates claim that there are sufficient legal safeguards to ensure due process. This implies

²⁰⁰ OW: ‘Eine hundertprozentige Sicherheit kann niemand garantieren, aber das Menschenmögliche zu tun für die Sicherheit der Menschen – das ist unsere Verantwortung’; BL Deb 25 April 2017, plenary protocol no 102, 1

that no individual should be deprived of his or her liberty if his or her guilt has not been proven.

In sum, the four rationalities of serious and irreversible damage, worst case scenario, zero risk, and a shifting burden of proof underlie several of the arguments and justifications, as well as most of the frames used in the debate. However, in some arguments in the debates, none of the rationalities could be identified and in the case of a shifting burden of proof, one of the arguments even contradicts this rationality. Nevertheless, the rationalities underlie the majority of arguments and frames which is why it can be concluded that there is strong evidence of a *dispositif* of precaution in the two parliamentary debates. The employment of the *dispositif* of precaution forms citizens in a way that they accept precautionary technologies, such as indefinite preventive detention, in order to combat terrorism. Furthermore, the outliers show that while an analytical framework like the governance through risk approach can account for the overall phenomenon, the reality often is more nuanced than that.

5.2 Attempts at explaining the differences

While the same logic seems to underlie the speeches of politicians in both jurisdictions, there are nevertheless considerable differences in the framework conditions and the frames used. As regards the concrete argumentation and justification patterns, only three of them appear in both debates. Some of the arguments and justifications which constitute patterns in one debate also sporadically appear in other debates. Nevertheless, it is particularly salient that some patterns in one debate do not appear at all in the other debate. The British politicians heavily emphasise that the measure is proportionate, that their human rights obligations prevent them from choosing an alternative to preventive detention or that the measure does not constitute ‘real detention’, none of which are utilised in the Bavarian debate. Bavarian politicians frequently argue that the measure is effective. Despite being identified as a popular argument in counter-terror rhetoric by previous research, British politicians do not mention this argument a single time. Furthermore, the politicians in Bavaria claim that strong powers for the state are necessary to guarantee security and freedom, but this claim is not made in the British debate at all.

The differences in framework conditions, argumentation patterns and frames used is striking given that both case studies represent a similar form of government, a liberal democracy, and the measures which are subject of the discussion are extremely comparable. In this section, it is discussed to what extent these differences can be explained. As stated in

the limitations, the following section is to be understood as an attempt at explaining the differences. No absolute statements on why politicians argue in a certain way can be made, as there are too many variables which could have influenced the legitimisation strategies.

Several of the differences can be attributed to the fact that the two debates took place at different points in time. The British debate took place just after the major attacks on 11th September 2001 in New York while the Bavarian Bill was discussed 16 years later after a series of attacks in Western Europe, including Nice, Paris, and Berlin. It therefore comes as no surprise that British politicians frame ‘terrorism’ as a US-American phenomenon while Bavarian speakers present it as a mainly Western European problem. In this context, it is also clear why British politicians frame terrorists mainly as foreigners while they are framed independent of nationality in Bavaria. None of the hijackers of the 11th September attacks were from the US, but instead from Egypt, Lebanon, Saudi Arabia, or the United Arab Emirates.²⁰¹ In contrast, several of the individuals responsible for the recent attacks in Western Europe had the nationality of a EU Member State. Most of the suspects for the major attacks in Paris in 2015 for instance had French or Belgian nationality.²⁰²

According to Mark Elliot, the British counter-terror strategy since 9/11 has significantly been influenced by its perception that terrorists are foreign nationals.²⁰³ It is in line with this assessment that the detention powers under the ATCSA only apply in relation to foreign nationals. Two of the arguments made by British politicians but not by their Bavarian counterparts can be traced back to this detail in the legal provision. One of the arguments which was made by British but not by Bavarian politicians was that the proposed Bill does not foresee ‘real’ detention. It constitutes a ‘unique’ kind of detention since the detainees would be free to leave any time if they find a country which would host them. The Bavarian politicians could not make this argument because the detention powers stipulated in their Bill apply not only to foreigners but to everyone. Another argument distinct to the British debate is that the government’s human rights obligations prevent them from deporting terrorist suspects and they therefore have to be detained. This line of argumentation is again linked to the fact that the detention powers only apply to foreigners as those are the ones usually being deported. Furthermore, the emphasis on human rights obligations in the British debate is likely to be influenced by the fact that the British Human Rights Act entered into

²⁰¹ ‘September 11th Hijackers Fast Facts’ *CNN* (Atlanta, 28 August 2017)

<<https://edition.cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts/>> accessed 15 June 2018

²⁰² ‘2015 Paris Terror Attacks Fast Facts’ *CNN* (Atlanta, 2 May 2018)

<<https://edition.cnn.com/2015/12/08/europe/2015-paris-terror-attacks-fast-facts/>> accessed 15 June 2018

²⁰³ Mark Elliott, ‘United Kingdom: The “War on Terror,” UK-style—The Detention and Deportation of Suspected Terrorists’ (2010) 8 *International journal of constitutional law* 131

force a year earlier. It incorporated the rights set out in the ECHR into British domestic legislation.²⁰⁴

Related to the time factor, there are many reasons to believe that certain differences in the justification discourse constitute evidence for a normalisation process. According to this assumption, the passing of various counter-terror measures since 9/11 has resulted in exceptional powers becoming accepted as normal aspects of the criminal justice system.²⁰⁵ Consequently, the need for justification of the measure in the Bavarian case is lower than when the British Bill was passed in 2001. In line with this approach, it would make sense that the Bavarian Bill was adopted according to the usual parliamentary procedure as opposed to the British Bill being adopted as fast-track legislation. Furthermore, the Bavarian debate was comparably much shorter than the British one, suggesting that the Bill did not get as much parliamentary scrutiny. Some of the arguments made by Bavarian politicians equally support the theory that precautionary counter-terror measures have become normalised. In both jurisdictions, the politicians argue that the measure is a reaction to the current threat situation. However, while the British politicians frequently claim that threat is exceptional and therefore requires an exceptional response, the Bavarian politicians argue that existing powers are simply adapted to an increased threat. The politicians in Bavaria also make the argument that the measure is justified because other federal states have already adopted similar measures, again suggesting that the measure is not new or exceptional. More generally, they claim that the measure is no legal novelty but that similar measures already exist in domestic law.

In sum, some of the differences in the justification discourses can be attributed to the fact that the debates took place at two different points in time and therefore in two different contexts. Furthermore, characteristics of the Bavarian debate indicate that a normalisation process has taken place and the justification discourse was adapted accordingly.

5.3 Implications

In Chapter 1, it was outlined that the present research has a twofold relevance. On the one hand, it has a scientific relevance as it empirically supports the governance through risk approach by analysing how it plays out in practice in the discourses of politicians. On the other hand, it also has a practical relevance because analysing how politicians concretely

²⁰⁴ ‘The Human Rights Act’ (*Equality and Human Rights Commission*, 29 January 2018) <<https://www.equalityhumanrights.com/en/human-rights/human-rights-act>> accessed 23 June 2018

²⁰⁵ Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-terror Laws in Australia’ (2014) 38 *Melb. UL Rev.* 362

attempt to legitimise precautionary measures provides a basis in order to effectively and sustainably challenge legitimacy of such measures. In light of this, the implications of the findings are discussed in this section.

5.3.1 Theoretical implications

As regards the scientific relevance, it became clear that there is strong evidence that the rationalities of zero risk, worst case scenario, shifting the burden of proof, and serious and irreversible damage underlie the speeches of politicians in both jurisdictions. The findings therefore empirically back up the governance through risk approach, confirming the employment of a *dispositif* of precaution which forms citizens in a way to accept precautionary means as suited to govern terrorism. Several points of the findings are noteworthy with regards to the findings' scientific relevance. First, the analysis has proved the interlinkage of all four rationalities. The argumentative patterns and frames through which the rationality of serious and irreversible damage plays out, for instance, heavily overlap with those that reflect the rationality of worst case scenarios. Another example is the argument that it is proportionate to detain potentially innocent individuals indefinitely, as the British politicians claim. It reflects that they expect serious and irreversible damage, and at the same time demand to shift the burden of proof and consider everyone as a potential threat.

A second noteworthy point is that not every rationality is reflected to the same degree in each of the case studies. The rationality of zero risk is for instance very clearly reflected in the argumentative patterns and frames used in the Bavarian debate. The politicians claim that they have to reduce the risk of terrorism as much as possible because the citizens expect them to protect the population. Furthermore, in the way they frame prevention, the politicians imply that it is possible to reduce the risk of terrorism to a minimum. This rationality plays out less explicitly in the British debate. However, the rationality of worst case scenario is pronounced stronger in the British debate than it is in the Bavarian debate. The politicians in the UK make direct use of worst case scenarios, while in the Bavarian debate this rationality is only reflected in how they portray an apocalyptic future.

Finally, how each rationality plays out concretely differs in each debate. It has already been emphasized that the British politicians' argumentative patterns and frames in the main part differs from the legitimisation strategies used by the Bavarian ones. Nevertheless, evidence of all four rationalities could be found in both debates. This means that the same rationality can be reflected through different arguments or frames. The Bavarian politicians' rationality of zero risk for example is articulated through the argument that the citizens expect

them to act and they therefore cannot take any risk. In contrast, the rationality plays out in the British debate through the argument that there is no alternative to the measure because leaving the individuals to roam free is too big a risk.

5.3.2 Practical implications

Having looked at the theoretical implications of the analysis, a look is now taken at its practical implications. In terms of practical relevance of the analysis, it was argued that the findings can provide a basis in order to effectively and sustainably challenge the legitimacy of precautionary counter-terror measures. Challenging the legitimisation discourse on these measures is necessary because it is questionable to what extent certain precautionary measures are compatible with principles of the rule of law and human rights - principles which build the very foundations of every democracy. The question now arises as to what lessons can be learned from the findings for challenging the legitimisation discourses of precautionary measures.

The analysis of the two debates has revealed that while the same four rationalities underlie the politicians' legitimisation discourses, which concrete argumentation and justification patterns are emphasised differs. Only three of the main patterns overlap in the two debates. Furthermore, the frames used partially differ as well. In other words, the four rationalities are reflected in each debate by different argumentative patterns and frames. Efforts to challenge the legitimisation discourses of politicians should therefore focus on the underlying rationalities rather than the concrete argumentative patterns and frames.

As an example, the Bavarian politicians' rationality of zero risk is articulated through the argument that indefinite preventive detention is necessary because the citizens expect them to act. This argument implies that prevention, or the avoidance of any risk, in the form of indefinite detention is the major means to protect. In contrast, the rationality plays out differently in the British debate by arguing that there is no alternative to the measure because leaving the individuals to roam free is too big a risk. In trying to challenge the legitimisation of indefinite preventive detention, it would be more effective and sustainable to challenge the underlying rationality, that is to strive for zero risk, rather than challenging each argumentative pattern separately. Even if the politician arguing in favour of the measure can be convinced that there are alternatives to indefinite prevention, he or she will likely find another argument based on the premise that the goal is to strive for zero risk. Challenging the underlying rationality of zero risk directly derives a range of arguments of its logic. In the end, it is the acceptance of the underlying logics which underlie each argumentative pattern

and frame that makes the precautionary measure appear adequate to other politicians and the public.

In order to tackle the four rationalities, a counter-narrative needs to be created. The counter-narrative should put into perspective the rationality that terrorist attacks cause serious and irreversible damage. It should stress the likelihood of worst case scenarios actually happening and make clear that the risk of terrorism can only be reduced to a limited extent. Finally, it needs to highlight that the rule of law and fundamental rights are essential for the functioning of a democratic society and that the burden of proof should therefore not be shifted in order to combat terrorism.

Conclusion

The point of departure for this thesis was the observation that counter-terror measures increasingly tend to have a precautionary character. This is problematic given that the compatibility of some precautionary measures with principles of the rule of law and human rights is highly questionable. Therefore, this research set out to inquire how precautionary counter-terror measures are attempted to be rhetorically legitimised in liberal democracies. To this extent, the parliamentary debates on a British and Bavarian Bill, both providing for indefinite preventive detention of terrorist suspects, were analysed with regards to how politicians justify the measure under discussion. Drawing on the analytical framework of governance through risk, it was argued that the same four rationalities of (1) serious and irreversible damage, (2) worst case scenario, (3) zero risk and (4) a shifting burden of proof underlie the politicians' justification discourses in both cases. However, the framework in which the discussion took place, the frames used, and the emphasis of concrete argumentation and justification patterns differed (in part) significantly from case to case.

These findings turned out to have a twofold relevance. On the one hand, they empirically back up the governance through risk approach which has so far mainly been studied on a theoretical level. The fact that this research has found empirical evidence of this theoretical concept encourages further efforts to look into how the *dispositif* of precaution plays out in practice. Empirically advancing this approach is promising as it can shed more light on how the concept of precaution concretely disseminates within different levels of society.

On the other hand, the findings have a practical relevance. They emphasize the importance of tackling the underlying logics of the justification discourses, rather than challenging every argument, justification, and frame separately. As such, they provide a basis for scrutinizing the legitimacy of laws providing for indefinite preventive detention and other precautionary measures. Questioning the legitimacy of policies and laws is essential for the functioning of democracy. One of the reasons why it is preferable to other forms of government is because democracy allows for decisions to be taken on the basis of arguments and discussion. Decisions taken on such bases tend to be good decisions, being responsive to the needs of the population. However, citizens, the actual power holders in a democracy, need to take part in these debates rather than leaving them to the political leaders alone. This is especially true for laws and policies which jeopardize the guarantee of human rights and rule

of law principles. If no one scrutinizes such political decisions, the essential pillars of democracy are at risk of collapsing and eventually democracy itself.

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