UNDERSTANDING JUDICIAL INDEPENDENCE AND FAIR TRIAL IN AN ERA OF TERRORIST THREATS: A COMPARATIVE PERSPECTIVE

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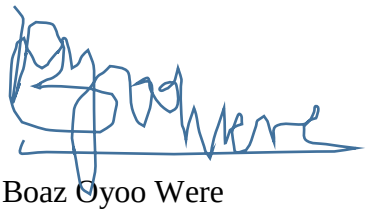
DECLARATION

This thesis is my original work and has not been presented and or submitted for a degree in any other university.

Signature Date



17 April, 2022.

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This thesis has been submitted for examination with my approval as the university supervisor.

Signature Date

Professor Dr. Attila Bado

DEDICATION

To my family for being a constant source of support and encouragement.

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ABBREVIATIONS AND ACRONYMS

CI – Constitutional Ideology.

CLGP – Constitutional Limitations on Government Powers.

DI – Decisional Independence.

ECHR - European Convention on Human Rights.

ECtHR – European Court of Human Rights.

ENSL – Expanded National Security Laws.

EU – European Union.

HLTT – High-Level Terrorist Threats.

HRF – Human Rights Frustrations.

ID – Impartial Disposition.

ICCPR – International Convention on Civil and Political Rights.

LP –Liberty Protection.

ML – Middle Left.

MR – Middle Right.

PF – Procedural Fairness.

PD – Partial Disposition.

SP – Security Protection.

TEU – Treaty on European Union.

UDHR - Universal Declaration of Human Rights.

UK – United Kingdom.

UN – United Nations.

U.S.A –United States of America.

ABSTRACT

Despite terrorism being a threat to peace in stable democracies, its potency on judicial independence and fair trial practices has never been fully understood. The purpose of this research was to establish the impact of expanded national security laws (counterterrorism laws) on judicial independence and fair trial practices in Western democracies that have experienced terrorist attacks. The research developed unique models for studying judicial response to terrorist threats. These analytical tools not only ensured robustness, but also safeguarded the validity and reliability of the study. Drawing on sixteen case law studies, I obtained strong evidence (support) for the view that terrorist threats pose significant challenge to judicial independence and fair trial practices, and when threats are high, this challenge is reinforced, particularly in the U.S., UK, and Germany. France, however, recorded a positive influence in terms of judicial outcomes.

CHAPTER ONE

INTRODUCTION

1. Introduction

Constitutional scholars agree that constitutional provisions often come under pressure as a result of crises situations (i.e. Ginsburg, Rosen, and Vanberg, 2019). Similarly, Roznai and Albert (2020) concur that constitutions are often broken under extreme conditions, particularly during war, secession, emergency or some other extraordinary circumstance. Yet, Finn (1991) argues that "Almost every modern constitution makes some explicit provision for crisis government" (p.13). This implies that constitutional perpetuity is just unfeasible even in mature democracies. These observations are distinctly worrying, and, thus, engender cardinal questions: how exactly do crises situations affect judicial decision making? Should judges abandon the constitution during crises situations and allow the executive to be in charge of its own expanded or discretionary powers? These are not simple questions to answer as they generate considerable controversies.

In yet another striking minority opinion, Justice Blackmun asserted in *Gregory v. Ashcroft*, 1991, that "the primary task of a judicial officer is to apply rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions" (see Wrightsman, 1999, pp.18-9). According to Justice Blackmun, judges should always defer to democratic institutions. This implies that during crises situations, judges ought to defer to (support) state's security policy. This takes us back to the observation opined in Ginsburg et al. (2019) and again back to our second question. Should judges abandon the constitution during crises situations and instead, as Justice Blackmun says, "apply rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions"? In other words, should judges defer to the executive on questions involving national security? Should judges sacrifice liberty or fundamental rights for the sake of national security? What is the role of the judiciary in counterterrorism? While there seems to be no simple answers for these questions, they continue to provoke scholarly debates and remain highly controversial. Against the backdrop of these controversies, I build a logical case with

demonstrable facts that government's response to national security threats is not only more likely to undermine the rule of law, but also very likely to exert undue pressure on the judiciary.

The primary aim of this research is to critically examine the impact of terroristic violence on the quality of justice provision in Western democracies. Terrorist acts are considered serious criminal offences in domestic laws.[1] The threats of terrorism not only terrify governments, citizens, and organizations, but also create considerable psychological distress and physical suffering (Hancerli and Nikbay, 2007). Since terrorism is considered a criminal act, it should attract criminal law response rather than 'war' model response. The criminal justice is therefore required to play a key role in counterterrorism measures. In particular, judicial response to counterterrorism measures forms the centerpiece of this research. Scholars observe that in recent years, there has been an emergence of 'counter-terrorism judicial review', that is, the use of judicialised processes to challenge state behavior with regard to counter-terrorism (Davis and De Londras, 2014).

I firstly provide a context for the problem statement and then demonstrate that terroristic violence is more likely to compel democratic states to develop expanded national security laws (i.e. counterterrorism legislations), which negatively impacts on the rule of law and the judiciary. In this study, expanded national security laws and counterterrorism laws or counterterrorism legislation are used interchangeably. I make a strong argument that expanded national security laws are not only liberty-intrusive schemes that challenge the right to a fair trial, but also pose serious threats to judicial independence. I also robustly demonstrate that a judge's capacity to act fairly or impartially is more likely to be curtailed in times of crises situations (i.e. national security threats). This is mainly because the willingness of other political branches to work constructively with the courts and demonstrate their commitment to the rule of law and constitutionalism in times of national security threats is more likely to wane.

Moreover, the present study makes averments that modern day terrorism is likely to present increasingly new challenges for national security, human rights, and the administration of justice. Scholars agree that challenges to democracy and the rule of law do come about in times of public fear. For instance, Zwitter (2012) opines that democracies are more likely to become less democratic in times of national security threats. The impact of these challenges on fair trial and

[1] The UN Security Council Resolution 1373, para 2 (c).

judicial independence is what forms the basis of this research work. The scholarship herein not only undertakes rigorous testing of existing facts, but also present evidence in support of the antecedent facts.

This chapter therefore lays out an illuminating background to the research, which culminates in a research problem. The gaps identified in the research problem form the basis of the research question and research objectives. The justification for research, and the methodology to be applied to satisfy my research objectives are all contained in this chapter. Definitions of key terms and concepts including the scope of research, its limitations and delimitations are made available at the tail end of this chapter. The chapter also makes key assumptions and end with a conclusion.

1.1 Background to the research

The global campaign against terrorism has taken a heavy toll on human rights and has negatively impacted on constitutional safeguards around the world (Scheppele, 2020, p. v). For example, according to the Amnesty International, human rights framework in European countries, which was so carefully constructed after the Second World War, is being rapidly dismantled due to terrorism threat.[2] No single definition of terrorism has gained universal acceptance. For the purposes of this study, however, I have chosen the definition commonly used by the US Government for the last 21 years. This definition is also widely accepted. Accordingly, "terrorism" is considered to be a premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience. "International terrorism" is terrorism involving the citizens or territory of more than one country.

The Council of Europe's definition of terrorism was put forth by the Council's Parliamentary Assembly in 1999. It defines an act of terrorism as:

"any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is

[2] Amnesty International (2017) Dangerously Disproportionate. The Ever-Expanding Security State in Europe. https://www.amnesty.org/en/latest/campaigns/2017/01/dangerouslydisproportionate/. Accessed 1 April 2021.

intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public".[3]

Scholars argue that before 9/11, the rights based model of democracy held sway in most democratic countries and state action had to conform to standards of legality and procedural propriety as well as be necessary, suitable and proportionate to the aim pursued.[4] However, since the 9/11 attacks on the U.S. soil, there has been a noticeable shift in the manner in which States view human rights and how they formulate the balance between rights protection and State action to combat terrorist threats.[5] Indeed, in the wake of September 11, 2001 terrorist attacks, the United States radically restructured its domestic law enforcement approach to terrorism. This included combining multiple separate government agencies into the Department of Homeland Security. It revised its laws and policy, culminating in passing the U.S. Patriot Act, which was mainly created to assist in the fight against criminal and terrorist acts. America's 9/11 was a catalyst for changing laws not only in the United States in the months following September 11, 2001, but also in other Western democracies.

Western democracies continue to experience difficulties on how to employ constitutional response to terrorism. For example, Western democracies have faced difficulties in prosecuting their own citizens who travel to other foreign countries to join combat zones. Indeed, with the phenomenon of foreign fighters, who have travelled *en masse* and from their Western countries to the conflict zones abroad (i.e. Syria and Iraq), the problem becomes compounded because it means that Western democracies are no longer safe from threats of domestic terrorism. This phenomenon is more likely to increase the risk of human rights violation. Scholars contend that terrorism threat may primarily be seen as a threat to the full enjoyment of human rights (Scheinin, 2020, p. 13). Scholars argue that although terrorism threat has caused tension between national security and human rights, both cannot be weighed against each other.[6] It is apparent that securitization has become "a proposed panacea to the threat of terrorism" (Scheinin, 2020, p. 19). But the

[3] See Reichel, Phillip. Comparative Criminal Justice Systems: A Topical Approach, 2nd edition, Upper Saddle River, New Jersey: Prentice Hall, 2005.
[4] Dora Kostakopoulou, „How to do Things with Security Post 9/11" (2008) Oxford Journal of Legal Studies 28, p. 317.
[5] International Commission of Jurists, Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights. Available at http://ejp. icj.org/IMG/EJP-Report.pdf. Last accessed 21st July 2010.
[6] Paulussen 2016, pp 25–26.

fundamental question that needs to be asked is whether balancing between security and human rights is possible. Can security be effectively provided with less violation of rights?

The case in point concerns human rights of terrorism-related suspects. A deeper issue is whether the recently introduced counterterrorism law and policy undermine safeguards for human rights. Does the judiciary has the constraint of deference to the executive branch? Notwithstanding the heinous crimes commissioned by terrorism actors, Western democracies still bear the primary responsibility in ensuring the protection of human rights (Feinberg, 2016, p. 180). The primary aim of the present study is therefore to examine the full impact of terrorism threat on judicial independence and fair trial practices. Prior to al Qaeda's attacks on the U.S. soil, acts of terrorism and their implications for judicial systems had not attracted much attention in legal scholarship. In all these mess of terrorist attacks on Western democracies, what then should be the role of courts (judiciary)? Even though the task of setting constitutional limits to legislative and administrative anti-terror measures is politically delicate and doctrinally demanding, the courts still have a responsibility of judicial oversight over both the executive and legislative arms.

The present study develops greater refinement in the understanding of judicial independence and fair trial in a changing world that increasingly experiences myriad security challenges posed by non-state actors. The background to this study is thus provoked and informed by violent extremism that has been meted out in recent years by non-state actors, whose self-determination is aimed at destabilizing law and order in unsuspecting Western democracies. Violent extremism entails commissioning an act of violence for purposes of achieving political, ideological, religious, social, or economic goals. It not only undermines law and order in society, but also upsets fundamental democratic principles and values. The study examines far-reaching consequences of terrorist attacks (violent extremism) in Western democracies. Violence is generally an act of physical force that usually causes or is intended to cause serious harm. The term Western democracies is used interchangeably with liberal democracies to denote western countries which share in common certain constitutional principles and values such as, the separation of powers into different arms of government, the rule of law, and the equal protection of human rights, civil liberties and political freedoms. It is important to first reflect on the developments of liberal democracy and the rule of law, in order to fully appreciate the impact of terrorist threats on fair trial and judicial independence in contemporary western democracies.

1.1.1 The Nature of Liberal Democratic States

Liberal democracy traces its origin to the age of enlightenment – age of reason, which was mainly an intellectual and philosophical movement that informed the people on new ways to make the world a better place, during the seventeenth and eighteenth centuries. The ideas at the time centered on the pursuit of happiness, sovereignty of the mind, constitutional government and separation of church and state. The possibility of democracy then became a serious consideration after it was initially thought of as inherently unstable and chaotic. This is because human beings were perceived to be inherently evil and violent. Against the backdrop of the foregoing perceptions, there was need to have a strong leader to restrain the evil nature of human beings, which was replete with evil designs and destructive impulses. The idea was to have a society, which human affairs could be guided not only by reason, but also by principles of liberty and equality. The other thinking at the time was that laws should apply not only to those who are governed, but also to those who govern, hence the legal concept of the rule of law. At the same time, there was renewed interest in Magna Carta - a royal charter of rights drafted in England in 1215. For instance, the petition of rights was enforced in 1628, and Habeas Corpus Act was passed in 1679, which established certain liberties to subjects.

The foregoing historical reflection provides great insights into the development of democracy, constitutionalism, and the Bill of Rights. However, progressive democratic development also came about through philosophical thinkers of the time, for example, Thomas Hobbes (1588-1679), John Locke (1632-1704), and Charles Montesquieu (1689-1755). Hobbes argued that the “state of nature”, in which individuals lived, everyone felt naturally equal, hence everyone suffered from fear and danger of violent death. Thomas Hobbes, contended in *Leviathan* (1651) that vesting absolute power in the government was necessary to avoid an anarchic 'war of all against all'. He argued that life of man in the state of nature was solitary, poor, nasty, brutish, and short. He observed that there were no laws or anyone to enforce them, hence the need to impose a supreme power to impose peace in everyone. Hobbes argued that people agreed among themselves to “lay down” their natural rights such as equality and freedom and deferred all power to the sovereign (supreme ruler). The sovereign was then better able to make and enforce laws for purposes of securing a peaceful society by way of social contract. Hobbes emphasized for the need to have a King (chief ruler) with absolute power.

Locke, however, differed with Hobbes, and called for limited power of the King. John Locke, in his *Second Treatise of Civil Government* (1689), argued that the state should rest upon consent, and that the governing authorities should never have absolute or monistic power. He observed that the King was limited by the natural rights of individuals and hence the government needed to "govern lightly." He also believed, unlike Hobbes that natural rights such as life, liberty, and property should never be taken away or voluntarily given up by individuals because such rights were "inalienable" (impossible to give away). Locke came up with the idea of separation of powers, but emphasized on the power of law-making by legislature, and the power of law enforcement by the executive. He only mentioned the judiciary as a third branch to be created under the authority of the legislature. Montesquieu observed that it was within the ambit of the government to maintain law and order, provide political liberty, and protect property of individuals. He advocated for a separation and balancing of the powers of government. He observed that the executive and legislative branches should be separated and further balanced by an independent court system, in order to check and prevent any branch from becoming too powerful.

Thomas Hobbes had long argued that the state is the sole actor that can legitimately wield violence. In the same vein, Max Weber in his "Politics as a Vocation" (1919) defined the state as a human community with the sole monopoly of the legitimate use of physical force within a given territory. Indeed, as (Dunleavy and O'Leary, 1987) point out, the "state is sovereign, or the supreme power, within its territory, and by definition the ultimate authority for all law, i.e. binding rules supported by coercive sanctions. Public law is made by state officials and backed by a formal monopoly of force" (p.2). In the modern democracy, the state remains the only actor that can legitimately authorize the use of violence including exercising control over it. This implies therefore that it is only the "state" as an actor that may exercise or authorize the use of physical force. All non-state actors trying to exercise physical force or meting out violence do undermine law and order by trying to challenge the state monopoly on the use of violence. For instance, terrorist organizations that try to wield violence in a bid to challenge the state monopoly on the legitimate use of violence, only exercise illegitimate physical force or violence. The power of the state has a long history and it should be reiterated that the state only exercises authority within the boundaries of a nation, hence the term "nation-state." Since the state is the supreme power within

its territory, it is also the ultimate authority for all law. But the authority of the state is backed by a legal system.

In law, the state may be treated as a legal person and is essentially a legal entity. At the same time, state agencies are often treated as juridical persons (*juridic*) in law. This means the state can sue or it can be sued. It can be sued if it fails to exercise its authority, duties, and obligations in accordance with the required norms or conventions. As Hobbes and Locke correctly observed, the relationship between people and the state is that of a "social contract." This means that when contract is entered into, a party can sue or be sued for breach of contract. It is important to remark, however, that the democracy of modern times gave birth to fundamental laws (constitutions), which have been the fortunes of the new systems of government. A constitution is generally an aggregate of fundamental principles that constitute the legal basis of the structure of a national government, and how government relates to its citizens.

Other than creating the three branches of government (executive, legislature, and judiciary), the constitution also protects the human rights- political and civil rights of individual citizens. The legal doctrine of separation of powers is therefore often enshrined in many constitutions. The principle of judicial independence therefore derives from the separation of powers doctrine. It anticipates non-interference in the judicial branch, and particularly in judicial decision-making, by the external political actors such as the executive, and legislature, and any other external influence. By extension, the word 'liberalism' is "classically defined as an attempt to limit the power of the state for the sake of individual freedom" (Holmes, 1995, p.18). This means that liberal democracies should provide greater freedom for their citizens. However, Carl Schmidt disagrees with this kind of characterization.

It has been well illustrated in the precursory paragraphs that the state enjoys the monopoly of legitimate physical force or violence. It has also been tendered that the state exercise its power over a nation with defined boundaries. Moreover, the authority of the state is backed by a legal system. Furthermore, legal systems have fundamental principles (i.e. constitution) from which the structure of government derives. The constitution does not, however, donate absolute power to the government, but it in essence limits the power that the government legitimately exercises. It has been instantiated that there exists an implicit "social contract" between government and citizens. Citizens agree to surrender their freedom and obey law and order of the state in exchange for the

greater security and prosperity. If the government fails to protect its citizens, then they are free to end their contractual duties and obligations with that particular government and enter into contract with another one. Indeed, citizens pay taxes to government in exchange for "public goods" such as security and justice. The protection of citizens therefore becomes an important contractual duty of government. If an organized (civilized) society is faced with disorder, the government is expected to restore order. At the same time, if an organized society is faced with injustice, the government is expected to provide restitution – restoration of justice.

Since government collects revenue from citizens in exchange for their protection, it cannot fail to protect them for fear of losing its legitimacy and being dropped from the social contract. This implies that the government must always spend a certain percentage of its annual budget in enhancing the national security of a nation-state. The government must also remain firm in ensuring law and order is maintained at all times and peace and stability prevail in the nation-state. At the same time, the government must ensure that it is the only state actor that can enjoy the monopoly of exercising legitimate physical force or violence and no any other non-state actor should compete or challenge it over the use and control of legitimate violence. What then must the government do when an illegitimate (non-state) actor such as an organized terrorist group tries to challenge the government's monopoly on the use of violence or physical force in a civilized society? A response to this question is illuminated in the immediate paragraph below.

In this study, Western democracies are perceived, and hence treated as civilized societies. They are also referred to as liberal democracies because of the common democratic principles and values that they share. Liberal democracies are bound by the constitution, they exercise limited powers, they respect the rule of law, they recognize and respect human rights, and they also recognize and respect the independence of the judiciary as an implicit concept derived from the separation of powers doctrine. To be able to serve the legal needs of society, liberal democracies create positive laws through the legislative branch, interpret and adjudicate laws through the judicial branch, and enforce laws through the executive branch. The positive laws created includes regulatory and penal. Penal laws are coded and are used to prescribe punishment for state offenders.

Since liberal democracies are civilized, they seek legal redress through an established justice system and process, which normally culminates in a judicial decision. They often do not

take the law into their own hands. This implies that state offenders (criminals) who go against the established law and order may be arrested and subjected to the criminal justice system. Depending on the magnitude of the offense committed, the penal code often prescribes the appropriate punishment for each offense. However, the punishment must be such that it is proportionate with the commissioned offense.

Robert Audi is quoted in Wolterstoff (2012) saying that liberal democracies are reputed for resisting using coercion. Instead, liberal democracies prefer using persuasion. However, a liberal democracy may use force for the reason of public safety, only that such use of force must be justified. The offense of terrorist attack, for example, is considered heinous or grave and the perpetrators must be subjected to a criminal justice system and process through which they are expected to receive a fair trial and subsequently, a proportionate punishment as prescribed in the penal code. The problem of terrorist threats in Western democracies, which is one of the main subjects in this study deserves greater illumination. Although terrorism is still a disputed term and thus does not have a unifying legal definition, it is a criminal act that has been commissioned since more than three centuries ago.

1.1.2 Threats to Liberal Democratic States

Lord Chief Justice, Coke, once stated that "the sovereign is bound to govern and protect his subjects".[7] However, a successful act of terrorism attack not only demonstrates the failure of a sovereign state to fulfil that important basic duty, but also undermines public confidence in the ability of government and, thus, engenders moral panic (Davis and De Londras, 2014). The fear of losing legitimacy as a result of the inability by democratic governments to curtail terrorist criminality is probably one of the biggest fears among Western democratic states. It is important to emphasize here that even as liberal democratic states try to subdue terrorist threat, they cannot be innocent of security bias, whereby the defense of civil liberties becomes relegated.

Ideally during peace time, liberal democracies are supposed to provide a "legal framework for society, ensuring that law and order prevail, protecting the national territory from external aggression, and upholding certain traditional moral values" (Dunleavy and O'Leary, 1987, p.7). However, transnational terrorism has gradually, but steadily risen to become the top security threat

[7] See Calvin's Case 7 Coke Report 1a, 77 ER 377, particularly 7 Coke Report 4 b, 77 ER p382.

in Western democracies. Non-state actors are increasingly using sophisticated methods and skills to challenge the authority of legitimate regimes. This has led to myriad changes in the interest of the state institutions and structures in charge of territorial security. How should the governments of Western democracies address extremism security threats, given that they have limited power under the constitution, and still safeguard human rights at the same time? This particular question poses a serious security versus liberty dilemma among Western democracies. It will be illustrated in this study that enhancing national security adversely affects the enjoyment of fundamental rights and freedoms.

Terrorism is believed to have originated during the Reign of Terror in France between 1793 and 1794. During this French Revolution, the ruling Jacobins employed violence, including mass executions by guillotine, with a view to intimidate the enemies of the state and compel them to obey the law and order. However, this form of violence might not be considered as terrorism by some scholars since it was an act of the state authority. But it can be argued that this form of violence was mainly associated with state terror. It was not until the mid-19th century when terrorism began to be associated with non-state actors. Organized non-state actors who perpetrated terrorism were known as anarchists. The term anarchism refers to a political philosophy and movement that is replete with hate against the ruling regime, and hence its destructive tendencies and violence to dethrone the ruling regime.

In the 19th century, violent crimes that count as modern terrorism had been experienced in Ireland, Russia, and the United States. In the early 20th century, there was a lot of political violence arising from revolutionary nationalism. This was mainly directed against western powers, for example, the Irish Republican Army against the British. In the late 20th century, however, there were increased terrorist attacks due to Islamic militancy, which was mainly commissioned in pursuit of religious and political goals. In 1993, for example, there was a Tokyo subway attack in Japan, and in 1995, there was the Oklahoma City bombing in the U.S.A. In the 21st century, the most deadly attacks were launched on September 11, 2001 (hereafter "9/11") on the U.S. soil.

There is, however, an interesting, but worrying paradox that has been faced by Western democracies from the 17th century until the 21st century. It may be argued that these democracies have worked really hard in perfecting their democratic principles and values for more than the last three centuries. This has translated into greater enjoyment of civil and political rights by citizens.

Back in the day, there was little enjoyment of these rights by individuals and the ruling regimes exercised absolute power. This is contrary to the democratic aspirations of western democracies, which are bound by the fundamental principles, and hence exercise power restraint. Western democracies have become more tolerant to civil liberties and political freedoms. It may be argued that the nation-state has lost much of its original powers since the last three centuries and now derives its powers from the constitution.

Since constitutional democracies are limited in power, there is too much freedom and human rights that have been donated to citizens by the constitution. The paradox facing western democracies is that the more they restrain themselves from exercising absolute power and allow for greater enjoyment of liberties, the more the nation-states become prone to national security threats. Indeed, there is an apparent positive correlation between scaling up the enjoyment of fundamental rights and freedoms in western democracies, and scaling up of methods, skills, and the frequency of Islamic terrorism. The two phenomena are directly and positively related such that increasing the enjoyment of human rights leads to an increase in national security threats. How then should the nation-state respond to this paradox?

Over the last three centuries, the democracy in western countries evolved and matured as one of the best in the entire world. Civil and political rights have been well entrenched in the fundament laws. The justice system has developed over the years to incorporate fair trial practices. For instance, fundamental procedural rights such as due process procedure, equality of arms, and an impartial and independent judiciary are some of the democratic achievements by western countries that guarantee justice and fairness. The rule of law, and myriad procedural protections in western democracies should guarantee a fair trial before an impartial and independent judiciary. However, this significant democratic milestone could easily be eroded due to contemporary security challenges. National security is among the top agenda items in Western democracies. It must be mentioned, however, that the aim of democracy building has always been to secure a just and peaceful society. It would be unthinkable that a just and peaceful society that embraces human rights and democratization would still face serious security challenges. But security has reemerged as a dominant issue in western democracies in this 21st century.

The first thing that terrorist threats do to a democratic state is to invite a government's response. When the threat is very high, the state is more likely to respond with a high dosage of

self-preservation measures. However, when the threat is very low, then the government's response is also likely to come in low dosage. This manner of response by the government to security threats is known as the principle of proportionality. The principle of proportionality applies the criteria of "reasonableness" in constitutional jurisprudence. It is a criteria supported by the European Court of Human Rights, the Inter-American Court of Human Rights and the European Court of Justice. Human rights protection requires the rule of law.[8] Scholars contend, however, that for "the last twenty years, constitutional courts have applied the principle of proportionality as a procedure that aims to guarantee the full respect of human rights (or fundamental rights) by the state. This principle is applied in both civil law and common law systems" (Cianciardo, 2010, p. 177). In other words, the state should not use a "sledgehammer to crack a nut". This is the ideal of liberal democracies. This is what probably makes a democratic government more "prestigious" than an authoritative government.

The preceding historical reflections not only provide a synopsis for democratic development of modern democracies, but also lay a strong foundation that enables us to chart the course of this study in a robust fashion. At this juncture, we are able to pick out from the prevenient paragraphs certain concepts and legal principles such as, sovereign power, absolute power, the separation of powers, limited government, the rule of law, the Bill of Rights, constitutionalism, equality of the law, principles of liberty and equality, habeas corpus, independent court, and social contract. All these concepts and legal principles provide the necessary theoretical building blocks and will thus be used throughout this study for purposes of explication. Indeed, theory construction is important and resides in the heart of every scientific work.[9] Concepts are often the building blocks for scientific thinking. They encompass universes of abstract ideas that represent reality. But it is only when concepts are placed into relationship with each other that they are able to move toward constructing an understanding of reality in society. Scholars observe that exceptional legal frameworks, resulting from the continued struggle against international terror, have now become the norm, permanently displacing prior human rights based regimes that were once enjoyed in liberal democracies.[10]

[8] Universal Declaration of Human Rights (December 10, 1948), Preamble.
[9] JACCARD, James, and JACOBY, Jacob. (2010). *Theory Construction and Model-Building Skills*. New York. The Guilford Press.
[10] Benjamin Goold and Liora Lazarus, „Introduction", p. 3.

1.1.3 Terrorism Threats to Human Rights in Liberal Democratic States

Scholarship about human rights in troubled democracy continues to echo real concerns. It is argued here that the rhetoric of exceptionalism and the "War on Terror" have significantly placed human rights in a precarious position. In an unprecedented way, liberal governments now view human rights as luxuries.[11] Trying to enhance national security stifles the enjoyment of human rights and it therefore becomes a delicate balance for any democratic government to try and promote both contemporaneously. It will be further illustrated in this study that high-level national security threats are more likely to provoke governments to adopt responses inimical to fundamental rights and freedoms.

It is apparent that terrorist threats are likely to undermine democratic gains in Western countries. For instance, Smith (not dated) argues that while counterterrorism measures are geared at thwarting terrorist threats, they can also represent some of the most flagrant violations of the European Convention on Human Rights. He points out that domestic counterterrorism measures contain some of the most flagrant human rights violations. He indicates that the events of the 9/11 terrorist attacks have given rise to an insidious „war on terror" rhetoric that threatens to destabilize and weaken international human rights protection. He argues that there is a strong belief that pre-existing legal regimes are incapable of effectively combating the terrorist threat.

The shocks brought about by the 9/11 attacks have proved perilous and detrimental to human rights enjoyment in Western democracies. The national security discourse and rhetoric based on "War on Terror" seem to have significantly shaped political institutions, including the judiciary. Scholars remark that arguments in favor of greater security measures and the exercise of more authoritarian powers at the expense of human rights often garner more weight in the public eye than calls for their protection. Moreover, the ability to "turn off" certain rights in the wake of the "overriding" interest of national security is thus often seen as reasonable under the current circumstances.[12] Probably one important legal consequence of the global anti-terrorism regime

[11] Oren Gross and Fionualla Ní Aoláin, "From Discretion to Security."
[12] Benjamin Goold and Liora Lazarus, „Introduction" p. 4.

post-9/11 has been the weakening of constitutionalism in liberal constitutional democracies. For instance, some Western democracies such as France has been operating in an almost 'permanent', but almost never declared, permanent state of emergency.[13] The once increasingly rule-of-law oriented Western democracies are now creating more powers to the state in times of crisis and the precise mechanisms for holding the state accountable to those powers is proving more difficult before the courts, particularly in times of state of emergency.

It is assumed in this study that Western democracies have limited power governments. This implies that with all other conditions remaining the same (ceteris paribus), the enjoyment of fundamental rights and freedoms in western democracies remain optimal - most favorable. Figure 1a below provides an illustration of how X (democracies with limited powers government) tend to enjoy Y (fundamental rights and freedoms). The basic argument being made is that governments of western democracies that are limited by the constitution tend to provide most favorable fundamental rights and freedoms to their citizens. However, in figure 1b preceded by 1a, there is a prediction that a change would occur in the enjoyment of fundamental rights and freedoms. In figure 1b, Z represents a national security threat (terrorist attacks). It is predicted that Z interferes with the relationship between X and Y.

The argument that is being advanced here is that the relationship between X and Y is moderated by the magnitude of Z. This implies that when the magnitude of Z is at low-level, then the relationship between X and Y is most favorable. However, when the magnitude of Z is at high-level, then the relationship between X and Y is affected such that there is a decrease in the enjoyment of fundamental rights and freedoms. In this case, X is the independent variable, Y is the dependent (outcome) variable and Z is the moderator variable. This means that the causal relationship between X and Y differs depending on the magnitude (level) of the third variable (Z). In other words, the relationship between limited power government (X) and human rights enjoyment (Y) remains more favorable when national security threat (Z) is low, but human rights enjoyment decreases when the national security threat (Z) is high.

[13] Jacques deLisle 'State of exception in an exceptional state' in Ramraj and Thiruvengadam, Emergency Powers in Asia, p. 342.

Figures 1a and b: The Dynamics of Human Rights Enjoyment

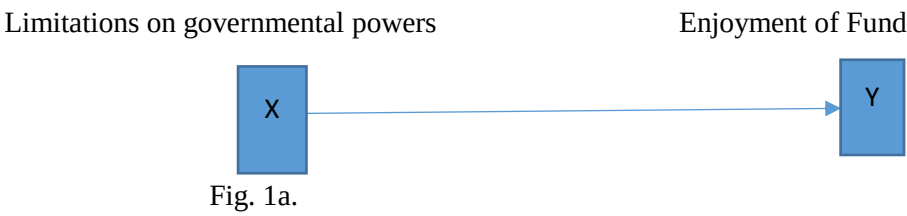


Fig. 1a.

Source: Author

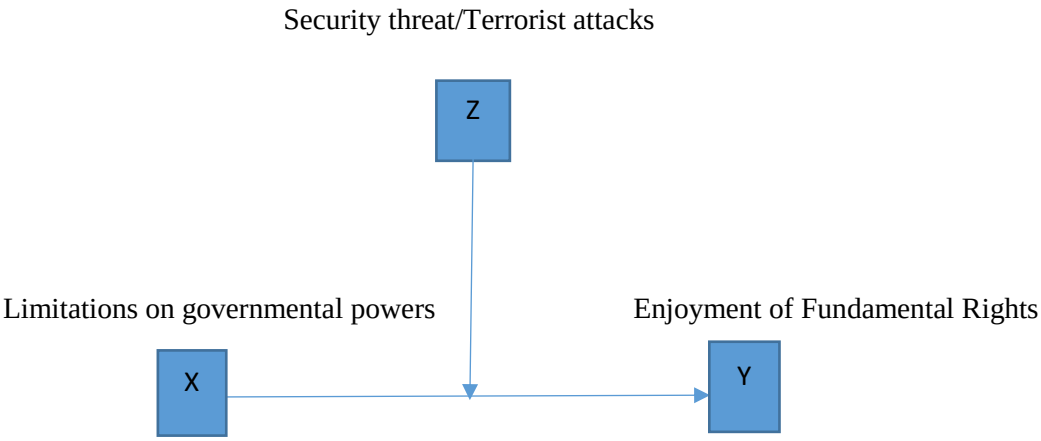


Fig. 1b.

Source: Author

It is important that we fit the above illustrations in figures 1a and 1b into reality. Figure 1a is meant to describe the relationship between limited power governments and the enjoyment of human rights before the September 11, 2001 (9/11) terrorist attacks on the U.S. soil. Figure 1b, however, depicts a relationship between limited power governments and human rights after the 9/11. Before the 9/11, the enjoyment of human rights was more favorable, but that enjoyment became less favorable after the 9/11. This is because terrorist attacks were perceived to be at low-level threats before the 9/11, but this changed to high-level threats after the 9/11. Although there were terrorist attacks in western democracies some decades before the 9/11, the penal codes that prescribed punishments for terrorism offenses were as ordinary as those that prescribed punishment for other types of offenses. In other words, terrorist offenses were more or less treated

as ordinary criminality. However, this "ordinariness" of the penal code remarkably changed and became "unique", after the 9/11. The frequency and the magnitude of terrorist threats after the 9/11 led to the creation of Expanded National Security Laws (ENSL). During this period of High-Level Terrorist Threats (HLTT), many governments in Western democracies came up with interventions (i.e. ENSL) to be able to de-escalate terrorist threats. By so doing, fundamental rights and freedoms previously enjoyed by citizens became affected and their enjoyment shrunk. The ENSL enabled governments to increase their powers and exercise too much discretion. To human rights advocates and enthusiasts, ENSL provides governments with legitimate opportunity to abuse their powers and frustrate human rights. It can be said that while western governments view ENSL as necessary measures to curb terrorist threats, human rights advocates perceive ENSL as Human Rights Frustrations (HRF). This is because ENSL are perceived to be a set of harsh security measures.

It can be illustrated further that High-Level Terrorist Threats (HLTT) potentially leads to Expanded National Security Laws (ENSL)/Human Rights Frustrations (HRF). However, it is also important to examine how the ENSL/HRF is likely to affect or influence the Procedural Fairness (PF). It should be noted here that with the ENSL/HRF put into place, its enforcement is likely to produce two things: Procedural Fairness (PF) and Lack of Procedural Fairness (LPF). It will produce PF only if its implementation is not abused by law enforcement personnel and is in accord with constitutional rights of the defendant. However, the ENSL/HRF will produce LPF if its enforcement is abused and is incongruous with constitutional rights of the defendant.

We are examining procedural fairness or lack of it, based on how the criminal justice system and process would treat or handle defendants of terrorism-related offense. This is done bearing in mind that such defendants are presumed innocent until proved guilty in accordance with the law. Additional crucial step is to be able to examine how the procedural fairness or lack of it, impacts on the judiciary. The judiciary in this case is understood as the neutral arbiter for disputes that arise between parties. It is expected that the judiciary is independent and judges that adjudicate are also independent. Independence in this sense means that the judicial branch is free from external influence by other political actors and judges are subject only to the constitution and not subject to the direction of any other person or authority. Judges are not supposed to be under undue pressure, intimidation and influence from other sources. Although we can have different forms of

judicial independence (i.e. institutional and decisional), this study will mainly focus on decisional independence.

1.1.4 Contemporary Threats to Judicial Independence in Liberal Democratic States

Scholarship on judicial independence continues to gain currency and controversies as well. Judicial independence is generally viewed as an essential feature of liberal democracy (i.e. Russell, 2001. p.1). The point to emphasize is that judicial independence goes hand in hand with judicial impartiality. As Russell (2001) observes, judicial impartiality is a sister concept of judicial independence. But should judicial independence be seen as an end in itself? For political scientists "studying the real world of politics, judicial independence and impartiality are not absolutes" (Russell 2001, p.2). Even liberal democracies differ in their treatment of judicial independence. Some have constitutionalized it, while others have not. From the perspective of political science, everything in the political system is connected to everything else and nothing in the political system is without a bias (Russell (2001, p. 2). The cardinal questions that should be asked are these: if indeed judicial independence is an essential feature of liberal democracies, should it be protected or face threats? If judicial independence is not an end in itself, then for what end does it serve?

Judicial independence should, however, be viewed as a means to an end. It serves the end of maintaining the rule of law in liberal democracies. As one scholar correctly opines, much of the Western world, constitutional review has come to be understood as "the necessary 'crowning' of the rule of law" (Cappelletti 1989, p. 205). The power of judicial review is dependent on judicial autonomy. Who would be scared most of judicial review? We can say that the institutions that bear democratic accountability would be most scared. For instance, when government wants to expand executive powers in the name of national security law, it has to worry about judicial response to such legislation. As one scholar argues, "the capacity of political system to implement policy is increased by low level judicial independence" (Della Porta (2009, p. 369). This implies that the executive and legislative arms of government would be the most scared about strengthening judicial independence.

Scholars observe that "Constitutional review – defined as the power of judicial bodies to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the

constitution – has emerged as an almost universal feature of Western-style democracy" (Vanberg 2005, p. 1). This observation further fuels the danger of the executive and legislative threat on judicial independence. The government would always want unlimited powers, and more so when it comes to matters related to national security threats. But one of the main responsibilities of the judiciary is to ensure that the government does not abrogate the constitutional limitation of government powers, even during crises situations. O'Brien and Ohkoshi (2001) observe that judicial independence can be threatened from both outside and inside the judiciary itself, by senior judges using administrative and personnel controls to direct decision making of individual judges lower in the judicial hierarchy. This implies that political interests and exigencies are some of the major contemporary threats to judicial independence.

To what extent has the "War on Terror" rhetoric potentially influenced jurisprudence of courts? It is important to investigate whether the post 9/11 "War on Terror" rhetoric has found its way into the jurisprudence of the courts, including the ECHR jurisprudence, and whether such influence is the force behind ensuring that security interests are given greater consideration over human rights. Although there are strong pillars that are said to guarantee judicial independence in Western democracies (e.g. tenure, merit-based selection, budget autonomy, better remuneration, etc.), these pillars do not, in and of themselves, necessarily guarantee judicial independence. This is because judges are embedded in an environment where they must be responsive to the preferences of other key institutional actors (e.g. executive and legislature), other judges and the public (Johnson, 2019, p.30). They have to be responsive, particularly to other key political organs, for fear or threat of enforcement resistance. James E. Baker, Chief Judge, United States Court of Appeals for the Armed Forces and Adjunct Law Professor, observes that "Law performs three national security functions. It provides substantive authority to act. It provides essential process. And, it conveys essential societal and security values.

In United States practice, each of these foundational functions is found in Constitutional law, statutory law, and Executive directive" (see Ballin, 2012, p. vii). Baker further argues that the 9/11 incidents put uncommon strain on each of these law functions. This implies that the 9/11 terrorist attacks put a lot of pressure on Constitutional law, statutory law and Executive directive. For instance, when the legislature develops new law to counter terrorism, such new legislations may put a strain on constitutional interpretation. Similarly, when the executive issues orders in

response to terrorist threats, such orders may put a strain on constitutional interpretation. Consequently, when judiciary is called upon to interpret the constitution in times of national security crisis, judges may be under pressure on how to interpret the constitution because they might get worried whether their judgement will be enforced.

The then Chief Judge of the Washington DC Circuit, once expressed with resignation that the awareness that judges can do little to compel enforcement of their "judgments is a real, recurring element in judicial thinking" (Johnson, 2019, p.30). This thinking overwhelmingly drives judicial self-restraint. This is likely to make the courts defer to the executive rather than risk the impossible. Johnson further argues that courts are more likely to defer to the executive (judicial deference) in foreign affairs policy and war powers. Courts are more likely to defer to the executive during crisis or emergency if they believe that the executive would derive popular support in implementing its policy.

Although one scholar, Susanne Schorpp, has conducted research exploring the spillover beyond war power in case (judicial) outcomes by comparing court behaviors in Canada, the United Kingdom and the United Sates during war on terror in the post 9/11-era, her analysis reveal varying results from the findings of the present study's analysis. Schorpp (2109) concludes that courts in all the three countries tend to "rule against the government at the same rate during periods of peace and war" (Sterett and Walker, 2019, p.4). Her researched focused on judiciaries with common institutional features (common law tradition). Also, the courts selected in her study were mainly Supreme Courts (i.e. courts of last resort). This allowed her to employ the most similar research design, which limits potentially confounding influences. All the three countries also enjoy strong judicial independence, and are respected judiciaries that enjoy legitimacy and support. Schorpp (2019) conducted a comparative test on judicial decision-making in times of war. She reveals that judges presiding in periods of high-level national security threats are more likely to face an emboldened government that derives extensive powers from the legislature (i.e. broader deference by legislature) in order to defend public interest.

During periods of high-level national security threats, the government is usually perceived as the chief defender of national security interests. Schorpp (2019) argues that such a shift is likely to make it difficult for the courts to limit government policy in times of war relative to in times of peace, hence a shift towards increased government support in case in which the government is the

petitioner. In contrast, however, Schorpp (2019) reveals that the judicial outcome might be different in cases where government is the respondent. Her argument is premised on the fact that, in cases where government is the respondent, such cases do not automatically signal government priority, hence judges may feel less constrained to vote against the government.

Emergency actions and decisions during periods of high-level national security threats are more likely to lead to "hyperlegality". This means a proliferation of documents, cases, guidelines, and a lot of interpretations (Hussain 2007). A section of scholarship indicates that courts are more likely to defer to the executive in times of war and emergencies because of the executive unitary will, which sometimes is perceived as lawless and mainly designed to overcome the crisis. When courts hold the powerful to account, they are essentially serving the rule of law. This contributes immensely to the motivation of going to court to seek justice. Johnson (2019) also contends that judicial appointees show increased deference to the executive faction/party that was responsible for their appointment and even to the appointing executing himself or herself during judicial decision making.

Judicial independence must be seen as a positive institutional virtue that allows for the promotion of procedural fairness, justice, and legal consistency (Johnson, 2019, p.42). Johnson further contends that as the political ground under the executive starts to shift unfavorably, threats to judges and the judiciary decline, thus making judicial independence vis-à-vis the executive substantially dependent on the constellation of actors in the institutional and political environment (Johnson, 2019, p.42). Elsewhere, scholarship on U.S. judicial behavior reveals that an upward trend in presidential approval is more likely to receive judicial support. Such trends in upward approval are thus predictive of greater judicial support for presidential actions challenged in the U.S. Supreme Court (Yates and Whitford, 1998).

Despite the challenges that the judiciary is likely to face during periods of national security threats, it must me well known to us that judges still hold a great responsibility of protection the rule of law and human rights. In this study I device one way of performing a test to examine how judges can still hold fidelity to the law even in times of crisis. It must be assumed that judges automatically do have Decisional Independence (DI). This implies that even if the judicial branch is perceived to have a weak institutional independence, decisional independence is not given to judges, but is instead automatically possessed by judges. It is important to add that judges can

either use their decisional independence honorably, by making impartial decisions or dishonorably, by making partial decisions.

Other than judges being expected to exercise decisional independence, they must also be seen to be impartial and that means they are required to exercise impartiality in their judicial decision-making. When judges perform their adjudication duty, it is expected that the outcome is an Impartial Disposition (ID) driven by Decisional Independence (DI). Disposition in this case is a term commonly used in both criminal law and civil law to refer to the final decision or outcome of prosecution and transferring of property to the care of someone, respectively. In this case, we use the criminal law meaning, that is, the final decision or judgment which terminates a judicial proceeding.

Although a judge normally relies on the facts of case, the evidence presented and the law in arriving at their decisions, it is therefore expected that their decision is guided by none other than the facts, the evidence adduced and the law. The judicial outcome is expected to reflect an Impartial Disposition (ID) driven by Decisional Independence (DI). Disposition in this case could be in two forms: conviction and acquittal. The role of the courts is quite important, especially in the protection of fundamental rights and freedoms. The courts are therefore empowered by the constitution to review ENSL/HRF to ensure that they respect a fair trial and procedural fairness. It must be a fair expectation that terrorism-related offense whose defendant receives Procedural Fairness (PF) will secure an Impartial Disposition (ID) driven by Decisional Independence (DI) and hence resulting in either a conviction or acquittal. The other expectation is that terrorism-related offense whose defendant suffers Lack of Procedural Fairness (LPF) will secure an Impartial Disposition driven by Decisional Independence and thus resulting in either a conviction or acquittal.

Since judges have decisional independence, they can use it to drive their impartiality or partiality on matters (disputes) before them when making judicial decisions. During the periods of high-level terrorist threats, suspected defendants are more likely to suffer rule of law abuses even before conviction. Arrest of suspects does not imply guiltiness. It is only a court of law that has the competence to determine whether the accused is guilty or innocent. At the same time, in times of high-level terrorist threats, procedural protections of defendants are likely to be compromised. Although it is expected that increased likelihood of terrorist attacks in western democracies is

likely to cause a state of emergency, which often leads to increased executive competence (expanded executive power), reduced legislative competence, reduced judicial power, increased government repression, and reduced enjoyment of liberties, the scenario being depicted here is couched outside the state of emergency. Instead, we are depicting a scenario whereby there is an increased executive power occasioned by national security threats but without necessarily compromising on the competence of both the legislature and the judiciary.

Tensions often arise between national security and human rights.[14] This tension then becomes a conflict between the government and citizen. Judges often confront the problem of judicial review arising from the dispute between national security and human rights. Indeed, courts have inherent constitutional duty to protect procedural fairness within a fair trial. Since the courts have the competence and are expected to review executive overreach within the checks and balance principle, it would be expected of them to ensure that procedural fairness in the criminal justice process is respected. There is one critical test that this study undertakes in determining the challenges to judicial independence in times of crisis. The focus, however, is on the decisional independence. Although the decisional independence may be latent, that is to say that it may not be directly observed in a judge's mind, it is still possible for us to rely on some observable responses, for instance, judicial decisions report, to assess the decisional independence of judges.

It is important to bring out and illuminate some pertinent characteristics of the decisional independence. Other than the fact that it cannot be directly measured, it is abstract and it is also inherently held by judges. It is not controlled by forces outside the judge. However, its practical application (actions) can be moderated by the external influence. Decisional independence can be used by a judge to produce a particular judicial outcome. The judicial outcome produced by a judge could be either impartial or partial. The impartiality or partiality of the decisional outcome can be said to be driven by none other than the decisional independence. For judges, a decisional independence whose practical application is uncorrupted by external influence is likely to produce an impartial judicial outcome.

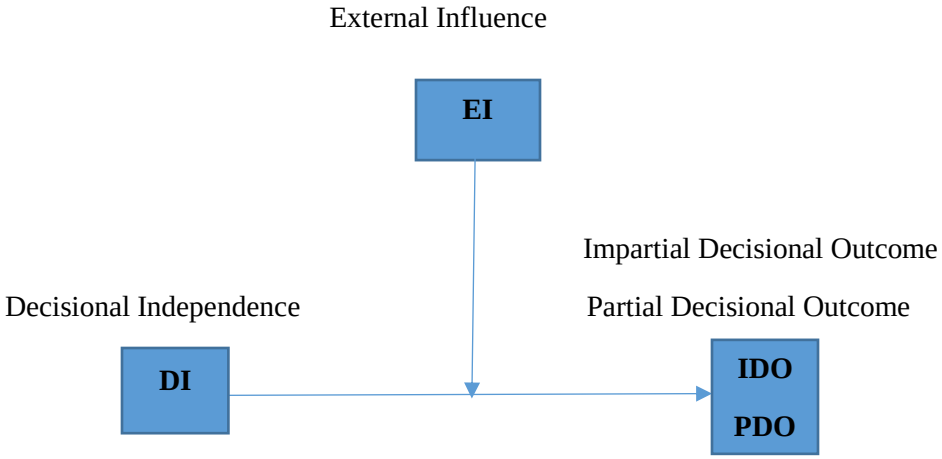
However, a decisional independence whose practical application is corrupted by the external influence is likely to produce a biased (partial) judicial outcome. For instance, before

[14] JENKINS, David. (2016). *Procedural Fairness and Judicial Review of Counter-Terrorism Measures*.

driving to a particular destination, you may independently decide the best route to follow to get safely to your destination. Your decision would be regarded as an independent decision, first and foremost, because you inherently have the independence of the mind to decide. Then as you try to drive to your destination, you come across a road sign that reads "Detour, road under construction." At this point your original independent decision has been effectively affected by the road sign writing (external influence). You may reach your decision but either not safely as you had planned or not in good time as you had earlier expected. This means that you can easily miss what you independently hope for due to external forces or influence. It is the same way that judges have their inherent decisional independence that no outside force may influence, but only through the practical application of it that external influence may interfere with the outcome of the case before a judge.

When the practical application of the decisional independence is corrupted (influenced) by the external factors, the then the likely outcome of the judicial decision would be a "Partial Decisional Outcome" (PDO) as opposed to the "Impartial Decisional Outcome" (IDO). We can test whether a judge's decisional independence was corrupted or uncorrupted by examining the reports of judicial decisions (outcomes) on case law. If a decision rendered by a judge is perceived to be impartial, then it can be agreed that the judge's practical application of decisional independence was uncorrupted by the external influence. However, if a decision rendered by a judge is perceived to be partial or biased, then it can be argued that the judge's practical application of decisional independence was corrupted by the external influence. In figure 1.1 below, decisional independence and how its practical application might be affected by external influence is well illustrated.

Figure 1.1 Effect of External Influence on the Practical Application of Decisional Independence.



DI = Decisional Independence; EI = External Influence; IDO = Impartial Decisional Outcome; PDO = Partial Decisional Outcome.

Source: author.

1.1.5 Threats to Fair Trial Practices in Liberal Democratic States

Thurman Arnold, in his Biography written by Waller (2005), argues that the dignity of the state as the enforcer of the law and the dignity of an individual who is in trouble with the law tend to disappear in times of war, rebellion and crisis. This implies that even in times of high-level terrorist threats, the ideal of a fair trial and the ideal of law enforcement are likely to be mere myths. Arnold argues that the "machinery" [legal protection] surrounding the ideal of a fair trial is seldom strong enough to prevent the conviction of weak and harmless individuals in times of national security crisis. This implies that the high turbulence caused by acts of terrorisms is very likely to weaken the legal protection of rights of individuals. Arnold further argues that the ideal of a fair trial is subject to injustices in the judicial process in times of public fear (during crisis).

Moreover, law enforcement loses its ideal during periods of public fear. Law enforcement represents the ideal of a set of principles that must be applied neutrally and logically without regard for the circumstances for the defendant or the accused party in a time of security threats. This set

of principles tend to clash with the principles of fair trial in times of high-level national security threats. In times of high-level national security threats, the prestige of government in preserving the rule of low gets lowered. At the same time, courts owe their prestige to the idea that they can consistently vacate executive overreach and remand the rule of law even in times of public fear. The present study strongly asserts that Judges should never be influenced into making wrong decisions, but rather should adhere to grander (foremost) neutral principles that uphold the prestige of the judiciary as an institution.

1.2 Methods of Analysis

In order to be able to test the impact of terrorist threats on judicial independence and fair trial practices in liberal democracies, I developed unique analytical models for studying judicial responses to terrorist threats. This sub-section provides a detailed treatment of the analytical models and how they can be applied to test judicial independence and fair trial practices in different judicial systems both during periods of 'low-level' national security threats and during periods of 'high-level' national security threats.

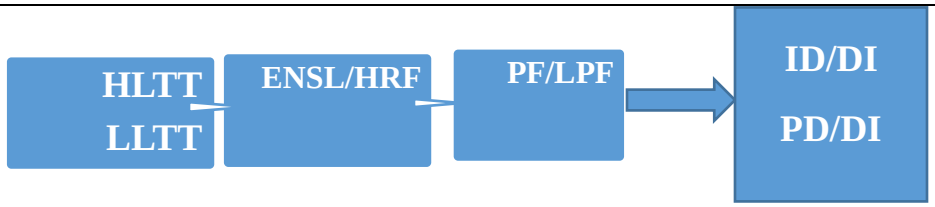
1.2.1 Testing the Impact of terrorist threats on Judicial Independence and Fair Trial

In figure 1.2.1 below, two scenarios are created to test the challenges to judicial independence during periods of high-level terrorist attacks. The scenarios depict periods of high-level national security threats that give rise to expanded national security laws (human rights frustrations), which then give rise to dispute between the government and individuals. Individuals may be arrested by law enforcement officials for being perceived to be terror suspects or for going against the provisions of the security laws. We frame the arrest of such people as "terrorism-related offense defendants'. In the first scenario, we anticipate that following the arrest of defendants, the criminal justice system and process will afford them procedural rights. That means the state agents were well guided to respect the rule of law and procedural rights.

In the second scenario, we anticipate that following the arrest of defendants, the criminal justice system and process will fail to afford them procedural rights, and hence the state agents will be regarded to have failed in respecting the rule of law and procedural rights. In the first scenario, we expect the dispute to arrive in the court of first instance, and receive impartial

disposition driven by decisional independence that culminates in conviction. In the second scenario, however, we expect the dispute to arrive in the court of first instance, and receive an impartial disposition driven by decisional independence that culminates in acquittal. But these two scenarios still do not satisfy the test of decisional independence. The next paragraphs that follow endeavor to complete this test.

Figure 1.2.1 Illustration of the Impact of Terrorist Threats on a Fair Trial and Judicial Independence.



LLTT = Low Level Terrorist HLTT = High-Level Terrorist Threats; ENSL = Expanded National Security Laws; HRF = Human Rights Frustrations; PF = Procedural Fairness; LPF = Lack of Procedural Fairness; ID = Impartial Disposition; DI = Decisional Independence; ID/DI = Impartial Disposition driven by Decisional Independence; PD = Partial Disposition; PD/DI = Partial Disposition driven by Decisional Independence.

Source: author.

Figure 1.2.1 above provides a succinct illustration of the impact of terrorist threats on a fair trial and judicial independence. It should be easier to use abbreviations instead of full words as has been the case in the above paragraphs. The import of figure 1.2.1 should be very clear by now. Since the two stated scenarios in the above paragraph did not completely satisfy the test of decisional independence, this paragraph endeavors to continue with the test. Since in criminal proceedings there are normally two main parties to the dispute (State v. Defendant), it is expected that the party that loses the case in the court of first instance and strongly believes that justice was not well served is free to move to the appellate court. In the first scenario as stated in the above paragraph, if the court of first instance convicted the defendant and the defendant moved to the appellate court and the appellate court upheld the earlier decision by the lower court, then it can be said that the court of first instance did not err.

If the defendant still feels dissatisfied and moves the appeal further to the apex court (Supreme Court) and the Supreme Court upholds the decision by the two lower courts, then the test is complete and it may be concluded that the dispute received an impartial disposition driven by decisional independence of judges. This would be hailed as "pure" justice since in a democracy, the concurrence of the three levels of courts may not have been due to any influence external to decisional independence. In the second scenario as displayed in the above paragraph, if the defendant is acquitted by the court of first instance and the state decides to move to the appellate court and the appellate court upholds the decision of the lower court. Then it can be said that the lower court did not err. However, if the state moves the appeal further to the Supreme Court and the Supreme Court still upholds the decision of the lower courts, then the test is complete and it can be said that the dispute received an impartial disposition driven by decisional independence of judges. This again would be hailed as "pure" justice.

1.2.2 Testing for Decisional Independence

The essence of this sub-section is to upscale the test for decisional independence as illustrated in the preceding paragraphs and in figure 1.2.1 In this test, we again introduce different scenarios and examine instead how the "Partial Disposition" (PD) may play out with Decisional Independence (DI). It is important to note first of all that the independence precedes the decision. This implies that a partial or impartial judicial decision only come about as a function of the independence of a judge. For a judge to make a partial decision, it must only come about as a result of some external forces that would potentially influence the independence of a judge. It must be made clear that Lack of Procedural Fairness (LPF) in a criminal prosecution amounts to lack of justice. The judges must ensure that if procedural fairness is not afforded to the defendant, then the defendant should not receive unfair conviction. We can create two instances of Lack of Procedural Fairness (LPF) and Procedural Fairness (PF). In each instance, we can create three different scenarios. Let us say that there are three levels of courts: lower court (court of first instance), Appellate court, and the Supreme Court. Then let us assume that there is a national security crisis due to high-level terrorist threats. Further, let us assume that there is no state of emergency, hence courts of law have competence. Furthermore, let us assume that arrests are made based on terrorism-related offense. Let us also have it that the arrested defendants are not afforded procedural fairness. Finally, let us have it that the dispute goes to court for determination.

In the first instance of LPF, we can have the first scenario depicting the State v. Defendant, whereby the defendant wins at the lower court, then the State appeals the decision of the lower court in the Appellate court (State v. Defendant). In the Appellate court, the defendant loses at this time and decides to move to the Supreme Court (Defendant v. State), whereby the defendant wins against the state. In this scenario, the defendant scores two wins against one for the state. If a fair trial process is lacking in this criminal proceeding and the defendant is able to score two wins against one for the state, then the test for decisional independence is satisfied. In this scenario, both the lower court and the Supreme Court are perceived to be impartial. The dispute before them is said to have received an impartial disposition driven by decisional independence. Moreover, the ruling by both courts against the government, not only enhance public confidence in the justice system and process, but it also sends a clear signal to the government that the rule of law and a fair trial process are guaranteed through independent and impartial courts of justice. However, the Appellate Court might be said to be biased because it would appear that the dispute before it received a Partial Disposition (PD) driven by decisional independence. In this case, it might be perceived that the Appellate court ruled in favor of a strict government policy despite the infringement on human rights by such policy. Also, the Appellate court's perceived bias might be said to be as a result of underlying forces or external influence.

Still on the first instance of LPF, we can have the second scenario depicting the State v. Defendant, whereby the defendant wins at the lower court, then the State appeals the decision of the lower court in the Appellate court (State v. Defendant). In the Appellate court, the defendant loses at this time and decides to move to the Supreme Court (Defendant v. State), whereby the defendant loses yet again against the state. In this scenario, the state scores two wins against one for the defendant. It must also be mentioned that if a fair trial process is lacking (i.e. lack of procedural fairness) in this criminal proceeding and the state is able to score two wins against one for the defendant, then the test for decisional independence is satisfied. In this scenario, both the Appellate court and the Supreme Court are perceived to be biased (not impartial). The dispute before them is said to have received a partial disposition driven by decisional independence. Moreover, the ruling by both courts against the defendant not only shrink public confidence in the justice system and process, but it also send a clear signal to the public that the rule of law and a fair trial process are not guaranteed by courts of justice. It shows the weakness of superior courts to protect fundamental rights and freedoms of individuals. However, the lower court might be said

to be unbiased because it would appear that the dispute before it received an Impartial Disposition (PD) driven by decisional independence. In this case, it might be perceived that the lower court ruled against a strict government policy that infringes upon human rights. Also, the lower court's perceived impartiality might be said to be as a result of a strong independence devoid of external forces and guided primarily by facts and evidence before the court.

The third scenario of the LPD instance involves the State v. Defendant, whereby the defendant wins at the lower court, then the State appeals the decision of the lower court in the Appellate court (State v. Defendant). In the Appellate court, the defendant wins yet again and the State decides to move to the Supreme Court (State v. Defendant), whereby the defendant loses this time. In this scenario, the defendant still scores two wins against one for the state. But since the decision of the Supreme Court is final and there can be no other further appeal, the defendant loses anyway despite scoring two wins in the lower courts. If a fair trial process is lacking in this criminal proceeding and the defendant is able to score two wins against one for the state, then the test for decisional independence is satisfied. In this scenario, both the lower court and the Appellate court are perceived to be impartial. The dispute before them is said to have received an impartial disposition driven by decisional independence. Moreover, the ruling by both courts against the government, not only enhance public confidence in the justice system and process, but it also send a clear signal to the government that the rule of law and a fair trial are guaranteed by independent and impartial courts of justice. However, the Supreme Court might be said to be biased because it would appear that the dispute before it received a Partial Disposition (PD) driven by decisional independence. In this case, it might be perceived that the Supreme Court ruled in favor of a strict government policy despite the infringement on fundamental rights and freedoms by that policy. Also, the Supreme Court's perceived bias might be said to be as a result of underlying forces or external influence.

1.2.3 Testing for Procedural Fairness

Tables 1.2.2a and 1.2.2b below account for scenarios that lead to testing procedural fairness in times of national security threats. Firstly, table 1.2.2a creates an assumption of Lack of Procedural Fairness (LPF) in first instance. In the same vein, table 1.2.2b creates the presence of Procedural Fairness (PF) in the second instance. In order to apply the two tables to test, I have created different scenarios that play out consecutively for each table. Table 1.2.2a depicts the LPF

instance. We can have three different scenarios, which are important in assessing whether or not the court is impartial and independent. The first scenario involves the State v. Defendant in the court of first instance. Again, we are assuming that there is high-level terrorist threat and arrests have been made on the basis of terrorism-related offense. After the arrest, the defendant is not afforded procedural fairness in accordance with procedural protection rights. Suppose the defendant wins, the State might decide to appeal the decision of the lower court in the Appellate court (State v. Defendant). If the defendant loses this time in the Appellate court, he would then make an appeal in the apex court (Supreme Court) - (Defendant v. State). Suppose the defendant wins again, then it can be said that there was a fair trial and the defendant won fairly. In this scenario, we can conclude that both the lower court and the Supreme Court assessed the facts, examined the evidence and fairly applied the law, hence the defendant won fairly and the state lost fairly. In this case, it is also possible to argue that the dispute received an impartial disposition driven by decisional independence. However, the Appellate court may be perceived to be biased and the dispute received a partial disposition driven by decisional independence.

Table 1.2.2a Depicting Scenarios for the LPF Instance in Criminal Proceedings.

Lack of Procedural Fairness (LPF)				
Party to the dispute	Court of First Instance	Appellate Court	Supreme Court	Party Score List
Defendant	Wins	Loses	Wins	Def. = 2 wins; State = 1
	Wins	Loses	Loses	Def. = 1 win; State = 2
	Wins	Wins	Loses	Def. = 2 wins; State = 1
State	Loses	Wins	Loses	State = 1 win; Def. = 2
	Loses	Wins	Wins	State = 2 wins; Def. = 1
	Loses	Loses	Wins	State = 1 win; Def. = 2

Source: author.

Table 1.2.2b. Depicting scenarios for the PF instance in criminal proceeding.

Procedural Fairness (PF)				
Party to the dispute	Court of First Instance	Appellate Court	Supreme Court	Party Score List
Defendant	Wins	Loses	Wins	Def. = 2 wins; State= 1
	Wins	Loses	Loses	Def. = 1 win; State= 2
	Wins	Wins	Loses	Def. = 2 wins; State= 1
State	Loses	Wins	Loses	State =1 win; Def. = 2
	Loses	Wins	Wins	State =2 wins; Def. = 1
	Loses	Loses	Wins	State =1 win; Def. = 2

Source: author.

Table 1.2.2b above depicts the PF instance. We can have three different scenarios, which are important in assessing whether or not the court is impartial and independent. The first scenario involves the State v. Defendant in the court of first instance. Again, we are assuming that there is high-level terrorist threat and arrests have been made on the basis of terrorism-related offense. After the arrest, the defendant is afforded procedural fairness in accordance with procedural protection rights. Suppose the defendant wins, the State might decide to appeal the decision of the lower court in the Appellate court (State v. Defendant). If the defendant loses this time in the Appellate court, he would then make an appeal in the apex court (Supreme Court) - (Defendant v. State). Suppose the defendant wins again, then it can be said that there was a fair trial and the defendant won fairly. In this scenario, we can conclude that both the lower court and the Supreme Court assessed the facts, examined the evidence and fairly applied the law, hence the defendant won fairly and the state lost fairly. In this case, it is also possible to argue that the dispute received an impartial disposition driven by decisional independence. However, the Appellate court may be perceived to be biased and the dispute received a partial disposition driven by decisional independence.

In the second scenario, let us say that in the court of first instance (State v. Defendant), the defendant wins and then the State decided to appeal the decision of the lower court in the Appellate court. This time, the defendant loses and makes an appeal to the Supreme Court (Defendant v. State), whereby the defendant loses yet again. In this particular scenario, it can be said that the defendant lost fairly and the state won fairly. Again, it can be said that the ruling by both the

Appellate court and the Supreme Court was fair and impartial and the dispute received an impartial disposition driven by decisional independence.

Since the procedural fairness was afforded to the defendant and he scored two loses against one for the state, we can say that the two courts are perceived to be independent and impartial. However, the lower court may be perceived to be biased against the state. Being biased here indicates that the dispute received a partial disposition driven by decisional independence. In the third scenario, the defendant wins in the court of first instance (State v, Defendant), then the state appeals the decision of the lower court in the Appellate court (State v. Defendant), whereby the state defendant wins again for a second time. The state then moves to the apex court (Supreme Court), whereby the Supreme Court overturns the decision of the two lower courts. In this case, the state now wins after losing twice in the lower courts. Since the decision of the Supreme Court is final, the defendant is convicted. He can no longer appeal. In this particular scenario, it can be said that the defendant unfairly lost and the state won unfairly. While the dispute can be said to have received an impartial disposition driven by decisional independence in the lower court and in the Appellate court, it is perceived to have received a partial disposition driven by decisional independence in the Supreme Court.

The above scenarios present possible ways of testing for a fair trial and judicial independence in the administration of justice involving terrorism-related proceedings. But one would argue that the same argument can be made of other ordinary cases that do not necessarily involve terrorist threats. To respond to this concern, it is important to remember that terrorism-related offenses are considered the most serious acts of criminality that threaten peace and order with social and economic disruptions of great magnitude. They are offenses that bedevil even the most powerful democracies and they are capable of affecting the powers of the judiciary in the state of emergency periods. It is expected that the judiciary must play its role fairly and justly without fear or favor. It is also expected that the judiciary is only guided by the facts, the evidence presented, and the provisions of the law in making a judicial outcome.

In any democracy, and western democracies in particular, courts are expected to be independent and impartial. When a defendant is brought to court and the dispute is tried in three levels of courts and the defendant scores two wins against one win for the state, it should tell us that the defendant is more likely not proven guilty and should be acquitted for lack of material

evidence, and for gross violation of his procedural rights. However, when the defendant's dispute is tried in three levels of courts and the state scores two wins against the defendant's one win, then it would be very likely that the defendant is proven guilty and should be convicted.

Another test for a fair trial and judicial independence can be carried out within the jurisdiction of Western Europe. This jurisdiction is unique in the sense that it provides two important settings for testing the impartiality and the independence of the courts. Other than the domestic jurisdiction, there is another layer of jurisdiction - supranational jurisdiction. Since most European democracies belong to the Council of Europe, they are also subject to the European Convention on Human Rights (ECHR), which therefore means that they have to respect and obey all judicial decisions by the European Court of Human Rights (ECtHR). We can then use this relationship between a European nation-state and a supranational organization to conduct our impartiality and independence test of the judiciary. This can be done, especially by not only comparing the impartiality/partiality of the domestic court's jurisdiction vis-a-vis the international court's jurisdiction, but also the independence. We can have two instances (domestic and international) with four different scenarios. These scenarios involve terrorism-related proceedings. The assumption here is that these cases happen when there is no state of emergency declared and therefore the judiciary has full competence. This particular test is also good for understanding the overall independence of the judiciary in a particular European country.

In the first scenario, we again have the two parties (State v. Defendant) under dispute. Suppose the state loses against the defendant in the domestic jurisdiction after which the state then decides to appeal the decision of the domestic apex court to the international court (ECtHR), whereby the state loses yet again for a second time, then the dispute is said to have received an impartial disposition driven by decisional independence, and hence the defendant secures an acquittal. In this particular scenario, the judicial independence of that particular democratic state may be perceived to be strong. This is because the international court (ECtHR) may not be perceived to be biased in its disposal of the dispute. In the second scenario, we have the state party winning against the defendant in the domestic jurisdiction. The defendant then decides to appeal the decision of the apex court in the ECtHR. Again this time, the state wins against the defendant. In this particular scenario, it can be again argued that the dispute received an impartial disposition

driven by decisional independence. We can say that the domestic court is impartial and the independence of the judiciary is strong.

In the third scenario, we have the state party losing against the defendant in the domestic jurisdiction. The state then appeals the decision of the apex court in the ECtHR, whereby the state wins this time and the defendant loses against the state. In this particular scenario, it can be said that the dispute received a partial disposition driven by decisional independence in the domestic courts. However, the independence of the domestic judiciary is said to be strong, but the apex court is biased against the government strict security policy. In the fourth scenario, the state party wins in the domestic jurisdiction and then the defendant decides to appeal the decision of the apex court in the ECtHR, whereby the state loses this time and the defendant wins against the state. In this particular scenario, it can be said that the dispute received a partial disposition driven by decisional independence in the domestic courts. Domestic courts may be perceived to be weak in independence and biased in favor of strict government security policy. Table 1.2.2c below captures a summary of both instances of jurisdictions and all the four different scenarios.

Table 1.2.2c Testing for Judicial Independence and Fair Trial among European Courts

Jurisdiction of Domestic Courts		Jurisdiction of International Court		Status of Domestic Judicial Independence
State Party	Defendant Party	State Party	Defendant Party	
Loses	Wins	Loses	Wins	Strong and Impartial
Wins	Loses	Wins	Loses	Strong and Impartial
Loses	Wins	Wins	Loses	Strong and Partial
Wins	Loses	Loses	Wins	Weak and Partial

Source: author.

It is important to remember that all the above tests for judicial independence and a fair trial (impartiality) are based on the Expanded National Security Laws (ENSL), which are perceived as "Human Rights Frustrations" (HRF) by human rights advocates. They are in this context perceived as strict government security policy. They are security measures that not only infringes on human rights, but also tend to undermine the rule of law. Since the scenarios are depicted when there are no states of emergency declared, the courts are not deprived of their competence and they are obligated to review government security policies that run afoul of the constitution and infringe on the fundamental rights and freedoms of individuals. It is only the judiciary, which is regarded as

the neutral arbiter that is expected to provide redress to such disputes. Different sets of case law reports that relate to terrorism-related offenses and proceedings will be examined in chapter four for purposes of conducting the tests.

The important point that is being made here is that while it is not very easy to prove whether the judiciaries in western democracies are independent or not, there are certain parameters that can be used to establish the impartiality or the partiality of individual judges. By being able to establish the impartiality or partiality, we are then able to conclude whether or not the practical application of the decisional independence was affected by external influence. Another method that can be employed in testing for the judicial independence is by creating a model that is capable of establishing whether the judiciary is pro-government or not. Again, this can be achieved by theorizing the relationship between terrorist threats and judicial deference. In this particular instance, we are able to test whether the judiciary is more likely or less likely to defer to the strict government security policy (expanded national security laws).

To be able to perform this test, we can model an "Ideological Issue Space". This is an analytical framework that can be used in a continuum of constitutional values and principles. For our purposes, we shall refer to this ideological issue space as "Security/Liberty Ideological Framework" (hereinafter "SLIF"). The model is a one-dimensional (unidimensional) continuum with ideologies placed therein, ranging from "very liberal" on the extreme left to "very conservative" on the extreme right as shown in figure 1.3 below. This analytical framework not only provides an understanding of the relationship between national security and civil liberties ideologies, but also characterizes the standard ideological constitutional provisions, and thus helping us examine the judicial behavior in times of high-level national security threats. The idea is to be able to determine whether or not the judicial decisions (outcomes) are biased in favor of the government. This analytical framework should be seen as bearing the concept of a conventional ideological spectrum.

The concept of constitutional ideology as used here refers to a system of ideas and ideals, which form the values and principles of a liberal democracy. Essentially, it carries the norms of western liberal democracies. These norms draw on constitutional ideologies, which are either codified or uncodified. In this case, an array of constitutional ideologies are presented as follows: the separation of powers (i.e. different branches of government), the independence of the judiciary,

judges as protectors of human rights, a system of checks and balances, the rule of law, and the equal protection of liberties. The terms such as liberty, the rule of law, liberal democracy, low-level national security threats, high-level national security threats, and judicial independence are all ideological labels. These constitutional ideologies may also be referred to as 'ideal types', meaning they are constitutional elements common to all western democracies (e.g. U.S., U.K, German, and France). Ideal types are not meant to refer to perfect, or moral ideals of democracies, but rather to stress the common high-value characteristics of those democracies.

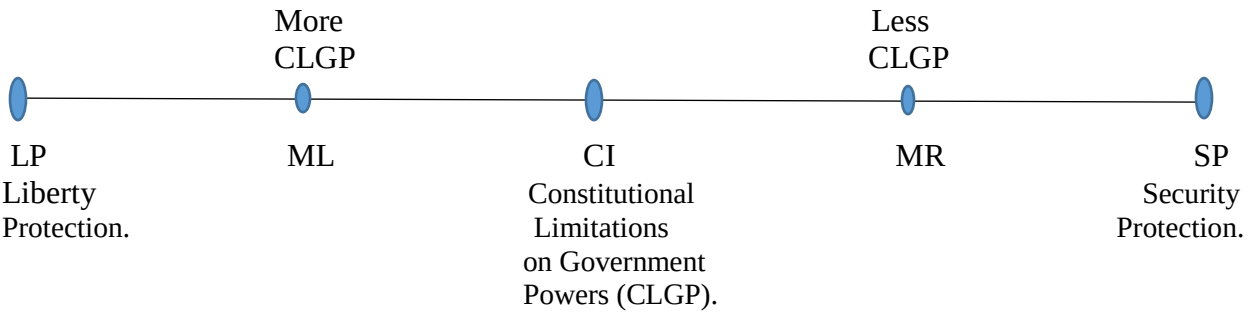
1.2.4 Testing for Judicial Independence Using Ideological Space Model

The ideological space model in figure 1.2.3 below determines the power function of the executive vis-à-vis the judiciary in a constitutional democracy during the low-level and high-level national security threats. From this model, we are able to examine the behavior of the judiciary and to determine its independence in two-time periods (low-level and high-level) of national security threats. The unidirectional model is fashionably or deliberately labelled to operationalize the model. From the extreme left to the extreme right on the continuum we have points LP, ML, C, MR and R. Point LP on the extreme left represents Liberty Protection, point ML represents Middle Left, point CI represents Constitutional Ideologies, point MR represents Middle Right, and point SP represents Security Protection. Then the Constitutional Limitations on Government Powers (CLGP) is fixed at point CI, (the core of constitutional ideologies) in the middle of the continuum. Point CI is assumed to be important, particularly in striking a balance between the executive power and the judicial authority and, thus satisfying the checks and balances principle.

To make the model work, it must firstly be assumed that the CLGP position on the unidirectional continuum is fixed (i.e. enshrined) in the constitution as part of CI and it should not change even during times of high-level national security threats. Secondly, it must be assumed that the government is very likely to violate the CLGP position at point CI during periods of high-level security threats and try to shift it to point MR. Thirdly, it must also be assumed that whereas the government will prefer position MR as opposed to position CI during times of high-level national security threats, the liberty proponents will still prefer either point CI or point ML during high-level security threats. Moving the CLGP to the right, shrinks the enjoyment of human rights. As the distance between LP and CLGP widens further to the right, then the judiciary becomes under

great pressure to try and pull back the CLGP to point CI, in order to satisfy the principle of checks and balances.

Figure 1.2.3 Ideological Space Model.



LP = Liberty Protection; ML = Middle Left; CI = Constitutional Ideology; MR = Middle Right; SP = Security Protection; CLGP = Constitutional Limitations on Government Powers.

Source: author.

It can be argued that individuals tend to enjoy more liberty when the CLGP position moves from position CI towards position ML (i.e. left side of CI). This implies that individuals feel that the government's interference in their lives is very limited and the courts have a constitutional obligation to protect those rights. However, when the CLGP position shifts towards position MR, it means that the executive branch is now taking back (i.e. clawing back) more powers and defying the constitutional principle of limited power government. This means that the ideal position of CLGP at position CI is being violated by the executive. When this happens, individuals are likely to lose more liberty and, hence they turn to the courts for redress and protection. At this point, the courts are more likely to feel the pressure of trying to restore the CLGP to its ideal position CI. This is because in order to satisfy the principle of checks and balances, the judiciary must review the government conduct and restore the CLGP to position CI. When the courts are able to pull back the CLGP to position CI, then it can be said that the rule of law is restored. It is only when the judiciary is independent that the rule of law can be guaranteed.

The analytical framework in figure 1.3 can be employed in analyzing the relationship between terrorist threats and judicial independence. We can examine how terrorism-related

proceedings involving human rights violations are adjudicated by courts. This can be achieved by studying different sets of case law reports and determining whether or not the courts ruled in favor of strict government security policy (expanded national security laws) or in favor of human rights protection. The independence of the judiciary can then be determined on the basis of the ability of the courts to restore the CLGP from any space on the right of CI and back to CI (i.e. the ideal point). The effectiveness of the judiciary in liberty protection during periods of high-level national security threats could be a good way of measuring judicial independence. This is because it is emphatically the province and duty of an independent judiciary (autonomous courts) to interpret what the law is and not to unduly defer to the executive policy, particularly if that policy infringes on human rights and runs afoul of the constitutional provisions. Indeed, courts in liberal democracies are imputed a special responsibility for ensuring that individuals do not suffer unjust treatment at the hands of the government. It will be shown in chapter two that as the level of terrorist threats changes from low to high, the enjoyment of liberty and its protection inversely changes from high to low. It then becomes the onus of the judiciary to restore that change to its original position, CI.

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

As a basic tenet of the Madisonian democracy, the concentration of power by the government poses a great threat not only to the decisional autonomy of judges, but also to individual autonomy and freedom. The executive branch should thus respect and adhere to the constitutional principles (ideologies) of limited power and avoid the temptation of assuming the totality of power in liberal democracies. Liberty can only be protected by the judiciary when it is capable of effectively moving the CLGP from any space to the right and restoring it to point CI of the continuum. This model provides an illustrious understating of how terrorist threats may pose greater risk to the

independence of the judiciary, especially when national security threat level is high (i.e. substantial, severe, and critical). Conversely, it can be argued that periods of low-level terrorist threats are associated with lower threats judicial independence. This classic model is therefore capable of providing a plausible account of the relationship between national security threats and threats to the independence of the judiciary in western democracies.

1.3 Research Problem

Terrorism has indeed remained a global national security threat, and despite the increasingly large volume of publications addressing terrorism, it is regrettable that little if any serious progress has been made in suitably determining the impact of terrorism on justice systems, particularly how it negatively impacts on judicial independence and fair trial in Western liberal democracies. The present study makes the argument that although a lot of research has been written about judicial independence and fair trial practices, there are surprisingly few systematic comparative studies that tackle the magnitude of the problem that terrorist threats pose to judicial independence and fair trial practices in democratic states. As one scholar (Rubin, 2004) observes, there is an urgent need for researchers to move from journalistic descriptions of terrorist events to a social-scientific understanding of this important phenomenon. Indeed, the aim of scientific work and by extension, legal research, is to produce knowledge that mirrors the presumed happenings of the real world. Legal scholars are almost silent about perceiving terrorism as a threat to judicial power.

Although one study, Schorpp (2019), emerges as the closest work that explores the spillover of the executive war power in case (i.e. judicial) outcomes by comparing court behaviors in Canada, the United Kingdom and the United Sates during war on terror in the post 9/11-era, her work only focuses on common law judicial systems and thus deprives civil law judicial systems of the opportunity to have a similar comparative knowledge. Schorpp (2019) leaves a knowledge gap since the effect of terrorism on judicial systems should be comprehensively understood. Miller (2017) argues that under conditions of high-level terrorist threats, citizens tend to lose confidence in their judicial systems, which they perceive as providing unnecessary due process and legal protections for suspected terrorists. Miller's work focuses on the effects of terrorism on judicial confidence based on individual-level attitudes. His methodological approach was, however, based on individuals' perceptions of the judicial systems rather than concrete judicial outcomes. To be

able to understand the real effect of terrorism threats on judicial systems, a researcher should be able to measure concrete judicial outcomes rather than public perceptions.

Ananian-Welsh (2016) looks into the impact of terror threats on judicial independence. The study by Ananian-Welsh makes the argument that counterterrorism legislations are mainly preventive in nature and therefore the courts of law are not traditionally suited to determine disputes involving preventive measures. Moreover, the study opines that involving courts in preventive counterterrorism schemes may place judicial independence at risk since it is more likely to expand courts' role within the crime-prevention role. Even though the work of Ananian-Welsh provides an interesting theoretical debate, it is, however, not based on rigorous empirical testing. Moreover, the work is a case study of Australia and therefore may lack the advantage of encyclopedic and generalizability.

The above reviews of the literature point to several gaps on the present topic. This research not only aims to be comparative and comprehensive in scope, but also employs novel analytical models uniquely triangulated to ensure robustness in testing the effects of terrorist threats on judicial systems. This research is therefore timely and is well endowed to enrich the topic by filling the extant gaps.

1.4 Research Objectives

This comparative research is meant to understand the potency of terrorist threats on judicial independence and fair trial practices in liberal democracies. The research will be guided by the following specific objectives:

1. To establish the effects of low-level terrorist threats on judicial independence and fair trial in liberal democracies.

2. To determine the effects of high-level terrorist threats on judicial independence and fair trial in liberal democracies.

3. To assess the proportionality of impact that different levels of terrorist threats have on justice systems in liberal democracies.

1.4.1 Research Questions

1. How do low-level terrorist threats affect judicial independence and fair trial in liberal democracies?
2. How do high-level terrorist threats affect judicial independence and fair trial in liberal democracies?
3. Do different levels of national security threats disproportionately affect justice systems in liberal democracies?

1.5 Justification for the research

Based on the gaps in the literatures as already mentioned in the above problem statement, this research primarily aims at filling extant gaps. Withal, this research aims to make a significant contribution to the knowledge of terrorism-related criminal justice by adding relevant perspectives to the existing body of knowledge. Most important, this research also aims to provide novelty in the study of judicial responses to terrorism threats. The preeminent justification for this study is that no comprehensive comparative research of this magnitude has ever been conducted to fully understand the effects of terrorism threats on judicial behavior. The present research seems to be the only work that provides a comprehensive and a systematic comparison. The present research is thus a clear demonstration that different judicial systems tailored to particular social goals in different jurisdictions, can indeed be comparatively analyzed with a view to providing an informed empirical knowledge to the benefit of policy and decision makers.

1.6 Significance of the Study

The present study not only adds to the theoretical body of knowledge in the sub-field of comparative law, but also creates an opportunity and practical significance for future research. Not only does this research makes an original contribution to the body of knowledge in the discipline of law, but also illuminates fresh methodological perspectives that should compellingly serve to invite future research. Thus the present research acts as a stimulant not only for a new wave of literature, but also for a more systematic basis for methodology, not just in comparative law but for the discipline of law in general.

1.7 The Scope of the Study

Although the study is comprehensive, it has a feasible scope. Its scope thus allows for the boundaries of the research to be carefully defined based on territorial, political, structural, and functional qualities. The present study focuses on selected four Western liberal democracies (U.S., UK, Germany, and France). All these countries have experienced terrorist threats and the study primarily aims at understanding how judicial systems have responded to those threats.

1.8 Limitations of the Study

This research was not without impediments. It encountered many challenges that deserve attention. Firstly, due to time constraints, the research only managed to focus on four countries. If there was adequate time, then the research would have included more countries. Besides, the present research relied on some secondary sources of information that sometimes only provided scanty information. In countries such as German and France, for example, sources of primary law are mainly in German or French languages. It took me a lot of time to use online interpreter apps to be able to understand some information in detail. Still, the study relied on case law for its document analysis and due to limited time, I only focused on 16 case law for the study analysis.

1.9 Delimitations of the Study

Since the scope of this work allowed for the boundaries of the study to be carefully defined based on territorial, political, structural, and functional qualities, this enabled me to only focus on manageable selected liberal democracies (U.S., UK, Germany and France). To enhance the validity and reliability of the study, I made sure that all sources of literature and data were authentic and official. In regard to language barrier, I relied heavily on online apps for interpretations and applied several different online apps for validation. In terms of data for study analysis, I made sure that I obtained authentic case law data from sources that are reliable and believable.

1.10 Definition of Key Terms

Adversarial System - A procedural system (the Anglo-American legal system) involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.

Anti-terrorism Laws – laws with the purpose of fighting terrorism.

Case Law - The law to be found in the collection of reported cases that form all or part of the body of law within a given jurisdiction.

Civil Law Legal System – a legal system with the body of law imposed by the state, as opposed to moral or common law.

Common Law Legal System – a legal system with the body of law derived from judicial decisions, rather than from statutes or constitutions.

Counterterrorism Laws – expanded domestic and international1 legal frameworks directed at the prevention of terrorism.

Counterterrorism Legislations – same as counterterrorism laws

Judicial Decisional Independence – the freedom to decide a case as the court sees fit without any constraint whether external or internal, actual or prospective.

Due Process = The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.

Expanded National Security Laws = counterterrorism laws developed by Western democracies after the September 11, 2021.

Fair Trial = a trial by an impartial and disinterested tribunal in accordance with regular procedures; esp., a criminal trial in which the defendant's constitutional and legal rights are respected.

Judicial Independence = an effective and competent protection of the constitution and promotion of the rule of law by the courts, without fear or favor.

Judicial Opinion = a court's written statement explaining its decision in a given case, usu. including the statement of facts, points of law, rationale, and dicta.

Judiciary = the branch of government responsible for interpreting the laws and administering justice.

Jurisdiction = a court's power to decide a case or issue a decree.

Jurisprudence = same as case law defined above.

Inquisitorial System = a system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry.

Liberal Democracy = a democratic system of government whereby individual rights and freedoms are officially recognized and protected, and the exercise of political power is limited by the Constitution.

Limited Power Government = a system of government in which a government has limitations on what it can and cannot do.

National Security = the safety of a nation against threats such as terrorism or war.

Terrorism = the unlawful use of violence and intimidation against civilians or state, in the pursuit of political aims. (Note that there are several other definitions of what terrorism means as provided for by other entities).

War on Terror = the American-led global counterterrorism campaign. Sometimes used figuratively.

Western Democracies = liberal democracies of the Western States.

1.11 Conclusion

This chapter is basically foundational and lays a strong foundation for studying judicial systems response to terrorist threats in liberal democracies. The chapter provides a cogent background and a robust description of the phenomenon under study. It explicitly describes the real problem and creates an academic thirst for empirical work on how to fully understand the problem. Novel analytical models are provided in this chapter and they are meant to serve the study by enhancing the rigor of analysis. The chapter also provides research objectives and questions that form the basis of the rest of the chapters in this entire work. The foundation provided in this chapter makes it possible for the study to obtain relevant data and be able to establish how such data speaks to theory.

CHAPTER TWO

LITERATURE REVIEW

2. Introduction

This chapter on the literature review provides an examination of existing pieces of relevant research on the present topic of study. Indeed, it is these existing pieces of relevant scholarship that provided a foundation for the present study. This chapter therefore allows the study to critically evaluate existing scholarship and research practices, in order to put the new thesis in context. In conducting the literature review, the study considered a raft of questions: who are the leading scholars in the subject area; what has been published on the subject; what factors or subtopics have these scholars identified as important for further examination; what research methods have they used; what were the pros and cons of using those research methods; what theories have these researchers explored. This chapter also makes a description of what is covered herein, the materials selected and why, and how those selections are relevant to the study. The overarching idea is to discuss what has been written by other scholars on the topic and where the study fits in the context of existing scholarship. The study essentially and substantively intends to evaluate the sources and methodologies used by other researchers, and then make a description of how the study is unique, original and different from the rest of the existing research on the topic under investigation.

2.1 Conceptualizing and Understanding Terrorism

It would do great injustice to this study, if the discussion on terrorist threats to judicial independence and fair trial proceeded without, first and foremost, conceptualizing what terrorism entails, and the interest of the state in maintaining social order. The contemporary definitions of terrorism are inadequate. There is no clearer and more objective definition of terrorism (Beres, 1995). Part of the problem is that many statutes only tend to describe the conglomerate nature of the terrorism crime. This has made the term become so broad and so imprecise as to be without reliable operational benefit. The pertinent and applicable criteria of legality under national or international law still remain unclear. Despite a lack of an objective definition, terrorism remains a criminality that lacks both just cause and just means. Some attempts have been made to define terrorism by terming it as a ’threat’ or as "threatened use of force or violence" or "threat of

violence". But the usage of the term threat still fails to establish identifiable thresholds of threat. One would then wonder, when exactly, would the threat be sufficient to make a convincing account of the presence of terrorism? Indeed, in the absence of settled, unambiguous thresholds, inclusion of the word "threat" within the definition of terrorism fails to produce an objective and watertight definition. Terrorism is an act of violence and indeed, violence against the innocent can never be permissible in any liberal democracy.

It may be noted that penning a definition of terrorism that is agreeable to everyone is still problematic. Terrorism is, indeed, a concept that has defied any simple and straightforward legal definition. It is less surprising, therefore, to find that there is no universally accepted definition of what constitutes "terrorism." As a result, different States have devised their own definitions of what constitutes terrorism. The United Nations (UN) has, for example, encouraged States to define terrorism in their own national bodies of law. Such attempts are typically found in their penal codes. However, this has allowed wide and divergent variations among definitions. The problem with an appropriate definition of terrorism poses a legal challenge. The problem being whether or not the appropriate juristic categorization should be 'war' or 'crime'.

Indeed, the lack of a unified definition of what terrorism is, has only led to the conceptual chaos. For instance, the U.S. Department of Defense defines terrorism as: "The calculated use of unlawful violence to inculcate fear, intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." At the same time, the U.S. Department of State defines terrorism as: "Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience."[15] Still the U.S. Patriot Act 2001 defines terrorism as: threatening, conspiring or attempting to hijack airplanes, boats, buses or other vehicles; threatening, conspiring or attempting to commit acts of violence on any "protected" persons, such as government officials; any crime committed with "the use of any weapon or dangerous device," when the intent of the crime is determined to be the endangerment of public safety or substantial property damage rather than for "mere personal monetary gain.[16]

[15] US Department of Defense Dictionary of Military.
[16] US Patriot Act of 2001.

The United Kingdom (UK) attempts to define terrorism in section 1 of the Terrorism Act 2000 (as amended) as "the use of threat designed to influence the government or intimidate the public or a section of the public that is made for the purpose of advancing a political, religious or ideological cause, and threat of action that involves serious violence against a person, serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system."[17] French authority on the other hand describes terrorism as a crime or lesser indictable offence, which includes deliberate attacks upon life; deliberate attacks on integrity of the person; abduction, holding of persons against their will; high jacking of an aircraft, ship or other means of transport; theft, extortion, destruction of and damage to property; computer offences (as defined in Section III of the Criminal Code); offences involving prohibited combat groups and movements; offences involving firearms, explosives or nuclear substances; handling the proceeds of one of the above offences; money laundering; insider offences; endangering human, animal or environmental health by introducing substances into the air, soil, sub-soil, foodstuffs or foodstuff ingredients, or water.[18] These crimes must be connected with an individual or collective operation aimed at seriously disturbing public order by intimidation or terror, which is the distinguishing feature of terrorism.

Subsumed in the above definitions and description, is the fact that some States have perceived terrorism as a "war", while others simply perceive it as a "crime". It is important to add that these two perspectives tend to frame terrorism in an international context. This means the approach to counter terrorism is usually crafted from a national perspective that resembles "us" versus "them." This makes terrorists to be treated as a threatening outgroup. The present paper, however, takes the view that terrorism is an act of crime, and perpetrators of such heinous, socially unacceptable and, indeed, unlawful acts, should have a fair trial in an open court, and if found guilty, should be convicted and isolated from the rest of good members in society. Those States that perceive terrorism as a "war" and an "evil" to be destroyed, and those that perceive terrorism as a heinous crime that deserves to be punished, are more likely to adopt different counteractions. For instance, the U.S. seems to be an outlier amongst western democracies because of the dominance of its military response as opposed to other Western states that have preferred the

[17] United Kingdom's Terrorism Act 2000.
[18] French Article 421-1 of the Criminal Code (CC).

criminal justice path. It is possible, therefore, that such variance in conceptualization and response strategy might lead to different criminal justice outcomes.

The above definitions and description of what terrorism is perceived to mean are nothing more than conceptual chaos. This raises the fundamental question of whether there is a convergence in jurisprudential trends in the law of terrorism. Legal principle demands, however, that there needs to be clear certainty in the law with respect to crimes and their penalties prior to the commissioning of any crime. One thing that is clear, however, is that acts of terrorism tend to disrupt social order in society. In point of fact, acts of terrorism pose a devastating danger in society. Not only do they disrupt peaceful coexistence, security, physical integrity, and the safety of individuals, but also defy law and order.

Terrorism has also been perceived as a war that is so 'evil'. It is an affront to law enforcement, and hence a crime that must be punished. It not only affects the human enjoyment of rights, but also challenges the legitimacy and effectiveness of political institutions. It may be said that terrorism threats potentially produce changes in political circumstances, which in turn lead to changes in legal circumstances. The recently introduced counter-terrorism laws and policies in Western democracies, for example, amount to changes in legal circumstances. It will be seen that such changes raise difficult questions about governments' commitment to the protection of fundamental rights and liberties. The security new laws and policies seem to grant State security agencies 'unbridled' powers. But such unconscionable powers when assumed by the State are likely to affect the rule of law and undermine a fair trial and the independence of the judiciary.

There is still no legally and objectively agreed definition of what terrorism means. This means that the concept of terrorism still lacks a more or less rational and coherent system of rules that can be relied upon for its interpretation. This also implies that terrorism might not be suitably analyzed using the black-letter law or the doctrinal research because its meaning still remains ambiguous. In other words, terrorism lacks stable meaning in law. The Black-letter analysis of law usually involves the researcher cross-referencing specific concepts, principles or rules so as to arrive at a more general underlying principle. This enables the researcher to form a mutually reinforcing and rational system of analysis. However, the meaning of the concept "terrorism" presents contradictions, gaps, ambiguities and irrationalities. This makes it difficult even for the criminal justice systems to process such crimes labeled as "terrorism". Indeed, various definitions

of terrorism fail to provide precise rules, which consequently fail to give more explicit guidance, and hence vague standards. The present study takes the view, however, that terrorism is a criminal act and its prevention is the traditional purview of the executive government. By prevention, it means the executive government using police and intelligence forces to focus their attention on the prevention of future terrorism offenses.

2.1.1 Terrorist Threats

Terrorism represents a major threat to the safety of world citizens. It has become a big challenge to all societies. However, liberal democracies are "potentially more vulnerable than are totalitarian regimes" (Schmalleger, 1997, p. 665). The question that arises therefore is, why liberal democracies? This is probably because liberal democracies have the rule of law as one of their core values. They have democratic ideals that provide much freedom and many rights, which enable citizens of these societies to have more space or latitude to commit heinous crimes and still be able to defend their acts in courts of law. In totalitarian regimes, the rule of law is almost a rare thing and citizens lack enough space or latitude to commit serious crimes because the authorities tend to respond to such crimes with remarkably disproportionate force. But this does not, however, imply that terrorist acts happen less in authoritarian regimes. In fact, they do happen even more. This assertion is corroborated by the empirical data of terrorist events laid out in chapter three of this study. If terrorists can find safe havens in countries that are even more antagonistic to the rule of law (totalitarian countries), what then can stop them from perpetrating their acts in countries that respect the rule of law? The response is very simple. It simply means that terrorists are individuals whose acts are driven by certain forces that do not recognize the might of retaliatory forces. This might be the case with suicide terrorists, who are normally so daring in their acts because they are ready to end their own lives.

Indeed, acts of terrorism are considerably devastating as they not only lead to the destruction of human rights, but also to the ruination of fundamental freedoms and democracy. Such acts also undermine to a greater extent, the pluralistic civil society and thus, leading to adverse consequences on the economic and social development of democratic states. Moreover, acts of terrorism have also greatly endangered innocent lives and dignity and significantly affected the security of individuals everywhere. At the same time, such heinous terrorist crimes have not only substantially threatened the social and economic development of democratic states, but also

have undermined the global stability and prosperity. In other words, acts of terrorism have a direct, destructive impact on the enjoyment of human rights and the well-being of democratic societies.

It may be argued that national security (public security) threats and human rights enjoyment are inversely related. This implies that an increase in one of them is likely to cause a reduction in the other one. For instance, when national security threat increases - gets to a high-level, the government is likely to introduce new policies (i.e. increasing the strength of security measures) that reduce the enjoyment of rights and freedoms. Conversely, when there is too much increase in the enjoyment of rights and freedoms, national security is likely to be at risk and public security is likely to drop. To be able to model this phenomenon, it is important to introduce a baseline or a point of reference. The present paper uses September 11, 2001 (hereafter "9/11") terrorist attacks on the U.S. soil as the baseline. It makes the proposition that before the 9/11, constitutional constraints on governmental power was very strong in Western democracies. This implies that there was a significant increase in the enjoyment of human rights, which in a subtle way translated to a drop in public security.

When the 9/11 happened, Western democracies realized that international terrorism was largely a threat to national security. The 9/11 terrorist attacks were followed in a few years by other methodical terrorist attacks in Western European countries. This made Western democracies scale up their national security measures-guards. New laws (counter-terrorism policies) were introduced in order to prevent future terrorist attacks. But these new laws and policies were not wholly kind to the enjoyment of human rights. It will be seen that the recently introduced counter-terrorism laws and policies by governments have contributed to human rights violations. Such violations include preventative detention, prolonged pre-trial custodial detention, pre-trial restriction on personal liberty, torture, unfair trial, delays in accessing defense attorney, and obtaining evidence under duress.

Although the international human rights law recognizes that States may need to derogate from or indeed suspend some rights in times of security crisis, such derogation must, however, be within quite strictly defined parameters of allowable action. It is very likely that in the face of national security threat, the government will act repressively. In 1996, for example, France introduced a penal code that criminalize mere association with suspected terrorist groups as a pre-emptive action. It allowed the police to monitor phones and online communications, impose house

arrests, and conduct home, vehicle, luggage, and computer searches without a warrant. It also allowed the police to detain suspects for ninety six hours, without judicial approval. In the U.S., the PATRIOT Act of 2001, for example, allowed security agencies to wire-tap private communications and the subpoena of records of individuals without probable cause. It also allowed police to hold suspects for longer periods without charge in public courts. But scholars argue that executive action ought to be restrained in a time of alleged or actual terrorism-related emergency. The point being made here is that during periods of national security crisis, governments are very likely to undermine the fundamental rights and freedoms enjoyed by citizens. Indeed, counter-terrorism laws and policies have primarily formed an effective regime of coercion. This has resulted into a decrease in the consumption of fundamental rights. The only recourse citizens may have in such a situation is remedy through the courts of justice.

2.1.2 Is Terrorism an Act of War or a Criminal Offence?

According to Decaux (2008), "current language of the "war on terror" is doubly misleading. In political terms, the slogan coined by the United States has no precise definition; it stresses the means—intimidation and terror—employed by the enemy, but cannot identify that omnipresent yet invisible enemy" (p.41). But Britain's Labour government recently publicly rejected such language. "In the UK we do not use the phrase 'war on terror,' because we can't win by military means alone, and because this isn't us against one organized enemy with a clear identity and a coherent set of objectives". [19]

One scholar contends that terrorism is a criminal act of war (Ananian-Welsh, 2016) and courts have an important role to play in administering terrorism-related criminal trials and determining the guilt or innocence of the accused person (defendant). Courts find themselves playing a central role in anti-terrorism schemes. For instance, control orders are normally administered ex parte by a court without notice to the affected individual. Control orders allow for an extensive array of potential restrictions and obligations to be imposed on a particular individual suspected to be behind terrorism acts or activities. Understandably, one would argue that control

[19] Hilary Benn. "International Development Secretary Speaking at a Public Conference in New York," cited in Jane Pelrez, "Briton Scorn 'War on Terror' Phrase." International Herald Tribune (April 17, 2007). 1R–5. Such language, deemed "counterproductive" by British diplomats, was abandoned in December 2006 in order to avoid any suggestion of "a clash or a war of civilizations.

orders just slightly fall short of imprisonment in a state facility. Gleeson CJ observed in Thomas, that if control orders were administered exclusively by the executive government, then there would be little opportunity for the protection of human rights.[20] When courts are made to be involved in preventive counter-terrorism schemes, then the court's role is essentially expanded to include the crime-prevention purview. To some extent control laws can be said to be incompatible with the maintenance of the integrity of the courts.

2.1.3 Levels of Terrorist Threats

For purposes of estimating the effect of terrorist threats on fair trial principles and judicial independence, the present study creates variation in level of terrorist threats. I stylize these levels as: low-level terrorist threat, and high-level terrorist threat. The former implies the period before the 9/11 (i.e. pre-9/11 era) while the latter indicates the period after the 9/11 (i.e. post-9/11era). At the same time, the pre-9/11 era denotes period of non-expanded national security laws while post-9/11 era typify period of expanded national security laws (i.e. counterterrorism laws and policy). This distinction thus enables the study to induce variation in the main independent variable, which is, national security laws.

2.1.3.1 Low-Level Terrorist Threat: pre-9/11 Era

It is important to conceptualize and explore two fundamental concepts: 'low-level' terrorist threat and 'high-level' terrorist threat. This is important for establishing their impacts on 'fair trials' and 'judicial independence' in Western liberal democracies. The present paper, therefore, distinguishes between the 'low-level' and the 'high-level' terrorist threats. This distinction is drawn on threat levels developed by the UK based Security Service M15. According to the M15's method of measurement, a low-level terrorist threat denotes the threat that is perceived as low and moderate, hence an attack is considered possible, but not highly likely. However, a high-level terrorist threat denotes the threat that is perceived as substantial, severe and critical, hence an attack is highly likely in the near future.[21]

[20] Thomas (2007) 233 CLR 307, 329 [17] (Gleeson CJ).
[21] https://www.mi5.gov.uk/threat-levels. Retrieved on 12 October, 2020.

It is important to add that low-level terrorist threat also denotes low lethality and low frequency in acts of terrorism within a short period of time. In the pre-9/11 era, the terrorism image seemed too abstract and citizens' attitudes toward the phenomenon were rather unstable. This ['unstable attitude'] means that people had not fully drawn their attention to the real dangers of terrorism. This was probably because many Western democracies had not experienced high-level terrorist attacks and their human rights and freedoms were not much interfered with by the State power.[22] At the same time, during the pre-9/11 era, many Western democracies treated acts of terrorism as ordinary-conventional crimes since there were low-level terrorist threats during that period.

In terms of democratic enjoyment, the present study associates low-level terrorist threats with greater democratic enjoyment (i.e. increased freedom and more rights for citizens). For instance, one study, Schmalleger (1997), observes that in the period before 9/11, democratic ideals of Western liberal democracies restricted police surveillance of likely terrorist groups and also curtailed luggage, vehicle and airport searches (Schmalleger, 1997, p.665). Schmalleger (1997) further observes that even laws designed to limit acts of terrorism only served as stopgap measures. He criticizes the pre-9/11 anti-terrorism laws as less effective to prevent both domestic and international terrorism. Against this backdrop, it would be important therefore to examine how criminal justice systems in Western liberal democracies functioned during the pre-9/11 era, particularly with regard to arrest, prosecution, adjudication, and sentencing of terrorism-related offenses.

Despite the clarity of the penal law in Western democracies and the hope that such clarity and understanding of the law would lead to low-level terrorist threat, terrorism perpetrators actually tend to defy the clarity of law. In 1766, Cesare de Beccaria pointed out that when law is written in a clear manner and universally read and understood, the very fact of its existence will cause a decrease in crime (Jones et al. 2008, p.136). Beccaria's sentiment may be interpreted to mean that a simple clarity in regard to punishment would be sufficient and desirable to deter an individual contemplating crime since he or she would be able to accurately measure the inconvenience of conviction against his or her momentary pleasures of the crime. According to

[22]SEKERDEJ, Maciej; and KOSSOWSKA, Małgorzata. Motherland under attack! Nationalism, terrorist threat, and support for the restriction of civil liberties. *Polish Psychological Bulletin*, 2011, vol. 42(1), 11-19.

Beccaria, this would be a powerful deterrent tool. The literature indicates that "Following the lead of Voltaire, Montesquieu also insisted that the criminal law should be clear and without subtlety." (Jones, Mark and Johnstone, 2008, p.136). Moreover, scholars argue that "In moderate governments the love of one's country, shame and the fear of blame, are restraining motives, capable of preventing a great multitude of crimes."[23] Despite these thoughtful sentiments on crime mitigation, terrorism perpetrators seem to defy clear laws and commission infractions contrary to clear laws. Such defiance leads to high-level terrorist threats.

2.1.3.2 High-Level Terrorist Threats: post-9/11

Scholars contend that a decade and a half after the 9/11, terrorist security threats remain high in the U.S. and in Europe (i.e. Rudenstine, 2016). At the same time, Cohen (2008) contends that during periods of high-level national security threats "most democracies have allowed themselves certain human rights violations. Elementary rules of law have been broken numerous times, to varying degrees, by both civil and military security services of democratic countries"(Cohen, 2008, p.6). He further adds that during exceptional phenomenon in democratic states, the ban on torture, instituted by international convention adopted by the United Nations General Assembly in December 1984, constantly gets violated. Liberal democracies tend to suffer a dominant reflex action, which does not allow their hands to be tied by international law, especially if such law does not offer sufficient protection against attacks from terrorists who themselves disregard that same body of law. In other words, democracies not only tend to shed their rule of law obligations, but also their human rights protection obligations during periods of high-level national security threats. Cohen also points out that a "democracy has the duty to maintain a balance between the effectiveness of its fight against terrorism and respect for human rights" (Cohen, 2008, p.9).

A lot has changed since September 11, 2001 both in terms of the law and security policies. This period is characterized by a lot of fear that the State might lose its constitutional duty and obligation to protect its citizens. It symbolizes a period whereby terrorist attacks are more likely to be mounted against civilian targets on an unprecedented scale. It provokes the State to affirm

[23] Charles Louis de Secondat, Baron de la Brede et de Montesquieu, Spirit of Laws, Thomas Nugent, trans. David W. Carrithers (ed.) (Berkeley: University of California Press, 1977), p. 158.

its resolve that it cannot tolerate being defeated by the terrorists. Many Western democracies again struggled to redefine "terrorism" in their penal codes, but there is still a lack of consensus or a unifying definition of terrorism. The United Nations (UN) has encouraged States to define terrorism in their own national bodies of law. However, this has allowed wide and divergent variations among definitions.[24]

The problem with an appropriate definition of terrorism poses a legal challenge. The problem being whether or not the appropriate juristic categorization should be 'war' or 'crime'. Indeed, the lack of a unified definition of what terrorism is, has only led to the conceptual chaos. For instance, the U.S. Department of Defense defines terrorism as: "The calculated use of unlawful violence to inculcate fear, intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."[25] At the same time, the U.S. Department of State defines terrorism as: "Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience."[26]

The United Kingdom (UK) defines terrorism in section 1 of the Terrorism Act 2000 (as amended) as "the use of threat designed to influence the government or intimidate the public or a section of the public that is made for the purpose of advancing a political, religious or ideological cause, and threat of action that involves serious violence against a person, serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system."[27]

French authority defines terrorism as a crime or lesser indictable offence, which includes deliberate attacks upon life; deliberate attacks on integrity of the person; abduction, holding of persons against their will; high jacking of an aircraft, ship or other means of transport; theft, extortion, destruction of and damage to property; computer offences (as defined in Section III of the Criminal Code); offences involving prohibited combat groups and movements; offences

[24] SAUL, Ben, (2004), Definition of "Terrorism" in the UN Security Council: 1985–2004. *Chinese Journal of International Law*, 2005 4(1), p. 141.
[25] U.S. Department of Defense, 2003 at 1
[26] Office of the Coordinator for Counterterrorism, 2002 at p.4.
[27] https://www.legislation.gov.uk/ukpga/2000/11/section/1. Retrieved on 17, September, 2020.

involving firearms, explosives or nuclear substances; handling the proceeds of one of the above offences; money laundering; insider offences; endangering human, animal or environmental health by introducing substances into the air, soil, sub-soil, foodstuffs or foodstuff ingredients, or water. These crimes must be connected with an individual or collective operation aimed at seriously disturbing public order by intimidation or terror, which is the distinguishing feature of terrorism.[28]

For France, terrorist cases are prosecuted and tried within the ordinary French judicial system. This shows great respect to procedural rights in the French criminal justice. Also, all terrorism cases are centralized in Paris and managed by specialized units. In France, criminal law is the principal legal weapon employed against terrorism. Even though the French pre-emptive criminal justice is based on legislation from the 1990s, which bears its roots from earlier practices, it has reached an unprecedented level in its application, expansion and repression, more so in recent years because of the recent terror attacks commissioned in France by its own citizens.

The French criminal justice model has, however, been criticized as one, which provides the basis to predict future offenses. By requesting the law to punish prior to the commission of a crime, the fight against terrorism challenges the very foundations of the criminal law. It thus replaces the idea of prevention, with the vague notion of pre-emption. However, despite the French's proactive manner in prosecuting terrorism cases, its judicial system remains relatively strong and has greater competence (authority) in handling terrorism-related crimes. The post-9/11 era has seen the growing power of the judicial system in adjudicating terrorism cases, with a view to neutralizing terrorism actors. Any anticipation of risk of terrorism in France is dealt with as soon as possible for purposes of efficiency and the political management of the terrorism threats.

High lethality and high frequency of the terrorism events within a short period of time. Immediately after the 9/11, the threat of terrorism was perceived as considerably salient and serious, as opposed to before the 9/11 when it was perceived as distant and abstract by Western democracies. All terrorist offenses are being perceived differently from all other ordinary criminal offenses against the State.

[28] Council of Europe-Committee of Experts on Terrorism: *Profiles on Counter-Terrorist Capacity, France*, 2013. Web link: https://rm.coe.int/1680641029. Retrieved 18 September, 2020.

Moreover, in the post-9/11 era, tremendous advance in information and communication technologies (ICT) such as the internet and now the smart phones have made the dissemination of information much easier for the international terror groups than in the past. Increasingly (more than ever), terrorists are also trying to challenge the national security of the nation-state and the State's monopoly on violence and war. This has led the State to introduce new approaches and structures. For instances, Western democracies are also trying to leverage information technology in their 'war' against terrorism. This includes elaborated intelligence analysis.

Scholars argue that the response of the United States to the 9/ 11 terrorist attack profoundly compromised the rule of law.[29] Whenever the rule of law is compromised in constitutional democracies, fair trial and judicial independence are more likely to become impaired. During periods of high-level national security threats, democratic values seem to be weakened in the name of security. Some actions taken by government tend to undermine liberty and the judiciary. At the same time, threats to terrorism breeds intergroup intolerance, prejudice and xenophobia. Moreover, during periods of high-level terrorist threats, the rule of law is highly likely to be undermined through extraordinary rendition, torture, targeted killing, electronic surveillance, indefinite detention without trial, and distortions of the criminal justice process. Three years following the 9/11, for instance, there was a significant increase in volume of alleged terrorist suspects who were prosecuted in the U.S. federal courts.[30] With the increase in intensity of terrorism threats in many western democracies after the 9/11, perception of terror threats witnessed citizens become more supportive of policies that restrict civil rights of social groups that are commonly associated with terrorist activities, for instance, Arabs and Muslims.[31]

High-level terrorism threats are more likely to excite collective consciousness, and hence increase a sense of nationalism among citizens. According to Durkheim, collective consciousness is the totality of beliefs and sentiments common to the average members of society. The "stronger

[29] LEONE, C. Richard; and ANRIG, Gregory. (2007). (Eds.). *Liberty Under Attack: Reclaiming Our Freedoms in an Age of Terror*. Public Affairs.
[30] SHIELSDS, A. Chistopher. (2012). *American Terrorism Trials: Prosecutorial and Defense Strategies*. El Paso: LFB Scholarly Publishing LLC.
[31] Davis, D., & Silver, B. (2004). Civil liberties vs security in the context of the terrorist attacks on America. *American Journal of Political Science*, 48, 28-46.

the collective consciousness, the more similar individuals are in their values and beliefs."[32] When a nation-state acquires a collective consciousness that terrorists do not respect the humanity of individuals, a sense of nationalism is likely to increase. When citizens are high on nationalism, they are also very likely to support retaliatory actions, and tougher policies towards terrorism. This perception tends to invoke national attitudes characterized by in-group solidarity, and a stronger identification with the in-group (nationalism). Nationalism is linked with less tolerance for others, whether external or internal.[33] However, this might also lead to increased prejudice against emigrants. Emigrants residing in a foreign countries might be profiled and even persecuted on mere suspicions during high-level threat periods.

In terms of democratic enjoyment, the present study associates high-level terrorist threats with constricted (tightened) democratic enjoyment (i.e. decreased freedom and reduced rights for citizens). For instance, some of the democratic ideals of Western liberal democracies have now been lost and hence, there are police surveillance of likely terrorist groups at the airports, including thorough luggage, and vehicle searches. In the post-9/11 era, there have been expanded national security laws (counterterrorism legislations) designed to enhance national security and protection against terrorist attacks. The present study assumes that the post-9/11 era counterterrorism laws are likely more effective to prevent both domestic and international terrorism. However, the present study also makes an observation that the post-9/11 counterterrorism laws are more likely to infringe upon human rights, hence may negatively impact the criminal justice systems in Western liberal democracies. Against this backdrop, it would be important therefore to examine how criminal justice systems in Western liberal democracies are functioning in the post-9/11 era, particularly with regard to arrest, prosecution, adjudication, and sentencing of terrorism-related offenses.

Due to frequently experienced periods of high-level terrorist threats, Western liberal democracies ceased conceptualizing terrorism as an ordinary- conventional crime. They resolved

[32] ROYCE, Edward. (2015). *Classical Social Theory and Modern Society*. New York: Rowman and Littlefield, p.72.
[33]HINKLE, S., & BROWN, R. (1990). Intergroup comparisons and social identity: Some links and lacunae. In: D. Abrams & M. Hogg (Eds), *Social Identity Theory: Constructive and Critical Advances* (pp. 48–70). New York: Harvester Wheatsheaf.

to adopt new measures to respond effectively to the problem of future terrorist attacks. This led to the creation of counter-terrorism laws.

2.2 Theoretical Literature

2.2.1 Theoretical Underpinning: Action and Payoff Theory

Although all the three branches of government (executive, legislature and judiciary) are said to be independent based on the separation of powers doctrine, they are also to some extent interdependent. This means that they all have a triadic interaction. This phenomenon is, however, conflicted with regard to the respective value positions of the three branches of government. The action and payoff theory provides a good explanation for the respective value positions held by the three branches. It is important to mention that the action and payoff theory derives from the exchange theory espoused by George Homans (1961/1974). It states that peoples' actions are driven by the learned anticipation of rewards and punishment. According to Homans (1961/1974), exchange theory is characterized when a person within the interaction, gets more out of the exchange than the other person. Homans argues that a person's behavior "is a function of its payoffs, of its outcomes, whether rewarding or punishing."[34] He further argues that people are ranked based on what they do themselves- that is, on what they give in social exchange- and on what they get from others. This implies that the performance and effectiveness of the three branches of government (executive, legislature and judiciary are based on the anticipated rewards and punishment by citizens.

It may be argued that human behavior is a function of certain payoffs, which are, the consequent rewards and punishments. This implies that all the three branches of government are likely to perform or undertake actions based on their calculations of payoffs (i.e. actions that give them more rewards and less punishments). For the executive branch, for instance, introducing expansive national security laws that enhances national security, but limits liberty would be an action that is more likely to provide greater payoffs (i.e. more rewards) and less punishment to the government. This is because if the executive fails to provide its citizens with adequate security, it risks losing its legitimacy and being punished through rebellion by citizens. In the event on national

[34] Homans, G. (1961). P. 12.

security threats, the government would always want to take quick actions (i.e. behaving approvingly) that would earn it positive approvals. For instance, immediately after the 9/11, the Bush administration initiated a robust response to the terrorist attacks, which drove his poll ratings from 55 percent favorable before 9/11 to 90 percent favorable shortly after the 9/11.[35] Scholars argue that a fundamental tension exists in any constitutional order between the basic premise of government constrained by law and the perceived need for discretionary power to face disastrous emergencies and crisis (Keller, 2008, p.44).

In respect of the legislative branch, passing the expanded national security laws that keep the country secure, but limits liberty is an action that is more likely to yield greater payoffs in form of rewards and less punishment. Since legislators are accountable to voters, their failure to take actions that will keep the country safe would be more likely to earn them greater punishment by citizens. As far as the judicial branch is concerned, protection of human rights and liberty against government's harsh national security laws would be more likely a greater payoff (reward) than allowing the government a free hand to enforce harsh laws that considerably limit liberty and infringe on human rights. If the judicial branch gives the government a free hand to enforce harsh laws and limit liberty, then the judiciary would have significantly failed to play its role of checks and balance. The failure is likely to earn the judiciary greater punishment due to lack of public confidence in the judiciary by citizens. It is important to understand that the constitutional functions of the judiciary include the protection of the constitution, human rights, and the rule of law.

Due to the respective value positions of the three branches of government, it is very likely that when it comes to an approach for solving the problem of terrorist threats, inter-branch conflict is more likely to present. In particular, both the executive branch and legislative branch are more likely to be on one side of the problem continuum against the judicial branch on the other side of the continuum, hence the inter-branch conflict. According to the value position theory, the more valuable the results of an action is to the actor, the more likely that action is to be performed. This

[35] Bergen, L. P. (2011). *The Longest War: The Enduring Conflict Between America and Al-Qaeda*. New York, NY 10020: Free Press.

implies that since both the executive and the legislature would be more likely to endorse the expansion of national security laws in order to enhance the national security by virtue of their dyadic consensus, since by so doing, they would be rewarded by citizens for protecting the country against terrorist attacks. Conversely, since the judicial branch holds the conviction that part of its function is to safeguard the constitution, rule of law, human rights, and liberty, it would less likely endorse harsh national security laws that will infringe upon human rights and liberty.

It can be argued that the judiciary also would likely reflect on several other propositions that would give it greater payoffs in terms of rewards (public confidence) by citizens. According to the success proposition, for example, any action or behavior that generates positive consequences would likely be repeated in the future. Since the judiciary would be alive to the fact that its role of checks and balances, and particularly checking the executive overreach (excess power) has generated positive approvals (consequences) by citizens in the past, it would likely continue doing the same, that is, pushing back the government's harsh security laws that infringe upon human rights, so as to continue enjoying the positive approvals (public confidence) by citizens.

Still, there is another element of emotional reaction by citizens. It is undoubtedly the case that an incident of terrorist attack would be of absorbing national and international attention. It would be the case also that if a nation experiences high-level terrorist threats, then citizens are more likely to react emotionally by urging the government to enhance security and to ensure that all citizens are safe. This emotional reaction must be receive a positive response action by the government. If citizens react emotionally about the danger they face in terms of security and the government fails to respond positively by providing adequate security, then the citizens would likely become angry at and aggressive against their government due to insecurity frustration. This would only engender more punishment for the government and less reward (little payoff). But since the government is aware of the fact that being responsive to citizens' demands would produce greater payoffs and less punishment, it would be very determined to roll out the harsh national security laws to satisfy the citizens' demands. The government will thus be forced to behave approvingly so that it retains its legitimacy and positive approval by citizens. Based on these circumstances, we are actually treated to a wide range of phenomena, which includes cooperation, conformity, and competition.

In terms of cooperation, both the executive and the legislature would want to cooperate (dyadic consensus) so as to earn positive rewards out of citizens' satisfaction with national security. Conversely, in regard to conformity, the judicial branch would want to conform to its constitutional responsibility of checks and balances by checking against the executive overreach (i.e. enforcing harsh security laws that infringe upon human rights and considerably limit liberty). Ironically, with respect to competition, the executive and the legislature on the one side of the continuum and the judiciary on the other side of the continuum will be set on a competition mode. The three branches of government then ends up forming two groupings (i.e. the executive and the legislature v judiciary) competing for the positive rewards (greater payoffs) by citizens. The foregoing circumstances are very likely to create inter-branch conflict pitting the executive and the legislature on one side of the continuum against the judiciary on the other side of the continuum.

The conclusion that may be drawn from this theory is that protection of human rights while countering terrorism is increasingly becoming a challenge in many Western democracies. Efforts by governments to fight terrorism and terrorist groups have not only potentially affected human rights enjoyment, but have also caused remarkable tensions between the executive and the judiciary.

2.2.2 The Theory of State

It may be said that since terrorist threats changes both the political and legal circumstances of a country, such threats then potentially set a conflict stage between the State and terrorism perpetrators. In other words, societal interests of the State collide with the interests of terrorism perpetrators. Interestingly, the means often used by terrorists to disrupt social order is illegitimate physical force. Yet, it is only the State that should have the legitimate monopoly of physical force. Indeed, Max Weber had long observed that it is only the State that can successfully exercise a monopoly of legitimate physical force in the execution of its orders (see Dusza, 1989). The main interests (aims and purpose) of the State are essentially to secure social order and guarantee legal security for the protection and enjoyment of peace. The question then that needs thoughtful responses is this: how does the State react to threats against its preservation? Basically, there are two strands of thought that governments in democracies tend to invite when designing how to deal with organized crimes or terrorism problem. These are namely, state-centered theories, and constitution-centered theories.

Proponents of state-centered theories advance the argument that state has a pre-legal right, or non-positive right of natural law, and therefore it is supposed to act for its own preservation. This view is purely classical. According to Klaus Stern, the state always has an unwritten, supra-positive right of necessity, which positive law cannot limit (see Jakab, 2016). This school of thought further argues that norms cannot bind state in exceptional situations in which instead, the state, by necessity, has its own right to self-preservation. It asserts that legal norms cannot take away the right of the state due to the very abnormality of exceptional situations. In other words, the state is perceived as a pre-legal institution, whose power is originally unlimited, and only tamed by the law. This perceived right of the state is not merely alongside the constitution, but clearly against it, since the constitution cannot apply in an abnormal, emergency situation. Carl Schmitt, who was a harsh critic of liberal democracy, fully embraced the idea of the extraordinary executive power of the State (see Rasch, 2019). He insisted that the emergency power of the State can never be consistent with the rule of law. The two are like water and oil – they cannot mix. It will be seen that governments' counter-terrorism response has essentially augmented the executive power and diminished the enjoyment of human rights and freedoms. However, a moderated version views the power of state as subject to positive law. The moderated state-centered version is that although the state has the right to employ all the necessary measures to fight against intrusion and destruction of public order by state enemies, those measures should derive from the provisions of positive law.

By the same token, Max Weber makes an interesting observation that the State not only monopolizes force (violence), but also the law during extraordinary times. This implies that the State is more likely to monopolize the law in times of national security crisis (terrorist threat). Instead of making the law subject to judicial interpretation, the State is more likely to take the law into its own hands during periods of unusual national security threats, and relegate the important function of the judiciary. This account clearly demonstrates the ability of the State to undermine judicial power in times of national security crisis. Indeed, the administrative State may decide to become illiberal and undemocratic in pursuit of its core identity or interest- social order. The administrative State is thus likely to become an interventionist State and adopts arbitrariness. But the argument being made here is that extraordinary executive power of the State can be made to conform to the rule of law and allow the judiciary to enforce its judicial authority whenever government's use of force and encroachment into civil liberties is not proportional to the alleged suspicion or proof of criminality.

The constitution-centered theories on the other hand, advance the idea that there needs to be protection of constitutional interests by the state. It articulates a prohibition on excessiveness of governmental powers. Furthermore, it demands compliance with positive law by the state. In other words, the constitution-centered theory advances the supremacy of the constitution, while the state-centered theory advances the supremacy of the sovereign (executive). How should the modern democratic State reconcile these opposing lines of thought? The aforementioned theories pose dilemma to State authority in liberal democracies. This is compounded by the fact that the encroachment of government on individual's fundamental rights and liberties often fail to achieve presumptive validity. How then should governments approach this more complex problem in the face of national security threats? To be able to answer to these questions, it is important to invite more discussions on the need by the State authority to act more differently during exceptional circumstances (extraordinary times) such as during war, and during terrorist attacks.

The debate on the justification of exceptional state power in times of national security threats may be scaled further in relation to some well-established theoretical frameworks in the literature. These frames add to the justification of the use of State power to fight against organized crimes and terrorist threats. They include, the State of Exception, the Enemy Penology, and Pre-Crime. For instance, the doctrine of "margin of appreciation" under the European Convention on Human Rights (ECHR), seem to embolden the State's discretion to derogate from Article 15 of the Convention, and thus exercise substantial force at the expense of liberty. The state of exception theory has become a convenient mechanism by the State to suspend judicial order. A reliance on the judicial branch to safeguard citizens' constitutional guarantees, therefore, becomes illusive during a state of exception (emergency). However, it is strongly argued in this study that even in a time of national security threats (i.e. terrorism threats), the government is, and must still be, subject to the rule of law and it must act in ways that protect the fundamental rights of its citizens. As a corollary, the government should not be entirely immune to judicial scrutiny in a time of national security threats.

Although terrorism has become an important phenomenon in recent period, legal scholars have had little interest in conducting a systematic research linking terrorist threats to diminution of a fair trial and judicial power. The possibility of terrorist threats curtailing a fair trial and judicial independence has not elicited much attention among legal scholars despite controversies

surrounding national security laws and policies on counter-terrorism. The present study is a timely contributor to filling in the gap. Since terrorist threats may potentially change both the political and legal circumstances, such threats are likely to set a conflict stage between different branches of government. In particular, changes in legal circumstances that affect the rule of law are very likely to undermine a fair trial and judicial independence. The reminder of the discussions below endeavor to model mechanisms that link terrorist threats to diminution of a fair trial and judicial independence.

In figures 2.3.2 and 2.4 in the sub-sections below, the study is able to demonstrate how a liberal democratic State is likely to respond to terrorist threat. Figure 2.3.2, for instance, illustrates three ways a liberal democratic State would likely choose in dealing with national security threats (terrorist threats). However, it is highly unlikely that a liberal democratic State would adopt the diplomatic option in responding to terrorist threat. The two most possible options include military action or legal action. However, in this particular study, we are mainly interested in the legal action option, based on the tenets of the rule of law, which is an *essentialia* of liberal democracies. That means that the study only pays considerable attention in examining the rule of law (legal option), but pays no attention to the diplomatic and military options. Figure 2.4 provides an illustration that state's response to terrorist threats puts the judiciary at the center of decision-making between the state as an aggrieved party on one side, and the terrorist group (defendant) on the other side. The assumption being made here is that the judiciary or judges (fact-finders) are making judicial decisions in a liberal democracy. As already been mentioned in chapter one, the *essentialia* of liberal democracies include the rule of law, an independent judiciary, and respect for human rights.

2.3 How Do Liberal Democracies Respond to Terrorist Threats?

Developed legal systems in Western democracies tend to subscribe to the rule of law. Courts are also called upon in a wide variety of contexts to determine whether a particular government action excessively impinges on settled expectations of fundamental justice and individual liberty (Sullivan and Massaro, 2013). While many democracies have responded to terrorist threats through the dictates of criminal justice system, some have responded through the dictates of war. These responses then beg the question: is act of terrorism a criminal act or an act of war? When President George W. Bush pronounced that the al-Qaida terrorist attacks on the U.S. territory on the 9 September 2001 was an "act of war", he was essentially calling for a military

response, instead of a legal response, to terrorist threats. The legal response to acts of terrorism finds legitimacy in the criminal justice system. This requires that defendants and witnesses be afforded access to counsel, and the justice process imposes judicial supervision over government action. On the other hand, however, the military response to terrorist threats involves the invocation of the executive powers instead of the criminal process.

If the events of the 9/11 were analogous to war, then that means the President (George W. Bush) was authorized to invoke his powers as the Commander-in-Chief without statutory constraint. This would essentially mean that the government claims the authority to imprison terrorist suspects without counsel, and continue to hold them with extremely limited access to the courts, for an indefinite term. It then follows that the rule of law, constitutional structures and limitations on Executive power would be rendered subservient to the need for military victory and national security (Garrison 2011, pp. x-xi). Immediately after the 9/11, President Bush invoked the powers and prerogatives of the presidency in times of international threat.

When President George W. Bush declared the 9/11 terrorist attacks as an "act of war", it was incomprehensible how an act of terrorism could be conveniently defined in a time of crisis. It is understood that "terrorism" as a concept still lacks a legal (formal) definition even in the U.S. How President Bush arrived at defining it as an "act of war" is still not very clear. But one thing stands out and deserves attention. Branding of terrorist acts as an "act of war" by the political leadership has implications for democracy, the rule of law and the independence of the judiciary. Firstly, it is away to deny the justice process a chance and according that chance to the dictates of military. When political leadership suppresses the justice process, it essentially undermines the power of the judiciary. Judicial independence is weakened when the executive deliberately undermines judicial power. President Bush "asserted that as a "war time" Commander-in-Chief he had the inherent powers to seize and detain "enemy combatants" indefinitely as he determined with no accountability to the Judiciary or Congress" (Garrison, 2011, p.265). In a June 2002 press conference Secretary of Defense, Rumsfeld, echoed the Bush Administration view that captured terrorists would be treated differently than criminals (Garrison 2011, p. 283).

2.3.1 Perception of Terrorism by Democracies: An 'Act of War' or a 'Criminal Act'?

Should liberal democracies treat terrorist acts as war crimes that demand the law of war other than criminal statutes? Although President George W. Bush repeatedly referred to terrorism as an "act of war", there is nowhere under the U.S. primary law that defines terrorism as an act of war. This means that when President Bush authorized that terror suspects to be tried in a special or military court, his action must have been illegal. The perpetrators of the 9/11 terrorist attacks [enemy belligerent] needed to be treated as criminals because what they participated in was a criminal act. Moreover, past terrorist acts in the U.S. had been prosecuted as ordinary criminal offenses (Elsea, 2006, p. 3). However, due to the magnitude of damage and the loss of life that they caused, the U.S. authority treated the attacks as act of war. On November 13, 2001, President George W. Bush signed a military order pertaining to the detention, treatment, and trial of certain non-citizens as part of the war against terrorism. By signing the military order, President Bush obviously invoked *jus in bello* (law in war –law in armed conflict). It was not, however, known to the Bush administration that the military order that he signed was partly in contravention of the *jus cogens* norms of the Geneva Convention of 1864 (i.e. relief to the wounded without any distinction as to nationality).

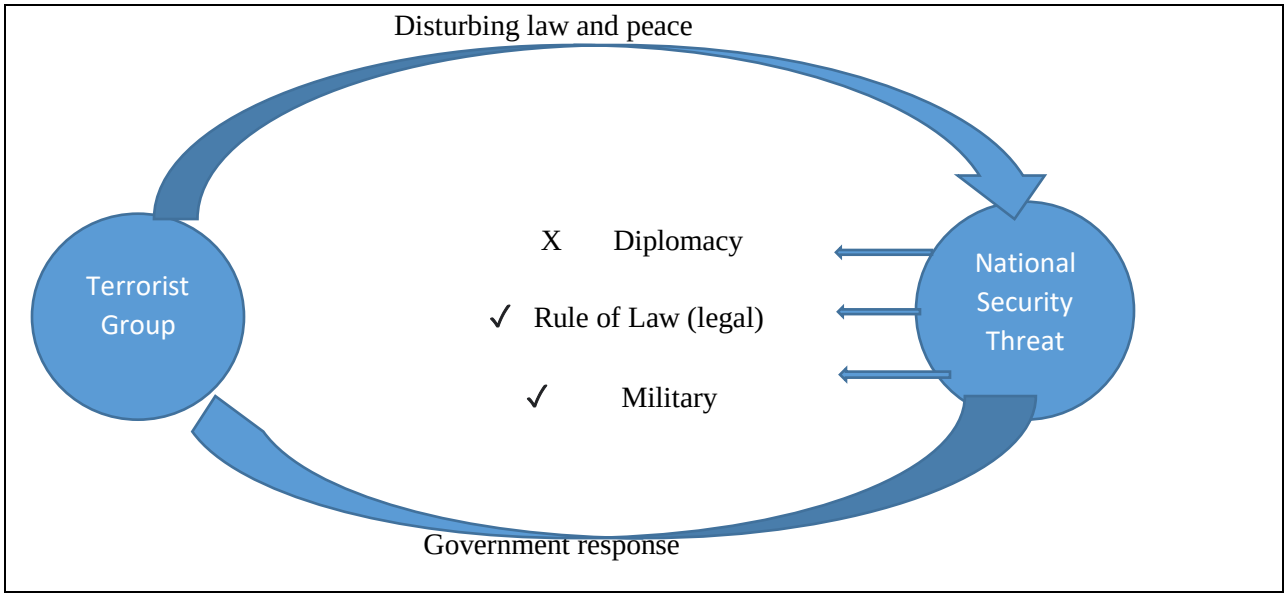
The fear of the Bush administration to prosecute terrorist suspects under the ordinary criminal law was because the civilian courts have well established rules of procedure and evidence. Also such proceedings could be lengthy and subject to multiple appeals, during which a conviction could be overturned on technicality. It was feared, however, that it would be impossible to empanel an impartial jury for such trials within the U.S. This was the most marked attempt to undermine judicial authority by the executive.

2.3.2 The Usual Toolbox of National Defense by Liberal Democracies

How should liberal democracies fight terrorism, and what is the proper balance between human rights and national security? Democratic governments typically are not only more likely to respect the rule of law, but they are also very likely to comply with international law during internal armed conflict, and more likely to have higher rates of judicial independence (Loyle, 2016). The usual toolbox of national defense in democracies: military force, legal justice, and international diplomacy. While an effective response to terrorist threat by the state is absolutely necessary, the

response, however, should not be weaponized to undermine democracy, human rights, and the rule of law. Figure 2.3.2 below provides an illustration.

Figure 2.3.2 Government's Response to Terrorism Threats in Liberal Democracy



Source: author.

Since liberal democracies are expected to respect and promote the rule of law, it is important therefore that criminal justice systems operating in liberal democracies also must respect and observe due process guarantees, and legal protection of human rights. This is possible if the judiciary is also independent.

A slightly varying perspective is provided by other scholars. For example, Walker (2007) argues that there are two possible legal responses to terrorist threats that are likely to be employed by democratic governments. The first one he calls "criminalization" and the second one he calls "control". He mentions that criminalization response involves implementing legal measures that seek criminal justice outcomes such as the government relying on extra policing powers to gather evidence. He then points out that the second tactic is to prevent, disrupt, and counter any form or act of terrorism by engaging in "control". He further argues that "control" is essentially an executive-based risk management. Control involves measures such as proscription, detention without trial, control orders, port controls, data-mining, and the seizure of assets (Walker, 2007,

p.1400). He is quick to add that several powers such as arrest, interrogation, and stop and search could legitimately be included in either strategy.

In the "control" mode, the objective relates to "future law enforcement . . . not necessarily directed to solving a crime that has already taken place.[36] The purpose of control is normally tied to the idea that the threat of terrorism demands an early police intervention at the preparatory stages of a terrorist act to detect and disrupt it. [37] The argument that is normally fronted by the government is that it is too dangerous to allow the terrorists to move towards their objectives. But such special laws also might easily undermine the legitimacy of the criminal justice system. The techniques of control thus tend to be widely viewed as harmful to constitutionalism. This is because individual rights may be diminished or even eliminated without the public display of an affirmation of the evidence against them, and without venerated rules such as proof beyond reasonable doubt (Walker, 2007, p.1401).

2.4 The Role of Courts in Counterterrorism

What should be the role of the judiciary in counterterrorism? Scholars argue that the judicial handling of terrorism cases is likely to weaken the judiciary's ″political insularity." Political insularity requires that the judiciary must be independent of political institutions and the public in general. The "greater the insularity from political control, the more likely judges are to do what is just rather than what is politic" (Fiss, 1993, p. 60). Indeed, the moral authority of the judiciary must be highly protected by making the judiciary free of political control. Political insularity is one of the foundations of judicial authority. It must also be emphasized that political insularity is also conducive for justice in Western democracies. For instance, the United States is often thought to possess the most independent judiciary (Fiss, 1993) and the US Federal courts are often treated as the fullest embodiment of the ideal of judicial independence. However, the tension between the Trump administration and the judiciary over terrorism-related judicial decisions as

[36] Sybil Sharpe, Search and Surveillance 199 (2000).
[37] For examples of early intervention, see especially Statements in Media Might Have Prejudiced Jury in Criminal Trial, TIMES (London), May 1, 1990. See also Stewart Tendler & Sean O'Neill, The Al-Qaeda Plot to Poison Britain, TIMES (London), Apr. 14, 2005, at 1.

witnessed in recent years, sends worrying signals as to the political insularity of the American judiciary.[38]

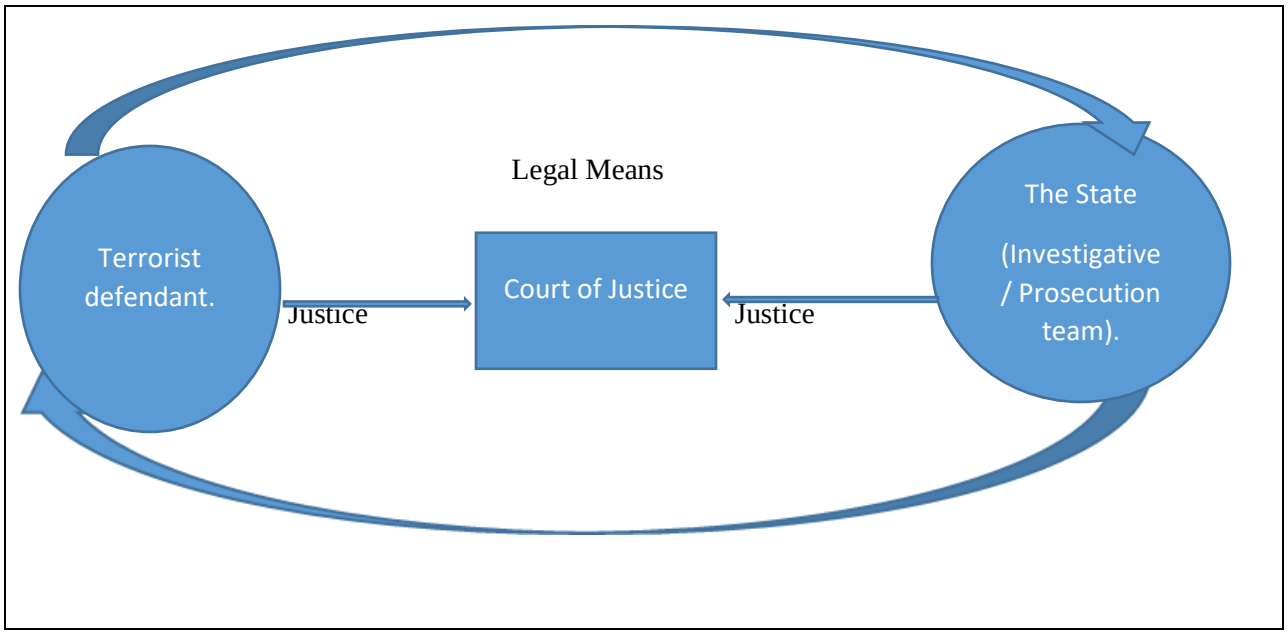
In his attacks on the judicial system in response to terrorist attacks that happened on Tuesday, October 31st, 2017, in which the terrorist attack in Manhattan led to eight deaths and several serious injuries, President Donald Trump made a pointed statement targeting the judiciary in his response of the terrorist attack. He called the courts a "joke" and a "laughingstock." President Trump also said he would "certainly consider" sending the suspect to the U.S. military prison in Guantánamo Bay. Trump stated:

"That was a horrible event, and we have to stop it, and we have to stop it cold. We also have to come up with punish-ment that's far quicker and far greater than the punish-ment these anim-als are getting right now. They'll go through court for years. And at the end, they'll be — who knows what happens. We need quick justice and we need strong justice — much quicker and much stronger than we have right now. Because what we have right now is a joke and it's a laugh-ing-stock. And no wonder so much of this stuff takes place. And I think I can speak for plenty of other coun-tries, too, that are in the same situ-ation."[39]

In regard to President Trump's remarks, we can say that the modern threat of terror not only poses new challenges to Western democracies, but also to the independence of judicary. It is important to mention that these challenges are not only operational but also legal. But how should democratic governments fight terrorism and preserve democracy at the same time? Terrorism offences in Western democracies should be punished through legal responses. This is because Western democracies have adequate criminal justice capacity to afford justice to terrorism perpetrators.

[38] https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts. Retrieved on 7 April, 2021.
[39] Ibid.

Figure 2.4 Democratic Justice and Legal Control of Terrorist Violence.



Source: author.

How are courts linked to counterterrorism activities? Figure 2.4 above provides an illustration. It must be known that counterterrorism activities involve government action. In terms of jurisdiction and standing requirement, an almost directly derivative conclusion of the court's starting viewpoint, according to which counter-terrorism must be within the law and not outside, is the wide interpretation of its jurisdiction. It has been decided that courts have jurisdiction over these matters because they involve actions of the executive branch, which are as a matter of principle under the jurisdiction of superior courts. At the same time, courts must regard themselves as an essential part of the "democratic triangle" (i.e. Executive-Legislature-Judiciary). They also must understand their role as the main guardian of the rule of law. The present study argues that traditionally, courts should rarely reject a case in times of national security crisis (i.e. terrorist threats) on the basis of non-justiciability. In other words, courts should not find that another institution, for instance, either the Legislature or the Executive is better equipped to rule on the issue at hand than the court itself. This must expressly apply to issues of counter-terrorism.

Judges have a duty to balance national security and human rights, in times of peace and of war. Elsewhere, Yigal Mersel, Registrar of the Supreme Court, Israel, contends that judges must do all they can to balance properly between human rights and the security. He further mentions

that ”In this balance, human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy.”[40] By all clear indications, not much less, terrorist acts seem to be contemporary threats to the independence of the judiciary in Western democracies. Moreover, Miller (2017) strongly argues that despite the fact that independent judiciaries tend to prevent democratic reversals, facilitate peaceful transitions of power, and legitimate democracy among citizens, it is unfortunate that the same citizens living under terror threats tend to lose confidence in the independence of judiciaries.

Incisively, Miller (2017) contends that under conditions of high-level terrorist threats, citizens tend to lose confidence in their judicial system, which they perceive as providing unnecessary due process and legal protections for suspected terrorists. Ironically, however, Miller (2017) observes that there is a significant negative effects of terrorist threats on “judicial confidence the more independent the judicial system is from other branches of government” (p.2). It can be inferred that Miller’s argument suggests that during high-level terrorist threats, if the judiciary maintains its independence and resists any form of interference by the executive or the legislature, then it is more likely that the judicial system would grant terrorist suspects due process and legal protection. This judicial conduct is likely to offend the public and, hence the negative effects of terror threats on judicial confidence. This implies that citizens tend to support the executive and legislature in whatever measures that they introduce to counter terrorist acts, even if such measures are bound to intrude into their liberty.

In another study, Ananian-Welsh (2016) looks into the impact of terror threats on judicial independence. She makes the argument that counterterrorism legislations are mainly preventive in nature and therefore the courts of law are not traditionally suited to determine disputes involving preventive measures. She opines that involving courts in preventive counterterrorism schemes may place judicial independence at risk since it is more likely to expand courts’ role within the crime-prevention role. She further argues that courts of law tend not to be familiar or even well equipped to deal with laws that are aimed purely at preventing future criminal offenses. Although Ananian-Welsh (2016) seems to applaud the involvement of the judiciary into counterterrorism measures

[40] Mersel, Yigal. Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During The Terror Error. International Law and Politics. Vol. Vol. 38:67, 2013, p. 92

by ensuring that the executive powers are properly checked, she, however, fears that such involvement seems to extend the judicial role into new territory. Moreover, Ananian-Welsh (2016) expresses fear that some counterterrorism control orders tend to seriously impact the rights and liberties of citizens in the sense that they are likely to extend executive power, and permit security and police forces to mandatorily interrogate, incarcerate and even restrain individuals in the absence of criminal charge. Such schemes do not reflect positively on the judiciary if the judiciary decides to take part in supporting the executive's liberty-intrusive orders. She further argues that such control measures also tend to challenge broader notions of due process and thus present serious risks to judicial independence. She, however, concludes that courts and judges may involve in counterterrorism schemes, but only if they have the necessary tools that would enable them to protect not only their independence and integrity, but also the fairness of the criminal justice process.

Yet in another study, Tulich (2012) contends that the preventive aim of the newly introduced counterterrorism laws is "at odds with the traditional judicial duty of determining rights in dispute by applying law to the facts in issue."[41] Counterterrorism laws are thus likely to make the courts to have a preventive focus and that implies that the courts would be reduced to relying on intelligence information rather than evidence of past criminal offenses, in determining legal disputes. This would also put the courts in an awkward situation in the sense that they are likely to make judicial decisions based upon evidence adduced to them *ex parte* by the executive.

The judiciary is at the center of liberty v. national security dispute. As Garrison (2011, p.423) observes, 'the judiciary and the rule of law have a role in national security policy during times of crisis." Hamilton once said: it is the province of the Judicial Department to say what the law is. What judges and courts of law must ensure: limited government, Constitutional supremacy, and the protection of liberty and the rule of law. The judiciary must therefore be the citadel of the public justice.

[41] Tamara Tulich, 'Prevention and Pre-Emption in Australia's Domestic Anti-Terrorism Legislation' (2012) 1(1) International Journal for Crime and Justice 52, 52-53.

2.5 Terrorism and Criminal Justice in Western Liberal Democracies

It is important to have a detailed treatment of how Western liberal democracies have developed legal instruments targeted at curbing acts of terrorism. It is important to add that some of these legal instruments are anticipatory in their operationalization. This implies that the post-9/11 counterterrorism laws are mainly preventive in nature as opposed to the pre-9/11 terrorism laws. The discussions in the subsequent sub-sections also illuminate the provisions in statutes and the penal codes as well as executive orders.

2.5.1 The U.S.A Law: From Terrorism to Criminal Justice

Terrorism in the U.S. did not start with the Osama bin Laden's Al-Qaeda organization. The Osama led Al-Qaeda was not the first terrorist group to use political violence against the United States. Indeed, by 1980s, terrorism was not a new phenomenon to the U.S. A host of terrorist groups were already demanding changes in American foreign policy (Wills 2003: xi). Terrorists are normally willing to bomb, assassinate, kidnap, and hijack to pressure the government to act and change its policy in favor of the terrorist group. The activities of terrorist groups must, however, be strongly condemned. The 9/11 attacks on the U.S. soil, for example, were waged by groups that believe that targeting non-combatants (civilians) is somehow a legitimate tool (method) for demanding and accomplishing their policy objectives.

In early 1980s, President Ronald Reagan said that: "Let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution. We hear it said that we live in an era of limits to our powers. Well, let it also be understood, there are limits to our patience" (Wills, 2003, p.1). The Reagan's remark is a clear indication of how government reacts during exceptional phenomenon, such as emergency. The implication being that limited powers government tend to lose their "cool" and put the rule of law aside as they act with absolute discretion to respond to emergency.

Article I, Section 9, of the U.S. Constitution authorizes suspension of the writ of habeas corpus in instances where rebellion against or invasion of the public safety appears imminent. This indicates that acts that are deemed as gross criminality and a threat to national security may result in undermining the rule of law. Black's Law Dictionary defines criminality as "an act or practice

that constitutes a crime."[42] Criminality is therefore any conduct or behavior that is contrary to or forbidden by criminal law. Whereas terrorism offences are distinct from other types of crime in that individuals who commit terrorism-related offences have political, religious, and racial intentions, such offences still fall under criminal justice and subject to penal regime.

An interesting development has been observed in the U.S. whereby perceived high-level terrorist attacks are associated with warrantless wiretapping, some acts of torture, media censorship, and increased public surveillance measures (i.e. Hetherington and Suhay, 2011). It is surprising that during periods of high-level terrorist threats, citizens tend to even support government policies that infringe upon the legal protections provided by independent judiciaries. This implies that during high-level terrorist threats citizens are more likely to support counterterrorism policies that infringe upon civil liberties, which are substantially protected by independent judicial systems.

2.5.1.1 Terrorism, Expansion of executive power and Diminishing of Civil Liberties

According to Banks (2004), the concentration of power in the executive docket merits careful attention since civil liberties tend to be decidedly diminished in the state's determination to wage war on terror. He argues that the federal government's historical response to civil disturbance reveals a pattern of expansion of federal police power. Banks points out that governmental powers have often been expanded to meet past threats and the PATRIOT Act is but the latest in a long line of such congressionally sanctioned expansions of federal police power (see Cohen and Wells 2004, p.3). To the contrary, "The American Constitution was originally designed as an experiment in republican liberty and limited government" (Banks, 2004, p.29). The U.S. PATRIOT Act essentially enhances intelligence gathering and law enforcement capability by amending the Foreign Intelligence Surveillance Act (1978. Government officials can also get requisite evidence through ''*ex parte* court orders under the no-notice procedures'' pertaining to telephone or Internet service providers.[43]

[42] Black's Law Dictionary, 9th ed., p. 431.

[43] Section 211, amending the Cable Communications Policy Act, 47 U.S.C. Section 551; Pikowsky, ''An Overview of the Law of Electronic Surveillance Post September 11, 2001,'' 609; Doyle, ''The USA PATRIOT Act: A Legal Analysis,'' CRS-7, n. 15. Also, Section 212 allows Internet service providers to reveal the content of subscriber data on a volunteer basis if the ISP believes it has information that risks immediate harm, death, or physical injury. Section

The PATRIOT Act also deters and punishes a variety of offenses that relate to money laundering, smuggling, or economic terrorism. Prior law allowed more limited access to records such as subscriber names, addresses, telephone numbers, and telephone billing records. Electronic surveillance is arguably the most invasive technique available to law enforcement officials. A basic concern with this investigative tool involves the protection against unreasonable search and seizure provided by the U.S. Constitution's Bill of Rights.

2.5.1.2 Judicial Independence in Times of National Security Crisis: U.S.A

National security threats pose serious challenges to constitutional rights and to judicial independence. Stephen Reinhardt in his article "*The Judicial Role in National Security*", (2006) observes that the role of judges during times of war, be it a traditional war or a "war on terrorism", is essentially no different than during times of peace. He argues that judges should at all time interpret the law to the best of their ability, consistent with the constitutionally mandated role and without regard to external pressure. He further argues that in wartime, the need for judicial independence should be at its highest. He expresses fear, however, that the very concept of judicial independence tends to be most vulnerable, and imperiled by threats both inside and outside the judiciary. He contends that externally, there is usually a lot of pressure coming from the elected branches, and often the public, to afford far more deference than may be desirable to the President and Congress, as they wage wars to keep the nation safe. This pressure often includes threats of retribution, including threats to strip the courts of jurisdiction. He adds that internally, judges may question their own right or ability to make the necessary, potentially perilous judgments at the very time when it is most important that they exercise their full authority. He further points out that the concern is usually exacerbated by the fact that the judiciary is essentially a conservative institution and judges are generally conservative individuals who dislike controversy, risk taking, and change. The sentiments by Reinhardt reinforce the perceived pressure that judges feel in judging during period of crisis.

The U.S. Constitution generally fails to recognize international human rights law. Congress can pass laws such as the National Emergencies Act 1974, which permits the president to declare

212, amending the Stored Communications Act, 18 U.S.C. Sections 2702–03. Pikowsky, "An Overview of the Law of Electronic Surveillance Post September 11, 2001,'' 610.

emergency and activate specified emergency provisions so long as they are notified to Congress. Emergencies last for one year. On September 14, 2001, the U.S. Congress agreed to a joint resolution known as Authorization for Use of Military Force, which has the status of a public law (Dickson, 2019). It allowed President George W. Bush to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed or aided the terrorist attacks that happened on September 11, 2001 (Dickson, 2019). However, the U.S. Supreme Court finally held in *Hamdan v Ramsfeld* that military courts established in Guantanamo Bay without congressional approval were unconstitutional because they violated the Geneva Conventions on the Laws of war, which the Court said were part of the U.S. Uniform Code of Military Justice.[44]

A section of scholars argue that there are models of constitutional emergency regimes. They contend that these models are based on the premise that constitutional norms and legal rules must control governmental responses to emergencies and terrorist threats (Gross and Fionnuala, 2006, p.86). They point out that the fundamental assumption that underlies these models is what they call the assumption of constitutionality: "whatever responses are made to the challenges of a particular exigency, such responses are to be found and limited within the confines of the constitution" (p.86). For instance, Chief Justice Hughes stated in *A.L.A. Schechter Poultry Corporation v. US*, that the ordinary legal system already provides the necessary answers to any crisis without the legislative or executive assertion of new or additional governmental powers. ''Extraordinary conditions do not create or enlarge constitutional power.[45] This implies that the occurrence of any particular crisis should not be an excuse or justification for suspension, in whole or in part, of any existing piece of the ordinary legal system (Gross and Fionnuala 2006, p. 86). Justice Davis bravely asserted in *Ex parte Milligan* that the constitution applied equally in times of war and in times of peace.[46]

Professor Geoffrey Stone in his article "*Civil Liberties v. National Security in the Law's Open Areas*" (2006) observes that judicial responses to threats to individual liberties in wartime is

[44] 548 US 557 (2006.
[45] *A.L.A. Schechter Poultry Corporation v. US*, 295 US 495 at 528 (1935) (Hughes, C.J.).
[46] *Ex parte Milligan*, 71 US (4 Wall.) 2 at 120--21 (1866) (Davis, J.). Edward S. Corwin, Total War and the Constitution (New York: A.A. Knopf, 1947), pp. 39--80; Jules Lobel, ''Emergency Power and the Decline of Liberalism" (1989) 98 Yale Law Journal 1385 at 1386--87; Molly Ivins, ''Trampling all over the Constitution," Chicago Tribune, November 22, 2001, p. N19.

mixed at best. This is because the judiciary has shown a pattern of making decisions in favor of a government policy and sometimes against government policy. The twenty first century, however, poses greater threats to the independence of the judiciary due to the so-called "Global War on Terror". The U.S. just like other Western democracies is faced with a conflict (terrorism threats) with no projected or foreseeable end. This implies that the "war-related challenges to constitutional rights and to judicial independence, which typically subside with the end of a conflict, will continue unabated into the indefinite future" (Reinhardt 2006, p.1309). Reinhardt further argues that "in an era of "war without end," any inclination of judges to lessen the necessary constitutional vigilance will not only seriously jeopardize basic rights to privacy and liberty, but also will make it more difficult to fend off other, non-war-related challenges to judicial independence, and as a result cause harm to all of our fundamental rights and liberties" (p.1310).

One scholar contends that an essential element of judicial independence is that "there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions" (Cox 1996, p.565-66). A few years after the 9/11, the U.S. Congress passed the Detainee Treatment Act. This was in line with the Graham-Levin Amendment. This amendment was part of the legislation that prohibits any court from hearing or considering habeas petitions filed by aliens detained at Guantanamo Bay. The Supreme Court was, however, asked to rule on whether the Act would apply only prospectively, or whether it would also apply to pending habeas petitions. This particular matter provides a good example of how the state can interfere with the jurisdiction of the court - denying courts their jurisdiction for purposes of controlling their decisions. This is undoubtedly a marker of violation of judicial independence.

In *Padilla v. Hanft (amicus)* and *Hamdi v. Rumsfeld*, serious possible threats to judicial independence emerge. This is due to the position which was taken by the U.S. administration regarding the scope of its war powers. In challenging cases brought by individuals charged as "enemy combatants" or detained at Guantanamo, the U.S. administration strongly argued that the President has "inherent powers" as Commander in Chief under Article II, which provides him authority and powers during times of crisis and such powers are essentially not reviewable by courts or subject to limitation by Congress.

It is important to emphasize here that the U.S. administration's position on the Guantanamo cases was difficult to comprehend. The government insisted that no court anywhere in the U.S.

had any jurisdiction to consider any claim, whether on torture or pending execution. The government was of the firm view that any individual held on any American military base located on any territory under the American jurisdiction, could be held for an indefinite period without intervention by court. At the same time, the U.S. government has been relying on sweeping assertions that the executive powers in domestic surveillance program should not be fettered for purposes of maintaining the U.S. security.

The fundamental question that should be asked is whether or not the role of a judge should change in times of crisis. Some would argue that in times of national crises, "judges must necessarily give greater weight in many instances to the governmental, more specifically the national security, interest than they might at other times" (Reinhardt, 2006, p.1311). According to Reinhardt, judges and courts need to be conscious of the fact that the government's interests in protecting the nation's security are usually heightened during period of national security crisis. He further argues that there are particular instances whereby unconstitutional detentions during peacetime may well be deemed constitutional in times of crisis. He points out that this should not be perceived as if the role of the judge is different. Neither should it be perceived to mean that courts curtail their constitutionally mandated role in times of crisis. Rather, it should be understood that while some governmental interests may be insufficient to justify deprivations of fundamental rights and freedom during peacetime, such interests may be substantial to justify government's action in denying rights and liberty in times of national emergency. Reinhardt, however, cautions that courts must not at any time allow the balancing of security and rights/liberty to turn into a routine licensing of unbridled and unsupervised executive power.

The foregoing views point to the pressure on the judiciary in times of national security threats. The courts find themselves in a special dilemma, especially trying to balance government's security interests and individuals' liberty. Courts may find it difficult to consider the extent to which they should give the government's interest enhanced weight in times of national crisis. This dilemma is particularly critical given that many Western democracies are now facing and engaged in an unprecedented conflict ("war without end"). It may understood that the judiciary might accord the government's security interest enhanced weight during period of security crisis. This is based on the fact that a state of crisis is temporary, hence the curtailment of individual liberty that ensues would only last for a limited period. However, with the "war on terror" facing Western

democracies and without a foreseeable end, balancing governmental security interests and individual liberty interests is likely to become a perpetual stress on the judges. Act of terrorism mean "war without end" unlike the traditional military wars. This means that pressure on the judiciary and, hence threats to judicial independence may continue unabated for the indefinite future.

There is to a greater extent, sensible rationale that the government requires more latitude in order to keep the country safe during times of national security threats. The courts have at times deferred to the government. But when the conflict has no foreseeable end, then an interesting conundrum emerges and even if judges were willing to sacrifice some fundamental rights and freedom in the short run, they face the challenge of trying to do that indefinitely, hence the pressure on judges. Judges must therefore get ready to deal with that pressure for a greater period of this twenty first century.

2.5.2 The United Kingdom Law: From Terrorism to Criminal Justice

The United Kingdom had long experienced myriad acts of terrorism prior to the 9/11. Its consequences on human rights curtailment is not something new to residents of the UK. For instance, the curtailment of the right to silence in the UK was brought to bear on August 25, 1988, in response to escalating terrorist attacks. The August 20 bombing in County Tyrone of a military bus left eight British soldiers dead and twenty-eight injured.[47] The British government decided to adopt a series of security measures and the package included a measure to limit the right to silence of suspects and defendants. This was controversial because the right to remain silence is a well-established right in the human rights law. The right to remain silence during police interrogation and during trial in court is a well-established right.[48] The government's argument for the proposed measure was that the wide and systematic lack of cooperation with the police by those.

In the UK, terrorism crimes and terrorist-related offences are all subject to the criminal justice system in the same way as all other ordinary crimes. The Crown Prosecution Service (CPS) normally reviews the case and makes a decision whether or not to charge a suspect based on the

[47] Steve, Lohr, ''*IRA Claims Killing of 8 Soldiers as it Steps up Attacks on British*,'' NY Times, August 21, 1988, p. A1.
[48] 140 Parl. Deb., H.C. (6th ser.) (1988) 184 (comments of Tom King, Secretary of State for Northern Ireland).

Code for Crown Prosecutors. However, one could argue that the motive of terrorism offences are different from other types of ordinary crime in the sense that individuals who commit terrorism-related offences do have political, religious racial and/or ideological motivations, as opposed to typical criminal motivations, which may be due to personal gain or revenge. It is important to understand that in the UK, the CPS and Metropolitan Police have specialist units that have been set up to undertake terrorism cases. Also, there are four other police Counter Terrorism Units (CTUs) within the UK.

It is important to mention that in recent years a number of offences and powers have been designed to counter the activities of terrorists in the UK. This was mainly due to the frequency and scale of terrorism incidents after the 9/11. For instance, Schedule 2 of Counter-Terrorism Act 2008 contains a list of offences which a judge could conclude have a terrorist connection. These include charges such as murder or causing an explosion. Moreover, Section 30 of Counter-Terrorism Act 2008 imposes special custodial sentences for offenders of particular concern who have committed offences under Schedule 2.

2.5.2.1 Substantive Terrorism Offences

In recent years a number of offences and powers have been designed to counter the activities of terrorists. Before their creation these had not been addressed by permanent legislation. They include, but are not limited to, offences under the Terrorism Act 2000 (TA 2000) and Terrorism Act 2006 (TA 2006). On July 7, 2005, the U.K. experienced a terror attack, as the one levied against the United States in 2001. On July 7, 2005, a terror cell (the Abu Hafas Al-Masri Brigade) commissioned an attack on the London underground public transportation system. The terror perpetrator ”detonated explosives on three subway cars and one street level double-decker bus, resulting in the combined deaths of fifty-three people, and the injuring of another 700 individuals” (Beckman, 2007, p.51). Some weeks later, on July 21, 2005, some copycat attacks were attempted on the underground, but failed.

In yet another terrorism incident, suicide bomber Salman Abedi was alleged to have murdered 22 bystanders at the Manchester Arena in 2017, by detonating his home-made bomb. Hashem Abedi, the younger brother of suicide bomber Salman Abedi, was later extradited from Libya to the UK to face terrorism charges and was tried and sentenced to at least 55 years in prison

for the murder of 22 people at an Ariana Grande concert. This was after the jury found him guilty of conspiracy and having worked closely with his brother Salman Abedi. Earlier in the year 2020, a jury in the UK took less than five hours to find Hashem Abedi guilty of 22 counts of murder, one of attempted murder in relation to those who survived, and one of conspiracy to cause an explosion.

The prosecution case was that Hashem Abedi effectively worked hand-in-hand with his suicide bomber brother (Salman Abedi) in the planning and carrying out the deadly attack on that night in May 2017. Jenny Hopkins, from the Crown Prosecution Service, said: "This was the largest murder case in English legal history. Abedi will spend the next five decades behind bars where he can't harm others. My thoughts remain with the families of those who died and the hundreds of survivors".[49] In this particular terrorist attack, while 22 innocent lives were lost, 264 people were injured and 710 survivors have reported suffering from psychological trauma, and police identified more than 1,000 victims.

2.5.2.2 The U.K. Constitutional Law

The U.K. does enjoy constitutional principles just like other Western liberal democracies. However, those principles are not derived from a singular Constitution document, but rather from a variety of different sources. These sources include the historical documents and events. A good example is the Magna Carta in 1215, or the promulgation of the 1688 Bill of Rights by Parliament, which illustrate important principles pertaining to the Rule of Law in society, the Supremacy of Parliament and the protection of civil liberties. Another significant document is the important foundational acts of Parliament (i.e. the "unrepealed statutes of the realm") which set forth fundamental principles regarding governance and civil liberties. In addition, there are judicial decisions interpreting the fundamental statutes, which add meaning to the above statutes.

At the same time, there are customs and practices developed over time, called "conventions of the constitution." However, the most important source of constitutional law in the U.K. stems from statutory law enacted by the Parliament. A good example of this is the Human Rights Act of 1998, which came into effect in the year 2000. This piece of legislation incorporated all of the norms of the European Convention of Human Rights into English law and made them part of the

[49] https://www.cps.gov.uk/cps/news/brother-manchester-bomber-jailed-55-years. Retrieved on April 18, 2021.

U.K. constitutional norms. It is important to emphasize that this particular law has been only compared to the U.S. Constitution's Bill of Rights (Terrill, 2003). It covers pertinent areas of human rights including the war on terrorism, prohibition of torture, freedom of association and assembly, and right to liberty and security. "According to the 1995 report in the books published by Her Majesty's Stationary Office, the U.K. constitutional law is comprised of approximately 138 Acts of Parliament considered of a fundamental and constitutional character" (Beckman, 2007, p.2).

2.5.2.3 The UK Counterterrorism Statute

The Prevention of Terrorism Act of 1989 was probably the most notable of the anti-terrorism laws in the U.K. prior to 2000. This piece of legislation dealt more with governmental powers relating to the Northern Ireland, but less with the prevention and deterrence of global or international terrorism. Although the 1989 Act defined terrorism as "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear," and contained rules to prevent such acts from occurring, the scope of the Act covered only the Northern Ireland. Just like the United States, there was no singular or omnibus piece of legislation dealing with anti-terrorism in the U.K before the Terrorism Act of 2000. There were, however, a myriad of different laws and provisions passed to deal with issues pertaining to common criminal cases, but arguably extendable to terrorist activities. The striking similarity between the U.K. and the U.S. is that many of the law enforcement tools that were in place and targeted for combating domestic terrorism, were the same tools that law enforcement had at its disposal for all criminal offenses occurring within the country. In other words, there were no special tools to catch terrorists apart from those tools utilized to catch the common criminal as well (Beckman, 2007, p.55).

While it is widely believed that the America's quick legislative action in the fall of 2001 in the form of the Patriot Act will be subject to constitutional challenges and reviews as the years progress, the same cannot, however, be said about the British Anti-Terrorism, Crime and Security Act of 2001. Although, it was equally similar to the U.S. Patriot which passed with little dissension, the 2001 U.K. Anti-Terrorism legislation, unlike the U.S. legislation, is not subject to constitutional restraints and reviews. This is because the British court system lacks the ability to conduct such a review. The British legal system does not allow for the overturning of the British

constitutional law by way of judicial review unless based upon laws pertaining to the European Union or the Human Rights Act, which again, they can only recommend to the legislature. It should also be mention here that the UK legislative response after the 9/11 (i.e. Terrorism Act of 2005/2006) makes it a criminal offense when a person distributes a terrorist publication.

2.5.2.4 The Role of the UK Judiciary in Counterterrorism

The role of the UK judiciary in counterterrorism has been controversial at best. Kavanagh (2011) argues that in the 20th Century (i.e. pre-9/11 era),"Once "the mantra of national security" was invoked by the executive, the issue was often declared to be nonjusticiable." She points out that the most notorious instances of this was the decision in *Liversidge v. Anderson*, where the House of Lords did nothing to oppose or even question a system of executive detention without trial (p.172). For example, Lord Diplock's leading judgment in the Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case), affirmed that "National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases establish and commonsense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problem which it involves."[50]

Writing his decision in 1995, Lord Justice Simon Brown judiciously summed up the typical approach of the courts when confronted with issues regarding national security. "The very words "national security" have acquired over the years an almost mystical significance. The mere incantation of the phrase of itself instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies."[51] Accordingly, in the 20th Century (in the pre-9/11 era), judges appeared to be abdicating their proper function in the national security context (Kavanagh, 2011). Indeed, the twentieth-century jurisprudence did not inspire confidence that the courts would provide enough protection against executive incursions into the rule of law in times of crisis. In the period after the 9/11, evidence reveals, however, that there has been a "constitutional shift" from a completely hands-off judicial approach on matters touching

[50] CCSU v. Minister for the Civil Service [1985] A.C. 374.
[51] Simon Brown LJ, Public Interest Immunity, Pub. L. 579, 590 (1994).

on national security to a more hands-on approach. In the twentieth-century, "there appears to be a widespread judicial support for the view that issues concerning national security are no longer non-justiciable" (Kavanagh, 2011, P.173).

In *A and Others v. Secretary of State for the Home Department* (The *Belmarsh* case), the Court pronounced itself with a constitutional shift – from deference to government (pro-government) to pro-liberty. This was in a landmark decision rendered in 2005. In *Belmarsh*, the House of Lords declared that a scheme of indefinite detention without charge of suspected international terrorists was incompatible, inter alia, with the Convention right to liberty under article 5 ECHR. *Belmarsh* is a remarkable constitutional shift. Lord Rodger observed in the *Belmarsh* case that, while the executive and legislature are entitled to a degree of respect in matters concerning national security, " deference to the views of the government and Parliament . . . cannot be taken too far. Due deference does not mean abasement before those views, even in matters relating to national security . . . the legitimacy of the court's scrutiny role cannot be in doubt".[52]

2.5.2.5 Judicial Independence in the U.K

A discussion on the judicial independence in the U.K. produces mixed or even conflicting perceptions. Firstly, English courts do not have the power to override the authority of Parliament due to the traditional principle of parliamentary sovereignty. Parliamentary sovereignty (parliamentary supremacy) makes Parliament in the U.K the supreme legal authority, which can create law or end any law. This implies therefore that the powers of the U.K's judicial branch in making legal decisions are curtailed by the U.K Parliament. However, the same Parliament in its legislation of the Human Rights Act (1998), did recognize the fact that English law is to some extent incompatible with rights spelled out in the European Convention on Human Rights. For instance, sections 3 and 4 of the act indicate that, English courts can issue a declaration of incompatibility. The provisions of these sections enable English "courts to indicate to the government that remedial action should be taken to correct that portion of a domestic law that is not in compliance with the fundamental democratic principles represented in the Convention" (Terrill 2009:5). Terrill further observes that "although English courts do not have the power to override the authority of Parliament, the role of the judiciary has been enhanced considerably by

[52] A and Others v. Secretary of State for the Home Department [2004] U.K.HL. 56, [2005] 2 A.C. 68. See at [176].

this legislation. The judiciary has been given the authority to encourage both the executive and legislature to take corrective action when domestic legislation is not in compliance with human rights provisions" (p.5).

Since Parliament exercises supreme legal power in Britain, this implies that English courts cannot declare an act of Parliament unconstitutional. Moreover, for a very long period of time, there was a fusion of powers in Britain, instead of a separation of powers as experienced in the U.S. This means that both the executive and legislative branches of the British government were merged in Parliament. It was not until recently that the Highest Court in the land (i.e. Appellate Committee of the House of Lords), was separated from Parliament. The passage of the Constitutional Reform Act (2005), established the Supreme Court of the United Kingdom to replace the Appellate Committee of the House of Lords. Today, the U.K has Supreme Court as the Highest Court in the land.

2.5.3 The Germany Law: From Terrorism to Criminal Justice

Germany has grappled with terrorist threats, both domestic and international since 1970s. In the post 9/11 era, German has come up with an array of security packages (Security Package 1 and Security Package 2). The Security Package 1 was passed by Parliament in November 2001 to better address national security threats. In December 2001, Parliament passed more legislations under the Security Package 2 to enhance preventive efforts against terrorism and also increased powers of authorities in the area of national security (Morag, 2011). In dealing with terrorist threats, Germany's post war democratic leadership has not been keen on using emergency powers or extralegal measures employed during the Nazi regime. The current approach to dealing with terrorist threats has been to avoid emergency legislation and instead apply regular criminal law.

Just like the U.K., Germany has been fighting domestic terrorism for several decades, and it has also had extensive experience in developing its laws to meet the challenges of security. For instance, in the 1970s, Germany revised its penal and criminal laws at several points, in part to be more responsive to the terrorist threats that it faced at the time (Beckman, 2007). Moreover, from the 1960s-1980s, West Germany was the target of several terrorist attacks mainly by a leftist terrorist organization called Red Army Fraction (RAF). For example, in the 1980s alone, terrorist attacks and violent protests accounted for 15,000 crimes against the state (Katzenstein, 2002). A

notable attack was the slayings at the 1972 Olympic Games in Munich - by Islamic based terrorists (Beckman, 2007). On December 19th 2016, Anis Amri, a Tunisian citizen, is alleged to have hijacked a truck and crashed into a Christmas market at Breitscheid Platz in Berlin. The Islamic State claimed responsibility for the attack, which resulted in twelve deaths and fifty additional casualties.[53]

It is important to emphasize that Germany values human dignity as a core basic right. Germany's new constitutionalism has placed human dignity at the core of its value system (Kommers and Mille, 2012). Article 1 (1) of the Basic Law declares: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[54] The principle of human dignity, as the Constitutional Court has repeatedly emphasized, is the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of all guaranteed rights.6 Paragraph 2 continues: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." The personal freedoms set forth in Article 2 reinforce the principle of human dignity. The Court also spoke once again of the negative and positive character of rights. Basic rights are usually perceived as fundamentally negative rights against the state, suggesting that constitutional rights apply directly to public law.

2.5.3.1 German Constitutional Law

Article Eighteen of the German Constitution (the Basic Law) demonstrates the balancing test between the need to protect civil liberties and the need to protect the homeland security. Article Eighteen of the Basic Law mandates that individual rights can be forfeited and/or abandoned if utilized in a manner which would subvert or "attack the free democratic basic order." The Federal Constitutional Court has held that the legislature may limit individual freedoms if necessary to promote community rights and the democratic order (Boyne, 2003). At the same time, the state wields the power not to permit the enemies of constitutional democracy to use the cover of the rule of law to attack the foundations of an organized society (Katzenstein, 2002). The Federal

[53] OSINT Summary: Vehicle impact attack on Berlin Christmas market highlights increasing adoption of tactic," Jane's Terrorism Insurgency Monitor, accessed December 20, 2020, http://janes.ihs.com/TerrorismInsurgencyCentre/Display/1791686.
[54] Basic Law for the Federal Republic of Germany; https://www.btg-bestellservice.de/pdf/80201000.pdf.

Constitutional Court has also included “community security” as a basic right to be enjoyed by all citizens and therefore it should also be a priority of the state to protect and preserve it. This means that the government’s counterterrorism measures to protect the collective society might outweigh individual claims, according to Germans constitutional law.

Unlike the U.K., the German framers of the Basic Law emulated the American system of judicial review. This essentially means that the German Federal Constitutional Court plays a significant role in checking on the abuses of government which might otherwise operate to the detriment of the individual and contrary to the German Constitution. Thus, the framers meant to make emphatically clear the importance of individual liberties and the utmost respect for human dignity. Germany’s high regard for civil liberties has been sometimes criticized. For instance, the U.S. State Department’s 2005 World Report on Counterterrorism described Germany and its counterterrorism efforts as follows: “German cooperation with the United States on the counterterrorism front remained strong, although sometimes limited by Germany laws and procedures. German laws and traditional procedures, as well as the courts’ long-standing and expansive view of civil liberties, sometimes limited the success of cases prosecutors brought to trial” (U.S. State Department, 2005; Beckman, 2007, p.92). Moreover, in Germany, terrorism is primarily an issue of domestic laws and policing. This approach is totally different from the approach of the United States under the administration of George W. Bush.

The ability of the Nazi party to rise to power during the early 1930s, ”prompted the framers of the German Constitution to include many clauses seeking to avoid a repeat of “power grabs” under claims of emergency powers and threats to the homeland security” (Beckman, 2007, p.90). It is important to mention that Germany’s Constitution was clearly born and is, indeed, a ”reaction to its past ugly history of despotism and human rights abuses that came with the Nazi regime’s ascendancy to power” (Beckman, 2007, p.90). This means that for a better appreciation of Germany’s laws and approaches to homeland security, it is important to take into account its past in regards to the degradation of civil liberties.

The Germany Constitution is well designed to guide the state when dealing with extremist political violence such as terrorism. For instance, the West German Basic Law, whose framers understood better the difficulties constitutional crises pose for the task of constitutional maintenance, sets forth in Article 115 various provisions the German state must respect in

declaring and coping with states of emergency. For example, Article 101 of the Basic Law, for example, prohibits extraordinary (military) courts in all cases. An amendment to the Basic Law, Article 115g, further states that the "constitutional status and the exercise of the constitutional functions of the court must not be impaired." The French Constitution of the Fifth Republic offers considerably less guidance. Article 16 simply grants the president of the republic wide powers to cope with emergencies but also provides that the Parliament may convene of right and that the president may not dissolve the National Assembly during an emergency. Article 1 of the Germany Constitution raises to superior standing, the normative principle of respect for human dignity. The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.

Germany attaches significant importance to the fight against terrorism. It also attaches considerable weight to an effective criminal prosecution and successful prevention of terrorist acts within rule of law standards. It is important to mention here that Germany also finds it indispensable to work closely with other foreign governments at international level in the fight against terrorism. It is important to point out that Germany's approach to countering terrorism relies on its well- developed set of tools available in criminal law. These tools provide adequate measures on how to avert dangers related to terrorism. It is also important to mention that there is no separate law in Germany exclusively relating to the fight against terrorism. The German Criminal Code also known as (Strafgesetzbuch), is available online: "www.gesetze-im-internet.de".

Finn (1991) in his authoritative study observes that "Antiterrorism policies in the Federal Republic are greatly conditioned by the normative context of the Basic Law and its commitments to human dignity, the preservation of the free democratic basic order" (P.206). In the pre-9/11 era, West Germany's antiterrorism legislation had attracted considerable domestic and international criticism. Some critics opined that antiterrorism statutory provisions amount to the most repressive antiterrorist legislation in existence in a liberal democracy.[55] Critics felt that some of the antiterrorism policies were simply overreactions to the rather small numbers of acts of political violence actually committed in the Federal Republic. The pre-9/11 acts of terrorism prompted the institutional changes, which included the professionalization and expansion of the Federal Criminal Police Office (BKA). BKA readily acquired and maintained a technologically

[55] Owen, Fiss, "Foreword: The Forms of Justice," Harvard Law Review 1, 13 (1979).

sophisticated computer system for intelligence work.[56] In 1973, BKA was given express authority to direct all national operations against terrorist activities. It was also given responsibility for collecting and centralizing all information concerning terrorism. Two units were then formed within the BKA. These units included the Suppression of Terrorism (TE) department, which was responsible for investigating political crimes, and the Special Branch (ST), which was responsible for collecting information and overseeing the computer operations which enabled the BKA to acquire information on several million German citizens.[57]

In the period between 1974 and 1978 there was heightened terrorist threat in West Germany. The government responded by introducing a number of important changes in the substantive criminal law. This was also in response to public pressure which mounted on the government to effectively respond to terrorism. Some of ty of those changes granted the security agencies extraordinary powers. The provisions included expansive authority to wiretap communications and to search mails without notification to or judicial recourse for the individual affected. This went contrary to the provisions under Article 10 of the Basic Law. The changes introduced in the Penal Code in the 1970s substantially changed the landscape of the Germany's criminal law. Before the said amendments, security officials possessed no statutory authority to initiate criminal investigations in the absence of very specific evidence of criminal activity.[58] As opposed to the British legislation, the West German statutes on terrorism have tended to increase rather than limit judicial discretion in terrorism-related prosecutions. This essentially underscores the judiciary's role as the guardian of the German democracy.

Moreover, the Basic Law explicitly forbids establishment of emergency courts (Finn 1991). The two most important amendments to the Criminal Code were mainly Sections 129 and 129a. Amendments gave provisions, which made criminal, the existence or formation of a terrorist organization. Precisely, Section 129 of the Criminal Code permits imprisonment for a period of five years for individuals who form an association directed to the commission of a criminal offense or who participate in, recruit for, or aid a criminal association.

[56] Friedrich, Reason of State, supra n. 95 at 10.
[57] Carl J. Friedrich, Transcendent Justice (Durham, N.C.: Duke University Press, 1964), 3.
[58] The Federalist, supra n. 10 at 251 (No. 40).

2.5.3.2 German Criminal Code

The German Criminal Code (Strafgesetzbuch) eschews providing a clear legal definition of what terrorism is all about. However, Section 129a (1)-(9) on "Forming terrorist organizations", claims to provide an elaborate statutory elements of what constitutes terrorist acts.[59] The Criminal Code makes it illegal to form, participate in, or support a terrorist organization. In essence, Section 129a focuses on traditional criminal offences such as murder, causing physical or mental harm, committing offences against the environment, among other offences (German, Criminal Code, and Section 129a, 2008). Since German criminal legislation does not provide terrorism definition but essentially employs a definition of a terrorist organization that is too general, legal practitioners argue that it affords the government maximum flexibility in defining particular groups or activities as terrorist (Morag, 2011).

The Federal Republic also introduced substantial changes to the Code of Criminal Procedure to cope with the unique demands of terrorism-related investigations and trials. These changes, however, do not substantially affect the rules of evidence or shift burdens of proof. They instead address attorney-client relationships and other courtroom proceedings. In the new provisions, the government may, under judicial supervision, monitor the exchange of documentary and written materials between attorneys and their clients. However, under certain circumstances, the government may exclude defense counsel from trial and may conduct trials ex parte, without the presence of the defendant if the defendant is perceived to have intentionally disrupted the proceedings.

The German Anti-Terrorism Act 1976 inserted a new criminal offence in the Criminal Code, termed "formation of a terrorist group" (Bildung terroristischer Vereinigungen). "Under the new Sec. 129a(1) Criminal Code, it was an offence to form or to support a group of persons aiming to commit murder, manslaughter, or genocide, to take hostages or kidnap persons in order to compel others to do something, or to commit offences dangerous to public safety, such as arson"(Davy, 2007, p.179). The Anti-Terrorism Act 1976 made it an offence not to immediately

[59] See Federal Ministry of Justice at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html. Retrieved on April 17, 2021.

report to the police any offences committed under Sec. 129a (1) that came to the individual's knowledge.[60]

Terrorist offenses are normally punished in accordance with the provisions of the general criminal statutes. Additionally, in August 2009, three new provisions (Sections 89a, 89b and 91 of the Criminal Code) were introduced into the German Criminal Code by the Act on the Prosecution of the Preparation of Serious Violent Offences Endangering the State (Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten - GVVG). These recent criminal provisions make punishable the preparation in certain forms by individuals of serious violent acts which endanger the state.[61] In addition, they also make punishable initiating or maintaining of contacts with a terrorist organization for the provision of instruction to this effect.[62] Besides, the Federal Criminal Police Office (Bundeskriminalamt) has been given expanded powers to fight the threat of international terrorism. This is a task newly allocated to it by the legislator, which has amended the Basic Law mainly for this purpose. These individual powers are primarily based on existing regulatory models of the Federal Police Act (Bundespolizeigesetz) and police acts of the Länder.

In June 2015, however, Sections 89a and 89b of the Criminal Code were amended by the Amendment Act on the Prosecution of the Preparation of Serious Violent Offences Endangering the State (Gesetz zur Änderung der Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten – GVVG-ÄndG). This was mainly done to include travelling abroad with the intent of facilitating terrorism punishable under the Criminal Code. Besides, a new Section 89c of the Criminal Code was also introduced to criminalize acts of terrorism financing.

Unlike in France and U.S., there is no separate procedure in Germany for prosecuting persons suspected of having committed terrorist offences. All provisions of the Code of Criminal Procedure which apply to other accused individuals before or during trial are in essence to be applied to those suspected of terrorist offenses. In particular, accused individuals have equal rights as all other accused individuals during interrogation and, or in the main hearing. It is also important to mention that the rights of the defense counsel are mainly not subject to any specific restrictions.

[60] Sec. 138 para. 2 Criminal Code as amended by the Anti-Terrorism Act 1976.
[61] Section 89a of the Criminal Code
[62] Section 89b of the Criminal Code.

They could, however, be subject to limitations that also apply to other proceedings regarding other heinous offences. The Courts Constitution Act[63] provides that the Federal Public Prosecutor General at the Federal Court of Justice has, inter alia, jurisdiction for the prosecution of terrorist criminal offences in respect of the accusation of "forming terrorist organizations" as stipulated in the Criminal Code.[64] In Germany, the investigating judge at the Federal Court of Justice may perform duties related to preparatory proceedings, including the ordering of special investigatory acts.[65] Moreover, the criminal panel of the Federal Court of Justice with jurisdiction for national security matters may rule on complaints against investigatory acts.[66]

2.5.3.3 Terrorist Organizations in Germany

Finn (1991) observes that German terrorism has been characterized by three distinct phases—the first was from the late 1960s to 1972, the second from 1972 to 1977, and the third from 1984 to the present.[67] Between 1967 and 1972, the first period, there were an estimated 90 terrorist incidents; approximately 649 occurred between 1970 and 1979, when terrorism in the Federal Republic was most prominent.[68] In the period between 1980 and 1985 there were 1,601 attacks, many of much smaller dimension and scale than those in the 1970s; total damage has been estimated by the government to be between 200 million and 250 million Deutsche marks. [69] There have been several terrorist factions in Germany, some of which, traces their origins way back prior to 9/11. These included the Red Army Faction, 2d June Movement, Revolutionary Cells, and Right Wing Terrorism.

[63] Sections 74a, 120 and 142a of the Courts Constitution Act
[64] Section 129a of the Criminal Code.
[65] Section 169 subsection (1) sentence 2 of the Code of Criminal Procedure.
[66] Section 135 subsection (2) of the Courts Constitution Act.
[67] For a general review, see Hans Josef Horchem, "Terrorism in West Germany: 1985," in Paul Wilkinson and Alasdair M. Stewart, eds., Contemporary Research on Terrorism (Aberdeen, Scotland: University of Aberdeen Press, 1987).
[68] Hans Josef Horchem, "Terrorism and Government Response: The German Experience," 4 Jerusalem J. Intl. Rel. 43 (1980).
[69]David Th. Schiller, "The Economic Implications of Terrorism: A Case Study of the Federal Republic of Germany," 7 Terrrorism, Violence, and Insurgency Report 37 (1986); Christopher Hewitt, "The Cost of Terrorism: A Cross-National Study of Six Countries," 11 Terrorism 169 (1988).

2.5.3.3.1 The Red Army Faction

The Red Army Faction (RAF) was the most prominent and indeed the most durable of the terrorist organizations in the Federal Republic since the 1970s. It was originally founded by Meinhof, Baader, and Mahler. It was founded for purposes of armed revolution through urban guerrilla violence. From 1970, the RAF undertook a program of violent actions. This primarily entailed arson, bank robberies, and bombings. This program lasted until 1972, when the founders were eventually captured by state security forces. For example, Baader was arrested in Frankfurt on June 1, 1972. Shortly after, Ensslin was arrested on June 7 and Meinhof was arrested on June 15. They were later put on trial three years after their arrest. Also included in the trial was Jan-Carl Raspe).[70] They were charged with murder, attempted murder, robbery, and criminal association. They were finally sentenced to life imprisonment. However, the trial attracted widespread international attention. It turned out that charges of complicity between certain defendants and their lawyers led to the exclusion of some of the attorneys for the defense. Moreover, it became apparent that some of the defendants, particularly Baader and Ensslin, engaged in some illegal tactics aimed at disrupting the criminal proceedings. Such designs (schemes) later formed the basis for changing the Code of Criminal Procedure. The RAF continued its actions after the arrest of its leaders in 1972 and conducted a raid on the German Embassy in Stockholm in 1975 and then participated in the hijacking of a Lufthansa plane to Mogadishu, Somalia, in 1977. They did all these with a view to securing the release of imprisoned leaders.

Acts of terrorism continued despite the arrest and subsequent deaths of RAF leaders. In May 1976, Ulrike Meinhof reportedly hanged herself while in jail. One year later (1977), Baader, Ensslin, and Raspe reportedly committed suicide in their cells. RAF was also reportedly responsible for the kidnaping and murder of Hans-Martin Schleyer (head of the German Employers Association), the murder of Attorney-General Siegfried Buback, and an attempted attack on the Federal Justice offices in Karlsruhe. After 1977, RAF was accused of attacking General Alexander Haig (supreme commander of NATO) in 1979 and also the 1981 attack on U.S. Air Force headquarters in Ramstein. Over the years, RAF continued to recruit new generations of leaders and in 1984 it displayed great resurgence. In early 1985, it announced that it had formed a "united

[70] Mauro Cappalletti, Judicial Review in the Contemporary World (New York: Bobbs-Merrill, 1971), 69-88.

front" with the French group Action Directe (AD) and the Belgian Communist Cells (CCC). On February 1 in 1985, the RAF reportedly killed Ernst Zimniermann, a German arms manufacturer. Furthermore, since 1989 about thirty imprisoned members of the RAF have continuously engaged in hunger strikes designed to seek sympathy from the outside support base.

2.5.3.3.2 The 2d June Movement

The 2d June Movement is a terrorist movement founded in July 1971 by former students at the Free University in West Berlin. The name 2d June commemorates the shooting of Benno Ohnesorg by the police on June 2, 1967. The 2d June Movement rejected the intellectual pretensions of the RAF and instead sought to integrate the working classes into the concept of the armed struggle. Its organization comprised of members of several smaller anarchist groups. It was, however, less structured and rigid as compared with the RAF.[71] The 2d June Movement reportedly took part in the kidnaping in 1975 of Peter Lorenz, chairman of the CDU in Berlin. In return for the release of Lorenz, it sought the release of six imprisoned terrorists, including Horst Mahler. The government responded and exchanged five prisoners. However, Mahler, refused to leave the prison cell. The government, however, subsequently arrested most of the kidnapers and by 1980 some of the imprisoned leaders of the organization announced the dissolution of the movement but it was immediately absorbed by the RAF.[72]

2.5.3.3.3 The Revolutionary Cells

The Revolutionary Cells (RZ) proclaimed that it was ideologically distance from the RAF theory. Its revolution was mainly focused on the relationship of armed struggle to society through the "contact theory." Its primary goal was to have a clear connection with some local protest on issues, which then made it remain popular at a local level. It also preferred to operate through imagination and spontaneity without an elaborate application of techniques commonly employed

[71] For a review, see Walter F. Murphy and Joseph Tanenhaus, eds., Comparative Constitutional Law Cases and Commentaries (New York: St. Martin's Press, 1977).
[72] Walter F. Murphy, "An Ordering of Constitutional Values," 53 S. Cal. L. Rev. 703, 745-54 (1980).

by the RAF.[73] Since 1973 the RZ has undertaken more operations than either the RAF or the 2d June Movement. Its operations have mostly targeted American interests.[74]

2.5.3.3.4 Right-Wing Terrorism

Since the early 1980s right-wing political violence has comprised a significant part of political violence in West Germany. Violence on the right-wing increased as membership in the country's largest legal right-wing organization, the National Democratic Party (NPD) tended to decline. In the late 1960s the NPD announced that it had recruited about twenty-five thousand members. However, in 1978 it only claimed nine thousand members.[75] By 1985 its membership dropped to just four thousand.[76] The NPD took part in political leadership by occasionally winning seats in local elections. For instance, in 1989, it won 6.6 percent of the vote in Frankfurt. The number of crimes committed by the right increased steadily in the early 1980s before declining to about sixty-nine incidents in 1985. This was a drop from a high of eighty-three the year before.[77] In his seminal work of right-wing violence in Germany, Peter Merkl concludes that "there can be no doubt that right-wing terrorism ... is increasing again at the same time that political right-wing activities, with an estimated 20,000 members in various organizations, have not really expanded as expected under a conservative administration."[78]

There remained three major organizations and several smaller groups, which targeted younger individuals for recruitment. These individuals were also perceived to be more radical and were likely to be inclined more towards the NPD. They mainly included: German Action Group (Deutsche Aktionsgruppen), headed by Manfred Roeder, the Hoffman Military Sport Group (Hoffmann Wehrsportgruppe), led by Karl-Heinz Hoffman, and the Popular Socialist Movement of Germany-Party of Labor (VSBD-PdA).[79] Another group was known as the Action Front of National Socialists (ANS). This group was known for intensive military training, and was also

[73] See, e.g., Justice Stewart's dissenting opinion in Moore v. City of East Cleveland, 431 U.S. 494, 535-36 (1971); and Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L. J. 1, 20 (1971).
[74] 431 U.S. 494, 535-36 (1971).
[75] Richard Lindley, Autonomy (Atlantic Highlands, N.J.: Humanities Press International, 1986), 187.
[76] Barber, What the Constitution Means, supra n. 5 at 123-26.
[77] Arthur Kuflick, "The Inalienability of Autonomy" 13 Phil. & Pub. Aff. 271, 297 (1984).
[78] Arthur Kuflick, "The Inalienability of Autonomy" 13 Philosophy. & Public Affairs 271, 297 (1984).
[79] Carl J. Friedrich, Constitutional Reason of State (Providence, R.I.: Brown University Press, 1957), 13.

suspected of being a terrorist organization."[80] The founders of all the three groups were imprisoned. Hoffman was arrested in 1980 for reportedly murdering, Shlomo Levin, who was a Jewish publisher whom he suspected had written about the terrorist organization and its activities. He was then acquitted in 1986 but then convicted of possession of firearms. It can be argued that right-wing violence has mainly been to frustrate the peace and democratic enjoyment in liberal democratic states. The virulent anti-Americanism tendencies of the organization has seen it target mainly NATO facilities and personnel.

2.5.3.4 Judiciary in Germany

Courts in the Lander function as trial courts as well as the first-level appellate courts for both federal and state law. Moreover, Federal courts are courts of final appeal. The highest ordinary court is the Federal Supreme Court of Justice. The independence of the judiciary in the Federal Republic of Germany is guaranteed by Articles 101 and 115g of the Basic Law. Article 101 specifically prohibits extraordinary (military) courts. Article 115g importantly states that the Federal Constitutional Court may not be suspended during an emergency. In other words, Article 115g seeks to ensure the institutional integrity of the judiciary is well maintained even in times of crisis. This provision reinforces the constitutive principle of separated power.

2.5.3.5 Appointment of Judges

Although the appointment of state judges is fundamentally based on merit. Appointment on merit is important for enhancing the independence and neutrality of judges. Nevertheless, no system is entirely perfect. The so-called Councils of the Judiciary participate in the appointment and promotion of judges. But it happens that the Councils are made up of some political leaders. Politicians from state parliaments normally have seats on most of those Councils. This implies that politicians do, in fact, have a great amount of influence when it comes to the appointment and promotion of judges in Germany. Political participation in the appointment of judges is justified on the basis that representatives of the people have an input. It is to ensure that judicial appointments reflect the will of the people.

[80] Barber, What the Constitution Means, supra n. 5 at 128.

2.5.3.6 Judicial Independence in Times of National Security Threats: Germany

Courts in Germany lack formal connection to the electorate. This implies that they are more likely to work in the interest of justice and winning public confidence. The importance of public support is important for courts in Western liberal democracies since they lack democratic accountability. Courts must therefore act consciously to foster that public support. The Germany's Federal Constitutional Court (FCC) has been perceived as the most powerful constitutional court in the present time. This perception makes this court of great interest in the understanding of judicial independence. This particular court (FCC) has been able to establish a strong and independent base despite occasionally being challenged by the executive government. It is one court that enjoys remarkable authority in Germany.

Judicial independence in Germany is anchored in the constitution popularly known as the Basic Law. Article 97, paragraph 1 states that: "Judges shall be independent and subject only to the law". Therein, the German legal system differentiates between two types of judicial independence: firstly, there is objective independence, which guarantees neutrality. This implies that judges may not be influenced, neither by colleagues nor by superiors, in their decisions. Secondly, there is personal independence, which guarantees that judges who are lifetime appointees may not be removed or transferred during their good behavior. These provisions are mainly designed to shield judges from arbitrary or undue influence. Judges are deemed to be nothing but the mouth of the law. German judges are, however, subject to internal control mechanisms. This involves internal administrative supervisions to monitor judges' work. Judicial independence is also entrenched in many legal instruments to which Germany is subject. They include: the Universal Declaration of Human Rights, the European Convention on Human Rights and Fundamental Freedoms (i.e. UDHR article 10 and ECHR article 6, respectively), and Article 19 TEU.

In the 1990s, German courts confronted terrorism in different contexts. Courts, however, "took a rather cautious stance, every now and then rejecting blunt approaches favored by administrative authorities or politicians" (Davy, 2007, p. 196). The German Government and Parliament started to respond more effectively to international terrorism in October and November 2001 (Davy, 2007, p. 200). The guiding principle of natural justice in the German bench is "*nemo index in sua causa*". This means that no one should be a judge in his own case. But this is rather

controversial because judges still decide how the law can and should be interpreted and they also judge decisions made by their colleagues. It can be argued, however, that German courts may not be susceptible to abuse. This is because there are two other supranational courts that can review legal decisions of German local courts. Being a member of the European Union, Germany acknowledges the jurisprudence of the European Court of Justice (ECJ) in Luxembourg and the European Court of Human Rights (ECHR) in Strasbourg. This means that certain legal decisions made by German courts may be overturned.

2.5.4 The France Law: From Terrorism to Criminal Justice

The French Constitution of the Fifth Republic provides considerably less guidance in times of emergency and instead offers the president broad powers. For instance, Article 16 grants the president of the republic wide powers to cope with emergencies. But it also provides that Parliament may convene during emergency and the president may not dissolve the National Assembly during an emergency. Some of the main terrorist organizations include the French group Action Directe (AD) and the Belgian Communist Cells (CCC). On January 25, 1985, the AD reportedly assassinated General Rene Audrian, a high-ranking French defense official.

In France, there is a police department known as the "Judicial Police". The judicial police are responsible for criminal investigations. They particularly focus on investigation of organized or serious crimes such as violent crimes such as terrorism; illegal drugs; trafficking in human beings; trafficking in cultural property; and trafficking in arms, explosives, and nuclear, biological, and chemical materials. The judicial police are divided into 19 regions throughout France. In 1995, the French government adopted legislation that clearly spelled out the role of law enforcement. This was meant to assure greater public security in France. Thus the French National Police is responsible for ensuring a sense of public security, controlling the flow of illegal immigration, combatting organized crime, especially such as terrorism and drug trafficking, protecting the country from terrorism, and to maintain public order.

The judicial police conduct criminal investigations and then they notify either a procurator in case of a serious offense or an investigating judge in case of a very serious offense. It is then that the procurator or magistrate would direct the actual investigation of serious or very serious offenses. It can be said that with respect to criminal investigation, the French legal system allows

for both a police investigator and a magistrate investigator who jointly conduct the interrogations of very serious crimes. It is normally the case that the suspect would be informed way early that the police and an investigating judge are proceeding with an investigation involving his or her conduct. It is important to mention that both the French Code of Criminal Procedure and the French Penal Code, state and describe the legal status of the police.

The French counterterrorism model has developed over decades of experiences with terrorist offenses. Indeed, like other European countries, France has a history of internal violence and terrorist acts by extreme left-wing groups advocating independence or greater autonomy. In response to the increasing threat of international terrorism, France developed a preemptive approach characterized by a great emphasis on intelligence-gathering and aggressive prosecution to dismantle terrorist networks information. These measures also focused on removals of foreign terrorism suspects and those suspects accused of fomenting radicalization and recruitment of terrorists.[81] It is not surprising that by the time the fight against Islamist terrorism had become an international priority following the September 11, 2001 attacks on the U.S soil, France already had put in place some counterterrorism machinery.

In regard to public order and domestic security in France, recent events have been clearly dominated by the fight against terrorism. There has been even a debate on the adoption of a French 'Patriot Act' following the recent attacks against Charlie Hebdo. Consequently, laws "relating to domestic security have been following one another for a decade (cf. notably the 2003 Internal Security Law; the 2011 Law on Orientation and Programming for the Performance of Homeland Security; and most recently the 2015 Law on Security Intelligence)" (Hourquebie, 2018, p.45). Rather than France "accepting derogations that would be specific and related to the circumstances of the crisis, it seems that the Constitutional Council, as usual, has remained in the field of the conciliation between freedoms, even if it means shifting the balance, when doubts about constitutionality arise, in favor of the legislator to enable them meet the objectives of maintaining the order or fighting against terrorism" (Hourquebie, 2018, p.49).

[81] For a detailed analysis of France's use of national security removals, see Human Rights Watch, France – In the Name of Prevention: Insufficient Safeguards in National Security Removals, vol. 19 no. 3(D), June 2007, http://hrw.org/reports/2007/france0607/.

2.5.4.1 The Impact of Counterterrorism in France: Casting a Wide Net?

One of the characteristics of counterterrorism law is investigations into association *de malfaiteurs* (criminal conspiracy). This has seen the arrest of large numbers of people who are suspected to have some connection or association with an alleged terrorist network. The strategy of casting a wide net ("*coup de filet*") or "kicking the anthill" ("*coup de pied dans la fourmilière*") is based on the faith among counterterrorism practitioners (expert on French counterterrorism intelligence services) that such strategy has the ability to destabilize terrorist networks as well as undermining their logistics. And it matters little if a good number of the accused are found to be innocent after spending one or two years in pre-trial detention.[82] French counterterrorism strategy seems to be more flexible than that of the United States and the United Kingdom. The French criminal justice system allows the authorities to adjust legal responses to address effectively the threat of domestic and international terrorism. Although this strategy is also more likely to lead to a trade-off in rights, it has helped, however, to avert extrajudicial measures in the fight against terrorism. But it must be pointed out here that too much flexibility in the criminal justice system is likely to stretch the rule of law to the breaking point unless there are some good limits fixed to the system.

In practice, French counterterrorism laws and procedures tend to undermine the right to a fair trial for those facing charges of terrorism. For instance, the broad definition and expansive interpretation of association *de malfaiteurs* translate into a low standard of proof for decisions to arrest suspects or to place them under investigation by a judge. This implies that casting a wide net to ensnare large numbers of people who might have some connection with an alleged terrorist network has been one of the concerns with human rights violation. Intelligence material obtained from defendants are sometimes used as evidence yet the defendant attorney is sometimes not allowed access to such material, including information coming from third countries, is often at the heart of association *de malfaiteurs* investigations. Indeed, most if not all investigations are launched on the basis of intelligence information. The appropriate use of intelligence material in judicial proceedings can play an important role in the effective prosecution of terrorism offenses.

[82] Laurent Bonelli, "An 'anonymous and faceless' Enemy. Intelligence, exception and suspicion after September 11, 2001," Cultures and Conflicts, no. 58 (2005), pp. 101-129. Bonelli is a researcher at the University of Paris-X (Nanterre) and a member of the French team of the European Commission programme "The Changing Landscape of European Security.

But the close links between specialist investigative judges and the intelligence services in terrorism cases undermine the skepticism and consideration for the rights of the accused with which the judges should approach any potential evidence or source of information. The right of defendants to a fair trial is seriously undermined when they cannot effectively probe or question the source of the evidence against them.

2.5.4.2 The French Judicial Preemptive Approach

The procedures for selection and promotion of judges in France are rigorously based on merit (Sumption, 2021). This process serves to promote judicial independence in France. In regard to French judicial preemptive approach to counterterrorism, it had been regarded as unique in the past. For nearly twenty years before 1980s, France had primarily relied upon a state-led justice system to combat terrorism. However, in 1981 the government of President François Mitterrand abolished the State Security Court, a special tribunal that had tried all national security cases since 1963. This court primarily composed of three civilian judges and two military officers. It conducted its proceedings in secret with no right of appeal. The year following its abolishment, the French parliament modified the Code of Criminal Procedure to enshrine the principle that in times of peace, crimes against the "fundamental interests of the nation" shall be dealt with in the ordinary criminal justice system.[83]

France, has in the recent past adopted a preemptive approach in the fight against terrorism. Although this approach is grounded in the ordinary justice system, terrorism investigations and prosecutions are subject to exceptional procedures, and are managed by specialized prosecutors and judges. It is worth mentioning that since the mid-1980s all terrorism cases in France have been centralized in the capital city, Paris, among specialized prosecutors and investigating judges who normally work in close cooperation with the national intelligence services. Moreover, the basic counterterrorism statute, adopted in 1986, established the centralized judicial system for terrorism-related offenses, which today defines the French model. What is more, Law 86-1020 of September 9, 1986, fashioned a specialized corps of investigating judges and prosecutors based in Paris. This is also regarded as the Central Counterterrorism Department of the Prosecution Service, which

[83] CCP, art. 702 (as amended by Law No. 82-621 of July 21, 1982). The official English-language translation of the Code of Criminal Procedure is available at www.legifrance.gouv.fr.

handles all terrorism cases. At the same time, the 1986 law created trials by panels of professional judges for heinous terrorism-related crimes in the Court of Assize in Paris, which is seen an exception to the rule of trial by jury in these courts.[84] This law extended maximum police custody to 96 hours (four days) in terrorism-related cases.

The focal point of the French judicial counterterrorism approach is the largely defined charge of "criminal association in relation to a terrorist undertaking" (i.e. *association de malfaiteurs en relation avec une entreprise terroriste*). This charge, mainly introduced by Law 96-647 of July 22, 1996, provides the security authorities the ability to take preemptive action way before the act of terrorist crime is commissioned. The preponderance of terrorism suspects are detained and prosecuted mainly on this charge. The terrorist crime in France is normally defined as "the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles." [85] This charge used to be regarded as a minor felony offense and was mainly tried in the Correctional Court, and punishable by up to 10 years in prison. However, the law that was established in 2006 made the offense a serious felony punishable by up to 20 years in prison, especially when the criminal association was formed with the purpose of preparing attacks on life and physical integrity, as well as abduction, unlawful detention, and hijacking of planes, vessels, or any other means of transport.[86]

In France, the punishment for being the leader of such a criminal association was raised from 20 to 30 years.[87] Moreover, the 2006 law, which was mainly enacted in response to the July 7, 2005 bombings in London, also increased the maximum period of police custody in terrorism-related cases to six days.[88] The four major pieces of legislation adopted since 2001 primarily

[84] The Constitutional Court ruled that replacing a popular jury by professional judges in terrorism-related cases was a legitimate means of avoiding pressure and threats. Decision No. 86-213 DC, September 3, 1986.
[85] Criminal Code (CC), art. 421-2-1.
[86] The law provides for the higher penalty for membership in a group whose purpose is to prepare attacks on persons as listed in article 421-1 (willful attacks on life, willful attacks on the physical integrity of persons, abduction and unlawful detention and also the hijacking of planes, vessels or any other means of transport); attacks with explosives or fire in places and at times where such attacks are likely to cause the death of one or more persons; or the introduction into the atmosphere, the ground, waters, foodstuffs or ingredients of any substance liable to cause the death of one or more persons. Moreover, Law No. 2006-64 of 23 January 2006 pertaining to the fight against terrorism and adopting different measures for security and border controls. From February 2008, no one had yet been prosecuted with association *de malfaiteurs* as a serious felony offense. For more, see the National Assembly, Law Commission Information Report on the implementation of Law No. 2006-64 of 23 January 2006, February 5, 2008.
[87] Law No. 2006-64 of January 23, 2006.
[88] Ibid Law No. 2006-64 of January 23, 2006.

reinforced counterterrorism measures. These laws expanded police powers to conduct vehicle and building inspections as well as imposing data retention and disclosure obligations on internet and telecommunications services. The new law also required disclosure of encryption codes where necessary in relation to a terrorism-related investigation. In addition, it also shored up security measures at airports and seaports as well as increasing surveillance measures generally. The new law also instituted new measures to fight financing of terrorism.[89]

2.5.4.3 French Criminal Justice System

The criminal justice system in France is mainly based on the inquisitorial approach. This is an approach in which the Office of the Public Prosecutor opens a judicial investigation of a criminal offense but can ask an investigating judge (*juge d'instruction*) to preside over investigations with the assistance of police assigned to him or her. The investigating judge is normally supposed to be impartial and should mainly focus on establishing the truth, and is also entrusted with uncovering both inculpating and exculpatory evidence. The judge may order arrests and wire taps, or he or she may issue warrants and orders to appear as a witness or produce documents instead. The judge may also require the police to conduct any lawful inspection. At the same time, prosecutors, defendants, and civil parties to a criminal proceeding may ask the investigating judge to order particular inquiries, which the judge may so authorize or deny.[90] The decisions are normally subject to appeals to the higher Investigative Chamber (*Chambre d'Instruction*). In theory, the investigating judge is perceived as an impartial arbiter and is authorized to search for all relevant evidence, including information that could help the defense.[91] However, in practice, investigating judges are more likely to build a solid case against the defendant than probably trying to seek "the truth." Moreover, there are also concerns about insufficient checks on their power of investigating judges, much to the detriment of the rights of the defendants.

[89] Law No. 2001-1062 of 15 November 2001 concerning everyday security; Law No. 2003-239 of 18 March 2003 for internal security; Law No. 2004-204 of 9 March 2004 adapting justice to the evolution of criminality; and Law No. 2006-64 of 23 January 2006 concerning the fight against terrorism and adopting different measures for security and border controls.
[90] Article 82-1 of the Code of Criminal Procedure (CCP) provides a non-exhaustive list of investigative steps.
[91] Code of Criminal Procedure, Art. 81.

2.5.4.4 Role of the Investigating Judge in Terrorism Cases

The role and power of the specialized counterterrorism investigating judges in France deserves greater mentioning. These judges are normally perceived as well "informed" on terrorism matters, and also believed to be "independent".[92] Scholars contend that the significant authority of the investigating judge in the French system is amplified with respect to terrorism cases. The rationale being that a security-cleared, specialized, and experienced judge will, on the basis of all relevant information, including sensitive intelligence material, be competent to connect the dots: discern the existence of a terrorist network, even where the material acts demonstrating this existence are limited to common crimes such as forgery of identity documents and still be able to determine the identities of the members of the network.[93]

It is important to mention, however, that terror-related defense lawyers in France tend to complain, for instance, that the way in which judicial investigations in terrorism cases are conducted seriously undermines the right of each defendant to an effective defense.[94] This right is regarded as the cornerstone of the right to a fair trial. The international legal instruments, for instance, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) stipulate the minimum guarantees necessary to ensure the right to a fair trial to all persons accused of a criminal offense. These rights include timely and confidential access to counsel, and adequate time and facilities to prepare the defense. Moreover, another key element is the respect for the principle of "equality of arms," which normally requires that the prosecution and the defense have equal opportunity to prepare and present their cases. This includes the obligation on the prosecution to disclose all material information.[95]

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[92] Jeremy Shapiro and Bénédicte Suzan, "The French Experience of Counter-Terrorism," Survival, vol. 45, no.1, Spring 2003, p. 78.

[93] Shapiro and Suzan, "The French experience of counterterrorism."

[94] Human Rights Watch interviews with Sébastien Bono, Paris, June 21, 2007, and February 28, 2007; Henri De Beauregard, Paris, July 6, 2007; Fatouma Metmati, December 13, 2007; Bernard Dartevelle, Paris, June 21, 2007; Nicolas Salomon, Paris, July 5, 2007; Sophie Sarre, Paris, July 6, 2007; Antoine Comte, Paris, May 10, 2007; Dominique Tricaud, Paris, December 10, 2007.

[95] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by France on November 4, 1980, art. 14; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, art. 6. See also European Court of Human Rights judgments: Dombo Beheer B.V. v. the Netherlands, judgment of 27 October 1993, Series A no. 274, p. 19, § 33; Ankerl v. Switzerland, judgment of 23

2.5.4.6 Changing constitutional jurisprudence in France

Scholars observe that France has changed the constitutional jurisprudence to the greatest extent. In France, "the Constitutional Council (Conseil Constitutionnel) has taken into account the 'reality' both in inland security and social welfare cases, which has led it to adopt a 'pragmatic' approach in its jurisprudence" (see Szente and Orosz, 2018, p. 292). It is to be noted, however, that in France, the constitutional court had to face and resolve unaccustomed problems. "In France, shocking terrorist attacks put huge pressure not only on the legislature and the government but also on the Constitutional Council in adjudicating the constitutionality of the antiterrorism legislation, and, indirectly, to upkeep the 'fundamental laws of the Republic'. These fundamental laws were at stake when the deprivation of nationality as a sanction against terrorism was suggested, which concerned directly such substantial liberties as the equality or the right to citizenship" Szente and Orosz, 2018, p. 292). In some controversial policy, for example, the ban on the wearing of headscarves or the concealment of the face in public space became an unprecedented legislative measures when they were adopted in the protection of public order. The Constitutional Court needed to strike a new balance between the freedom of religion and the public security interests (Szente and Orosz, 2018, p. 292).

2.5.4.7 Judicial Independence in France

In France, there is a tradition of a consultative role that the judiciary plays in the legislative process. Instead of taking the risk of judicial annulment, legislators normally consult with judges about what terms of legislations are constitutionally permissible and, hence the legislature is able to revise legislation accordingly. France provides a good example whereby an independent judiciary is capable of influencing the legislative process in a manner that protects constitutional principles and values.

October 1996, Reports 1996-V, pp. 1567-68, § 38; Ruiz Mateos v. Spain, judgment of 24 June 1993, Series A no. 262, p. 25, § 63; Nideröst-Huber v. Switzerland, judgment of 18 February 1997, Reports 1997-I, p. 108, § 24; and Beer v. Austria, no. 30428/96, § 17, 6.2.2001.

2.6 Expanded National Security Laws (Counterterrorism laws)

Do expanded national security laws and policies on terrorism affect judicial independence and fair trial practices in Western democracies? Counterterrorism laws are primarily meant to enhance preventive measures and to strengthen punishment for terrorism offenses. The present study advances the argument that counterterrorism measures developed by High Contracting Parties immediately after the 9/11 are more likely to illustrate the danger posed by "War on Terror" discourse to human rights protection under the ECHR. It must be made clear that in times of high-level national security threats, the text of many statutes is normally written hurriedly and generally without adequate debate and deliberation. This sometimes leads to ambiguous legislations. But since the principal role of courts and judges is to interpret the black letter law, the devil very often is in the details. This is to say that judges sometimes have to come across certain national security laws that go against constitutionally guaranteed rights. Some scholars have even countered the perception that expanded national security laws are effective in counterterrorism. Their empirical models reveal that restrictions in liberty based on countering terror attacks are not necessarily effective or good for national security protection (i.e. Dragu 2011: Bueno de Mesquita 2007).

One study, Ananian-Welsh (2016) describes counter-terrorism law and policy as liberty-intrusive legislative schemes. She further expresses her fears and warns that unless the judiciary can stand firm and preserve its independence, then getting involved in such liberty-intrusive legislative schemes (anti-terrorism law) may easily threaten judicial independence in an age of terrorism. She argues that the unwarranted involvement of the judiciary in promoting government policy on national security poses potential risks to judicial independence. She contends that judges ought to exercise an effective oversight of executive power in times of national security threats. The makes the argument that as the potential for public scrutiny wanes, the executive powers seems to increase (wax). Broadly speaking, the judicial branch finds itself uniquely placed to act as a check on the executive power. In terms of the tripartite separation of powers, the judiciary is entrusted with ensuring the legality of government action. Indeed, in an effort to fulfil this obligation, the judiciary must independently and impartially apply the law.

Although the independence of the judiciary is constitutionally enshrined in many Western democracies, some countries give the provisions on separation of powers as indicative of the

independence of the judiciary from the executive branch and the legislative branch. This is perceived to as power by the judiciary to exercise effective judicial review, and to accordingly preserve the rights and liberties of individuals from unwarranted executive overreach. Ananian-Welsh (2016) argues that anti-terrorism frameworks developed rapidly after 11 September 2001 terrorist attacks on the U.S. soil. One scholar has described the legislative process shortly after the attacks as "hyper-legislation" (i.e. Roach 2011). Immediately after the 9/11, Western democracies perceived terrorism as an imminent threat requiring broad-spectrum legislation aimed at the prevention of future terrorist acts (Ananian-Welsh 2016). The idea was to make counter-terrorism laws serve both as a "sword" and as "shield". Sword by which offenders are punished and a shield by which crime is prevented.

The United Nations Security Council (UNSC) also played a major role in the establishment and improvement of national security legislations, particularly on counterterrorism. For instance, scholars opine that an "assessment of the role played by the United Nations (UN) is critical to understanding post-9/11 changes to global antiterrorism law and policy." [96] It is understood that although the UN had already involved itself with terrorism issues even before the 9/11, the role that it played in global counter-terrorism efforts after 9/11 was highly unprecedented. Although the UN is said to leave member states a wide of margin of appreciation in terms of specific details of their counter-terrorism measures, it, however, threw its influential support towards a number of counter-terrorism measures. These included measures (laws) against the financing of terrorism, the use of immigration law as a counterterrorism law, and laws against the incitement of terrorism. Although some of these laws tend to limit human rights, they might not be necessarily very effective in preventing terrorism. Kent Roach contends that counterterrorism frameworks developed rapidly after the 9/11 and this saw several liberal democracies respond to the threat of global terrorism with hyper-legislation.[97]

It is important to mention that the impetus for the expanded national security lawmaking came about in the wake of the September 11, 2001 attacks on the United States. This has seen many governments pass new counterterrorism legislation in response to the United Nations

[96] Roach, Kent. (2011). The 9/11 Effect (Comparative Counter-Terrorism) || The United Nations Responds: Security Council Listing and Legislation. https:/www.cambridge.org/core, p 21.

[97] Ibid 309.

Security Council resolutions guidelines and also, due to pressure from the United States that suffered terrorist attacks. This has since resulted in more than 140 governments passing counterterrorism legislation, based on the findings by the Human Rights Watch.[98] Following the 9/11 terrorist attacks on the U.S. soil, the UN Security Council noted in its preamble to Resolution 1456 in 2003 that, "any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians."[99] It is important to mention that, states, in keeping with their duty to ensure respect for the right to life, they have an obligation and a responsibility to protect all persons within their jurisdiction from any harm, including terrorist attacks. To be able to answer to the question of whether the expanded national security laws and policies on terrorism affect fair trial practices and judicial independence in Western democracies, it is important and necessary to extract and illustrate concrete phenomena. Detailed illustrations are provided in the subsection below.

2.6.1 Impact of Expanded National Security Law on Human Rights

Terrorist attacks on the 9/11 sparked the War on Terror (WOT) discourse. This discourse argues that the rule of law and legal regimes that existed prior to 9/11 are incapable of dealing with the threat posed by the exceptional nature of this 'new' form of international terrorism.[100] One scholar, Yourow, believes, for example, that "national security and crime prevention interests to be closest to 'the authority priority and furthest from the rights-protection priority'.[101] The 9/11 attacks seemed to have represented a break away from the 'traditional' form of terrorist activity. As Western democracies face immense difficulties in modern times in ensuring full protection for their communities from terroristic violence, the development of new national security laws does not blend well with human rights enjoyment.

[98] https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11. Retrieved on April 17, 2021.
[99] See the UN Security Council Resolution 1456, Annex, p. 2, 2003. (https://www.un.org/ruleoflaw/files/UNSCR1456.pdf).
[100] Didier Bigo and Elspeth Guild, „The Worst-case Scenario and the Man on the Clapham Omnibus" in Benjamin Goold and Liora Lazarus (eds.), Security and Human Rights (Oxford: Hart Publishing, 2007), p. 106.
[101] 9 Howard C. Yourow. The Margin of Appreciation Doctrine, p. 52.

The present study makes the argument that in the post-9/11, governments' intelligence organizations and security forces have been provided vast and covert powers with which to prevent terrorism. The present study is able to demonstrate that governments tend to wields considerable executive powers in times of high-level national security threats. During high-level national security threats, public scrutiny on how the executive government exercises its powers usually wanes and the only legal institution left to check such powers is the judiciary. But for the judiciary to be able to effectively check executive power, it must be both independent and impartial. It is only an independent judiciary that can protect the rights and liberties of individuals from executive overreach.

Immediately after the 9/11, terrorism was identified as an imminent global threat that required a broad-spectrum legislation aimed at the prevention of future acts. The post-9/ 11 expanded national security laws (counterterrorism legislations) effectively represent a broad and dangerous expansion of government powers. Western liberal democracies saw the need to strengthen the view that the law should operate both as a sword and a shield, meaning the law should not only punish offenders, but it should also serve as a mechanism by which heinous crimes such as terrorism are prevented. It shall be demonstrated in the present study, however, that the expanded national security laws have provided the government security agencies with wide discretionary powers. Discretionary powers normally give an administrative authority or agency some degree of latitude with regard to decision making which are legally admissible. However, it shall be illustrated here that such discretionary powers tend to be abused in favor of the government and in violation of the international law on human rights. The abusers of these laws tend to use their discretionary powers to carry out operations or activities that are not legally admissible and in sharp contradiction with

National security threats, have in the recent period, unprecedentedly undermined the efficacy of the administration of justice in Western democracies. The criminal justice system has been, particularly greatly affected by the recently introduced national security laws and policies. The effectiveness and the efficiency of the criminal justice system (the wheels of justice) have been slowed, hence delays in the dispensation of justice. Shakespeare, had long observed that the delay in justice is one's 'bane' (source of harm) in life. Hans Kelsen opined that efficacy is a specific requirement for the existence of a legal system, therefore, of law. This implies the

imperative capacity of the criminal investigation agencies and judicial system to apply the law regularly, efficiently and in a timely manner in the administration of justice.

In the positivist fashion, law (i.e. national security law) is the expression of human will, and is therefore the command of the 'sovereign'. This suggests that any positive law, whether good or bad, should be obeyed and respected as it reflects the will of the people, either directly or indirectly through their elected leaders. In regard to the national security policies, it must be admitted that such policies are important insofar as they fulfill a social or community goal, aimed at some improvement of the social, economic or political welfare of the community members in general. In times of national security threats, governments pursue policies, some of which lead to a restriction of the rights of individuals. But Dworkin urges that, government policies should be fair in setting out principles that accord respect to the rights of individuals, hence the need for justice and fairness.

According to the imperative theories of law, positivists posit the coercive element of the law. They argue that law is essentially a matter of force created, imposed and enforced by the most powerful group of persons in society, with a view to applying sanctions. The most powerful group of persons for this matter denote the executive members and the legislators. These two political organs (branches) of government are often perceived to be more powerful than the judicial branch. Indeed, Alexander Hamilton, author of Federalist No. 78, said that the judiciary as a branch of the proposed government would be the 'weakest' of the three branches because it had "no influence over either the sword or the purse. The judiciary can be considered the weakest branch because the mode of appointing judges, tenure of service for judges and its budget allocation, all depend on the will of both the executive and the legislature.

Since the judiciary has no influence over the 'sword' or the 'purse', it therefore faces a continual jeopardy of being overpowered or influenced by the other two (executive and legislative) branches. Since the executive holds the sword and the legislature keeps the purse, judicial independence has a lot to fear from both the executive and the legislature. The judiciary can never, therefore, attack the other two branches with success. It may be said that the practicality of judicial independence, therefore, partly depends on the strictness of the separation of powers doctrine. However, despite this institutional guarantee, judicial independence is bound to be scared of the

executive and the legislative powers. So are fundamental rights and freedom, particularly during periods of high-level national security threats.

The expanded national security laws also led to the creation of "terrorism penology." Penology is a term that refers to the study of the way in which society responds to crime. It thus covers the wide range of processes that are concerned with the prevention of crime, the punishment, management and treatment of offenders and the measures concerned with reintegrating them into their communities. However, it must be emphasized here that state security agencies tend to over stretch their discretion and sometimes rush to make decisions that are unlawful. Even though it is in times of terror and upheaval that fear and rash action get at their peak, it is important for Western democracies to adhere to the very democratic principles that serve to uphold the rule of law.

After the September 11, 2001 (9/11), terrorism was perceived as an existential threat across western democracies. Indeed, the impact of the terrorist attacks on the U.S. soil on 9/11 changed the world in monumental proportions. It led to the U.S. and other western democracies initiating new national security policy measures and also expanding on the already existing policies on national security. In the U.S., for instance, the Bush administration perfectly created the "war on terror" device, which gave the U.S. and other European democracies the excuse to limit liberty through the creation of expanded national security laws. For instance, Peter L. Bergen in his, "*The Longest War: The Enduring Conflict Between America and Al-Qaeda*" (2011), has clearly pointed out that the "war on terror" device warped and distorted 'key American ideals about the rule of law.' This is a clear indication that new policies and strategies on counter-terrorism are likely to undermine the rule of law in democracies.

Whenever the national security is under threat, a responsible state would swiftly respond with strategies aimed at decisive neutralization of the perceived enemy. The government may therefore choose certain means of response that are not only aimed at neutralizing the enemy, but also restricting liberty. The justification for liberty restriction being that the new policies restricting liberty is meant to strongly equip the government and provide it with more powers so that it can effectively strengthen national security and protect the country against future terrorist threats. Western democracies have adopted these measures through counter-terrorism legislation. Counter-terrorism laws have therefore introduced new guidelines on the ways which terrorism cases are

investigated and prosecuted. However, these guidelines have impacted the criminal justice system in western democracies. At the same time, counter-terrorism laws have elicited a lot of reactions with some scholars and critics arguing that they have led to the abuse of coercive powers by the government and thus, government is likely to use such laws as a 'permanent' weapon for preserving its prerogatives. It should be emphasized that, indeed, one of the major impacts of counterterrorism laws is that police has acquired more powers of stop, search and arrest. This reinforces the point that when democratic governments are faced with the devastating threat and consequences of terrorism, they must act swiftly and decisively to protect individuals under their jurisdiction. Indeed, governments are under the obligation to prevent terrorist acts and to bring those responsible for such acts to justice. But in doing so, governments must be reminded, however, that effective counterterrorism strategies and human rights protection should never be conflicting goals, but rather complementary and mutually reinforcing.

Counter-terrorism laws have also received criticism from legal academic, as enactment of a far-reaching set of laws which have the potential of sustaining conviction even in the absence of the actual violent action being commissioned or intended.[102] These laws also create a struggle between state security preservation and liberties and freedoms of citizens' protection. The implication being that counter-terrorism laws seem to prioritize security over liberty, (i.e. sacrificing liberty for security). But this is problematic because it creates more problems by crossing the boundaries. For instance, they cross the boundary between security and human rights. Moreover, they cross and weaken the boundary between the executive and the judiciary. They also potentially weaken the Western constitutional model of liberty protection. In other words, they are an affront to Western constitutionalism. They have also significantly challenged the traditional legal concepts and criminal categories.

The pressure to cross these important boundaries are bound to create unexpected or unwanted outcomes within the criminal justice system. In jurisdictions that terrorism is treated as 'war', the response has been military retaliation. In these jurisdictions, captured civilian detainees are treated as 'enemy combatants', and are prosecuted by a military commission. The U.S, exemplifies this jurisdiction. To the contrary, in jurisdictions that treat terrorism as a 'crime', the

[102]MASFERRER, *Counter-Terrorism, Human Rights,* 6.

government's response has been prosecution. In these jurisdictions, arrested terrorist suspects are treated as 'terrorist suspects', and are prosecuted in a public court. The United Kingdom (UK), exemplifies this jurisdiction. The foregoing clearly produce two criminal justice models (i.e. the U.S. model and the European model) in the context of terrorism that deserve scholarly attention.

The U.S. criminal justice model in respect of terrorist suspects trials, is more likely than the European model, to violate appropriate legal rules and procedures. When appropriate legal rules and procedures are violated within the criminal justice system, fair trial and judicial power are very likely to be undermined. For instance, using the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act of 2001, the U.S. Attorney General introduced new guidelines to the terrorism-related criminal justice. This included freezing assets of suspected terrorists and those suspected to be associated with terrorist groups, the cancellation of the writ of *habeas corpus* and its replacement with indefinite detention. At the same time, the executive promulgated an executive order according to which non-citizens of the U.S. suspected of terrorism would face the fate of trial before the military tribunals. For the first time in history, the world watched as the U.S, which is regarded as the democratic vanguard of the liberal world, cross the boundary between the executive and the judiciary. By preferring to try non-citizens suspected of terrorism before a military tribunal instead of an open court, the executive significantly undermined the judiciary.

In the U.K, for example, counterterrorism legislation considerably curtailed the right to liberty and security of individuals, contrary to Article 5 of the European Convention on Human Rights. The British government applied for derogation from Article 5 of the Convention, which deals with a person's right to liberty and security. This allowed the executive government arrest or detain any person suspected of terrorism activities. This was deemed necessary because the British Parliament effectively passed the Anti-Terrorism, Crime and Security Act (2001), which permitted the arrest and detention of suspected terrorists for an extended period of time contrary to the typically permitted procedure of criminal investigation. According to Article 15 of the Convention, derogation from Convention Articles is only permitted in time of war or other public emergency threatening the life of the nation. The British government sought derogation order due to fears of international terrorism following the September 9, 2001 terrorist attacks on the U.S. soil.

The European criminal justice model in respect of terrorist suspects trials seems different from the U.S. model. It perceives terrorism as a ‘crime’ and the preferred legal response is prosecution. In addition, European democracies probably have a strict adherence to international norms as opposed to the U.S. All the states forming the Council of Europe are bound by the European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms). This is an international convention to protect human rights and political freedoms in Europe. Article 6 of the Convention, for example, provides a detailed right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time. This Article also provides for the presumption of innocence, and other minimum rights for those charged with a criminal offence, including terrorism, adequate time and facilities to prepare their defense, to have access to legal representation, the right to examine witnesses against them or have them examined, and the right to the free assistance of an interpreter. Under the "independent tribunal" requirement, the European Court of Human Rights (ECtHR) has ruled in the past that military judges in Turkish state security courts are incompatible with Article 6. In compliance, the Turkish government adopted a law abolishing these courts.

Moreover, Article 15 of the ECHR only permits the member states of the Council of Europe to derogate from this Article in a time of “war” or “public emergency threatening the life of the nation”. Member states are allowed to derogate from certain rights guaranteed by the Convention based three substantive conditions: there must be a public emergency threatening the life of the nation; any measures taken in response must be "strictly required by the exigencies of the situation"; and the measures taken in response to it must be in compliance with a state's other obligations under international law. In addition to these substantive requirements, the derogation must be procedurally sound. The foregoing propositions inform us about two things that lead to one important conclusion.

Firstly, since the European criminal justice model perceives terrorism as a ‘crime’ and secondly, since European democracies are bound by strict adherence to international norms on human rights as opposed to the U.S., it is reasonable to conclude therefore that the indicators for ‘fair trial’ under the European criminal justice model are stronger in comparison to the U.S. model. But can we really make a comprehensive conclusion that the European criminal justice model is

likely to produce better fair trial outcomes in respect of terrorist suspects as opposed to the U.S. criminal justice model? Abundant caution is required in providing a response to this question. Commentaries by legal academic indicate that fair trial is not possible without an independent and impartial judiciary. Professor Attila Bado, has argued strongly, for example, that judicial independence means judicial strength for a fair trial, since it is the independence of the judiciary that enhances fair trial.[103] In the same vein, Professor Zoltan Fleck opines that judicial strengthening (judicial power) bears exceptional significance to fair trial.[104] The implication being made is that fair trial depends on the independence and the impartiality of the judiciary.

It cannot be gainsaid that counterterrorism laws have also contributed to limiting judicial discretion. The counterterrorism laws have, among other things, sought to reform the penal code and prosecution guidelines because it is widely believed that while penal code that existed prior to the 9/11 was not punitive enough to deter criminals, particularly terrorism perpetrators, the prosecution guidelines were equally not reasonable enough to aid the investigating and the prosecution teams to obtain adequate information and procure material evidence to secure conviction. Almost all governments of western democracies sought to adjust penalties to reflect the seriousness of the terrorism crime in the belief that the application of the criminal law was frequently disregarded because the penalties it prescribed were seen as too lenient and even unreasonable to some extent. By doing so, however, the reformed penal code and the prosecution guidelines are more likely to limit the use of judicial discretion, for example, in *habeas corpus* proceedings.

2.6.2 Impact of Expanded National Security Law on Criminal Justice Systems

Scholars contend that political leaders tend to be susceptible to political pressure in times of national security crisis. This is evident by the very few votes against the PATRIOT Act, despite its many cutbacks on fundamental rights and freedom. Aharon Barak, the President of the Israel Supreme Court once said that "the real test of judicial independence and impartiality comes in situations of war and terrorism" because in these times, judges should hold firmly the fundamental

[103] BADO, Attila. (2014). A Comparative Analysis of Judicial Power, Organizational Issues in Judicature and the Administration of Courts. In "*Fair Trial and Judicial Independence: Hungarian Perspectives*." (2014). BADO, Attila. (Ed). Switzerland: Springer International Publishing.
[104] Ibid

principles and values (Danieli, Brom, and Sills, 2012). One of the impacts is a paradigm shift toward incapacitation and prevention of crime rather than traditional deterrence or retribution (Cole, 2008). For instance, the U.S. PATRIOT Act essentially criminalized conduct preparatory to acts of terrorism, and "thus shifting both traditional and intelligence investigative resources to an inherently anticipative context" (see Ballin, 2012, p. x). It can be argued that the expanded national security laws broadened the scope of the terrorist crime investigation, but lowered the threshold for criminal investigative purpose. This means that security agencies can be arbitrary in their stops, arrests and detaining individuals even on weak suspicions.

At the same time, scholars debate whether the traditional criminal justice systems are capable of accommodating preparatory terrorism offences. Stability and security are the motivators for penal policy. At the same time, the new law emphasizes on incapacitation and making crimes less feasible to commit. This replaced the tactic of deterrence through threatened punishments, which was prevalent in the traditional criminal law. It is worth pointing out that prior to the 9/11, criminal justice systems in Western liberal democracies mainly followed the traditional criminal justice frameworks while prosecuting terrorism-related offenses. However, the expanded national security laws introduced after the 9/11 seem to have been set apart from the traditional criminal justice frameworks.

2.6.3 Impact of Expanded National Security Law on the Rule of Law

Scholars continue to question constitutional maintenance during emergency. Many constitutions fail to diminish controversy through greater specificity in constitutional draftsmanship. However, almost every modern constitution makes some explicit provision for crisis government (Finn, 1991). Finn argues that "crises raise issues of how" to interpret specific provisions in a constitutional document (p13). Many Western democracy constitutions now acknowledge the inevitability of crises and the need for expansive powers to cope with them. But it should be mentioned here that greater specificity of constitutional language is still unlikely to resolve all questions of constitutional interpretation.

The present study is of the view that states will normally take whatever action they deem necessary to ensure their physical survival. It can be argued that as a matter of political prudence, democratic governments are rarely willing to risk their survival by ceding to a generous conception

of individual liberties in times of national security crisis. The harsh reality is that "necessity" typically trumps "individual liberties and rights". Interestingly, Thomas Jefferson, perceived to be an opponent of expansive national power, once conceded:

"The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means".[105]

Jefferson's comments make clear that there is far from universal agreement that any set of limitations, irrespective of origin, can or should restrain the exercise of powers of emergency in a constitutional state.

Criminal justice is a particularly complex process. It entails a series of stages, which include arrest, investigation, charge, prosecution, trial, sentence, appeal, and punishment. This process is usually undertaken by criminal justice functionaries: police department, prosecution team or investigating judge (civil law tradition), court system, and prison. The principal goal of the criminal justice system is normally to bring the guilty to justice and restore social order in society. While the criminal justice system is responsible for catching and convicting offenders, it must also ensure that the defendants have a fair trial, and if they are found guilty, then the punishment they receive must be fair and proportionate to the crime or offense committed.

Governments have an obligation to provide protection and support to victims of crime, including terrorist crimes. This approach to justice system is called the victim-centered approach. Due to high-level of terrorist threats it has become an increasingly important for governments to retool the contemporary criminal justice system and practice. This is owing to the fact that increased cases of terrorist attacks have left many victims considerably affected. Terrorist attacks usually target the civilian population and in the process victimize large numbers of people. The victimization may take various forms such as the death of a large number of civilians, material losses, physical injury and psychological trauma for surviving victims, and long-term damage to

[105] Preamble, The Basic Law of the Federal Republic of Germany (Bonn: Press and Information Office of the Federal Government, 1987). See also Elmar M. Hucko, ed., The Democratic Tradition: Four German Constitutions (Leamington Spa, Eng.: Berg Publishers, 1987)

quality of life.[106] The criminal justice system must therefore be able to deal with these various forms of victimization.

Although Western democracies might have different justice models, their approach to the punishment of offenders is more or less the same and is underpinned by reductivist principles. It is important, however, that the justice model that they employ seeks to ensure that punishments reflect the seriousness of the crime that has been committed, and thereby ensuring that offenders get their 'just deserts' for their actions. Moreover, the justice model should also emphasize the desirability of consistent sentences. It must be emphasized further that such justice models should always curb the discretion of law enforcement agents working in criminal justice agencies and the need for the criminal justice process to effectively protect human rights and, particularly the accused's rights. It is important to emphasize, however, that all acts of crime in the community require a uniform and consistent response by the law enforcement agencies. According to the enlightenment era criminologist, Beccaria, a key exponent of classicist criminology, the most appropriate solution to an act of crime is a clearly defined and consistently applied legal code and a criminal justice system that is predictable and also swift in its operations (Joyce, 2006).

It is emphatically argued herein that the criminal justice system has changed with the increasing levels of terrorist threats. The 9/11 attacks on the U.S. soil fearfully exposed wider insecurities and fragilities experienced in contemporary society. Criminal justice agencies' abilities to respond to terrorism crime came into question and stirred political debate. It may be argued that the criminal justice system prior to 9/11 and the criminal justice system post 9/11 indicate contrasting paradigms at work, with the one prior to 9/11 lenient to terrorist suspects while that of post 9/11 being harsh to terrorist suspects. In other words, the criminal justice system post 9/11 has been adjusted to mete out stiffer penalties for terrorism offences. Scholars argue that "Governments in the UK and the USA, for example, have justified harsher penalties, more austere regimes and the removal of rights from suspects, defendants and prisoners on the grounds that they

[106] See, Handbook on Criminal Justice Responses to Terrorism: Criminal Justice Handbook Series. (2009). New York, p.107.

are satisfying public opinion."[107] In the same vein, public support for punitive criminal justice policies against terrorists seems to have increased after the 9/11.

2.7 Criminal Justice Systems

The present research is making an assumption that high-level national security threats are more likely to heighten discretion for unfavorable treatment within the criminal justice system based on suspicion of terrorism as opposed to low-level national security threats. High-level national security threats are also more likely to make courts of law become highly contested judicial space. It is also believable that high-level terrorist threats are likely to introduce disparity in the criminal justice system whereby suspects associated with terrorism are given unequal treatment, and different sentences for similar offences, particularly during high-level terrorist threats.

Although criminal justice systems in Western liberal democracies should be endowed with counterterrorism laws, such laws should aim at preventing, detecting and prosecuting those involved in terrorism acts or activities. The law enforcement agencies must therefore have appropriate powers to effectively perform their statutory functions. Counterterrorism laws must, however, ensure that they are reasonable, necessary and proportionate to a legitimate purpose. This includes legislation on counterterrorism measures relating to control orders, preventative detention orders, pre-charge detention, post-sentencing detention, surveillance and telecommunications interception, data retention, terrorist financing, foreign incursions, and terrorist organizations.

2.7.1 Criminal Justice in the Pre-9/11 Era

Academics have struggled for decades to define what 'terrorism' is, reaching no significant consensus. Even in Western democracies, terrorism has remained an elusive concept to assign a watertight definition. It is no wonder that in the pre-9/11 era, terrorism offenses were more or less treated as conventional criminality. It can further be argued that the pre-9/11 era had also experienced considerable development of human rights and judicial strengthening. These developments enabled human rights to be well entrenched in the constitutions and courts were

[107] Hancock, L. (2004). Criminal Justice, Public Opinion, Fear and Popular Politics. In Muncie, J, and Wilson, D. (2004). *Student Handbook of Criminal Justice and Criminology*. (Eds.). U.S. Cavendish Publishing. P.51.

given the constitutional mandate to protect those rights. It should not escape mentioning that just before the 9/11 terrorist attacks, the enjoyment of democratic values, and human rights and liberty were almost at its peak in most Western constitutional democracies. State power and its coercive force had been almost fully calmed by freedom of individuals founded on democratic values and principles. The State largely reserved the power of coercion and embraced benevolent persuasion. The State fashioned the enforcement mechanism that not only respected human dignity, but also liberty of individuals. Criminal justice systems in Western democracies tend to place great emphasis on the rights of the defendant. It may be argued that failure to respect the defendant's rights "can in some cases even lead to the dismissal of criminal charges despite overwhelming evidence of guilt."[108]

It should be borne in mind, however, that a state is a political society and hence an association of human beings established for the achievement of certain ends by the use of certain means. The unity of people in a State is therefore necessary for the attainment of peace, order, and civilization. Whenever these ideals are threatened by unlawful means or actors (terrorist threats), then the government as the legitimate representative of the State must act forcefully and decisively in order to restore and maintain those ideals. The government is therefore the only authorized entity to employ both coercive and legal means to restore peace and order in a political society. Salmond had long observed that the fundamental purpose and end of political society is defense against external enemies, and the maintenance of peaceable and orderly relations within the community itself.[109] He opined that the essential duties of governments are twofold: war and the administration of justice. Other functions of government such as feeding the poor and building schools remain secondary. Indeed, the Leviathan, as told by Hobbes carries two swords: the sword of war and that of justice. The citizens' expectation of their government, therefore, is that it will always go out and fight their battles. The State must therefore use its power to wage just war as a means of defense in a political society against external and internal enemies. In addition, with regard to the administration of justice, the State is authorized to use its power to enforce rights and to suppress and punish wrongs.

[108] GERBER, et al., p.406.
[109]SALMOND, W. John. (1902). *Jurisprudence or The Theory of the Law*. Bell Yard, Temple Bar, London: Stevens and Haynes Publishing, p. 185.

Although the European Union (EU) Member States have diverse cultural and legal traditions (i.e. common law and civil law), their criminal justice systems are geared towards producing similar judicial outcomes. In 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism, set out in its resolution 49/60, stated 6 that terrorism includes "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes" and that such acts "are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them." The legal profession desires a definition that can be used for the successful prosecution and conviction of accused terrorists. Defense or an appeal by an accused terrorist is easier if the crimes are ambiguously defined. Prosecutions in the US can be under the Homeland Security Act of 2002 (8).) This Act emphasizes the danger to human life, covers the critical infrastructure and key resources, but also includes the psychological and political aspects.

2.7.2 Criminal Justice in the Post-9/11 Era

Scholars observe that the 9/11 terrorist attacks on the U.S. soil "irrevocably changed the backdrop in which choices about investigative methods are made – the risk and realization of catastrophic terrorism, including the prospective use of WMD. That threat has not disappeared with the demise of Osama Bin Laden". [110] It can also be argued that the 9/11 incidents also re-invented the wheel of an intelligence driven preventive paradigm in combating terrorism. James E. Baker, Chief Judge, United States Court of Appeals for the Armed Forces observes that after the 9/11, "it seemed, western democracies faced a zero-sum choice between security and liberty as well as between a criminal and a military paradigm of response" (see Ballin, 2012, p. viii). This implies that after the 9/11 attacks on the U.S. soil, Western democracies made securitization a priority. National security was given priority over liberty (human rights) and military response to terrorism was given priority over criminal justice response. This in essence means that criminal justice in Western democracies became infected with interests that were totally detrimental to the interest and the norms of the rule of law.

[110] See James Baker's forward in Marianne F.H. Hirsch Ballin. (2012). Anticipative Criminal Investigation: Theory and Counterterrorism Practice in the Netherlands and the United States, p.xiii. The Hague: The Netherlands. T.M.C. Asser Press.

In point of fact, the post-9/11 era brought about a sharp rise in the frequency and scale of terrorist incidents, not only within the European democracies, but also in the U.S. and other parts of the world. The September 11, 2001 terrorist attacks on the U.S. soil ushered in a new era in the fight against global (transnational) terrorism. New national security laws and policies became imperatives. These new security measures have not only affected [reduced] the enjoyment of human rights and fundamental freedoms, but also weakened the legal institutions. This era is known for unprecedented incidents and incidences of arbitrary arrest, extraordinary rendition, and torture. Also, strict adherence to the rule of law principle has been negatively impacted. In Europe, for instance, the European Court of Human Rights (ECtHR) has repeatedly pronounced itself that even suspected terrorist offenders must not be stripped off their human rights since such rights are essential elements of any democratic society that truly respects the rule of law. A section of the literature suggests that respect for human rights and the fight against terrorism are entirely compatible. This school of thought advances an argument that legal responses based on respect for fundamental rights are the only effective response to terrorism.[111] However, this observation might be inadequately convincing because it is based on "ought" rather than "is". How the State ought to respond to terrorism threats and how it is actually responding to such threats makes for divergent thoughts.

In the post-9/11 era, Western democracies' criminal justice institutions have been made to acquire coercive norms different from the pre-9/11 era. Institutions tend to generate norms, which in turn, shape their behavior. The coercive norms have, thus molded the acting, thinking and feelings of these institutions towards terrorist defendants. Trying terrorist defendants has become more or less a fierce legal 'war' between the State party and the defendants with each side wanting to win against each other. Even as the criminal justice system starts with arrests and investigations before trial, the extraction of confession through torture should never be a valid recourse to obtaining confession of truth. In some instances, there have been occasions of arbitrary arrests on mere suspicions or assumptions and discriminatory treatments linked to race and religion. Such treatment by the State are usually couched under the defense of safeguarding the national security. It can be argued that one striking characteristic of the post-9/11 Western democracies is that while the function of the prosecutorial sword (i.e. the tools used by the government to fact-find) got

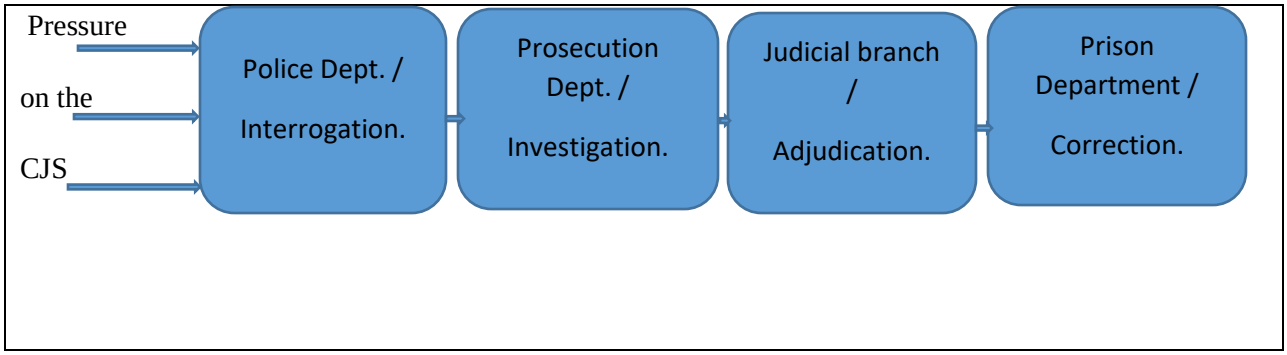
[111] SALINAS, de Frias, Ana. (2012). *Counter-terrorism and human rights in the case law of the European Court of Human Rights*. Council of Europe Publishing.

greater sharpening, the shield (i.e. the safeguards that provide a fair system of justice and the protection of individual rights) got blunted.

There are also concerns that the post-9/11 criminal justice might be prone to torture. In his Essay on *Crimes and Punishments* (1766), Beccaria pointed out that torture was cruel and barbaric. He argued that torture shares the defects of trial by ordeal. Beccaria contended that, torture had no logical relationship to discovering truth. But was Beccaria an armchair philosopher? Can terrorist volunteer information to law enforcement agencies without being put through some moments of torture? A New York Lawyer, Peter Van Schaack, once said with resignation that "to preserve society individuals must bleed; to secure a reverence for the laws that connect that society the violators must suffer" (Johnson, Wolfe and Jones, 2008, p.171).

Figure 2.7.2 below provides an illustration of how post-9/11 era is likely to exert more pressure on the criminal justice system. The present study assumes that during high-level terrorist threats, considerable pressure is more likely to be mounted on the criminal justice system to act swiftly and firmly against terror suspects. This pressure is likely to add stress on the limited capacity of the criminal justice systems. This might not only weaken, but also compromise the ability of criminal justice systems to function within the rule of law and human rights principles. Despite the pressure, it is imperative that the legal processes pursued by these systems must be fair and in accordance with the "universal" justice standards.

Figure 2.7.2 Terrorism and Pressure on the Criminal Justice Systems (CJS) in Democracies.



Source: author.

2.8 Understanding a Fair Trial

Montesquieu had long opined that, "in moderate governments . . . the life of the meanest subject is deemed precious" and no one can be deprived of honor or property except after a long and careful inquiry during which he or she has been given every possible opportunity to make a defense".[112] The discourse on fair trial, however, raise concerns in times of high-level national security threats. For instance, Weissbrodt and Hansen (2013) maintain that the right to a fair trial does not theoretically apply differently to extraordinary courts than it does to regular courts. They, however, voice their concern that "extraordinary courts consistently raise concerns over the right to a fair trial, particularly concerning independence and impartiality" (Weissbrodt and Handen, 2013, p. 310).

While in the past 'fair trial' did not have much broader meaning as a procedural principle, it has in the recent period emerged as one of the most important principles in respect of the functioning of the judiciary. In fact, judicial independence may be said to be an element of fair trial. There are indeed various rights associated with fair trial. They include Article 10 of the Universal Declaration of Human Rights (UDHR), the Sixth Amendment to the United States Constitution, Article 6 of the European Convention of Human Rights (ECHR), and Articles 14 and 16 of the International Covenant on Civil and Political Rights (ICCPR). Perhaps a more comprehensive treatment of the right to a fair trial including the due process right is provided by the Office of the United Nations High Commissioner for Human Rights (OHCHR). The OHCHR provides 12 clear guiding principles and guidelines on the right to a fair trial and due process for purposes of assisting legislators, decision makers, judges, lawyers and prosecutors, and law enforcement officials. The present study summarized and stylized the 12 guidelines as shown in the table below.

[112] Spirit of Laws, p. 155.

Table 2.8a OHCHR Principles on Fair Trial and Due Process.

The OHCHR 12 Guidelines and Principles on a Fair Trial and Due Process
1. Effective access to justice for all individuals. 2. Criminal charges to be determined by a competent, independent and impartial tribunal. 3. The right to a fair trial involves the right to a public hearing. 4. The right to be presumed innocent until proved guilty according to the law. 5. Defendants cannot be compelled to testify against themselves, or to confess guilt. 6. The right to a trial 'without delay' or 'within a reasonable time. 7. The right of defendant to be tried in his or her presence. 8. The right to representation by competent and independent legal counsel. 9. Disclosure of relevant materials to the defendant by the prosecutor. 10. The right to call and examine witnesses that are against defendant. 11. The right to a genuine review of the conviction and/or sentence by a higher tribunal. 12. Effective remedies to defendants for the violation of their fair trial rights.

Source: author using the OHCHR materials.

It is important to mention, however, that a section of scholars view violation of 'a fair trial' more broadly, meaning, they perceive violation of a fair trial as involving violation several procedural rules and not just a single violation of such rules. They argue that the requirement of "fairness" "covers the proceedings as a whole, and the question whether a person has had a "fair" trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage" (Vitkauskas and Dikov 2017:59). In the case of *Barberà, Messegué and Jabardo v. Spain* (§§67-89), for example, the European Court of Human Rights (ECHR) ruled that the domestic proceedings had been unfair because of the cumulative effect of various procedural defects.[113] However, each defect taken alone, would not have convinced the Court that the procedural rules were "unfair. But this argument is, however, problematic. This is because in some cases, there are certain procedural violations which could unfairly dictate the final judicial decision-making. For instance, a violation of Article 3 (prohibition against torture) of the European Convention on Human Rights could lead to obtaining evidence that is contrary to the rules of evidence. It is therefore important to mention

[113] See Barbera, Messegue and Jabardo v Spain: ECHR 13 Jun 1994.

that the manner in which the evidence is obtained and used by the domestic criminal justice system might be relevant in determining the conclusion of the overall fairness of a trial.

At the same time, a fair trial may also be understood in terms of equality of arms. For instance, when a lower degree of protection of equality of arms is evidenced, then the court concerned must ensure that such protection is upheld and is not violated by the authorities within the criminal justice systems. The procedural principle of "equality of arms" requires that each party be afforded a reasonable opportunity to present its case under conditions that mitigate substantial disadvantage to either of the parties. It is important that all domestic courts ensure that are sufficient safeguards available for the defendant to have overall access to fair proceedings. Some of the equality of arms violations are illustrated in table 2.8b below.

Table 2.8b Equality of Arms Violations in Trial Proceedings.

Equality of Arms Violations during Trial Proceedings
1. State representative allowed to make submissions to court of cassation in absence of defense.
2. Unequal application of time limits for different parties to submit supplementary pleadings.
3. Denial of access to certain evidence relied upon by opposing party.
4. False denial by one party of existence of documents that would have assisted another party.
5. Denial of access to case file at pre-trial stage of criminal proceedings.
6. Deliberate Practical obstacles towards the defendant's lawyer.
7. Law passed subsequent to dispute in order to influence outcome of proceedings.
8. Refusal by court to hear defendant's witnesses while hearing witnesses proposed by opposing party.
9. Procedural difficulties for defendant to challenge findings of prosecution experts.
10. Refusal of courts to examine authenticity of documents crucial for outcome of case.
11. Lack of neutrality by court officials.

Source: author based on readings of the literature.

The concept of "fairness" as understood within the meaning of Article 6 essentially implies that the defendants must be afforded sufficient opportunities to state their case and contest the evidence adduced against them, but which they otherwise consider false. At the same time, the present study is of the opinion that procedural fairness as an 'essential characteristic' of courts of

justice. This implies that courts have a duty and an obligation to protect and promote procedural fairness in all court proceedings.

In discussing a fair trial, Article 6 of the European Convention on Human Rights, for instance, becomes crucial and should be the main point of reference or the defining standard within the confines of criminal proceedings. The main object of Article 6 is that every individual is entitled to a fair and public hearing within a reasonable period of time by an independent and impartial court or tribunal established by law. This implies that in order for a fair trial to succeed, it requires an independent and impartial judiciary. In her work, which addresses the subject matter of fair trials in detail, Summers (2007) observes that the right to a fair trial has become an issue of increasing international concern and importance. However, a lot of attention should now be focused on how the courts of justice should able to ensure the effectiveness or the efficacy of a fair trial in an age of high-level national security threats. The European Court of Human Rights (ECHR), has been increasingly relied upon to determine the scope of a fair trial right. Summers has, however, criticized the ECHR for providing little guidance as far as the scope is concerned. She points out that, instead the ECHR has been focusing more on reconciling procedural rules rather than addressing the broader issues with regard to the scope.

The right to a fair trial is also important because it is a well-recognized international normative instrument charged with protecting human rights. For instance, Article 8 of the American Convention on Human Rights (ACHR); Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); Article 14 of the International Covenant on Civil and Political Rights (ICCPR); and Article 10 of the Universal Declaration of Human Rights (UDHR), all emphasize on the fair trial rights.[114] Since western liberal democracies are known to "proclaim an allegiance to both democracy and the rule of law, the guarantee of fair procedure becomes a standard by which a state's commitment to these ideals is measured."[115] The present study is of the view that the theoretical principle of a fair trial should not be dependent upon a particular criminal procedural model in the western liberal democracies. The present study is also of the opinion that the theoretical principle of the rule of law should not have differing interpretations in the western liberal democracies.

[114] (i.e. See Summers 2007, p. 97).
[115] Ibid, 97.

2.8.1 Effects of Terrorist Threats on Fair Trial

Thurman Arnold, in his Biography written by Waller (2005), argues that the dignity of the state as the enforcer of the law and the dignity of an individual who is in trouble with the law tend to disappear in times of war, rebellion and crisis. This implies that even in times of high-level terrorist threats, the ideal of a fair trial and the ideal of law enforcement are likely to be mere myths. Arnold argues that the "machinery" [legal protection] surrounding the ideal of a fair trial is seldom strong enough to prevent the conviction of weak and harmless individuals in times of national security crisis. This implies that the high turbulence caused by acts of terrorisms is very likely to weaken the legal protection of rights of individuals. Arnold further argues that the ideal of a fair trial is subject to injustices in the judicial process in times of public fear (during crisis).

Moreover, law enforcement loses its ideal during periods of public fear. Law enforcement represents the ideal of a set of principles that must be applied neutrally and logically without regard for the circumstances for the defendant or the accused party in a time of security threats. This set of principles tend to clash with the principles of fair trial in times of high-level national security threats. In times of high-level national security threats, the prestige of government in preserving the rule of low gets lowered. At the same time, courts owe their prestige to the idea that they can consistently vacate executive overreach and remand the rule of law even in times of public fear.

Judges should never be influenced into making wrong decisions, but rather should adhere to grander (foremost) neutral principles that uphold the prestige of the judiciary as an institution.

2.8.2 Fair Trial Practices in the pre-9/11 Era

A fair trial is an element of human rights. Human rights consist of basic entitlements that should be available to all human beings in every country since they are universal in application. It is important to note that a full statement on the declaration of human rights is found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The declaration includes important entitlements such as the right to a fair trial and the freedom of thought, conscience, expression and religion, and prohibits torture and inhuman and degrading treatment. This declaration is being enforced by the European Court of Human Rights, and its incorporation into UK law by the 1998 Human Rights Act means that accusations that public

bodies (i.e. governmental agencies) have breached an individual's human rights will have to be initially heard in the UK domestic courts as well.

From the English Magna Carta to the United Nations Universal Declaration of Human Rights (UDHR) in 1948, human rights found legitimacy and became inalienable rights. It is through the legitimacy of human rights that the criminal justice system is seen to be fair and just. Rules of criminal procedure in many Western democracies were created to facilitate the dispensation of justice and indeed, have played an important role in maintaining the rule of law. For instance, the rules require that criminal trials must be commenced and concluded expeditiously, within a reasonable time for the interest of the public, as well as the accused individual and victims. In light of the foregoing, three assumptions are necessary to be made. Firstly, we are making the assumption that the constitutional limitation of governmental power was strong, hence adequate enjoyment of human rights during the pre-9/11 era. Secondly, we are making the assumption that legal rules guiding fair trial practices received considerable support by criminal justice institutions during the pre-9/11 era. Thirdly, we are also making the assumption that fair trial practices were strongly supported and well respected by the criminal justice institutions during the pre-9/11 era.

It can be further argued that the pre-9/11 era had experienced considerable development of human rights and judicial strengthening. These developments enabled human rights to be well entrenched in the constitutions and courts were given the constitutional mandate to protect those rights. It should not escape mentioning that just before the 9/11 terrorist attacks, the enjoyment of democratic values, and human rights and liberty were almost at its peak in most Western constitutional democracies. State power and its coercive force had been almost fully calmed by freedom of individuals founded on democratic values and principles. The State largely reserved the power of coercion and embraced benevolent persuasion. The State fashioned the enforcement mechanism that not only respected human dignity, but also liberty of individuals.

In the pre-9/11 period, the law of criminal procedure regulating criminal trials and setting out the steps taken by the State were designed to safeguards against the abuse of law, and to ensure that there was equality of law for both terrorist defendants and other conventional criminal defendants. In other words, the equality of arms principle was well respected. This ensured that the abuse of power by the State was constrained. The pre-9/11 era also accorded both parties

(prosecution and defendant) ample time and the ability to equally prepare in bringing cases before the court. Moreover, both parties had the opportunity to disclose the relevant information and evidence in the case, as well as the opportunity to question witnesses.[116] Due process guarantees were also satisfactory and all the legal rights owed to the defendants were more likely respected. The fundamental procedural rights such as the right to remain silent, the right to access the evidence, which forms the bases of the cause of action against the defendant were equally well respected. Indeed, from the nineteenth century to the twentieth century, there were elaborate institutional development of the criminal justice system in many Western democracies, and the accused individuals were given certain procedural rights within those institutional setting.

It may be said that the principle of procedural rights for all suspected terrorists became well grounded in fair trial with due process. The American criminal procedure law, for instance, had designed a concept of exclusionary rule of confession. Following the Fifth Amendment of the U.S. Constitution, criminal procedure law guaranteed the procedural rights as inalienable and inherent. The now popular Miranda rules, for instance, endorsed the procedural rights as human rights values, thus limiting the powers of the investigating authority in matters of investigation. This means that extraction of confession through torture became an unlawful recourse to obtaining confession of truth. The grounding of these procedural rules was a clear indication of the need to limit State power for the purpose of ensuring more protection and greater enjoyment of human rights and liberty. But even as different Western democracies follow different legal systems, they are bound by the international human rights instruments such as the UN's ICCPR Covenant and the EUCHR Convention. For instance, the U.S. and the UK, belong to the common law tradition, while Germany and France belong to the continental (civil) law tradition.

Each one of the countries under the study have their own Code for Public Prosecutors. The Code for Public Prosecutors is normally prepared by the Director of Public Prosecutions and gives guidelines to prosecuting officials working for the State Prosecution Service based on principles in crime and criminal justice policy. The guidelines must always be followed by the prosecution party when making decisions concerning whether or not to prosecute a particular suspect for

[116] CHEESMAN, J. Samantha. An Overview of Fair Trial Standards and National Security from a Comparative Perspective. In In "*Fair Trial and Judicial Independence: Hungarian Perspectives*." (2014). BADO, Attila. (Ed). Switzerland: Springer International Publishing.

alleged offenses. This also emphasizes the need for realistic prospect of securing a conviction. This can be considered by the so called "the evidential test" and whether the public interest will be served by pursuing a prosecution (i.e. the public interest test). The Code for Public Prosecutors further puts forward guidelines to aid decisions as to what precise charge should be brought against a person who is being proceeded against.

It is important, therefore, to take a scholarly dimension by systematizing legal rules in all the four countries. The focus is strictly to compare the application of legal rules in court decisions. It is important that we mainly rely on published judicial decisions which are accessible and can be taken into account. This is because court decisions on similar facts may offer a correct picture of doing case comparison across the four countries. In other words, court cases may offer a picture of the law in action. Indeed, focusing on the court decisions has the great advantage of showing how the rules work in practice. It would not be correct, however, to assume that court decisions (judicial facts) are neutral (objective facts) data. This means that we must first and foremost establish a common core-a criterion of measuring the fairness of judicial decisions, and hence judicial independence. In this we use both the ICCPR and the ECHR provisions on fair trial and judicial independence as the common core (baseline law) from which we can measure the practice of fair trial and judicial independence based on the judicial behavior of judges as reflected on their court decisions. The selection of all case laws to be examined here is done on the basis of previously conceived types or categories of facts which are considered relevant to all the legal systems under this comparison study.

Table 2.8.2 below is pivotal in providing a template for human rights law as espoused by both the ICCPR and ECHR. We may use those rules and provisions as a template (benchmark) from which to examine fair trial practices by comparing the template law with actual facts of human rights as administered by Western democracies during the pre-9/11 period. It is expected that different legal systems may create different legal realities, and thus deviating from the core of the template law (ICCPR and ECHR) depending on the security crisis a country is facing. We strongly suspect that deviating from the template law would be less likely during periods of low-level national security threats, but more likely during periods of high-level national security threats.

Table 2.8.2 The ICCPR and ECHR Template for Human Rights.

Template for Human Rights	ICCPR	ECHR
State's obligation to respect human rights	Article 2(3a)	Article 1
Right to effective remedy by a competent court	Article 2(3b)	Article 13
Prohibition of torture	Article 7	Article 3
Right to liberty and speedy trial	Article 9(1-5)	Article 5
Right to a fair trial	Article 14(1-3)	Article 6
No punishment without law	Article 15(1)	Article 7
Derogation from Covenant/Convention in emergency	Article 4	Article 15

Source: author based on the ICCPR and ECHR information.

2.8.3 Fair Trial Practices in the Post-9/11 Era

Although the UN has been on record stating that "effective counterterrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing," [117]this might not be the case, particularly in democracies that have introduced counterterrorism laws to curb high-level terrorist threats. It is more likely the case that expanded national security laws and their applications are incongruous with maintaining an effective rule of law-based criminal justice system. There is no doubt whatsoever that counter-terrorism laws are part of government effort to mitigate terrorist threats, but these laws do not favor human rights in the context of criminal justice. Counter-terrorism laws tend to affect fair trial practices. The introduction of the expanded national security laws lead to a weak rule-of-law-based criminal justice system instead of a strong rule-of-law-based criminal justice system. It is also important to point out that a strong rule-of-law-based criminal justice system depends partly on government officials (executive) and judges (courts of justice).

Just like the truth often becomes the first casualty of war, human rights have become the first casualty in the post-9/11 era. Due to high-level terrorism threats in recent periods, the rule of law in Western democracies has almost taken second place to national security. The recently introduced counter-terrorism laws and policies by the State, tend to collapse the rule of law by

[117] See, Global Counter-Terrorism Strategy (A/RES/60/288) adopted by the General Assembly in 2006, p.1.

undermining human rights, due process rights and fair trial standards. There have been concerns on the procedural due process rights of terrorism-related crime suspects. It is important to note that even suspects accused of committing the gravest crimes such as terrorism must still be provided due process rights. The due process is important for conveying respect for human rights. It not only promotes fairness but also ensures adherence to legal rules in the prosecution of criminal suspects.

On the investigation side, suspects of terrorism-related cases after the 9/11 are more likely to be mistreated during investigations in order to procure information and evidence. This mistreatment includes torture, longer detention without being produced before a court of law and being denied the right to defense counsel. In some cases, some suspects are subjected to rendition. In other words, there is likely to be disobedience for the rule of law during periods of high-level terrorist threats. The rule of law is a constitutional principle that asserts the supremacy of the law as an instrument governing the actions of individual citizens in their relationships with each other. It also controls the conduct of the state agents (i.e. law enforcement officials) towards citizens. In particular, the rule of law suggests that citizens can only be punished by the government using formalized procedures when they have broken the law or suspected to have broken the law. The rule of law also emphasizes that all citizens must be treated in the same way when they commit wrongdoings because criminal offenders in one jurisdiction are subject to same penal Code.

Regarding the prosecution side, penal populism seems to have permeated the thinking of post 9/11 criminal prosecutors and investigating teams. Penal populism emphasizes the need to adopt a harsh approach towards those who carry out heinous crimes such as terrorist attacks. It is thus characterized by factors that include the use of 'hard' policing methods, longer sentences and the increased size of the prison population, and harsher prison conditions. Law enforcement agencies that adopt this course of action for terrorist suspects do so as they believe that the approach of 'getting tough with criminal offenders is viewed more favorably by the general public. However, there could be a danger with the miscarriage of justice when the rule of law is not obeyed by the law enforcement agents.

The expanded national security laws adopted post 9/11 give law enforcement agents more discretionary powers, which they can easily abuse and frustrate the fair trial and procedural safeguards afforded to defendants. This could lead to miscarriage of justice. The zeal with which

the law enforcement agents have been conducting themselves in post 9/11 justice model is reminiscent of what befell the '*Birmingham Six'*, the '*Guildford Four*' and the '*Cardiff Three'*. All these cases involved miscarriages of justice as a result of abuse of police discretionary power. Although these examples date back to decades prior to the 9/11, it should be understood that they provide a better understanding of how the overzealous law enforcement agents are more likely to bungle the fair trial practices and procedural fairness in the post-9/11 era.

In the Birmingham Six, it was later established that the six defendants who were jailed for life in 1975 in connection with IRA bombings during the 1970s were jailed wrongly. In 1991 they were freed when the Court of Appeal accepted that the convictions were unlawful and amounted to a miscarriage of justice. It was sufficiently alleged that police officers who had investigated the case fabricated evidence and that prosecution lawyers also withheld crucial exculpating evidence that was vital to the defense counsel. Moreover, in the 'Guildford Four', the four defendants who were given life sentences in 1975 in connection with bombings carried out in Woolwich and Guildford, were wrongly jailed due to miscarriage of justice. Consequently, they were freed by the Court of Appeal in 1989 because improper methods were used by the police to obtain their confessions.

Furthermore, in the 'Cardiff Three', the defendants were wrongly jailed in 1990 for the murder of a Cardiff prostitute. Fifteen years later the police arrested the person who had been responsible for this crime. It was sufficiently established, however, that the original conviction was obtained by the police manipulation of vulnerable witnesses to give false evidence. Such cases of miscarriages of justice are more likely to occur in the post-9/11 era as opposed to pre-9/11 era. Although the examples adduced herein dates back to decades before the 9/11, the assumption and prediction of this study is that such cases of miscarriage of justice are bound to surge during periods of high-level national security threats.

Unfair trial and, indeed, a miscarriage of justice may be perceived as a wrongful conviction whereby a defendant is punished for a crime he or she did not commit. This could happen due to the reasons mentioned in the above paragraph. During periods of high-level terrorist attacks, it is very likely that improper pressure might be placed on a defendant by the police to confess to a crime. Police pressure, which may include the use of threat or violence, may result in a defendant confessing to a crime he or she did not commit or result in witnesses giving false evidence. The

other possible cause of unfair trial is the fabrication of evidence. This normally arise when evidence is deliberately planted on a suspect by the police. This activity is usually mostly undertaken by state security agents to ensure that a watertight case exists against a person or persons suspected by the police of having committed a crime. This practice is more likely to arise during periods of high-level terrorist threats because the police might firmly believe that a suspect is guilty of an offence but they simply don't have convincing evidence to persuade a jury of that person's guilt. Immediately after a terrorist attack has happened, police are normally keen on getting the suspects and conducting investigations to obtain inculpating evidence. During this activity, they are also likely to feel the public pressure to get the suspects at all costs and this might make them also to use their discretion wrongly to fabricate evidence.

In certain instances, it is also very likely that there would be some deliberate failure by the prosecution to disclose information relevant to the defense counsel. In most cases, the task of investigating criminal offences is performed by the police in common law jurisdictions and by investigating judge in civil law jurisdictions. Fair trial practices and procedural rules require that all material relevant to the prosecution's case should be disclosed to the defense counsel who lack the resources to carry out a detailed investigation. However, the failure by the investigating team to disclose all material evidence to the defense team may severely prejudice the ability of defense lawyers to defend their client(s) more effectively, especially if the police suppress evidence that is potentially damaging to the prosecution's case. The non-disclosure of evidence by the police has been the basis of some high-profile miscarriages of justice. This is more likely to happen during periods of high-level terrorist attacks.

Since western democratic states tend to adhere to the rule of law it is important that criminal suspects should be treated fairly and impartially by the courts. There are several rights which belong to the sphere of criminal procedure. These includes the right to evidence, the right to legal representation, and the right to interrogate the other party, and so on. The primary concern that needs considerable attention and mentioning is the procedural fairness during terrorism-related criminal proceeding. The argument being made here is that the risk of denying defendants procedural rights are much higher during periods of high-level terrorism threats. This includes denying defendants the right to the disclosure of evidence against them. In some jurisdictions such as the UK, the State has mounted the defense of Public-Interest Immunity (PII), which allows the

court to review Closed Material Procedure (CMP). This procedure allows the State to disclose sensitive material to the judge without having to disclose the same material to the defendant (accused party). While Article 6 of the ECHR confers the right to a fair hearing in criminal and civil proceedings, Article 5(4) goes further to state that a person deprived of his liberty by arrest or detention is entitled to take proceedings to determine the lawfulness of his detention. These international instruments not only provide principles which are deemed 'inviolable', but also provide clear guidelines on fair trial practices to local courts.

Even though limitations of fundamental rights by governments due to extraordinary situations such as terrorist threats might be legitimate, there must remain some residuum of justice. The argument here is that the limitations of fundamental rights by the government during times of crisis must be done in accordance with the law, but not at the whims of the government. In the post-9/11 era, terrorism crimes are currently being treated as extraordinary crimes. Procedural rights designed to protect defendants' due process tend to be violated. It is the substantive and procedural due process that lay the foundation of fair trial. For instance, limits on a defendant's access to evidence and the ability to confront it is a stark violation of the due process and fair trial. Also, whenever security agents use their powers anchored in the recently introduced security laws to randomly arrest, investigate and prosecute suspects without due attention to the 'filtering' process, amount to the violation of suspects' right to liberty at the pre-trial stage of criminal procedure.

Although procedural rules derived from common law and civil law traditions might be different, they must, however, comport with fair trial standards. Indeed, fair trial standards must derive from the human rights law. In this regard, the International Covenant on Civil and Political Rights (ICCPR) provides a baseline against which to measure fair trial standards. For instance, the length of custodial detention coupled with the actual length of trial in light of the presumption of "innocence" until proven guilty, particularly in regard to terrorism-related crimes has been one of the major causes of concern with regard to fair trial practice. It is also important to emphasize that procedural rules must be clearly fashioned and monitored even when defendants are suspected of commissioning grave offenses. There have been occasions where the nature of allegations against the accused person have been withheld from them in the interests of national security. This happens when the court grants a court order allowing the prosecution to refrain from disclosing evidence to defendant where such disclosure would be damaging to the public.

It must be emphasized that human rights must play a major role in how the criminal process is understood and justified. Procedural rights, for instance, are said to operate as 'procedural restraints on State power and they ensure that the accused individual is treated with dignity and respect. These rights ensures that procedural law guarantees procedural fairness. It is important that the rights of the accused should mainly depend on the institutional form of the proceedings. This implies that the regulation of the criminal justice institutional setting must thus be seen to be a prerequisite to enabling the consistent and lawful application of procedural rights, and the creation of a uniform standard of procedural fairness across different democratic jurisdictions.

While the criminal procedure is important [an instrument] for implementing norms of fair trial, there must also be an impartial court or tribunal clothed with judicial power to hear and determine the matter before it. The breakdown in the rule of law in an age of terrorism threats can only be rebuilt by an independent and an impartial judiciary. However, this expectation of the judiciary rebuilding the rule of law has received serious hurdles. This has made the judiciary become 'untrusted' or a less powerful constitutional guardian during periods of national security threats. The foregoing exposes the vulnerability of fair trial standards during periods of national security threats. It is important, however, to examine a set of carefully selected terrorism-related case law in the post-9/11 era, with a view to lending support to the effects of terrorism on fair trial and judicial independence in Western democracies. Even though functionalism advances the theory that most legal systems are more likely to solve legal problems in a similar way, irrespective of different legal traditions (i.e. rules and concepts), it is important to subject this proposition to further analysis by examining trial outcomes of terrorism cases before courts in different jurisdictions.

Despite the procedural rules already put in place as guidelines for fairness in the criminal procedure, before and during trial, the post-9/11 era and, particularly with the introduction of the new counter-terrorism security laws and policies, is more likely to experience some resistance [abuse of power] by the State to accept and show full commitment to those procedural norms of fair trial without undermining the practicality of those rules. It should be noted that the rights of the accused suspects are supported by the fundamental principle that a person is innocent until proved guilty. British laws are now subject to the European Court in Luxembourg.

In some cases, there have been conflict between the principle of fair trial and open justice on the one side, and the principle that gives weight to national security interests on the other side. These two principles pull in different directions. But it is important to note that the context always provides much weight and, hence, becomes crucial to any resolution which leads to striking a balance between the two. For instance, the disadvantage created by the closed material procedure may impede the defendant's ability to access information or material that he can use to prepare for his defense. How the court should decide to strike a balance between procedural rights and national security interest is a big test on the independence of the court.

Although a closed material procedure might be perceived to prevent a fair trial of defendants, in *Home Office v Tariq* [2011] UKSC 35, the UK Court ruled otherwise [a closed material procedure does not prevent a fair trial]. While the UK Court considered that the right to a fair trial was an absolute right, the Court noted, however, that the elements of a fair trial, or the rights that are implied by the right to a fair trial, are themselves not absolute. *Home Office* decision is an indication that the Court has some discretion in balancing between national security interest and human rights enjoyment. In this particular case, we see the local court deferring to the government policy on security. The decision in *Home Office* is further revisited in part 2.3 below as part of the discussion on judicial independence.

There are other terrorism-related trials that local courts have downplayed human rights concerns and instead deferred to the government policy on national security. There have been cases where some foreigners are deported to their home countries on mere suspicion of being linked to terrorist groups. The reason for such deportation becomes convenient, especially if the accused reside in Western democracies that forbid torture, but come from countries that still practice torture to extract confession. In *Abu Qatada v United Kingdom* [2012] ECHR 56, for example, the European Court of Human Rights considered whether the applicant's rights under Article 3 (torture), Article 5 (liberty and security), Article 6 (fair trial) and Article 13 (effective remedy) of the European Convention on Human Rights would be breached if the applicant was deported to Jordan where he faced criminal proceedings. The accused had launched appeals not to be deported to Jordan where he was more likely to face torture and his rights to a fair trial denied. However, both the Special Immigration Appeals Commission (SIAC) and the House of Lords declined the appeals by the accused. On appealing to the ECtHR, the Court held that there would be a violation

of article 6 as there was a real risk that evidence obtained by torture would be used in a retrial. This was an important ruling in which the Court (ECtHR) pronounced that the deportation of applicant from the UK to Jordan would constitute a violation of Article 6 of the Convention.

On the issue of evidentiary rules, interrogation as an instrument of investigation should never be unlawfully applied to procure confession. The maxim of no man is bound to accuse himself (*nemo tenetur seipsum accusare*) limits police power to force confession. It is only when a confession is voluntary that it becomes admissible according to evidentiary rules. Involuntary or coerced confessions must always be rendered inadmissible as per the evidentiary rules.

2.8.4 How Crises Situations Affect Due Process and Fair Trial

Democratic governments try to adjust their legal process in order to handle exigencies such as terrorist threats. However, it must be of utmost importance for the government to understand that due process is guaranteed in a constitutional democracy. During a high-level national security threat, ”normal” criminal justice responses tend to be deemed by the government as inadequate to the challenge (crisis) at hand, hence the government would make adjustments to develop new procedural mechanisms to prevent, contain and punish terrorist acts (Aoláin, and Gross, 2013). Scholars observe that democracies are more likely to create “due process exceptionalism” during national security threats by making a court exceptional (Aoláin and Gross, 2013).

An exceptional court is one that is displays domestic system bias with procedures and processes that differs from the normal ordinary court. Such courts are said to be procedurally and substantively deficient of the prestige of due process ideal. Special or military courts established when a state is in crisis are likely to have different evidentiary and procedural rules from the ordinary courts. Moreover, judicial appointment (selection) mechanisms and processes are likely to be different from the “ordinary.” For instance, procedural rules related to the introduction or exclusion of evidence may differ. At the same time, the perceived neutrality, impartiality and independence of the court provoke a great concern. What this means is that when democracies are faced with a national security crisis, then the quality of due process ideal is more likely to be taken away when government adjusts its legal response mechanisms.

Criminal law practitioners believe that exceptional courts (special and military) tend to have a lower fair trial guarantees. For example, Martin Scheinin, the former United Nations Special

Rapporteur on Human Rights and Counterterrorism found that longer periods of pre-charge and pre-trial detentions, with inadequate access to counsel, and limitations on the right to appeal or bail, tend to characterize exceptional courts (Aoláin and Gross, 2013, p. 8-9). However, Eric Holder, The U.S. Attorney General during the Obama Administration made a speech saying that the U.S. Due Process Clause mandated procedural safeguards that depend on specific circumstances. He added that where national security operations are at stake, due process must take into account the realities of the combat. He also made a distinction that ”due process” and ”judicial process” are not one and the same, particularly when it comes to national security. He added that the Constitution only guarantees due process, but not judicial process. He reiterated that the Constitution's guarantee of due process is ironclad (Aoláin and Gross, 2013, p. 4).

There are restraints and limitations imposed upon the powers of democratic states. Furthermore, interface between domestic courts and international courts guarantees a setting of judicial standards and the meaning and forms of fair trial. This may shape the way democratic states may use exceptional courts to administer justice to violent actors (terrorists)

2.9 Understanding Judicial Independence

Scholars agree that Western democracies have secured the existence of judicial independence through constitutional provisions that guarantee terms of office for judges and restrict haphazard removal of judicial officers; prohibit the prosecution of civilians in military courts; employ a fair and credible selection criteria for judicial posts based on merit qualifications; stipulate that the courts are a separate branch of government from the executive and the legislature; and ensure that courts are fiscally autonomous.[118]

Today nearly all Western democracies provide in their written law for an independent judiciary. For instance, in the U.S., Code of Conduct for United States Judges, Canon 1 states that "An independent and honorable judiciary is indispensable to justice in our society."[119] Moreover,

[118] Domingo, Pilar. Judicial Independence and Judicial Reform in Latin America, in Andreas Schedler, Larry Diamond and Marc F. Plattner, eds., The Self-Restraining State: Power and Accountability in New Democracies. Boulder, CO: Lynne Rienner Publishers (1999); Apodaca, Clair. The Rule of Law and Human Rights, Judicature 87(6) (2004): 292–299; Camp Keith, Linda, C. Neal Tate and Steven C. Poe. Is the Law a Mere Parchment Barrier to Human Rights Abuse? The Journal of Politics 71(2) (2009): 644–660

115 Code of Conduct for United States Judgeshttps://www.uscourts.gov › judges-judgeships ›

Canon 2 indicates that "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. In Germany, Judiciary Act § 25 (1972) asserts that "A judge shall be independent and subject only to the law." Furthermore, the Constitution of the French Republic Article 64 (Oct. 4, 1958 asserts that "The President of the Republic shall be the guarantor of the independence of the Judicial Authority." This implies that undue executive and legislative pressure should not be a de facto scourge on the judicial function.

Judicial independence is the cornerstone of the rule of law. Representative democracies demand that judiciaries also must account for how they perform. One way of measuring judicial independence is by using "political accounting" as an indicator. In other words, the judiciary is deemed independent when political accounting mechanisms show respect for the constitutional positions of courts and judges, and their obligations to provide for fair trials (Langbroek 2018). When the constitutional and societal functions of courts and judges are respected by politicians, the public, court administrators and the media, then the judiciary can be deemed to be independent. The purpose of judicial independence in this case is to secure basic human rights and impose constraints on governmental power. The role of the judiciary, even at times of national security crisis, should not become a thin reed on which to rest liberty and democracy. Judges are mainly appointed rather than elected. They also enjoy security of tenure. They are therefore well positioned to protect liberty and democracy at all times.

Although the EU has come up with the European Union Justice Scoreboard with a view to assisting the EU and the Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States, it does not provide good indicators for measuring judicial independence.[120] Rather the indicators that it provides (i.e. length of the proceedings, clearance rate and number of pending cases) are all indicators for measuring effectiveness in performance but not independence.

Many scholars define judicial independence from a narrow perspective. For instance, a section of the literature define judicial independence in terms of the method of selection of judges (Geyh 2008), [usually by Judicial Appointments Commissions], autonomy of judicial budget,

[120] https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2013_en.pdf. Retrieved on April 27, 2021.

security of tenure of judges, and clear separation of powers (i.e. Larkins 1996; MacCormick 2009). Although all these views make really good contribution to the literature, they miss some important perspective. They focus mainly on the prerequisites for judicial independence rather than the substantive judicial independence. However, these prerequisites still do not guarantee the independence of the judiciary. For instance, Chester (1997) observes that mere separation of powers fails to guarantee judicial independence.

At the same time, Garoupa and Ginsburg (2009: 130) contend that there is no evidence that a fair selection system of selecting judges through "Judicial Councils promote independence." The present study is therefore of the opinion that judicial independence can only be achieved when certain pertinent acts by justices manifest in the bench, particularly in their decision making. Indeed, the present study is of the view that if judicial independence is compromised then the rule of law is more likely to be severely undermined. Some scholars, however, define judicial more broadly and with generality that leaves the meaning of the concept 'vague'. Shapiro (1981), for instance, defines judicial independence as the existence of a neutral third party to serve as impartial adjudicator over conflicts among societal actors.

In terms of popular democracy, judges should not feel coerced to always decide according to what is perceived to please the general public. The idea of popular democracy is sometimes theoretically at cross-purposes with judges being accused of being unrepresentative elements in government. It is therefore important that judges are insulated from outside pressures. But are judges capable of insulating themselves from their own personal interests other than the outside pressure? Also, are courts capable of establishing and protecting their institutional integrity during periods of high-level national security threats? How comprehensive are the above definitions? They perceive judicial independence as the ability of the judiciary to protect the guarantees set out in the Constitution by having the power to say "no" to the Legislature and "no" to the Executive when they try to overstep the limits of their constitutional powers. However, this seems to be a very narrow definition of judicial independence.

2.9.1 Indicators of Judicial Independence?

When are judges independent? Upon my reading of a body of literature on judicial independence, I developed various themes, which I then refined as relevant indicators for

measuring judicial independence. The present study is therefore of the opinion that judges are said to be independent when: they follow the law; they follow the constitution and precedent; they are free from political and philosophical predilections; they render unbiased judgments; they are impartial and non-partisan; they maintain intellectual honesty; they show dedication to the enforcement of the rule of law regardless of popular sentiment; they decide based on the facts presented in evidence; they have the ability to render decisions in the absence of political pressure and personal interests; and they don`t have to look over their shoulders before deciding a case.

Table 2.9.1 Indicators for Measuring Judicial Independence.

Indicators for Measuring Judicial Independence
Judges may be said to be independent when: • they follow the law • they follow the constitution and precedent • they are free from political and philosophical predilections • they render unbiased judgments • they are impartial and non-partisan • they maintain intellectual honesty • they show dedication to the enforcement of the rule of law regardless of popular sentiment • they decide based on the facts presented in evidence • they have the ability to render decisions in the absence of political pressure and personal interests • they don`t have to look over their shoulders before deciding a case.

Source: author.

It is important to mention, however, that in order for judicial impartiality and a fair trial to be realized, there has to be some degree of judicial independence. For instance, Bado (2014), observes that judicial independence provides the judiciary with considerable strength for fair adjudication and, therefore, judicial independence, indeed enhances a fair trial. It is also worth noting as mentioned by Dodek and Sossin (2010) that judicial independence is a necessary prerequisite for the operation of the rule of law. The present study therefore provides the following as a "shorthand" definition of judicial independence. It discerns judicial independence as 'an effective and competent protection of the constitution and promotion of the rule of law by the courts, without fear or favor'.

How exactly should we define 'judicial independence'? In conceptualizing judicial independence, it is possible that one may argue that legal language, and hence, legal concepts have

no absolute validity since they might vary from one particular jurisdiction to another. However, it is also important to point out that a majority of legal concepts seem to be stable units of legal meaning, irrespective of the legal tradition that they belonging to. Moreover, legal integration across national boundaries has also majorly contributed to either harmonization or convergence of some legal concepts. This is not, however, same thing as effecting same-ness and suppressing difference. The present study only aims at creating a true and reliable map of this legal concept (judicial independence). As a comparatist legal scholar, my role is to remain a powerful player in advancing legal language and legal concepts in the clearest fashion.

2.9.2 Judicial Independence in the Pre-9/11 Era

Most definitions of judicial independence uncritically assume that there are no unavoidable human elements that tend to creep into the judicial decisions. The decision of guilt, innocence, or other legal culpability be driven by facts, weight of evidence, and law rather than by the discretion of the judge. Under common law tradition, judges can also make a great many procedural decisions that are decisive in influencing trial outcomes. This is, however, less common under the civil law.

Judges are appointed to do right to all manner of people in the community, using the law as the instrument and the means of delivering justice. Judges are therefore essentially expected to uphold justice, to protect rights, to redress wrongs, and to maintain right. But judges must be seen to do so, to the exclusion of their own free will and discretion. In other words, judges must exclusively apply the principle of law in the course of administration of justice. However, judges can only succeed in delivering justice in an enabling environment free of undue influence, pressure, and intimidation *de quiconque* (from anyone).

In both common law and continental legal traditions, judges are mostly bound hand and foot to walk in predetermined paths. This is because they administer justice under pre-established authoritative rules. But it must be none the less noted that the total exclusion of judicial discretion by predetermined rules of law (legal principles) is impossible in any legal system. This implies that judges would still have some discretion with which to apply good conscience and natural justice despite the rigid rules they operate under. The judicial discretion that judges have can be used in two important ways: to rule in favor of the government and to rule against the government.

Human rights and freedoms are more likely plenty in limited governments. Under the constitutional democracy, the power of government is limited. As Max Weber had long observed, government can be bound by legal norms and limited by vested rights.[121] Indeed, the legitimacy of modern government rests on "authorization by the constitutional norms of the State."[122] It must be emphasized, however, that the independence of the judiciary depends partially, but not wholly on the nature, and hence the practicality of the separation of powers doctrine. Because the separation of powers can never be absolute in any political society, it cannot therefore entirely guarantee judicial independence.

However, the separation of powers may be categorized as weak or strong. It is weak in political systems with interrelated and interwoven relationships. It is none the less strong in those political systems with disconnected, distinct, and specialized disciplines. For instance, political systems that deny the judiciary financial (budget) autonomy and have judicial officials serving as members of the cabinet or legislature, must be considered weak in terms of the separation of powers doctrine. In these kinds of systems, the judiciary may not be free of political control and this also implies that judicial appointments are subject to the executive. This potentially leads to judicial weakening, hence lack of independence and impartiality.

Conversely, political systems which provide budget autonomy to the judiciary and enforce distinct institutions are perceived to be strong in terms of the separation of powers. In these systems, the judiciary is considerably free of political control and judicial appointments are more likely to be made through competent independent bodies. This inherently leads to judicial strengthening. It is this judicial strength that enhances a fair trial and adjudication because it buttresses both independence and impartiality. Other than the strength of the separation of powers, judges also need security of tenure as a quintessential guarantee for their individual independence. It is only in a political system with a strong separation of powers and security of tenure for judges is guaranteed that the fidelity to the rule of law may prevail. It should be mentioned that fidelity to the rule of law is one condition for the protection of fundamental rights and liberty against incursions by government powers.

[121] WEBER, Max. (1978). *Economy and Society: An Outline of Interpretive Sociology*. Roth, Guenther and Wittich, Claus (eds). Berkeley: California. University of California Press.
[122] Ibid, 644.

An independent and impartial tribunal is necessary for the dispensation of justice. This requires the absence of pressure, intimidation, and influence from other sources, particularly political, racial, ethnic, religious, and financial. The independence of the judiciary requires that both the institution of the judiciary and individual judges must be subject only to the constitution, and not subject to the direction by any other person or authority. Courts of law, therefore, while exercising their constitutional authority, have a duty to observe, respect, protect, promote, and indeed fulfil the procedural rights of the accused individuals. It is important to underscore the fact there were no radical national security laws on terrorism prior to the 9/11. This means that all judicial decisions on terrorism-related proceedings were made under the already existing laws as opposed to under the new counter-terrorism laws and policies. It turns out that the questions to which judicial decisions were required were mainly questions of law rather than questions of fact. The courts were simply required to ascertain and apply the appropriate legal principle (declare an authoritative precedent). Judicial decisions operated as proof of the law.

However, after the pre-9/11 era, new counter-terrorism laws and policies were introduced. The implication being that the courts were now confronted with new sets of facts. In the case of the courts being required to answer the questions of fact, they are more likely to have a wiggle room to develop "new law" in their judicial decisions instead of merely declaring the proof of the old law, which are considered destitute of the new facts. Such judicial decisions require an original precedent and that means judges do have some discretion with which to exercise *jus dare*, that is develop (make) the law.

The argument being made here is that in the pre-9/11 era, judges had limited discretion to develop new law or to develop counter-terrorism jurisprudence because they would merely make declaratory precedents to the already established and settled laws that were similar to those before them. It may also be argued that in the pre-9/11 era, judges lacked creativity in their judicial decisions because they had extremely limited discretion to develop original precedent on terrorism-related proceedings. An original precedent can only be made as a source of new law. The argument here is that the pre-9/11 judges presiding over terrorism-related trials were not yet exposed to new facts that were brought to the fore in the post-9/11 era. These new facts include and not limited to prolonged pre-trial custodial detentions, denial of *habeas corpus*, and arbitrary arrests on mere suspicion rather than reasonable suspicion. It may be emphasized that in the pre-

9/11 era, judges presiding over terrorism-related criminal trials had less "law-creating" power in respect of counter-terrorism jurisprudence as opposed to judges presiding over such cases in the post-9/11 era. Judges assume a law-creating power when an original precedent is being established under the new laws. This means that counter-terrorism jurisprudence could only be developed by original precedent, which was only possible in the post-9/11 era.

Criminal proceedings in Western democracies also follow two distinct traditions: accusatorial commonly practiced in common law jurisdictions and inquisitorial commonly practiced in continental law jurisdictions. The accusatorial procedure features two distinct adversaries and a judge as a neutral arbiter. However, in the continental tradition, the judge usually has a more active, somewhat paternalistic, role to play in the case. In any criminal proceeding, whether adversarial or inquisitorial, there are usually two sides that face each other: the accused individual and society. It can be argued that the two sides to the conflict (the individual and society) are more likely equipped with unequal power. The power of society [prosecution] is often well-organized and equipped relative to that of the accused.[123] This disproportioned power can only be balanced by an independent and impartial judiciary, which must ensure that the equality of arms principle is upheld throughout the criminal proceedings. Criminal proceedings in this case encompasses all the activities of State agencies, from the police to the courts of law. These activities include various stages: inquiry, investigation, charge, indictment, judgment, and appeal.[124]

It would be of great injustice to dwell with an excess of enthusiasm on the rights of the accused individuals, but forgetting the pain of the victims who suffer undeservedly from the grave crimes commissioned by terrorists. Although the European Union (EU) Member States have diverse cultural and legal traditions (i.e. common law and civil law),

Indeed, there could be several forces that shape judicial behavior. In certain cases, judges may want only to interpret the law by providing a more reasonable interpretation as possible. This allows them to adjudicate and apply legal principles or doctrinal positions on the basis of their legal merits. In some instances, however, judges would be interested only in making good public policy that is close to their interests. This makes them choose between alternatives on the basis of

[123] TRECHSEL, Stefan. (2005). *Human Rights in Criminal Proceedings*. Oxford University Press.
[124] Ibid, 5.

their merits as policy. Still, judges may seek to make good policy, but they define good policy in terms of outcomes in government as a whole. This might be viewed as strategic, because the judge is more interested in helping the government to secure the best policy outcome.

2.9.3 Judicial Independence in the Post-9/11 Era

Scholars argue that the 9/11 attacks on the U.S. soil invented a "War on Terror" (WOT) rhetoric which to some extent has influenced judicial decisions on human rights and terrorism-related cases. In Europe, in particular, "Post-9/11 case law demonstrates that the Court has permitted arguments arising from WOT rhetoric in some instances to widen the breadth of the margin granted to respondent States."[125] In the post-9/11 era, are courts still strong, powerful, independent and impartial enough, to decide terrorism-related trials based on legal considerations, and not necessarily on government policy? In what ways have terrorist threats affected the independence of the judiciary in Western democracies in the post-9/11 era?

Scholars contend that threats to judicial independence come primarily from the autocratic impulses triggered by global arrest (McCormack, 2021). For instance, threat to Western democracies as a result of international terrorism have made governments to develop 'autocratic' impulses while responding to such threats. While judicial independence promotes democracy, rule of law, liberty, freedom and peace, acts of terrorism and governments' responses tend to work contrary and, hence pose considerable threat to judicial independence. McCormack (2021) further observes that judicial independence normally faces a great challenge (threat) "during periods of high-level national security threats such as wartime" (p 37). McCormack argues that the independence of the judiciary has been sorely tested in the post-9/11 era of terrorist detentions and prisoner abuse cases.

The independence of the judiciary in the post-9/11 era should also be perceived as referring to the structural arrangement ensuring that both the judiciary and individual judges are capable of making decisions free from executive interference.[126] Judicial independence in this case is primarily necessary to secure basic human rights and impose constraints on governmental power.

[125] Richard Smith (nd). The Margin of Appreciation and Human Rights Protection in the „War on Terror": Have the Rules Changed before the European Court of Human Rights?
[126] Office of Democracy and Governance, U.S. Agency for International Development, Guidance for Promoting Judicial Independence and Impartiality 5 (rev. ed. 2002).

Weissbrodt and Hansen (2013) state that "the judiciary must be free from inappropriate interference with the judicial process by external actors (including prosecutors), and must have exclusive jurisdiction over issues within its competence" (p.310). Internal judicial matters, such as court administration and case assignment must also be a protected realm. Weissbrodt and Hansen (2013) further suggest that judicial independence and impartiality should "both seek to address the same concern: guaranteeing a fair trial by providing parties a tribunal in which the outcome is not predetermined" (p.312). Impartiality here refers to the biases of a judge. Individual biases of a judge derive from external influences (such as bribes or threats) and internal pressure (such as psychology or morality). Impartiality may, however, be violated both subjectively if a judge has an actual bias against a party to the case or objectively if an objective observer would find the appearance of bias.[127]

2.9.4 Judicial Independence in Times of Crisis

McCormack (2011) observes that judiciaries are likely to face challenges to their autonomy and authority when countries are themselves have faced challenges to national security and economic stability. He further contends that the judiciary is a critical actor or player in policy decisions and, hence the need for judicial independence becomes a major concern. He points out that contrary to the stereotype that judges appear to sit solemnly above the fray and detached from reality, in fact, judges themselves are aware of the need to maintain connection to the real world. An independent and impartial judiciary must have the desire to assert its role in maintaining the doctrine of the separation of powers in a democracy. Indeed, judges must at all times protect democratic processes and values.

Emergencies (i.e. high-level national security threats) present a dilemma to the judiciary. During such times, judicial independence becomes both a liability and an asset. It becomes a liability to the executive, but an asset to the rule of law. This is because an independent judiciary may become a possible impediment to the unlawful designs of the government. At the same time, an independent judiciary may be a possible cure to the violation of the rule of law. Judges should

[127] Suzannah Linton, Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers, 4 J. Int'l Crim. Just. 327, 328 (2006). For the latter, the appeals chamber in the ICTY stated that the appearance of bias may manifest itself in two ways: either the judge has a financial or proprietary interest in the outcome of the case or "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." Prosecutor v. Furundzija, No. IT-95–17/1-A, Judgment, ¶ 189 (July 21, 2000).

be aware that they are bound to be bear the consequences of their own decisions, which could either give them a tremendous degree of credibility or disrepute.

In emergency (i.e. a time when consolidation of powers by the executive is crucial for the survival of the polity), an independent judiciary is more likely to be faced by tension, especially when it is part of the state that faces emergency. However, in ordinary times devoid of emergency or security threats, the exercise of power by one branch of government is normally checked by the other branches in order to achieve and maintain a balance designed to mitigate the peril of dictatorship. Scholars argue that in times of emergencies, a unified, hierarchical structure of government (consolidation of power by the executive), rather than a cluster of independent agencies, is apparently crucial to deal more effectively with the impending national security threats (Reichman 2011).

McCormack provides an illustration of how judges in Western liberal democracies have responded during times of crisis. He gives an example of the United Kingdom and the United States judges in response to the so-called "war on terror" when they had demands made on them for deference to the judgments of the executive. The two statements hereunder bear the illustration. The first statement is an opinion by Lord Hoffman of the U.K. House of Lords and the second statement is a dissent by Justice Scalia of the U.S. Supreme Court:

The first statement:

There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom . . . . This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation…Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.[128]

The second statement:

America is at war with radical Islamists. . . . [Today's opinion] will almost certainly cause more Americans to be killed. . . . What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in .nonetheless. Henceforth, as today's

[128] A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [95]-[96] (appeal taken from Eng.).

opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.[129]

In an earlier era, the U.S. Supreme Court dealt with a military judgment that American security demanded "exclusion" of Japanese-Americans from the West Coast.[130]

Justice Jackson said in his dissent:

”I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional”.[131]

Evidently, we do find that Lord Hoffman and Justice Jackson both made their judgments on matters of legal standards that were quite different from the judgments of fact and expediency made by the executive party. It can be opined that judicial independence is implicated in the degree to which judges are willing to defer to the normative judgments of the executive as opposed to the factual judgments. As Justice Jackson said in Korematsu, factual assessments of the degree of risk are not determinative on the legal judgment.[132]

2.10 Challenges of Constitutional Interpretation in Times of Crisis

Eminent constitutional scholars, Zoltán Szente and Fruzsina Gárdos-Orosz talk of “new challenges in the world including various European countries” and mention terrorism threat as one of the biggest challenges (Szente and Orosz 2018, p.3). They argue that all constitutional courts and other high courts have some basic options in dealing with these challenges. For instance, constitutional courts have the option of using the existing and/or traditional judicial constructions to overcome those challenges. At the same time, constitutional courts may use doctrines and interpretive tools based on the well-elaborated and permanent jurisprudence to survive those challenges. Moreover, they could also modify some well-established practice or adjust it to the new circumstances. In addition, constitutional courts may also seek essentially new approaches,

[129] Boumediene v. Bush, 553 U.S. 723, 827-32 (2008) (Scalia, J., dissenting) (internal citations omitted).
[130] *Korematsu v. United States*, 323 U.S. 214, 217 (1944)
[131] Ibid.
[132] Korematsu, 323 U.S. at 244-46. In Korematsu v. United States, 323 U.S. 214, 217 (1944), Justice Black's majority opinion pretended that all it needed to decide was exclusion of certain persons from certain locations, a purely security-driven concern. Id. at 223. That avoided the reality that the program in question was a forced relocation on the basis of race, later condemned by human rights conventions and ultimately known as part of "ethnic cleansing."

abandoning or reinterpreting some constitutional principles and practices. This clearly indicates that courts and or judges enjoy judicial discretion. This discretion can be used by judges to either remain impartial or become partial in their decision making. "Courts inevitably have had to reconsider their own older ideas and legal doctrines and arguments in their case-law that had been elaborated to handle other challenges in the past decades" (Szente and Orosz, 2018, p.4). Have the 'new challenges' in the various European countries changed the constitutional jurisprudence of European and other high courts, or not?

As new national security challenges emerge in Western democracies, constitutional systems evidently must face, from time to time, some special challenges. These challenges are products of the constantly developing societies. Scholars contend that constitutional justice evolves along this change as it is the main function of the constitutional courts and other judicial bodies conducting reviews to reconcile the opposing societal interests and ambitions with established standards of constitutionality or in particular cases arbitrate these conflicts (Szente and Orosz, 2018, p.10). Despite constraints on liberty brought about by expanded national security laws that are perceived to undermine fundamental rights, it is important to point out that the constitutional review of legal acts, the adjudication of individual complaints against arbitrary legislative, governmental or judicial actions, are some specialized legal instruments that serve to redress executive overreach.

In times of national security threats, the basic constitutional question is how to keep a balance between the competing interests of safeguarding individual (and group) rights while at the same time increasing the effectiveness of law enforcement in fighting terrorism. Scholars contend that despite crisis challenges constitutional courts may not escape from the responsibility to adjudicate and demonstrate justification and proportionality of their applied methods and legal tools in their constitutional adjudication (Szente and Orosz, 2018). But are we likely to see more of judicial deference or political loyalty in times of crisis? Interestingly, for example, Zoltán Szente and Fruzsina Gárdos-Orosz conducted a study on the Hungarian Constitutional Court's role in tackling crisis situations and found that crises situations tend to eliminate constitutional control, and, thus handing over excess power to government (special empowerment). Although Zoltán Szente and Fruzsina Gárdos-Orosz provide an account of the Hungarian judicial system in times of public fear, it is reflective of other democracies as well.

It is indisputable that Hungary has never been majorly directly affected by terrorism and inland security compared with France, Britain or Germany. Since 2010, only two mild incidents have been reported. The first case goes back to the 2000s, when the secretly operating extreme-right group 'Arrows of the Hungarians' National Liberating Army' committed a number of violent actions against Hungarian politicians and other public figures, and against Roma and Jewish people and communities (Szente and Orosz, 2018). Although the trial of the suspect has been ongoing, since 2011, there has been no links established to international terrorism. The second relevant case was the trial of one Ahmed H. He faced trial for terrorism, which allegedly occurred at the height of the 'migrant crisis in Hungary. This incident engendered wide ranging international attention and strong condemnation. Official charges indicate that the defendant incited the crowd waiting for admission at the Hungarian–Serbian border to violence. He is alleged to have joined the violence that occurred in September 2015. Szente and Orosz (2018) argue that although "neither of the two said cases have been closed so far, the latter case served as a justification for the Government to submit a new constitutional amendment on the 'crisis situation caused by a terrorist threat', which was adopted by Parliament" (p.100).

In Hungary, the constitutionalisation of 'terrorist danger' is said to have eliminated the constitutional control and ceded power to the Government (special empowerment) in emergency situation. This has been announced by the Parliament on account of a terrorist attack or any risk or crisis related to terrorism (Szente and Orosz 2018). For instance, one Hungarian judge of constitutional court is said to have asserted that:

"Constitutional adjudication is not independent of time and space. It must keep the pace with the changing conditions. The same standards that were developed and used for law-making by the Constitutional Court under stable […] circumstances, cannot be invariably applied to different historical conditions. Otherwise, some measures could become dogmas, which would paralyze the operation of the legislature, the government, or even the system of rule of law, and it would make it impossible to handle the [economic] crisis."[133]

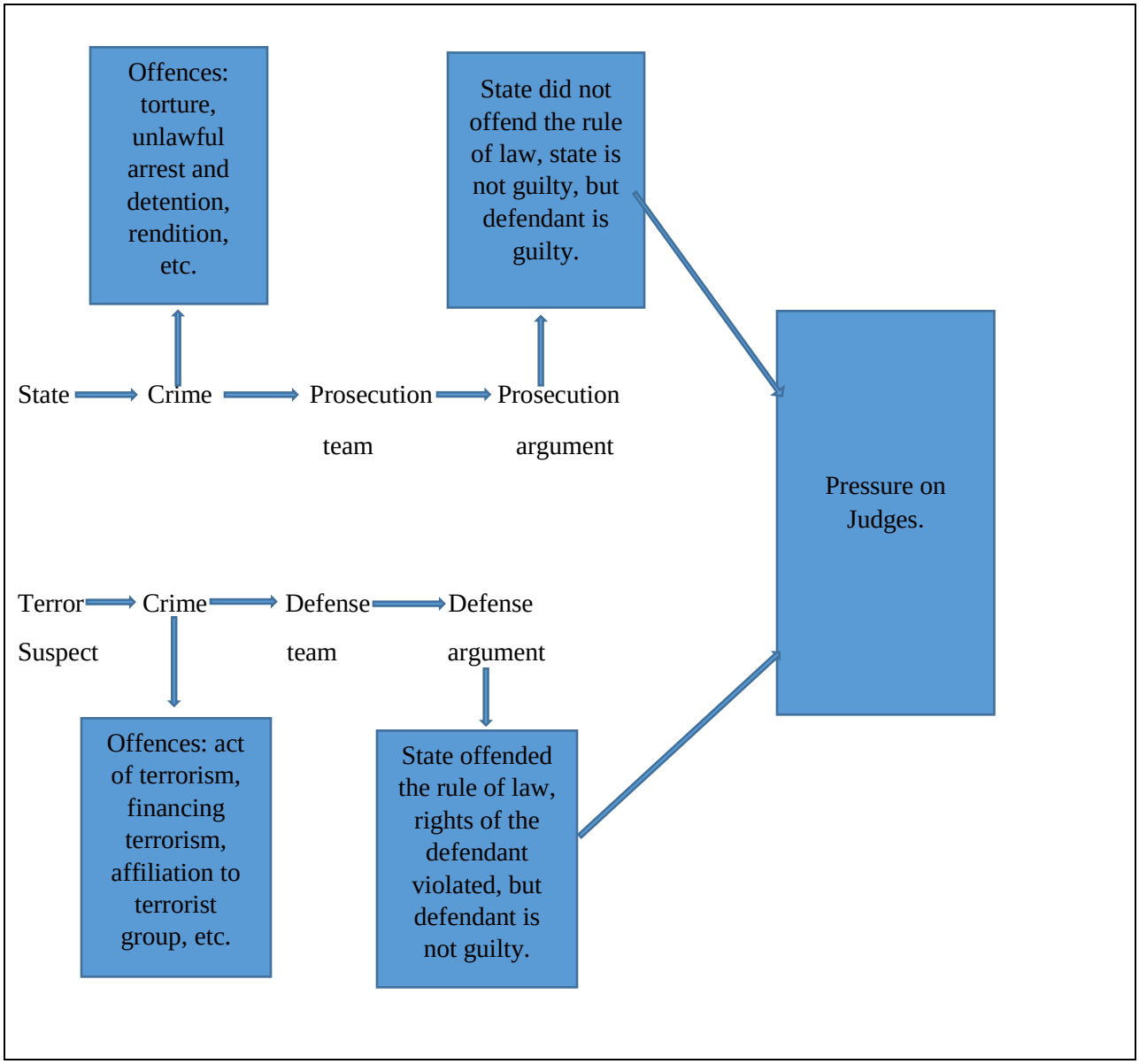
The above confession by a Hungarian constitutional judge is a clear manifestation that crises situations are more likely to affect how judges interpret the constitution. Figure 2.10 below demonstrates the challenges judges face when interpreting the law, especially when the

[133] Jogi Fórum, 2014. május 19. http://www.jogiforum.hu/interju/122.

government come to court with unclean hands. The assumption being made is that in times of high-level national security threats, the government is likely to undermine the rule of law, infringe upon human rights, employ torture in some instances, frustrate due process, and detain suspects for indefinite period of time without producing them before a public court for judicial determination. When courts are confronted with such unclean hands, judges are likely to find it very difficult (i.e. will be under pressure) interpreting the law, especially in times of high-level terrorist threats.

Since the new expanded national security laws tend to undermine the rule of law, the government party (prosecution team) tends to come to the court of justice with criminal baggage as well. It is not just the terror suspects that are brought to courts of justice with terrorist crime baggage. The state also come to court with its own crime baggage – undermining the rule of law. Figure …below is an illustration of the criminal baggage that the state carries to court while charging suspects of terrorist crimes. 'He who comes to equity must come with clean hands'.

Figure 2.10 Pressure on Judges When the State Comes to Equity with Unclean Hands.



Source: author.

Figure 2.10 above is a clear indication that the pressure on the judiciary and judges is usually fomented by the executive officials and the legislators. Both the executive and legislators would normally make public statements to the effect that the government has put all the necessary machinery and mechanisms in place to effectively deal with any threat of terrorist attacks. They

would make the public to be aware that when it comes to the problem of dealing with terrorist threats, law enforcement agencies are well equipped to respond to terrorist criminals and the national security law has been expanded to effectively respond to such terrorist threats. In most cases, both the executive and legislature would try to convince the public of their decisiveness in terrorist threat intervention. Their aim is usually to gain positive approval by citizens and the two political arms are responsive in addressing national security threats. However, the judiciary does not have the latitude to make public statements and tell citizens the role that it plays in responding to national security threats. The judiciary only speaks its mind from the bench when making judgments.

The perception usually created by both the executive and the legislature is that when police arrest terror suspects, the judiciary must do its best to convict the suspects (defendants). Such perceptions are sometimes uncritical of the criminal justice system. It makes the criminal justice system look like a conveyor belt whereby terror suspects get arrested, investigation is conducted, suspects are charged and prosecuted, and then the courts of justice convict and make judgment leading to custodial sentencing. The general public has also been made to uncritically believe that the criminal justice system is some conveyor belt. The implication then is that if terrorist defendants are arrested and charged in court and then later freed by court, then judges are to blame for abetting terrorist offences. However, for the judiciary and, hence judges, the criminal justice system is so complex. It must be guided by the rule of law and not by the will of the state.

Courts handling terrorism-related criminal trials in the post-9/11 are operating under a new set of rules (different ball game) due to two main reasons. Firstly, due to the newly introduced counter-terrorism laws and policies, which give rise to new questions of fact. Secondly, due to the fact that the new laws and policies have deprived the courts some authority. The judges are now presiding over cases in an era that has made some criminal justice institutions, particularly the investigating and prosecution agencies, become overzealous in their attitudes for duty, as opposed to their zealous attitudes during the pre-9/11 era. The courts of justice must be uniform and judges must ensure that the equality of arms is observed and respected. This can only happen by strictly observing the fixed principles which constitute the rule of law. By conforming to publicly declared principles, the administration of justice then becomes protected against the improper influence by

other political actors. Judges in their administration of justice must relay to the public at large, a confidence in judicial decisions.

CHAPTER THREE

METHODOLOGY

3. Introduction

This chapter is primarily concerned with research methods in comparative law. The study begins by exploring the importance of comparative legal research and then implicitly poses four fundamental questions with a view to linking the study's research questions to research design. Firstly is the question of what data is to be collected? Secondly is the question of where will data be found? Thirdly is the question of how will data be collected? Fourthly is the question of how will the data collected be analyzed? The term methodology as used in this chapter refers to techniques or group of methods employed in this particular investigation and inquiry (Hutchinson, 2013).

I must submit, however, that there was a heavy linguistic demand that came with the pursuits required for the present study, particularly the legal inquiry in Germany and France. Access to primary sources of law and policy in these countries required a professional language interpreter in both languages. The study, however, first used secondary sources as a first stepping stone before diving into primary sources, which were mainly in German and French languages. The study partly drew on scholarly legal writing (work) originally done in German and French languages, but translated into English by legal scholars from the two countries. But this was only partly useful in providing relevant information that actually led me to the main (primary) sources, which I had to use technology (language translator apps) and sometimes human translators to fathom out.

3.1 Comparative Legal Research

The idea of comparing laws (comparative law research) has attracted several debates and criticism among legal scholars. This is because some scholars advance the argument that comparative law is just a field of law and should not be treated as a method of comparing laws. Is comparative law a subject or simply a method? Clearly, this question shows that there is controversy and some level of difficulty in understanding exactly what comparative law entails.

For instance, a French lawyer and academic, Roland Drago, observes that comparative law is "an intellectual discipline which allows the jurist to broaden his field of research and to increase the knowledge of the foundations of his own legal system."[134] However, Drago is quick to add that comparative law cannot be just an academic subject. It must translate into concrete consequences, which allows for the influence of laws on each other. Here, we can say that Drago views comparative law more than just an academic discipline, but also as a process of influencing other laws.

However, there are other scholars who view comparative law as a method in legal research. One of the leading text books on comparative law "*An Introduction to Comparative Law*" by Konrad Zweigert and Hein Kötz, and translated by Tony Weir, observes that "there has been very little systematic writing about the methods of comparative law". As a consequence, the authors go on to argue, that even today, "the right method must largely be discovered by gradual trial and error". The authors argue that even the highly "experienced comparatists have learnt that a detailed method cannot be laid down in advance". They contend that, all that can be done, "is to take a method as a hypothesis and test its usefulness and practicability against the results of actually working with it" (Zweigert and Kötz, 1998, 33). Furthermore, the authors argue that the most appropriate approach in comparative law should lead to the functional approach, whereby similarity between legal systems should be the object of comparison.

In his article on "*Methodology of Comparative Law Today: from paradoxes to flexibility*", Husa (2006) advances the idea that the comparative study of law should not be overtly normative, and rigid since that would make it engender paradoxical positions found within the methodological debate of comparative law and comparative legal studies. Husa instead, advocates for a common sense based flexible understanding of comparative law methodology. His argument makes suggestions for a more open way by which to conceive methodology in comparative law. He adds that comparative law methodology should be "capable of evading some of the problems found at the extreme ends of the methodological debate between functionalistic and culturally/ contextually-oriented schools of thought."[135] Husa defends his position and makes it clear that

[134] See Drago, R (2003) 'Droit comparé', in Alland and Rials (2003), p. 45.

[135] https://www.persee.fr/docAsPDF/ridc_0035-3337_2006_num_58_4_19483.pdf, p.1094. Retrieved on April 27, 2021.

there should be a multidisciplinary teamwork in comparative study of law. It is important to note, however, that the flexibility in understanding methodology that Husa talks about, neither means nor equates to an acceptance of an 'anything goes' methodology in the Feyerabendian sense.

Paul Feyerabend is known for his most hilarious remarks about scientific methods. In his work "*Against Methods*" (1993), Feyerabend contends that "To say: 'the procedure you used is non-scientific, therefore we cannot trust your results and cannot give you money for research' assumes that 'science' is successful and that it is successful because it uses uniform procedures. The first part of the assertion ('science is always successful') is not true, if by 'science' we mean things done by scientists - there are lots of failures also. The second part - that successes are due to uniform procedures- is not true because there are no such procedures" (p.2). He also criticizes science as archaic. He argues precisely that "Science is an essentially anarchic enterprise: theoretical anarchism is more humanitarian and more likely to encourage progress than its law-and-order alternatives" (p.9). He further argues that "Neither science nor rationality are universal measures of excellence. They are Particular traditions, unaware of their historical grounding" (p. 214). However, Feyerabend agrees that comparison is possible as a method, but only under simple cases. More precisely, he contends that "Finally, the kind of comparison that underlies most methodologies is possible only in some rather simple cases. It breaks down when we try to compare non-scientific views with science and when we consider the most advanced, most general and therefore most mythological parts of science itself (p. 164). The aforementioned skepticism by Feyerabend has, however, not gone without criticism and critique.

In a more positive light, Barreau (1998, pp.51–62) and Granger (1995, p.45) contend that there is "science". They claim that there is no science without method. They further argue that in "science", it is more a question of "methods" rather than method. Geoffrey Samuel in his work "*An Introduction to Comparative Law Theory and Method*", provides a notable collection of scholarly views on the distinction between "method" and "methodologies." He illuminates the views of other scholars who contend that "method' is seen as a 'manner of conducting thought'. However, he makes an important observation that such "a general description does not really capture the complexity of methodological issues in the social sciences" (Samuel, 2014, p.2). The complexity in methodologies is further compounded by whether one is looking for the cause (explanation) of a social phenomenon, or for an interpretation (understanding) of a social

phenomenon. The other important issue that arises is whether or not a phenomenon is to be explained or understood by its social function. These angles or perspectives thus, engender different approaches, which entail different methods. Samuel seems to espouse the views of other scholars, which collate in the agreement that in the sciences, methodology has to be seen as a reflection on how methods should be constructed and how they should lead to knowledge that has an objective value. He makes a strong argument that method and methodology entail not just reasoning techniques such as induction, deduction and analogy, but equally involves schemes of intelligibility, theory and paradigm orientations.

The distinction between method and methodology is also well captured by Corten (2009, p.14). He views "method" as "the means by which one undertakes scientific research. Secondly method and methodology are to be distinguished from the substance of a discipline; thus, to teach the methodology of international law is not to teach international law itself. Thirdly, despite this separation, the choice of a certain method implies the choice of a certain theoretical approach. Consequently, the study of methodology is not just, as we have mentioned, situated within the realm of epistemology; it is also related to theory. It thus means different theories can lead to different methods.

Despite the clearly demonstrated controversies regarding comparative law research, the present study subscribes to the idea that any form of scientific knowledge should have an objective value. The present study, however, employs a comparative study approach by examining a comparative view of legal systems, and particularly the criminal justice systems. The present study is designed to compare the potency (effects) of terrorism laws on the judicial independence and fair trial before the 9/11 and after the 9/11. It is important to examine the effectiveness of judicial systems in terms of judicial outcomes before the 9/11 and after the 9/11 based on the performance of different criminal justice functionaries. The focus is primarily on the judicial systems response to terrorist threats in Western democracies. As the British poet Rudyard Kipling (1865-1936) once implied, "without comparing there is little to gain from a description only" (see Pennings et al., 2006, p.6). The present research employs "pragmatic judicial trials" (case laws) in its design to assess the realities of judicial independence and fair trial practices.

In order to conduct a comparison, the present research compares two periods in history. The first phase is denominated as pre-9/11 era and stands for periods of low-level terrorist threats.

The second phase is dominated as post-9/11 and stands for periods of high-level terrorist threats. By analyzing the two varying periods (low-level and high-level) of terrorist threats, we are able to assess the temporal effect of terrorism laws and provide evidence in support of the study's theoretical assumptions.

3.1.1 What is the study comparing?

It can be argued that comparative law is important as it serves the purpose of comparing legal rules (norms), concepts, categories, and institutions in one system with those in another system. On account of this, the present study is mainly comparing the judicial systems of Western democracies. The primary goal is to establish the effects of terrorism laws and expanded terrorism laws (expanded national security laws–counterterrorism laws) on the judicial systems. More broadly, the impact of terrorist threats on the judicial systems of Western democracies forms the basis of this research. The assumption being made in the present research is that before the 9/11 terrorist attacks on the U.S. soil, justice systems in Western democracies were optimally working and delivering optimal justice outcomes. The courts were perceived to be fair, impartial and independent. However, after the 9/11 terrorist attacks, governments in Western democracies developed expanded national security laws (counterterrorism laws) and these laws are theoretically suspected to be negatively impacting on judicial systems. The present research therefore takes this temporal advantage (i.e. before 9/11 and after 9/11) to compare and establish the effects of terrorist threats on judicial systems. This comparative approach and its applicable methods is not only theory driven, but also driven by the study's research questions. The research questions are meant to guide this study on what, when and how to compare.

Knowledge of different legal systems (systems of justice) provides point of comparison and contrasts. For example, techniques used in one country to combat crimes such as terrorism might be different in another country. In some cases, one country might adopt and adapt another country's technique. Another point of contrast might be in the judicial system. For example, while judges mainly play a passive role in the British and American trial processes, some European legal systems have judges playing an active role in the trial process (i.e. Germany, France, Italy and Hungary). Also, while some European legal systems might have private citizens as lay judges, American legal system has juries as a good comparison. Moreover, while a majority of western democracies have written constitutions (basic law/fundamental law), Britain has unwritten

constitution. Different countries may also have different criminal code or criminal procedure. All these differences predict different criminal justice practices.

3.1.2 Why Compare?

Why compare? One goal of comparative studies is to extend our knowledge of people, culture and countries beyond our own group (Reichel, 2018).[136] This provides researchers an opportunity to understand similarities and differences of the subjects and objects of study. As Santayana puts it, even as our feet are planted in our country, our eyes should survey the world.[137] Comparative legal studies provide an international perspective, hence it is important to highlight its value. Since contemporary technology has made global communications network possible, the world has indeed become small with shared common problems, for example, terrorist threats. Comparative studies therefore have both local and universal benefits. Citizens and countries are increasingly interdependent, and hence the need to compare their similarities and differences in terms of culture, values and experiences, which leads to establishing points of contrasts. The present study is of the view that comparative law can be developed so as to include a comparative view of the legal position in other jurisdictions.

In his illuminating response to why comparing is important, Yves Chevrel observes that to compare is indispensable to the progress of knowledge. He adds that it is important to compare by putting together several objects or several elements of one or more objects in order to examine the degrees of similarity so as to be able to draw conclusions from them that the analysis of each of them alone would not necessarily have allowed one to draw (Chevrel, 2006, p.3). It is important to add that comparative research asks, for instance, how different legal systems and legal cultures have addressed similar problems that our law faces, and with what degree of perceived success or failure? Also, since terrorist threats have really become analogous issues in all the four Western liberal democracies under the present study, comparative analysis can therefore be a particularly useful for considering the desirability of expanded national security laws as a response to forms of terrorist threats in the four jurisdictions.

[136] Reichel L. P. (2018).
[137] Santayana, G. (1905).

A section of scholars (i.e. Salter and Mason 2007, p.183), opine that "comparative analysis can be a particularly useful methodology for considering the desirability of introducing forms of legal regulation that have been successfully introduced in other jurisdictions as a response to analogous issues." In other words, Salter and Mason are indicating that researchers in comparative law (comparatists) are now able to use comparative law as a methodology for understanding how different pieces of legal legislations (statutes) meant to address or respond to a particular social problem (e.g. terrorist threats), function in different jurisdictions and whether or not they are successful in their implementation. Indeed, the only reason the present study is conducting a comparison across the four mentioned liberal democracies is to understand to what extent the expanded national security laws (counterterrorism laws) are capable of containing or mitigating terrorist threats in Western liberal democracies. Salter et al. make another observation that "comparative approaches to the conduct of dissertation research have formed an increasingly popular option for many dissertation students, particularly as access to the cases, statutes and academic articles of other legal systems and cultures have become available online" (Salter et al., 2007, p.182).

Although access to cases, statutes and even constitutions have become available online, some of them are in different (i.e. native) languages, and that means that researchers still need professional translators in order for them to be able to understand the proper legal meanings of some legal principles and doctrines as applied in different jurisdictions. Moreover, Sartori (1991, pp.244–5) points out that we need to compare in order to control the observed units of variation or the variables that make up the theoretical relationship. In other words, what this study is attempting is to identify the necessary and sufficient conditions under which the relationship between terrorist threats and harm to fair trial practices and judicial independence occurs in reality. A 'true' comparison may therefore require that a more explicit relationship exists between the research questions and research design in order for the comparison to yield positive analytical results.

3.2 Approaches in Comparative Law

One scholar Mark Van Hoecke points out that there are different methods that can be employed in conducting comparative legal research. He further argues that all these different 'methods' are not mutually exclusive and therefore it is "even possible to combine all of them in one and the same research" (Hoecke, 2004, p. 9). It will be demonstrated in the present research

that comparative legal research may use different approaches and each one of the approaches has special limitations and that means that an empirically reliable comparative study of law will often require a combination of different methods to be used in cross-level comparison as is the case with the present study. It is also important to add that mere differences between different legal systems at the level of concrete legal rules or regulations may become irrelevant if they happen to share enough structural commonalities and, hence this makes comparison easier.

One of the leading comparatists, Mark Van Hoecke argues that legal scholars have been educated with a firm doctrinal framework for their own legal system, but they lack such an overarching framework for comparative research. He opines that comparative legal research still faces both "epistemological and methodological problems" (i.e. Hoecke, 2004, p.165). The main epistemological problem revolves around the question: What kind of knowledge do we need for carrying out comparative research? Put another way, what are we comparing, and what should we take into account when doing so? The answer to the first part, on what we are comparing can be answered by the present study in the fashion that it is mainly comparing different legal systems. It is important to note that we can only compare different legal systems by objectively and neutrally describing the law. More importantly, however, Hoecke also emphasizes on systematizing the law. He defines describing the law as "identifying valid legal sources and determining the content of the rules they contain. Systematizing means the integration of all these sources and rules into one coherent whole, through interpretation and theory building" (p.166).

3.2.1 Functional Approach

A section of legal comparatists scholars argue that the functional approach is particularly appealing to comparatists undertaking a micro comparison in that it allows for the bringing together of two quite different objects by making reference to their practical uses and purposes. Indeed, in comparative legal studies, "a functional approach 'focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events' and as 'a consequence, its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations."[138] As Mark Van Hoecke

[138] Michaels, Ralf. (2006). 'The Functional Method of Comparative Law', in Reimann and Zimmermann (2006), p. 339.

observes, the functional method "offers one concrete guideline in that it suggests to focus on (common) legal problems and legal solutions in the compared legal systems, rather than on the (diverging) rules and doctrinal frameworks" (Hoecke, 2015, p8).

Michaels (2006) correctly observes that functional approach focuses not on the rules but on the effect of those rules. For instance, in this research, considerable attention is paid to the effects of expanded national security laws (counterterrorism laws) on the justice systems. The 'events' as referred to by Michaels could correctly entail terrorist events that the present study is concerned with. Judicial decisions that Michaels refers to correctly capture judgements delivered as a result of terrorism-related trials. Since the present study uses judicial systems as its unit of analysis and case law (judicial decisions) as its unit of observation, one would easily believe that the functional approach is more appropriate for this study based on the arguments made by a section of legal comparatist scholars. This approach, indeed, looks more attractive given that the judicial decisions or case law are a response to the terrorism-related cases (i.e. social problem in society).

The functional approach has often been couched under the functional-institutional approach and can be easily applied to answering the following question: which institution in system Y performs an equivalent function to the one under study (survey) in system X? By asking this particular question, the idea of functional equivalence then easily emerges. Since the study has identified terrorist threats as the main social problem that cuts across all the liberal democracies under the study, it is only prudent therefore to turn to the institutions (i.e. Rule of Law and legal instruments) that deal with it and then do a comparison of how those institutions function in solving similar social problem that different societies are faced with. It is important to mention, however, that legal institutions and systems are also embedded in the cultural matrix and that sometimes make comparisons a little more difficult.

It is important to point out that the functional approach is not bothered about the concepts of legal systems. Rather it focuses more on the institutions and it requires these institutions to be broken down into disparate parts or independent legal institutions so that they can serve as a single unit. For instance, the researcher cannot simply search the British law on counterterrorism as a single concept or institution. The functional approach method does not operate like that. Rather, it requires the researcher to ask the question: what functions does the British counterterrorism law

fulfils in common law systems? After posing such question, then the researcher can now turn to see how such functions are fulfilled in Germany, since both Britain and Germany practice different legal systems (i.e. common law and civil law, respectively). Counterterrorism laws in those countries are thus assumed to tackle similar social problems and produce certain solutions (outcomes) to the problem. Probably, the most attractive or appealing thing about the functional approach is that it makes institutions, even those doctrinally different ones, comparable as long as they are functionally equivalent and also as long as they fulfil similar functions in different legal traditions.

The functional approach is not, however, innocent of criticism. The criticism provided by the present study is that the functional approaching is lacking in schemes of intelligibility. Schemes of intelligibility in this case refers to the way natural or social facts are perceived and represented by the researcher. Although functionalism may be said to be a scheme, which can be used to analyze a phenomenon or social facts, it only concerns with what a particular independent institution does. It thus makes an independent institution the social end by providing the knowledge of that particular institution. Perhaps there could be a better (an alternative) approach to the functional method. For instance, a researcher would consider structuralism as a better approach. Structuralism allows the researcher to focus on the structures that are within the institutions that are being observed. These structures are important because they interrelate or they can be a collection of separate legal entities that form a functionally effective legal system. For instance, the present study focuses on the criminal justice systems as its unit of analysis. The structural approach is capable of allowing the present study to consider different structures of criminal law systems for analysis.

Criminal law systems have various functionaries: police department, investigating and prosecution department, judicial branch and the prisons department. All these separate (independent) functionaries or entities (institutions) can be collected together to form a criminal justice system, which can be intelligibly analyzed. The creative interaction of all the aforementioned criminal law functionaries is thus crucial for the analysis of results for the present study. Since the present study is mainly interested in the justice outcome, it is important to mention that such an outcome is a product of interrelating elements as opposed to one independent element. It is important to also point out that since the present study makes inquiry into the factual

foundation of social reality (problem of terrorism and criminal justice outcome), structuralism approach seems to provide a model that supposedly captures that social reality.

In a way, the present study considered that both functional and structural approaches can be intelligibly meshed to develop a more effective model for understanding the complexity of terrorism threats and criminal justice outcome. The present study is of the opinion that all law consists of persons, things (property) and obligations, and thus, only the structural approach takes cognizant of this fact. But the present study correctly observes, the two approaches (functionalism and structuralism) do not necessarily operate independently, for they can combine to form a relevant and a more effective methodological approach. Hoecke himself has also criticized the functional approach as inadequate. Hoecke (2015) criticizes functionalism as an approach that typically applies only at the level of micro-comparison. He contends that from a broader perspective, a more structural analysis of parts of legal systems may be more useful.

3.3 Main Variables

In the present research, the primary independent variable is 'terrorism laws' while the dependent variable is judicial independence and fair trial. In regard to my independent variable (terrorism laws), I induced variation and made it a binary variable. Explicitly, I operationalized my independent variable in binary terms as: terrorism laws and expanded terrorism laws (counterterrorism laws). Terrorism laws is used interchangeably as national security laws while expanded terrorism laws is used interchangeably as expanded national security laws or counterterrorism laws.

In respect of my dependent variable, I make the dependent variable a composite in the sense that it is composed of two elements (judicial independence and fair trial). The assumption here is that the two elements co-exists and one could probably say that fair trial is subsumed in judicial independence. I also further induced variation in the operationalization of my dependent variable. In order to operationalize my dependent variable, I denominated it in ternary terms as: fair, impartial and independent. The opposite would be less fair, less impartial and less independent.

3.4 Research Design

3.4.1 Quasi-Experimental Design

The main reason for employing this particular research design is to enable this research produce results that are valid, reliable and plausible, based on the study's research questions. Since we are looking at specific Western democracies (U.S., U.K, German and France), it is not possible to randomly assign these countries into two groups as would have been the case in a pure experimental design. The point to note here is that the present research is not interested in analyzing these countries *per se*. Rather, the present research is interested in analyzing the judicial systems in these countries. The first thing is to be able to divide judicial systems in these countries into two phases.

The first phase focuses on the terrorism-related justice outcomes by these judicial systems prior to the 9/11 (pre-9/11 era). It will be illustrated that this phase is also known as "low-level" terrorist threat. The second phase focuses on the terrorism-related justice outcomes by these judicial systems after the 9/11 (post-9/11 era). This phase is also denominated as "high-level terrorist threat. The essence of examining these judicial systems in two phases is based on a temporal (time) effect whereby one phenomenon happens first then followed by another phenomenon. The assumption here is that an era of low-level terrorist threats (pre-9/11) happened first followed by another era of high-level terrorist threats (post-9/11). The other assumption is that there were already terrorist laws existing in the pre-9/11 legal systems of the four Western democracies under the study. Then these terrorist laws were expanded and became extant in the post-9/11 legal systems of the four Western democracies under the study.

The "quasi-experiment" is basically a process in which two similar groups (i.e. judicial systems) receive different treatments (see Gerber and Green, 2012). In essence, we are primarily interested in understanding the practicality of judicial independence and fair trial before the introduction of the new security laws on terrorism (pre-9/11), and after the introduction of the new security laws (post-9/11). We are interested in determining whether the new security laws on

terrorism that were introduced after the 9/11 had any significant effect on the judicial independence and fair trial practices in the judicial systems of Western democracies.

In this particular quasi-experiment, the new counter-terrorism laws and policies are referred to as the treatment (i.e. security policy intervention) administered by the interventionist state. Since phase one of the grouping of these countries lacked the treatment (security policy intervention), we refer to it as the "comparison" group. In a quasi-experimental research design, the comparison group is the group of research participants or subjects that, for the sake of comparison, does not actually receive the treatment or intervention given to the intervention group. Comparison group participants are typically not randomly assigned to their condition. But since phase two of the grouping actually experienced the treatment (security policy intervention), we refer to it as the "intervention" group. We are then going to compare the two groups (phases), pre- and post- in order to obtain certain answers to reach some conclusions on the influence of new security laws on terrorism on judicial independence and fair trial.

The units of observations that we shall have to analyze will draw on a set of case laws on terrorism-related criminal trials. In essence, we expect to determine the extent to which judicial systems are likely to respond to terrorism-related cases and the consequences thereof. Because of the harsh counterterrorism laws and policies, there are reasons to suspect that these new national security laws on terrorism are more likely to influence judicial independence and fair trial. It is plausible to argue that the new security laws have a particular magnitude of influence because of the coercive nature of their enforcement and the infringement on human rights that they cause. This is because counterterrorism laws and policies is an intervention that donates more power to the executive at the expense of liberty and the rule of law. However, it should be reasonably expected that the effect on judicial independence and fair trial may vary with country's specific characteristics.

The advantage of this research design is that it provides for temporal precedence (time order). This enables us to clearly determine the influence of new security laws on terrorism in post-9/11 era as opposed to pre-9/11 era, assuming that such laws never existed in equal measure (strength) in the pre-9/11 era. The other remarkable advantage of this design is that it enables us to assert the covariation of the relationship. For instance, the following logical argument comes into play. If X, then Y; and if not X, then not Y. This may be interpreted to mean, if the state

administers new security laws on terrorism, then judicial independence and fair trial are likely to be undermined. However, if the state does not administer new security laws on terrorism, then judicial independence and fair trial are likely to remain strong. We are essentially assuming that governments of Western democracies acquired more powers in the post-9/11 era, but had less (limited) powers in the pre-9/11 era. Another notable advantage of this design is that it enables us to rule out other plausible alternative explanations as to the weakening of judicial independence and fair trial practices. In other words, it has the advantage of using two groups with similar characteristics for comparison and contrast. The comparison group is comparable in every way possible to the experiment group, except that it does not experience new security laws on terrorism.

Although there could be other inherent historical, cultural, social, and hence structural differences in the political systems of Western democracies, it is important to package them under similar characteristics, for purposes of this study. This is necessary for purposes of internal validity or the approximation of the validity of results produced by the study. For instance, tables 3.4.1a and 3.4.1b below provide a stylized example of similarities in characteristics that make the four countries suitable candidates for comparison. We are therefore basically dealing with "oranges" rather than a mixture of oranges and apples. All the four countries in tables 3.4.1a and 3.4.1b below are denominated as: Western democracies (West. dem), Constitutional democracies (Con. dem), support Judicial independence (Jud. ind), support Human rights (Civil. lib), support Fair trial, experienced terrorism in pre-9/11, did not administer Expanded (Exp.) national security laws on terrorism in pre-9/11, experienced terrorism in post-9/11, administered Expanded (Exp.) national security laws on terrorism in post-9/11. All these stated characteristics appear constant and common in all the four countries in each phase of the grouping.

Table 3.4.1a Countries' general-similar characteristics in pre-9/11 era

Country	West. dem	Con. dem	Jud ind.	Civil lib.	Fair trial	Terrorism in pre-9/11 era	Terrorism in post-9/11 era	Exp. security laws on terrorism in post-9/11 era
United States	yes	yes	yes	yes	yes	yes	yes	no
United Kingdom	yes	yes	yes	yes	yes	yes	yes	no
Germany	yes	yes	yes	yes	yes	yes	yes	no
France	yes	yes	yes	yes	yes	yes	yes	no

Source: author.

Table 3.4.1b Countries' general-similar characteristics in post-9/11 era

Country	West. dem	Con. dem	Jud ind.	Civil lib.	Fair trial	Terrorism in pre-9/11 era	Terrorism in post-9/11 era	Exp. security laws on terrorism in post-9/11 era
United States	yes	yes	yes	yes	yes	yes	yes	yes
United Kingdom	yes	yes	yes	yes	yes	yes	yes	yes
Germany	yes	yes	yes	yes	yes	yes	yes	yes
France	yes	yes	yes	yes	yes	yes	yes	yes

Source: author.

From the above tables, we are able to manipulate the two groups. The group in table 3.4.1a is called the control group, while the group in table 3.4.1b is known as the test (experiment) group. Both groups are virtually identical, except that they receive different values of the independent variable (i.e. terrorism laws-intervention-treatment). The group in table 3.4.1a does not receive this treatment-intervention. Only the group in table 3.4.1b receives the treatment-intervention. By design, the independent variable is the only way the two groups differ. It is the only variable that the variation is induced so that it differs systematically across similar characteristics of the two groups. It is the one that is intended to account for the observed judicial systems outcomes. It may be predicted that judicial systems outcomes (i.e. dependent variable) with regard to terrorist trials

in pre-9/11 era are more likely to differ with those of post-9/11 era. The comparison thus seems straightforward, especially with the complexity of contextual factors reduced to the barest possible minimum and considered to be almost constant.

3.4.2 Most Similar Systems Design

As will be demonstrated in chapter 5 of this research, the most similar systems design will be employed to compare similar judicial systems, for example, common law judicial systems within themselves and civil law judicial systems within themselves. The most similar systems design entails a situation in which the cases are similar but the outcome (or dependent variable) is different. As Anckar (2008) observes, "When applying the Most Similar Systems Design (MSSD), we choose as objects of research systems that are as similar as possible" (p.389). Scholars observe that the primary reason for choosing systems that are similar is the desire to keep constant as many extraneous variables as possible (e.g. Bartolini, 1993, p. 134; Sartori, 1991, p. 250; Skocpol, 1984, p. 379). Anckar (2008) further observes that the best application of a most similar systems design, would require the researcher to choose countries that are similar in a number of specified variables (the control variables) and different with regard to only one aspect (the independent variable under study) (p.390).

In making comparison using most similar design, we shall for instance compare U.S. and UK because they both have common law judicial systems. We shall then vary our independent variable by assuming that in the pre-9/11, both judicial systems were similar and everything was constant. Then we shall assume that only the U.S. developed and enforced expanded national security laws in the pre-9/11 era, but the UK did not. Then we shall be able to see what subsequently happened to the U.S judicial system after adopting the expanded national security laws as compared with the UK, which we assume did not. We shall then do the same with German and France since they also share civil law judicial systems. We shall vary the independent variable by assuming that it is only German that developed and enforced expanded national security laws, but France did not. Then we shall be able to assess the effect of expanded national security laws on the German judicial system as opposed to that of France, which we assume did not implement the expanded national security laws.

Table 3.4.2 provides both characteristics in the common law adversarial justice systems and characteristics in the civil law inquisitorial justice systems. When comparing the U.S with the UK, for example, we only need to focus on the characteristics of the adversarial criminal justice systems that both countries share. In comparing both German and France, we only need to focus of the characteristics of the inquisitorial justice systems that both countries share. For the U.S. and UK, for instance, we are able to control all those characteristics assigned to the adversarial criminal justice systems except for the independent variable, which we have to induce variation. For German and France, we are also able to control all those characteristics assigned to the inquisitorial criminal justice systems except for the independent variable, which we have to induce variation.

Table 3.4.2 Differences in Criminal Justice Systems in Liberal Democracies.

Different Criminal Justice Systems in Liberal Democracies

Adversarial Criminal Justice Systems	Inquisitorial Criminal Justice Systems
1. Due process model is emphasized.	1. Crime control model is emphasized.
2. Legal guilt is emphasized.	2. Factual guilt is emphasized.
3. Proof oriented.	3. Truth oriented.
4. Greater time is spent on trial.	4. Lesser time might be spent on trial.
5. Police does investigation.	5. Investigating judge does investigation.
6. Police might use torture to obtain evidence.	6. Investigating judges not likely to use torture to obtain evidence.
7. Prosecutors and defense counsels actively examines witnesses.	7. The judges actively examine witnesses.
8. Truth is discovered through competition between parties.	8. Truth is discovered by way of investigative procedure.
9. Parties on either side may have an interest in hiding the truth.	9. Parties on either side do not have much latitude to hide the truth.
10. Plea bargaining is common and truth might be subjective.	10. Truth bargaining is less common and truth is more objective.
11. Procedurally passive Judge.	11. Procedurally active Judge.
12. Procedurally active prosecutor and defense counsels.	12. Procedurally passive defense counsel.
13. Both oral and written submissions.	13. Only written submission.
14. Truth is determined from competition between opposing sides.	14. Truth is determined from a continuing investigation and screening process.

Source: author based on reading of the literature.

3.4.3 Most Different Systems Design

As will be demonstrated in chapter 5 of this research, the most different systems design will be employed to compare different judicial systems, for example, common law judicial systems with civil law judicial systems. The most different systems design entails a situation in which the cases are different but the outcome (or dependent variable) is the same (Lijphart, 1971). This particular design is predicated on comparing very different cases (i.e. criminal justice systems) that tend to have the same dependent variable (Anckar (2008). This design allows the research to identify a point of similarity between otherwise different criminal justice systems and thus identify

the independent variable that is causing the outcome. The criminal justice systems that we observe may have very different variables between them but we can identify the same outcome happening. It is possible for instance to have adversarial and inquisitorial criminal justice systems producing the same judicial outcome.

Table 3.4.3 Similarities in Criminal Justice Systems in Liberal Democracies.

Adversarial Criminal Justice Systems	Inquisitorial Criminal Justice Systems
1. Finding the truth is a fundamental aim.	1. Truth finding is a fundamental truth
2. The guilty should be punished.	2. The guilty deserves punishment.
3. The not guilty should be left alone.	3. The not guilty should not face trial.
4. If due process rights are violated then defendant might not be found guilty.	4. If due process is violated, then the defendant's trial terminates.
5. Burden of proof is on the prosecutor. government.	5. Burden of proof is on the trial judge/ government.
6. The process aims to punish the guilty.	6. The process aims to punish the guilty.
7. The defendant not required to cooperate with investigation.	7. The defendant is not required to cooperate with investigation.
8. Handles terrorism crime.	8. Handles terrorism crime.
9. Believe in due process rights.	9. Believe in due process rights.
10. Judiciary should be independent and impartial.	10. The judiciary should be independent and impartial.
11. The accused is innocent till proved guilty.	11. The accused is innocent till proved guilty.
12. Believe in fair trial practices.	12. Believe in fair trial practices.
13. Apply counter-terrorism law.	13. Apply counter-terrorism law.
14. Plea bargaining is allowed.	14. Plea bargaining allowed in some instances, eg. in France.

Source: author based on reading of the literature.

As is already well demonstrated in table 3.4.3 shown above, the idea is to be able to identify the variables existing between different criminal justice systems and isolate those that are in fact similar because we suspect that similar variables between the two justice systems may actually be the causal agent that is producing similar justice outcome in both legal systems. One advantage of using this design is that it doesn't have as many variables that need to be analyzed as is the case in the most different systems design. The researcher thus only needs to identify the same variable that exists across all different cases. Based on this particular design, we are assuming that both

common law and civil law legal traditions (adversarial and inquisitorial criminal law justice systems) when compared are capable of producing similar justice outcomes despite their different legal traditions. This analysis is carried out in chapter 5 of this research. For example, when we look at the 14 different characteristics stated in table 3.4.3, we are able to isolate almost all of them since they sound similar for both sides. It is assumed or rather suspected that it is those characteristics common to both sides that are responsible for producing similar justice outcomes (dependent variable).

3.5 Data Collection Method

The strategies for data collection for this research started after several readings of relevant literature on the topic. I conducted a preliminary analysis of the literature, which then opened doors for several secondary sources, which further helped in shaping the research strategy. Since I was cognizant of the fact that a legal research of this magnitude must be comprehensive and precise, I ensured that I first understood the research problem by way of conducting a thorough analysis and assessment of the literature, which then helped in generating the research question. This study uses both secondary and primary sources of data. Secondary sources used include Law Reviews and Journals, Legal Dictionaries and Encyclopedia, Ordinary Dictionaries, Treatises, American Law Reports, Headnotes and Annotations and Restatements. Primary sources used include Constitutions, Statutes, Treaties, Regulations and Case Law (i.e. case decisions).

The research realized, however, that secondary sources often explained legal principles more broadly and thoroughly as opposed to Statutes. The study also realized that using secondary sources was important in learning the basics of specific areas of law, understanding key terms and identifying important cases and statutes. In dealing with secondary sources, the study also put into consideration their depth of treatment, correctness and contemporaneity. The study also ensured reliability for all the secondary sources that were used. This was necessary because while there is a lot of legal information that can be obtained on the web, only some of it is reliable and official. The study thus took cognizant of this fact. Moreover, the study also realized that the primary sources (i.e. Constitutions, Statutes, Regulations and Case Law) were more authoritative than secondary sources because they bear primary authority. Their authority thus derives directly from a law-making body. Access to primary sources was mainly via different verified authentic websites.

The first sources of data for this study mainly came from documented secondary sources then followed by primary sources. Secondary resources for data collection included information from historical documents, newspapers, books, and magazines that were gathered (collected) with a view to extracting relevant information that correctly responds to research questions and capable of providing research answers. The first activity involved desk top research for historical events or incidents that involved terrorist attacks in the selected countries under this study. A lot of precaution was taken in order to avoid inaccurate data collection that could negatively impact the results of this study and ultimately lead to invalid results. There was need therefore to only focus on those facts, data and information that were relevant to and relating to the research topic and research questions.

The information obtained was then corroborated by drawing on the Global Terrorism Database (www.start.umd.edu/gtd/). The Global Terrorism Database (GTD) provides information on more than 200,000 terrorist attacks dating back to 1970. The GTD is an open-source database including information on domestic and international terrorist attacks around the world from 1970 through 2019, and now includes more than 200,000 incidents. For each event (terrorist attack), the GTD provides information on the date and location of the incident. It is important to mention that the GTD is currently the most comprehensive unclassified database on terrorist attacks in the world. The GTD Database is currently being hosted at the University of Maryland, U.S.A, which is a renowned academic research institution.

In addition, the second important activity with regard to data collection for this study involved searching relevant case law data related to various adjudication events involving terrorism-related trials in the selected western democracies under the study. This included both quantitative and qualitative information as well as relevant descriptions of those events. All the data collected were subject to the rules of reliability and validity. The study used Case Law Database obtained from the United Nations Office on Drugs and Crime (UNODC). The UNODC provides comprehensive information on terrorism offences case laws through its Sharing Electronic Resources and Laws on Crime (SHERLOC) portal (https://sherloc.unodc.org/cld/en/st/about-us/about-us.html). SHERLOC provides electronic evidence resources and is an initiative to facilitate the dissemination of information on the implementation of the United Nations Convention against Transnational Organized Crime, and the

international legal framework against terrorism. SHERLOC contains resources regarding 15 different types of crime, including terrorism crime. SHERLOC makes available to the public, all resources relating to organized crime from all the 193 United Nations (UN) Member States, as well as non-Member Observer States of the UN, and the European Union. It also contains resources which concern relevant cross-cutting issues such as, general procedural issues related to crime type. Some of the cross-cutting issues provided by SHERLOC include: jurisdiction, prosecution, adjudication and sanctions, investigation procedure, liability of legal persons, witnesses, victims, electronic evidence, national coordination and international cooperation. SHERLOC'S case law Database provides case summaries of judicial decisions relating to organized crime and terrorism. SHERLOC is especially recommended by the UN as appropriate for conducting legal research and designing legal and policy reforms.

3.5.1 Data Collected for Empirical Analysis

The data collected for empirical analysis was obtained from the Global Terrorism Database (GTD). The study first examined the database and verified that all the western liberal democracies in the study (U.S.A, UK, Germany, and France) are all captured in the database as countries who have experienced terrorist events (attacks) and threats. The study also examined the GTD Code Book and obtained further information on the number of variables specified in the database and how each variable was being measured (operationalization). The Code Book is dated August 2021 and consists of variables namely, GTD ID and date, incident information, incident location, attack information, weapon information, target/victim information, perpetrator information, and casualties and consequences.[139]

The Code Book also provided more detailed information regarding the definition of terrorist attack and reasons behind or attributes for the terrorist attacks. The GTD defines a terrorist attack as "the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation."[140] . In essence, in order for the GTD to consider an incident for inclusion in the GTD database, all three of the following attributes must be present. Firstly, the incident must be intentional, that is, the

[139] https://www.start.umd.edu/gtd/wp-content/uploads/2021/09/GTD-Codebook-August-21.pdf. Retrieved on September 17, 2021, pp 14-48.
[140] Id Supra note 37, p11.

incident of terrorist attack must be the result of a conscious calculation on the part of a perpetrator. Secondly, the incident must entail some level of violence or immediate threat of violence, that is, the incident of terrorist attack must entail property violence, as well as violence against people. Thirdly, the perpetrators of the incidents must be sub-national actors. The database apparently does not include acts of state terrorism.

Moreover, the GTD also formulated three precise criteria which must be present for an incident of terrorist attack to be included in the GTD database. The first criterion requires that the act must be aimed at attaining a political, economic, religious, or social goal. In terms of economic goals, the exclusive pursuit of profit does not satisfy this criterion. It must involve the pursuit of more profound, systemic economic change. The second criterion requires that there must be evidence of an intention to coerce, intimidate, or convey some other message to a larger audience (or audiences) than the immediate victims. It is the act taken as a totality that is considered, irrespective if every individual involved in carrying out the act was aware of this intention. As long as any of the planners or decision-makers behind the attack intended to coerce, intimidate or publicize, the intentionality criterion is met. The third criterion requires that the action must be outside the context of legitimate warfare activities. That is, the act must be outside the parameters permitted by international humanitarian law, insofar as it targets non-combatants.[141]

3.5.2 Actual Data Set Indicating Terrorism Events

The present study first exploited the data set by the GTD and then constructed a panel data set out of it. A panel data set is a form of longitudinal data, and it "consists of a time series for each cross-sectional member in the data set" (Wooldridge, 2009, p.10). Wooldridge further observes that panel data set has the advantage of allowing researchers "to study the importance of lags in behavior or the results of decision making" (p.11). This means that panel data sets provides a temporal advantage in the sense that the researcher is able to observe an entity or phenomenon for a period of time (e.g. years) and then should a new policy be introduced in between those years, then the researcher is able to split those years into two and making the year in which the new policy was introduced as base year. The researcher may then able to study and compare the behavior of

[141] Ibid, p.12.

the entity or phenomenon (unit of observation) during years before the new policy was introduced and the behavior of the phenomenon during years after the new policy was introduced. This enables the researcher to be able to determine (isolate) the effect (result) of the new policy on the characteristic (behavior) of the phenomenon under the study. This is the temporal advantage that panel data set provides.

In this case, the present study was able to observe terrorism events for a period of twenty eight years (1986-2015). The choice of years to include in the study was deliberate and allowed the researcher to split the years into halves (14/14). The first set of 14 years entails 14 years before the 9/11 (pre-9/11 era) and incudes all the years from 1986 to 2000 with, of course, the year 1993 being omitted because it was not recorded (missing) in the GTD data set. Then the second set of 14 years entails 14 years after the 9/11 (post-9/11 era) and includes all the years from 2002 to 2015. The year 2001 was considered the base year and was not therefore included in the study since it was the year that the September 11 terrorist attacks were launched on the U.S. soil. It is worth noting that the present study considers 9/11 terrorist attacks on the U.S. soil in 2001 as the main trigger of the expanded national security laws (new security policy - counterterrorism laws) across Western liberal democracies.

The panel data set used by the present study allowed for replication of the same country over time (i.e. twenty eight years). The countries included in the panel data set are four: U.S., UK, Germany, and France. I then designed a total of 28 units of observations (i.e. 28 years of recorded terrorism events). This implies a twenty eight-year panel data set on terrorism-related events. This therefore means that terrorism events in each country were observed 28 times since 28 years of data were obtained for each country. I stylized the panel data set as shown in table 3.5.2 below.

Table 3.5.2 Stylized Panel Data Set for Terrorism Events from 1986-2015.

GTD Empirical Data on Terrorism Events in the U.S.A, UK, Germany, and France						
Years	No. of Yrs	No. of Terr. Incidents Globally.	U.S.A	UK	Germany	France
1986-1992	7	27,725	247	1238	345	573
1994-2000	7	16,945	318	601	321	675
2002-2008	7	16,591	128	151	42	210
2009-2015	7	67,281	146	540	100	185
Pre-9/11	14	44,670	565	1839	666	1248
post-9/11	14	83,872	274	691	142	395
Total	28	128,542	839	2530	808	1643

Source: author using the GTD data set.

The importance of the above panel data set is that it provided the present study with considerable confidence that there were terrorism events (attacks) that actually occurred in varied years in Western liberal democracies and therefore warranted greater attention. The attention here mainly focused on how the criminal justice systems in the Western liberal democracies under the present study responded to those terrorism incidents during the period before the 9/11 and during the period after the 9/11. In other words, it provided a strong basis for the present study and for comparative analysis of criminal justice systems in Western liberal democracies.

3.6 Validity and Reliability of the Study

The research design for this study was carefully selected for purposes of producing valid results. The study selected correct indicators and correct operationalization in view of the theoretical concepts. The research design also adequately derived from the research questions. The research ensured validity by only selecting cases that are truly comparative and leaving out deviant ones. For instance, the case law selected for analysis involved terrorism-related trials. By selecting similar cases for analysis, comparability is more likely to be considerably enhanced. The goal here is for the study to yield truly comparable results for similar cases under the study's review and to be able to demonstrate that the results (evidence) produced through analysis, indeed, support and

improve the study theories. Reliability was ensured by way of operationalizing the main variables. This was to ensure that the research was able to specify correct measurements for both its independent and dependent variables.

3.7 Document Analysis

Although document analysis has been an underused approach to qualitative research, this approach can be valuable for analyzing preexisting texts (Morgan, 2021). This method entails of analyzing various types of documents such as books, newspaper articles, academic journal articles, institutional, and organizational reports. Scholars contend that any document containing text is a potential source for qualitative analysis (i.e. Patton, 2015). The term document as used here refers to a wide variety of material such as photographs, video, film, and visual sources (Merriam & Tisdell, 2016). In the same way documents consisting of texts can be used as a source for qualitative analysis, those that consist of visual material can also be a good source for qualitative analysis (Flick, 2018). Scholars agree that using pre-existing data is similar to using data from observations and interviews. For instance, books, articles, and other documents can be thought of as texts that are equivalent to the information a researcher would collect during an interview. In essence, these sources reflect the beliefs of people in a similar way to the data a researcher would collect from observations and interviews (Merriam & Tisdell, 2016).

3.7.1 Advantages of Document Analysis

It is important to mention that pre-existing data are often used with other types of data for triangulation. Triangulation is generally a strategy designed to increase the trustworthiness of a study (Morgan, 2021). The importance of triangulation is that it helps to determine if the findings of a study are consistent and to develop a deeper understanding of the topic being investigated. In other words, in addition to analyzing pre-existing documents, researchers also would use data from interviews and observations, hence triangulation. In using different methods to collect data, researchers are able to confirm their findings across data sets, hence minimizing the possibilities for biases (Bowen, 2009). For example, participant observation allows researchers to observe circumstances mentioned in interviews and situations informants may be reluctant to divulge. However, document analysis method permits them to gain new insights and awareness of any

descriptions their informants may have provided during an interview (Kawulich, 2005). Triangulation thus enhances the validity of qualitative research.

It must also be understood that some circumstances can make it difficult to do interviews and observations. For instance, the authors of texts or the most important person that you would prefer interviewing may no longer be alive or they may not be unwilling to participate in interviews. In such circumstances, document analysis would serve the goal if such documents are authentically written by those that are no longer alive or those that are not willing to participate in interviews. Another way to appreciate document analysis method is by reflecting on what happened during the COVID-19 pandemic. It made it hard to do observations at institutions or organizations that limited how many people could enter their facilities. This could only leave the option of using (pre-existing textual data (document analysis) to serve as a good source for qualitative research. Moreover, another reason for using pre-existing textual data involves its affordability and easy access. Electronic databases at universities and other institutions or organizations allow researchers to access a wide range of databases and textbooks (Braun & Clarke, 2013). In addition, the internet also offers access to an immense amount of data, often for free.

It is worth mentioning that although document analysis is frequently used to complement other research methods, some researchers use it as their only method of research. It has been proved that in certain cases, using pre-existing documents permits researchers to gain access to the best source of data for completing a project (Morgan, 2021). One good example is that when doing historical research, interviewing people who lived hundreds of years ago or conducting direct observations on how they lived is not possible. A second good example involves research on intimate personal relationships. Because people tend to be shy away from discussing this topic and also because these relationships are difficult to observe, documents, such as books and articles, can be an important source for investigating this subject (Merriam & Tisdell, 2016). Moreover, analyzing documents, such as books and journal articles, can be beneficial also because of the stability of the data (Morgan, 2021). Scholars contend that researchers may influence the participants during interviews or observations (Morgan, 2021). However, when they conduct a document analysis with pre-existing texts, the data are unaffected (Merriam & Tisdell, 2016).

Another advantage of conducting a document analysis is that it allows researchers to have access to data that would otherwise take enormous effort and time to collect (Merriam & Tisdell, 2016). In many cases, considerable time and resources are needed to undertake a field research or even conduct interviews. However, this can be cured by using pre-existing textual data by way of desk top research. Public records are normally available for anyone to examine and are often anonymous. Moreover, authors of books and articles appearing in newspapers and journals are generally aware that anyone will be able to read their content. This awareness usually reduces the ethical concerns associated with using public documents.

3.7.2 Disadvantages of Document Analysis

Just like interviews and observations, documents by themselves have their own disadvantages. It is important to note that they will likely not include important information other methods may uncover. For instance, when allowing outsiders to examine its documents, institutions or organizations may provide access only to content aligning with the values of their chief executives. Conducting research with documents as the sole source therefore raises questions about biased selectivity (Bowen, 2009). Another examples of potential biases that could arise from analyzing documents involve investigating public records and personal documents. Even though public records might seem objective, these documents could be biased. For example, Merriam and Tisdell (2016) discussed how police records documenting the incidence and frequency of crimes can be a function of how a particular department defines and reports the crimes.

The other weakness with relying on pre-existing texts involves working with limited data. This is so because data sources on a certain subject might not even exist. As a result, researchers might need to tweak their research interests or questions based on the available data (Blackstone, 2019). Also, since many documents are not produced for research purposes, the use of pre-existing texts as the sole source of data may not provide the content needed to conduct a study (Morgan, 2021). It must be mentioned, however, that limitations associated with conducting a document analysis do not mean that this method is a less worthy approach to research.

3.7.3 How to Reduce Bias in Document Analysis

The process of conducting document analysis should start with finding the right documents for the study. It must be emphasized that in selecting the documents, researchers need to consider several factors. One scholar, Flick (2018) mentions four factors to use when deciding which documents to include: authenticity; credibility; representativeness; and meaning. Authenticity in this case refers to the extent to which a document is genuine. For instance, Mogalakwe (2009) indicates that the authenticity of the documents to be analyzed is a foundational element of any research. Credibility in this case entails the extent to which a document is free from errors. One scholar (Flick, 2018), opines that, to decide whether documents are credible, researchers need to investigate whether their producers are reliable sources. Representativeness in this case involves how typical a document is. Researchers must be aware that if a document contains idiosyncratic content rather than material that reflects the content of a collection of other documents about the same topic, it lacks representativeness (Morgan, 2021). Meaning in this case implies the significance of a document's content. It is important to note, however, that to assess the meaning of a text as a whole, researchers need to connect the literal meaning to the context in which the document was created (Mogalakwe, 2009).

3.8 Target Population

Target population entailed all pre-existing textual case law (i.e. judicial opinions) with relevant information on terrorism jurisprudence.

3.9 Sampling Technique

Scholars contend that researchers need to decide on a sampling technique to construct the corpus that will allow them to achieve the goals of the research study (Morgan, 2021). One scholar, Flick (2018) mentions that a researcher might use purposive sampling for a document analysis. It is important to mention that purposeful sampling is widely used in qualitative research for the identification and selection of information-rich cases related to the phenomenon of interest. This research used purposive sampling technique.

3.10 Sample Size

Scholars contend that when conducting document analysis, the number of documents that a researcher should select cannot be determined prior to starting a study of this nature (Morgan, 2021). This number primarily depends on the research questions and other aspects of the research process. Consequently, figuring out whether a sample is large enough involves reaching a point of redundancy. It is important to understand that this point of the study occurs only when researchers cease to gain insights after collecting new data (Merriam & Tisdell, 2016). However, this research was able to select a sample size of 16 case law out of all the possible case law that were available.

3.11 Data Collection

Pre-existing textual data (case law) was primarily collected from secondary sources. These sources include relevant books, academic journals, authentic newspapers, and various state agencies websites. The actual data collection was done by way of coding. Coding refers to how a researcher defines what the data he or she is analyzing are about (Gibbs, 2007). More precisely, coding is a process of identifying a passage in the text or other data items (statistics, photograph, and image), searching and identifying concepts and finding relations between them.

3.12 Data Analysis

The analysis of data was done by way of thematic analysis. Thematic analysis is an ideal method for document analysis process (Morgan, 2021). Scholars agree that unlike other methods, thematic analysis is not a theoretically driven approach, and it does not prescribe epistemological or ontological frameworks (Braun & Clarke, 2013). There is also an agreement among scholars that the versatility of thematic analysis allows researchers to use this approach for many types of studies and to select the research design that matches their interests and areas of expertise (Braun & Clarke, 2006). In order to use thematic analysis well for analyzing documents, researchers need to realize that this method consists of a variety of approaches. Braun et al. (2019) identified three schools of conducting a thematic analysis and mentioned that each one is associated with more than one way of implementing this type of analysis. The first school is associated with a “reflexive” approach, the second with a “coding reliability” approach, and the third with a “codebook”

approach. Of these three schools, the only one based on completely qualitative methods is the reflexive approach (Morgan, 2021).

3.13 Selection of Cases (Case Law)

The present study considered it appropriate to make a good choice of cases (case law) for analysis of judicial outcomes. Great attention was paid to judicial decisions arising out of terrorism-related proceedings (offenses). The idea here is to be able to understand the way similar legal problems are pragmatically solved in different judicial systems.

3.13.1 Cases Selected for the Study

The present study selected a total of 16 case law for both pre-9/11 era and post-9/11 era. Each country (i.e. U.S., U.K, Germany and France) was assigned a total of 4 case law with the first set of 2 case law assigned before the 9/11 and the second set of 2 case law assigned after the 9/11. Table 3.4 below captures the selection and assignment of case law for each country.

Table 3.4 Selection and Assignment of Case Law for Each Country.

Observations	Year	Country	Case Name	Era
1	1996	US	*United States v Yousef*	Pre-9/11
2	1995	US	*US v McVeigh*	Pre-9/11
3	1993	UK	*Brannigan and McBride v the UK*	Pre-9/11
4	1988	UK	*Brogan and Others v the United Kingdom*	Pre-9/11
5	1995-2006	Germany	*Weber and Saravia v Germany*	Pre-9/11
6	1997-2010	Germany	*Uzun v Germany*	Pre-9/11
7	1997	France	*Arana v France*	Pre-9/11
8	1995	France	*France v Bensaid*	Pre-9/11
9	2004	US	*Hamdi v Rumsfeld*	Post-9/11
10	2002	US	*Padilla v Bush*	Post-9/11
11	2011	UK	*Al-Jedda v the United Kingdom*	Post-9/11
12	2009	UK	*A. and Others v the United Kingdom*	post-9/11
13	2003	Germany	*Germany v El Motassadeq*	post-9/11
14	2003	Germany	*Germany v Mzoudi*	Post-9/11
15	2006-2018	France	*Ramda v France*	Post-9/11
16	2008	France	*Leroy v France*	Post-9/11

Source: author.

CHAPTER FOUR

ANALYSIS

4. Introduction

The analyses herein are a culmination of rigorous (robust) tests based on various selected constitutional jurisprudence (case law) on the relationship between national security and human rights. I analyzed several types of secondary documents to identify the conditions prompting terrorism-related prosecutions. I assessed annual court reports on terrorism-related proceedings on each of the four countries. These annual reports were produced by both domestic and international organizations (official court reporters). I also analyzed the relevant transcripts of domestic trials and also the judgments at the European Court of Human Rights and the Inter-American Court of Human Rights. Moreover, I made good attempt at analyzing the Commission of Inquiry mandates and reports thereto. My analysis also included the transcripts of inquiry proceedings, and domestic and international media coverage of trials. I also did a thorough and careful study of each of the four country's constitutions, including emergency, and anti-terrorism/counter-terrorism laws. I then traced the origins of terrorism legislations and the extent to which they underwent change through legislative process. I also examined criminal codes and provisions that existed before and after the 9/11. Finally, I consulted several secondary sources for detailed histories of each country.

4.1 The Analytical Regime and Procedure

I conduct a multi-stage analysis in the following order. I first conduct a singular analysis involving each country under the study (U.S., U.K, Germany, and France. In doing so, I perform a comparison on each country with regard to judicial independence and fair trial on both different periods (times). The first period is the time before the 9/11 (pre-9/11 era), and the second period is the time after the 9/11 (post-9/11 era). By doing this comparison on a single country, I am able to expand knowledge of how national security threats tend to impact justice in periods of low-level threats and in periods of high-level threats.

In all case law analyses that will be selected for study, it is important to lay down certain assumptions. For instance, if arrest, prosecution, judgement and sentencing were undertaken in

times of high-level terrorist threats without following due regard to fair trial practices and without observing due process, and the court simply overlooked all that and failed to remedy, then we can correctly infer a less independent and a less impartial judiciary, which then leads to a negative justice outcome. Sometimes courts would defer to the government policy and claim that the government (executive and Parliament) are more competent than the judiciary to address matters touching on national security. However, if arrest, prosecution, judgement and sentencing were undertaken in times of high-level terrorist threats without due regard to fair trial practices and without observing the due process, and the court decisively remedied the problem, then we can correctly infer a strong independent and an impartial judiciary, which then leads to a positive justice outcome.

The second set of analysis is based on "most similar" designs. It is important to understand that since the countries under the study have criminal justice systems that operate under different legal traditions (systems), hence they are more likely to exhibit different characteristics in their criminal justice systems. The two main legal traditions under study are namely: common law, and civil law. Due to varying characteristics of these legal systems, it is expected that their criminal justice systems manifest some differences. Based on the most similar designs, I create two categories and assign all the four countries into a relevant category. To this effect, I designated the U.S., and the U.K to the common law legal tradition and Germany and France are designated to the civil law legal tradition.

The third set of analysis is based on "most different" design. It is important to mention that both common law legal tradition and civil law legal tradition are different in some fundamental ways. For this reason, it is important to understand how their differences impact criminal justice in times of national security threats. Even though all the four countries and the study are perceived to have experienced various acts of terrorism (terroristic violence), their different criminal justice systems are likely to produce different justice outcomes. Unless a rigorous analysis is conducted to test the differences, the prospect of obtaining such knowledge might be mute. As H. L. A. Hart opines in his positivist model of law, there are two ways in which to interpret the law based on two models. The first one is a model which divides law into a "core" of positive law-of determinate (settled law) and the second is a model of a "penumbra" where the law is uncertain or

indeterminate. Hart claimed that in the "core" the question of what law is, is already determined as a matter of fact, without resort to moral argument.

However, questions of law that occur in the "penumbra", in contrast, can be settled only by judges making choices which are ultimately determined, not by law, but by the values which judges happen to hold (Hart, 1961, pp.62-72). This implies that judges in common law countries have more latitude or discretion to make new laws as opposed to judges in civil law legal traditions, who strictly adhere to positive law and therefore have very little discretion to make new laws. The final set of analysis is based on the analysis of all the three sets. This final analysis is important to cement a coherent theory that is generalizable. At the moment, there is no suitable theory with greater explanatory power that can explain the phenomenon under this study. This study intends to develop one that can be generalizable.

Since the legal response to acts of terrorism are likely to engender important procedural and substantive legal questions, it is important to systematically assess how courts are able to interpret important statutory and constitutional questions in times of national security threats. The idea is to understand the permissible scope of counterterrorism laws and policies in the four selected Western democracies. Strikingly, Lord Atkin famously declared in *Liversidge v. Anderson* that "In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace."[142] Not surprisingly, Powell (2008) argues that almost every controversial decision has more than one constitutionally defensible resolution. In such cases, he points out that, the language and ideals of the Constitution require judges to decide in good faith, exercising what he calls the constitutional virtues, which he names as candor, intellectual honesty, humility about the limits of constitutional adjudication, and willingness to admit that they do not have all the answers.

In order to robustly conduct the above mentioned analyses, I employ three different types of analytical tools and techniques. The first one is called the ideological space model, the second one is called the analytical table and the third on is called the analytical figure. All these tools (three-stage analytical tools) are important because when all of them are applied to a single analysis, they demonstrate incredible rigor. The three analytical tools as provided below are

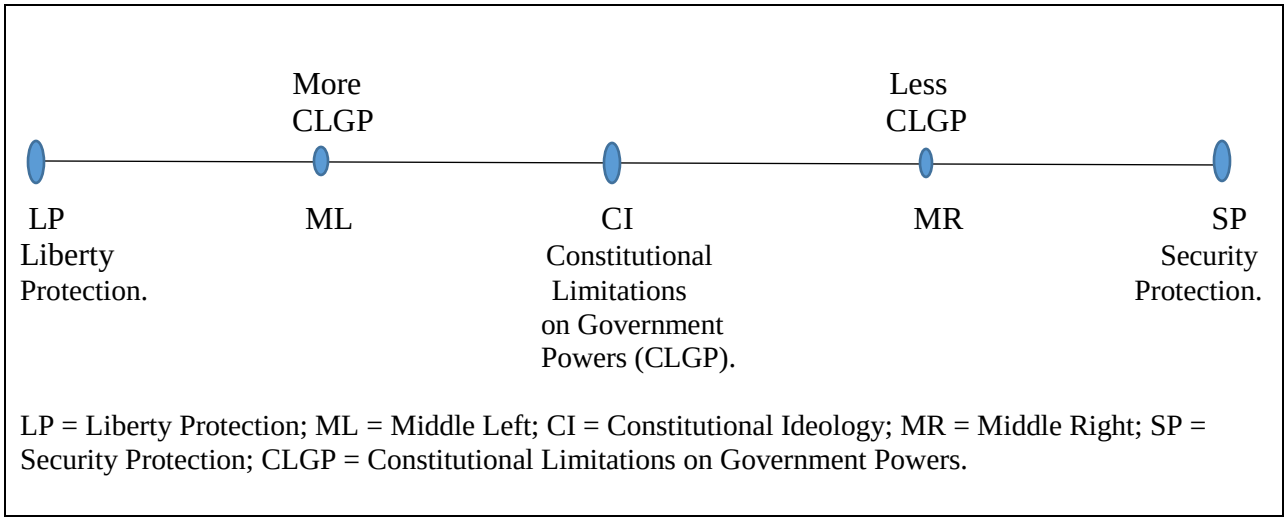
[142] Liversidge v. Anderson [1942] A. C. 206.

imported from chapter one of this study. For purposes of our analysis, I label the tables differently from the labelling seen in chapter one.

4.1.1 Analysis Based on Ideological Space Model.

The analyses below are based on ideological space model. This model is useful in determining the impartiality and independence of judicial systems in liberal democracies. It provides cogent demonstrations of how judicial systems should check the abuse of powers of the executive during high-level national security threats.

Figure 4.1.1 Ideological Space Model



LP = Liberty Protection; ML = Middle Left; CI = Constitutional Ideology; MR = Middle Right; SP = Security Protection; CLGP = Constitutional Limitations on Government Powers.

Source: author.

The ideological space model as provided in figure 4.1 above is based on the assumption that Western democracies have a Constitutional Ideology (CI). The CI is a constitutional norm which provides for a limited power government. I stylize this phenomenon using the acronyms CLGP, meaning Constitutional Limitations on Government Powers. Constitutional Limitations on Government Powers (CLGP) represents the idea of the rule of law and it therefore inhibits the exercise of arbitrary state power. It also means that the executive or legislature cannot assume to itself a power to rule by extemporary arbitrary decrees. This also implies that "it is essential that there should be an independent judiciary to ensure that the law is fairly applied and strictly

enforced" (Allan, 2003, p.31). The CLGP is also a constitutional norm by which the state validates its power and legitimacy through reference to objective legal norms.

We therefore expect that due to CI, all governments are bound by the constitutional norms to operate only within the law and not outside the law. We anticipate that all governments within Western democracies are able to respect and obey the rule of law, both in times of peace and in times of war or public fear. Moreover, we contemplate that when a government expands its powers and unreasonably uses that power to infringe upon liberty, then the constitutional custodian (judiciary), which doubles as human rights protector, will muster courage to check the executive overreach.

In using the ideological space model, we are able to test for judicial independence. For instance, I deliberately create two parties to the dispute (citizens v. government). Citizens would be happier and government will be unhappy if the CLGP moves from point CI to point ML of the continuum. This is because citizens shall have secured too much liberty at the expense of national security. At the same time, government will be happier and citizens will be unhappy if CLGP moves from point CI to point MR of the continuum. This is because the government shall have secured expanded powers at the expense of liberty enjoyment. In other words, the government prefers expanded powers beyond the CLGP limits to be able to effectively preserve the state, and restore peace. We assume that the tension between national security and liberty engenders a conflict and a dispute between citizens and government. This leaves the judiciary as a neutral arbiter to resolves such disputes. In order for the judiciary to be able to competently resolve such disputes, judges ought to demonstrate impartiality and fidelity to the constitution. In the event that we are able to see a contrariety from the judges, then we are only left to discern that they lack impartiality and hence, not faithful to the constitutional text.

We can test both the impartiality and partiality of a judge if in case the government arbitrarily moves CLGP from point CI to point MR and unreasonably uses its power to infringe upon liberty. In such circumstances, we should expect the court to issue injunction and stop the government by restoring the CLGP back to CI from MR. Likewise, if a citizen takes the law into his or her own hand by deliberately moving CLGP to ML by commissioning acts of terrorism (terroristic violence), we expect the court to punish that individual in accordance with the applicable law. When a judge is impartial, it means his or her decisions are mainly guided by facts

and the law, but not through other external influence. However, when a judge is seen as partial, his or her decisions are more likely a product of other interests or external influence.

4.1.2 Analysis Based on Analytical Tables

In order to analyze and test fair trial practices and remedies, I draw on Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and several other articles enshrined in the Covenant and the ECHR Convention. I have authored five tables as provided below, for purposes of testing fair trial remedies. The tables are stylized as: 4.1.2a; 4.1.2b; 4.1.2c; 4.1.2d; and 4.1.2e. Table 4.1.2a is mainly composed of information that I obtained from the ICCPR literature. It contains the general attributes of a fair trial. In order to test for fair trial remedies, I first conducted a thorough reading of the case law selected for this study and then conducted document analysis as already explicated in chapter three of this work. For each case law selected, I was keen on following if there was any procedural unfairness alleged by the defendant and then I cross-checked with the ICCPR general attributes of a fair trial as shown in table 4.1.2a below.

Table 3.1.2a Fair Trial Attributes.

General Attributes of a Fair Trial
1. Independent court – court must be competent, independent and impartial.
2. Public trial – trial to be held in public and judgment given in public.
3. Presumption of innocence – defendant to be presumed innocent until proved guilty.
4. Defendant told of charge – defendant must be informed of the cause of the charge.
5. Time and facilities to prepare – adequate time and facilities to prepare defense.
6. Trial without undue delay – defendant to be tried without undue delay.
7. Right to a lawyer – defendant given legal assistance by a counsel of his choosing.
8. Right to examine witnesses – opportunity to examine witnesses against defendant.
9. Right to an interpreter – free assistance of an interpreter for the defendant.
10. Right not to testify against oneself – defendant can't be compelled to testify against self.
11. No double jeopardy – no punishment for the same offence already convicted or acquitted.

Source: author based on article 14 of the International Covenant on Civil and Political Rights (ICCPR).

In regard to figure 4.1.2a above, it is important to emphasize that the rule of law in Western democracies is effectively achieved through the manifestation of the right to a fair trial. This should be an ideal to the irrefutable importance of stable democratic governance. The protection and guaranteeing the right to a fair trial involves protecting individuals from the unlawful and arbitrary curtailment of fundamental rights and freedom. Fair trial as used in the present study consists of both procedural justice and substantive justice.

In order to understand the legal or substantive issue raised by defendant in respect of alleged infringement of the Covenant or Convention, I cross-checked against the Covenant and Convention instruments as shown in table 4.1.2b below. By carefully reading the selected case law, each one of them provide background of the case. The background contains facts that led to cause of action. A careful reading of the facts reveals whether the defendant alleges due process or procedural fairness. Lack of due process or procedural unfairness in criminal justice is a serious maladministration of justice that should only lead to miscarriage of justice. In conducting this test, we are more interested in how courts respond to due process and fair trial malpractices. A free, fair, impartial and independent judge should be able to provide remedy for the defendant if procedural unfairness is well established. However, if a judge fails to provide remedy and instead defers to the state party, then it prompts the question as to whether the judge is really independent or impartial.

Table 4.1.2b The ICCPR and ECHR Template for Human Rights.

Template for Human Rights	ICCPR	ECHR
State's obligation to respect human rights	Article 2(3a)	Article 1
Right to effective remedy by a competent court	Article 2(3b)	Article 13
Prohibition of torture	Article 7	Article 3
Right to liberty and speedy trial	Article 9(1-5)	Article 5
Right to a fair trial	Article 14(1-3)	Article 6
No punishment without law	Article 15(1)	Article 7
Derogation from Covenant/Convention in emergency	Article 4	Article 15

Source: author based on the ICCPR and ECHR information.

Tables 4.1.2c and 4.1.2d provided below are very important for testing both fair trial and judicial independence. First, we need to assume that the first instance court or the lower court is more likely to be less independent than let's say the appellate court or the Supreme Court. This is based on the judiciary administrative hierarchy. Likewise, we can also assume that the appellate court is less independent than the Supreme Court, again based on the judiciary administrative hierarchy. Because of these variations, we then assume that the Supreme Court is the most independent and authoritative than the rest of the courts within the national jurisdiction. I model a situation whereby a case is handled by three different courts in the order of hierarchy. This happens when a party (defendant or government) feels dissatisfied with the decision of the first instance court and appeals the decision to a higher court. The three-stage proceedings (first hearing, first appeal, and second appeal) produce different scores attributed to each litigant (party).

I develop two hypothetical scenarios depicting "Lack of Procedural Fairness" (LPF) and Procedural Fairness (PF). In the first scenario (LPF) as indicated in table 4.1.2c below, the defendant alleges due process rights and procedural unfairness. Let's say the defendant wins in the first hearing and then the government appeals the decision. Then the government wins in the first appeal while the defendant loses and appeals the decision. Then the defendant eventually wins in the second appeal and the government loses. We can then obtain scores as follows: defendant = 2 wins; government (State) = 1 win. Our analysis will then turn out to be that both the court of first instance and the Supreme Court will be perceived to be fair, impartial, and independent while the appellate court will be perceived to be unfair, partial and lacking in independence.

Table 4.1.2c Depicting Scenarios for the LPF Instances in Criminal Proceedings.

Lack of Procedural Fairness (LPF)				
Party to the dispute	Court of First Instance	Appellate Court	Supreme Court	Party Score List
Defendant	Wins	Loses	Wins	Def. = 2 wins; State = 1
	Wins	Loses	Loses	Def. = 1 win; State = 2
	Wins	Wins	Loses	Def. = 2 wins; State = 1
State	wins	wins	wins	
	Loses	Wins	Loses	State = 1 win; Def. = 2
	Loses	Wins	Wins	State = 2 wins; Def. = 1
	Loses	Loses	Wins	State = 1 win; Def. = 2

Source: author.

Table 4.1.2d Depicting Scenarios for the PF Instances in Criminal Proceedings.

Procedural Fairness (PF)				
Party to the dispute	Court of First Instance	Appellate Court	Supreme Court	Party Score List
Defendant	Wins	Loses	Wins	Def. = 2 wins; State= 1
	Wins	Loses	Loses	Def. = 1 win; State= 2
	Wins	Wins	Loses	Def. = 2 wins; State= 1
State	Loses	Wins	Loses	State =1 win; Def. = 2
	Loses	Wins	Wins	State =2 wins; Def. = 1
	Loses	Loses	Wins	State =1 win; Def. = 2

Source: author.

In the second scenario (PF) as indicated in table 4.1.2d above, the defendant does not allege due process rights and procedural unfairness. This is a hypothetical case where state security agencies obeyed due process rights and courts ensured procedural fairness. Let's say the defendant wins in the first hearing and then the government appeals the decision. Then the government wins in the first appeal while the defendant loses and appeals the decision. Then the defendant eventually wins in the second appeal and the government loses. We can then obtain scores as follows: defendant = 2 wins; government (State) = 1 win. Our analysis will then turn out to be that both the court of first instance and the Supreme Court will be perceived to be fair, impartial, and independent while the appellate court will be perceived to be unfair, partial and lacking in independence. This could be a case of unlawful arrest or lawful arrest on mere suspicion.

In figure 4.1.2e below, I model a scenario within the Western European jurisdiction. This model only fits the UK, Germany and France because they are all Contracting Member States of the Council of Europe. That means they are all bound by the EHRC Convention and the ECtHR Constitutional jurisprudence. The analysis that are done on this table leaves out the U.S. Table

4.1.2e is very important for understanding the domestic judicial independence. We assume that the ECtHR is more independent and authoritative than domestic courts in Member States.

Table 4.1.2e Depicting Scenarios for the PF Instances under the European Criminal Proceedings.

Jurisdiction of Domestic Courts		Jurisdiction of International Court		Status of Domestic
State Party	Defendant Party	State Party	Defendant Party	Judicial Independence
Loses	Wins	Loses	Wins	Strong and Impartial
Wins	Loses	Wins	Loses	Strong and Impartial
Loses	Wins	Wins	Loses	Strong and Partial
Wins	Loses	Loses	Wins	Weak and Partial

Source: author.

I create a scenario whereby the defendant successfully wins against the government party after completion of domestic proceedings. Since the government is dissatisfied with the final decision of the apex court of the land, it appeals the decision to the ECtHR. If the ECtHR makes a decision in favor of the defendant, then we can say that judicial independence of domestic courts is perceived to be strong and the judges are also impartial. However, under circumstances whereby the defendant loses in domestic courts and then appeals to the ECtHR where he then wins, we are likely to perceive domestic courts as weak and partial.

4.1.3 Analysis Based on Analytical Figure

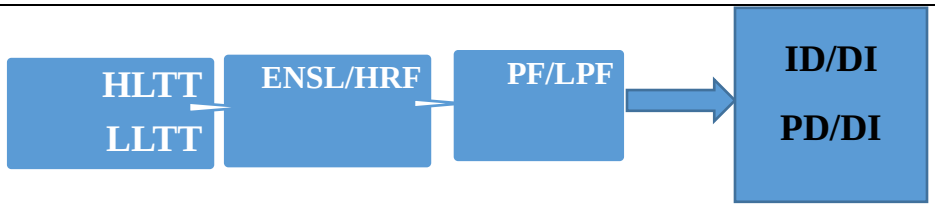
Figure 4.1.3 provided below is very important for testing decisional independence of judges. Even if we assume that Western liberal democracies cherish high values of democratic principles and respect the principle of judicial independence, we are likely to be wrong when we fail to recognize the fact that judges may themselves abuse their decisional independence. Judges in Western democracies are, for example, known to enjoy security of tenure, the selection process of judges is perceived to be merit-based, and the separation of powers is well respected by the executive and legislature. Yet, judges who enjoy guaranteed independence may abuse their

decisional independence. We assume that decisional independence is inherent in all judges and it cannot be given or taken away from them. In other words, we can say that the impartial disposition of disputes is a function of decisional independence. Impartiality here refers to the biases of a judge. Individual biases of a judge derive from external influences (such as bribes or threats) and internal pressure (such as psychology or morality). Impartiality may, however, be violated both subjectively if a judge has an actual bias against a party to the case or objectively if an objective observer would find the appearance of bias.[143] Weissbrodt and Hansen (2013) observe that judicial independence and impartiality "both seek to address the same concern: guaranteeing a fair trial by providing parties a tribunal in which the outcome is not predetermined" (p.312).

The tools in figure 4.1.3 allow me to invent a scenario whereby it all assumed that all judges in Western democracies enjoy independence with little external influence or pressure from either the executive or the legislature. Then all else equal (*ceteris paribus*), I am able to analyze a national security versus human rights dispute and assess how judges exercised their decisional independence. Justice outcomes are likely to be Impartial Decision (ID) based on Decisional Independence (DI) or Partial Decision (PD) based on Decisional Independence (DI). As another political scientist, Schubert, once said that "a Supreme Court justice's vote [decision] was a function of the relationship between his or her ideological position on the question at hand and the nature of the case stimulus" (Wrightsman, 1999, p.21). This implies that in as much as judges may have their inherent decisional independence, they are more likely to abuse it due to their personal interests.

[143] Suzannah Linton, Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers, 4 J. Int'l Crim. Just. 327, 328 (2006). For the latter, the appeals chamber in the ICTY stated that the appearance of bias may manifest itself in two ways: either the judge has a financial or proprietary interest in the outcome of the case or "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." *Prosecutor v. Furundzija*, No. IT-95–17/1-A, Judgment, ¶ 189 (July 21, 2000).

Figure 4.1.3 Illustration of the Impact of Terrorist Threats on Fair Trial and Judicial Independence.



LLTT = Low Level Terrorist Threats; HLTT = High-Level Terrorist Threats; ENSL = Expanded National Security Laws; HRF = Human Rights Frustrations; PF = Procedural Fairness; LPF = Lack of Procedural Fairness; ID = Impartial Disposition; DI = Decisional Independence; ID/DI = Impartial Disposition driven by Decisional Independence; PD = Partial Disposition; PD/DI = Partial Disposition driven by Decisional Independence.

Source: author.

It is also important to note that the analysis in figure 4.1.3 may lead theory building. For instance, I can hypothesis that:

1: High-level terrorist threats are more likely to make the government develop expanded national security laws that tend to infringe upon human rights and undermine the rule of law unless judges competently exercise their decisional independence and impartiality to resolve such disputes.

2: Although high-level terrorist threats are more likely to make the government develop expanded national security laws that interfere with human rights enjoyment and undermine the rule of law, when judges competently exercise their decisional independence and impartiality, they are likely to resolve such disputes.

The above techniques of analysis as already discussed are just additional method for conducting the very classical analysis of bodies of case law. The use of these techniques may provide insight into the interrelationships of the cases and could be useful for case prediction. The

techniques as applied here have a way justifying themselves. One problem with using this method is that it makes the assumption that facts of the case as presented in the trial court (during hearing) are the “real” facts of the case. Scholars of judicial behavior have argued that it is always invariably the case that the facts as found by the court and the “real” facts are somewhat different, but only that they could be reasonably close (Tyree, 1981). The implication being that the facts as used in the analyses of a body of case law are those that are already distilled or refined by the trial court since it is not possible to access the original facts of the case. Since the decision in a case is a function of the "facts" of the case as elicited from the written judgment (Tyree, 1981), it is important therefore to pay considerable attention to facts of the case.

Understand a judicial decision requires that I first I identify the facts, issues, legal procedure and arguments of the parties in the case and to also understand the point(s) of law that are included by the judge. It also involves working through the judge’s reasoning and trying to understand how the judge applies the law to the facts in order to reach the final decision. Although there are some existing reports on legal databases such as Westlaw or LexisNexis, not all cases are reported on those databases. It becomes necessary therefore to search for such cases and deconstruct them as in so doing, additional information in the judgment may well be obtained.

4.2 Deconstructing a Legal Opinion (Case Law)

In deconstructing the selected legal opinions, I came up with a thoughtfully reasonable scheme. I first look at the relevant facts, procedural history, relevant law, issues in the case legal background, the ratio of the case, and then the ruling in the case. The procedure is outlined as shown below.

Figure 4.2 Methods of Analyzing Legal Opinions.

Relevant facts: these are the exact events that led up to a claim being made.
Procedural history: this includes: this involves the type of claim, for example, a claim for judicial review, or the history of appeal process that has taken place.
Relevant law: this involves the law that is in dispute. This could be either legislation or case law in the case. This could be a section of an Act or an Article in a Convention. The issues in the case: these are the legal issues (points of law) that the judge has to decide.
The legal background and the interpretation of the law: this involves a broader examination of the law applicable to the case. It is the law that the case hinges on.
The ratio of the case: this involves the legal decision which the judge comes to. It is actually the point of law that is decided by the judge(s).
The ruling in the case: this involves the result in the case. Either the defendant wins or loses.

Source: author, based on literature readings.

4.3 The Structure of Analysis

The analysis is sequentially structured as follows. I first analyze the U.S. constitutional jurisprudence (case law) on the relationship between national security and liberty. I analyze two opinions (case law) before 9/11 and then two other after the 9/11. In so doing, we are able to compare the jurisprudent of the U.S. Supreme Court on the relationship between national security and liberty before the 9/11 and after the 9/11. This comparison enables as to understand the behavior of the courts during two distinct periods of low-level national security threats (pre-9/11 era) and high-level national security threats (post-9/11 era). After the U.S., I then do the same for UK, Germany and France. The main idea is to be able to and evaluate justice outcomes during each period of security dichotomy.

4.3.1 The US Jurisprudential Analysis of Terrorism Cases in the Pre-9/11 Era

Case law analysis occupies a central position in this work. In each case law (opinion of the court) carefully selected, the study was interested in deeply understanding the facts and the application of the law to facts. The study was also interested in understanding the legal issues that

led to the cause and legal reasoning of the fact finders (judges) and the subsequent majority opinion. Understanding the fact of the case is important because it provides the crucial background and a good understanding of what, who, where, and how in the case.

(i) *United States v Yousef*[144]

Mr. Ramzi Yousef and another person resided in an apartment in Manila, Philippines in January 1995 when one evening they caused some fire in their apartment due to terrorist activities. He then escaped to Islamabad, Pakistan. However, he left his laptop computer in his Manila apartment and upon inspection, the police found various files including a letter claiming responsibility for future attacks against American targets by the "Fifth Division of the Liberation Army." In early February 1995, the US Embassy in Islamabad, Pakistan received intelligence information that Yousef was somewhere in Islamabad. Then on February 7, 1995, Pakistani authorities, together with a special agent from the US Department of State, arrested Yousef at a guest house in Islamabad. The next day, Yousef was taken into custody, and shortly after, transported to the United States. On the plane, Yousef was duly informed of the charges against him pertaining to the World Trade Center bombing, which happened in the U.S. in 1993. He was also duly advised of his *Miranda* rights. He, however, waived his *Miranda* rights and made an extensive confession about the World Trade Center bombing plot.[145]

Yousef and others were charged with conspiring and attempting to damage, destroy and bomb numerous United States commercial airliners operating in East Asia routes, all but one of which had some United States city as a scheduled stop. In the first trial, Mr. Yousef and others were tried on charges relating to a conspiracy to bomb United States commercial airliners in Southeast Asia.[146] In the second trial, Mr. Yousef and others were charged with their involvement in the February 1993 bombing of the World Trade Center in New York City. It was alleged that on February 26, 1993, Yousef and others drove a bomb-laden van onto the B-2 level of the parking garage below the World Trade Center. Shortly after, set the bomb's timer to detonate minutes later.[147] At approximately 12:18 p.m. that day, the bomb exploded, and killed six people, injuring

[144] 927 F. Supp. 673 (S.D.N.Y. 1996).
[145] Yousef told the agents on the plane that he spoke, read, and understood English. He then signed the advice of rights form, waiving his Fifth and Sixth Amendment rights
[146] US District Court for the Southern District of New York - 927 F. Supp. 673 (S.D.N.Y. 1996)
May 29, 1996.
[147] Ibid, supra n. 136.

more than a thousand others, and causing widespread fear and more than $500 million in property damage.[148]

The trial of Yousef and others on the airline bombing charges began on May 29, 1996 and ended on September 5, 1996, when the jury found all three defendants guilty on all counts. The trial court then convicted them for the offence. Moreover, Yousef and others' trial on charges relating to the World Trade Center bombing began on July 15, 1997 and concluded on November 12, 1997, when the jury found both defendants guilty on all counts. The trial court again convicted them for the offence. Yousef and others were, however, sentenced for both convictions on January 8, 1998.

Relevant U.S. statutes state that:

(a) Whoever willfully —

(1) sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;

…shall be fined under this title or imprisoned not more than twenty years or both.[149]

Yousef in his motion argued alleging that he was mistreated and suffered while in the custody of unidentified individuals in Pakistan and Pakistani law enforcement agents. Yousef argued that his abduction in Pakistan and the United States' acquiescence in his alleged torture and interrogation warranted dismissal of his indictment citing the Second Circuit decision in *United States v. Toscanino.*[150] However, contrary to Yousef's argument, *Toscanino* does not whatsoever stand for the proposition that such allegations must result in dismissal of an indictment. The court ruled, however, that Yousef had failed to meet the requirements of *Toscanino.* The court argued that Yousef's affidavit did not sufficiently allege that United States agents participated in his alleged abduction and torture in Pakistan. Yousef also moved for dismissal of Count Nineteen of the indictment, which charged him with the unlawful placing of a bomb aboard a Philippines airliner far away from the U.S. soil. In this one, Yousef was simply challenging the extraterritorial jurisdiction based on principles of both domestic and international law. However, the trial court

[148] https://law.justia.com/cases/federal/district-courts/FSupp/927/673/2092722/. Retrieved on April 7, 2022.
[149] 18 U.S.C. § 32.
[150] 500 F.2d 267 (2d Cir. 1974).

ruled that exercising extraterritorial jurisdiction over Yousef and others for the crimes charged in the indictment was consistent with the statutory requirements, principles of domestic and international law, and the United States Constitution.[151] Yousef's motion to dismiss the indictment and its various counts for lack of jurisdiction was denied by the trial court.

Yousef appealed the conviction decision by the U.S. District Court for the Southern District of New York on charges relating to a conspiracy to bomb twelve U.S. commercial airliners in Southeast Asia. The point of law was: when the criminal conduct of terrorist occurs outside the U.S. which involves its airline, does the U.S. government exceed its authority by trying the alleged terrorist in the United States? However, the U.S. District Court had given a verdict that when the criminal conduct of terrorist occurred outside the U.S. which involved its airlines, the U.S. government did not exceed its authority by trying the alleged terrorist within the United States. Upon appeal, the U.S. Court of Appeal for the Second Circuit held that both domestic and international law are supported by the jurisdiction. Since the federal court had jurisdiction over the substantive crimes charged, including attempted destruction of aircraft in the special aircraft jurisdiction of the United States, it also has derivative jurisdiction over the conspiracy charges.[152] The Court argued that the conduct portrayed by Yousef is proscribed by the Montreal Convention and, thus, his prosecution and conviction was both in consonance with and required by the U.S. treaty obligations and domestic law.

In *Yousef*, we must understand that jurisdiction over crimes committed on aircraft is primarily regulated generally by the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft.[153] It requires, however, that a genuine link between the state and the aircraft is required by international law, in order for the state to lawfully assert jurisdiction over crimes committed on board.

4.3.1.1 Summary of Analysis

[151] Earlier decisions provide that extraterritorial jurisdiction over a conspiracy charge depends on whether extraterritorial jurisdiction exists as to the underlying substantive crime. *See United States v. Bowman,* 260 U.S. 94, 96, 43 S. Ct. 39, 40, 67 L. Ed. 149 (1922); *United States v. Cotten,* 471 F.2d 744 (9th Cir.), *cert. denied,* 411 U.S. 936, 93 S. Ct. 1913, 36 L. Ed. 2d 396 (1973). Since this court has jurisdiction over the substantive Section 32 charges, jurisdiction over the conspiracy charged in Count Twelve is also proper.
[152] US Court of Appeals for the Second Circuit - 327 F.3d 56 (2d Cir. 2003).
[153] https://treaties.un.org/doc/db/terrorism/conv1-english.pdf.

In this analysis, it is important to mention that although *Yousef* was decided in 1996 and 1997, the appeal was heard and determined in 2003. Since *Yousef* is a pre-9/11 era, we are assuming that the CLGP was at position CI of the continuum. If at all the US government had moved it to position MR for security reasons, then we should expect domestic courts to remedy that by restoring it to position CI. Moreover, our assumption is that *Yousef* being a pre-9/11 era, based on our previous indication, terrorist threats were perceived to be low-level at the time. In *Yousef*, we find no reason to believe that the US government had moved the CLGP to position MR from the normal (optimal) position CI. This was probably because, unlike the rest of Western liberal democracies, the US had not experienced a lot of terrorist threats to make the government develop special antiterrorism statutes. That means that terrorism offenses were at the time treated as ordinary criminality. It means therefore that the US courts adjudicated *Yousef* when the CLGP was optimally at position CI. Consequently, based on our ideological space model analytical tool in figure 4.1.1, we are not able to affirmatively say whether the US courts are impartial and independent or less impartial and independent in *Yousef*. However, we are able to tell that the US courts deferred to the government policy on terrorism-related cases in the pre-9/11 era. In *Yousef,* we see that the defendant (applicant) lost both in US district court (first-instance court) and in the US Court of Appeals for the Second Circuit. The US government, however, won in both instances.

Based on our analytical table, 4.1.2a, the applicant did not allege procedural unfairness. That means the investigating authorities and the trial court accorded him a fair trial right. There was no Article 6 violation, hence we find table 4.1.2a not applicable. Although the US is not a High Contracting Member of the ECHR, it is still necessary to use this template for ease of comparison. Based on table 4.1.2b, the applicant claimed ICCPR Article 7 and ECHR Article 3 violations. Again we are just fitting the claims into our analytical tables for ease of comparison. The applicant claimed he was tortured during detention. He further argued that the US did not have extraterritorial jurisdiction to try him for offences that occurred outside the US. Since we are assuming that there was no procedural unfairness alleged by the applicant, we cannot therefore apply table 4.1.2c for purposes of our analysis. However, since we are assuming that there was procedural fairness, when we apply table 4.1.2d we find that the applicant seem to have lost fairly in the domestic courts.

Since the US is not subject to the ECHR regime, that makes it impossible to apply table 4.1.2e in our analysis. Turning to figure 4.1.3, we can say that *Yousef* was an impartial disposition based on decisional independence of judges. We may conclude that the US courts appeared to be fair, impartial and independent in adjudicating terrorism-related cases in the pre-9/11 era. By fairness, it means the impartial application of existing rules and procedures.

(ii) *US v McVeigh*[154]

Timothy James McVeigh was an American domestic terrorist responsible for the 1995 Oklahoma City bombing that killed 168 people, 19 of whom were children, and injured more than 680 others, and destroyed one third of the Alfred P. Murrah Federal Building.[155] The incident attracted a lot of media publicity and became emotive. Due to perceived prejudice caused by media publicity, on February 19, 1996, the district court granted McVeigh's and Nichols' Motion for Change of Venue and transferred the case to Denver, Colorado.

Timothy McVeigh, a former U.S. Army soldier, was convicted on 15 counts of murder and conspiracy for his role in the 1995 terrorist bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Mr. McVeigh was tried, convicted, and sentenced to death on 11 counts stemming from the bombing of the Alfred P. Murrah Federal Building ("Murrah Building") in Oklahoma City, Oklahoma, that resulted in the deaths of 168 people.[156]

Mr. McVeigh appealed his conviction and sentence citing eight grounds that: pre-trial publicity unfairly prejudiced him; juror misconduct precluded his right to a fair trial; the district court erred by excluding evidence that someone else may have been guilty; the district court improperly instructed the jury on the charged offenses; the district court erred by admitting victim impact testimony during the guilt phase of trial; the district court did not allow him to conduct adequate *voir dire* to discover juror bias as to sentencing; the district court erred by excluding mitigating evidence during the penalty phase that someone else may have been involved in the bombing; the district court erred by excluding mitigating evidence during the penalty phase showing the reasonableness of McVeigh's beliefs with regard to events at the Branch Davidian

[154] 153 F.3d 1166 (10th Cir. 1998).
[155] https://www.nbcnews.com/id/wbna36634339. Retrieved on 9 February, 2021.
[156] 153 F.3d 1166 (10th Cir. 1998).

compound in Waco, Texas, and; the victim impact testimony admitted during the penalty phase produced a sentence based on emotion rather than reason.[157]

On the admissibility of evidence, the trial court argued that admission of inadmissible evidence may potentially disturb a defendant's conviction only if the error is not harmless. Thus the erroneous admission of evidence is harmless unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such an effect. Further, the court argued that cautionary instructions are ordinarily sufficient to cure any alleged prejudice to the defendant. The government bears the burden of proving the harmlessness of any error.

The United States Court of Appeals held that the district court failed to make an explicit record of its balancing of the Rule 403 factors. However, the Court may conduct a *de novo* balancing because the record contains a colloquy between the court and counsel that sheds considerable light on how the district court viewed the evidence. The Court concluded that even if there was probative value to defendant-appellant McVeigh's proffered evidence, it was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The United States Court of Appeals, Tenth Circuit was categorical that where public's interest in access to court documents is outweighed by interests which support nondisclosure, documents should be protected.[158] Thus, there was no error in excluding such evidence. Accordingly, the Court affirmed the district court's decision convicting McVeigh on 11 counts and sentencing him to death. After Timothy McVeigh had exhausted his direct and collateral challenges to his conviction and sentence, McVeigh was sentenced to death on August 14, 1997. His convictions and sentence were affirmed unanimously by the Tenth Circuit on September 8, 1998; and the Supreme Court denied certiorari on March 8, 1999.[159]

4.3.1.2 Summary of Analysis

In this analysis, *McVeigh* is a pre-9/11 era case. We are assuming that the CLGP was at position CI of the continuum. If at all the US government had moved it to position MR for security

[157]https://caselaw.findlaw.com/us-10th-circuit/1029918.html. Retrieved 4 February, 2021.
[158] https://www.justice.gov/archives/opa/brief-united-states-opposing-stay-execution.
[159] United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999).

reasons, then we should expect domestic courts to remedy that by restoring it to position CI. Moreover, our assumption is that *McVeigh* being a pre-9/11 era, based on our previous indication, terrorist threats were perceived to be low-level at the time. In *McVeigh*, we find no reason to believe that the US government had moved the CLGP to position MR from the normal (optimal) position CI. This was probably because, unlike the rest of Western liberal democracies, the US had not experienced a lot of terrorist threats to make the government develop special antiterrorism statutes. That means that terrorism offenses were at the time treated as ordinary criminality. It means therefore that the US courts adjudicated *McVeigh* when the CLGP was optimally at position CI. Consequently, based on our ideological space model analytical tool in figure 4.1.1, we are not able to affirmatively say whether the US courts were impartial and independent or less impartial and independent in *McVeigh*. However, we are able to tell that the US courts deferred to the government policy on terrorism-related cases in the pre-9/11 era. In *McVeigh*, we see that the defendant (applicant) lost both in the US district court (first-instance court) and in the US Court of Appeals for the Tenth Circuit. The US government, however, won in both instances.

Based on our analytical table, 4.1.2a, the applicant alleged procedural unfairness. That means the investigating authorities and the trial court did not accord him a fair trial right. However, this allegation was dismissed by both courts. The courts were right because even when the defendant complained about media publicity, which he felt would prejudice jury verdict, the judge allowed for the hearing of the case to be moved to a neutral location where the alleged prejudice would be harmless. This means there was actually no Article 6 violation, hence we find table 4.1.2a not applicable. Although the US is not a High Contracting Member of the ECHR, it is still necessary to use these templates for ease of comparison. Based on table 4.1.2b, the applicant claimed ICCPR Article 14(1-3 and ECHR Article 6 violations. Again we are just fitting the claims into our analytical tables for ease of comparison. The applicant claimed he did not receive a fair trial from the US district court. If we assume that there was procedural unfairness as alleged by the applicant, then we can apply table 4.1.2c for purposes of our analysis. However, based on my own research and extensive reading of the literature on this case, I concur with both courts that there was indeed procedural fairness accorded to the defendant. Since we are assuming that there was procedural fairness, when we apply table 4.1.2d we find that the applicant seem to have lost fairly three times in the domestic courts (district court, Court of Appeals and the Supreme Court).

The US government won in all the three instances, including the Supreme Court which decline the issuance of *certiorari*.

Since the US is not subject to the ECHR regime, that makes it impossible to apply table 4.1.2e in our analysis. Turning to figure 4.1.3, we can say that *McVeigh* was an impartial disposition based on decisional independence of judges. We may conclude that the US courts appeared to be fair, impartial and independent in adjudicating terrorism-related cases in the pre-9/11 era.

Altogether, in both *Yousef and McVeigh*, we can conclude that the US courts were more likely to support government policy on national security in the pre-9/11 era. However, the courts were still perceived to be fair, impartial, and independent in their adjudication of terrorism-related cases.

4.3.2 The US Jurisprudential Analysis of Counterterrorism in the Post-9/11 Era

(iii) *Hamdi v. Rumsfeld*[160]

There were mainly three points of law to be considered in *Hamdi*: 1) right to Due Process violation, contrary to the Fifth Amendment, 2) indefinite detention without trial 3) denial of access to an attorney.[161] Yaser Esam Hamdi is an American citizen who was captured by American forces while fighting for the Taliban in Afghanistan in the fall of 2001. He was initially detained at Guantanamo Bay, but was later transferred to the Naval Brig in Norfolk, Virginia, in April 2002. He was detained for several days awaiting the filing of criminal charges by the government. ‘‘Next friend’’ *habeas* petitions on Hamdi was filed in May 2002 by a public defender on Hamdi’s behalf. In addition, in June, Hamdi’s father, Esam Fouad Hamdi, also filed for *habeas corpus* as ‘‘next friend’’. Upon resolving the question of who had standing to bring a *habeas* petition on Hamdi’s behalf, the U.S. District Court appointed the public defender to represent him. The Court also required the government to allow Hamdi unhindered access to counsel, and further ordered the government to answer to the *habeas* petition. However, the government challenged the decision of the U.S. District Court and immediately appealed at the Fourth Circuit Court of Appeals.[162] The

[160] 542 U.S. 507 (2004).
[161] https://www.supremecourt.gov/opinions/03pdf/03-6696.pdf.

[162] Hamdi v. Rumsfeld 316 F.3d 450 (2003).

government rebutted that the Executive Branch had the right, during wartime, to declare people who fight against the United States "enemy combatants" and thus restrict their access to the regular court system.[163]

The U.S. District court ordered the government to produce some pertinent material evidence for a review by the court. However, not wanting to produce these materials, the government appealed. The Fourth Circuit Court of Appeals panel reversed and deferred to the government (ruled in government's favor), arguing that the separation of powers required federal courts to practice restraint during wartime because the executive and legislative branches are most suitable and, thus organized to supervise the conduct of overseas conflict in a way that the judiciary simply cannot. The court therefore found that it should defer to the Executive Branch's "enemy combatant" argument. Did the government violate Hamdi's Fifth Amendment right to Due Process by holding him indefinitely, without access to a lawyer, based solely on an Executive Branch declaration that he was an "enemy combatant" who fought against the United States? Does the separation of powers doctrine require federal courts to defer to the Executive Branch's reasoning that an American citizen can be an enemy combatant?

In an opinion backed by a four-justice majority of the U.S. Supreme Court, and partly joined by two additional justices of the same court, Justice Sandra Day O'Connor wrote that although Congress authorized Hamdi's detention, Fifth Amendment due process guarantees give a citizen held in the United States as an enemy combatant the right to contest that detention before a neutral court of justice.[164] The majority rejected the government's argument that the separation-of-powers prevents the judiciary from hearing Hamdi's challenge. Justice David H. Souter, joined by Justice Ruth Bader Ginsburg, concurred with the majority that Hamdi had the right to challenge in court his "an enemy combatant" status. Souter and Ginsburg, however, disagreed with the plurality's view that Congress authorized Hamdi's detention. However, Justice Antonin Scalia issued a dissent joined by Justice John Paul Stevens. At the same time, Justice Clarence Thomas dissented separately.[165]

[163] https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/CF04F594D0FB92CAC1257244004DE1EE. Retrieved on 12 May, 2021.
[164] https://caselaw.findlaw.com/us-supreme-court/542/507.html. Retrieved 17 May, 2021.
[165] Ibid, Supra n 148.

4.3.2.1 Summary of Analysis

In this analysis, *Hamdi* is a post-9/11 era case. We are assuming that the US government had already shifted the CLGP to position MR from position CI of the continuum. If at all the US government had moved the CLGP to position MR for security reasons, then we should expect domestic courts to remedy that by restoring it to position CI. Moreover, our assumption is that *Hamdi* being a post-9/11 era, based on our previous indication, terrorist threats were perceived to be at high-level at the time. In *Hamdi*, we find myriad reasons to believe that the US government had moved the CLGP to position MR from the normal (optimal) position CI. This was evidenced by the military detention of Mr. Hamdi, indefinite detention, lack of access to a counsel, and lack of due process. Because of the 9/11 terrorist attacks, the US developed the Patriot Act,[166] which limited freedom and fundamental rights. That means that terrorism offenses were at this time now treated under a special penology different from that of ordinary crimes. It means therefore that the US courts adjudicated *Hamdi* when the government had shifted the CLGP to position MR from position CI. Consequently, based on our ideological space model analytical tool in figure 4.1.1, we are able to see that while the US District Court is appearing to take a civilian criminal justice model, the US Court of Appeals of the Fourth Circuit is appearing to be supporting the military justice model. At the same time, we can see that the US Supreme Court is also firmly supporting the civilian justice model rather than the military justice model.

Based on our ideological space model in figure 4.1.1, we are able to say that the US courts present mixed results in terms of fairness, impartiality and independence with regard to adjudicating terrorism-related cases. We can say that both the US District court and the US Supreme Court appear to be fair, impartial and independent when adjudicating terrorism related cases. However, the US Court of Appeals appear to be less fair, less impartial and less independent when adjudicating terrorism-related cases. We can also say that both the US District Court and the US Supreme Court succeeded in restoring the CLGP to position CI from position MR, while the US Court of Appeals was unable to restore the CLGP to position CI. We are also able to see that while the US Court of Appeals are supportive of the government's expanded national security

[166] https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf.

laws, both the US District Court and the US Supreme Court are keen on ensuring that the government does not abuse its discretion with regard to the expanded national security laws.

Based on our analytical table, 4.1.2a, the applicant alleged procedural unfairness. He was denied access to counsel, due process rights and subjected to indefinite detention. That means the investigating authorities under the military regime did not accord him a fair trial right. However, we see that both the US District Court and the US Supreme Court are able to remedy the procedural unfairness and ensuring that Mr. Hamdi receives a fair trial. However, the US Court of Appeals appear to support the military justice model, which does not fully provide the right to a fair trial. This means there was actually Article 6 violation, hence we find table 4.1.2a applicable to our analysis. Although the US is not a High Contracting Member of the ECHR, it is still necessary to use these templates for ease of comparison.

Based on table 4.1.2b, the applicant claimed ICCPR Article 14(1-3 and ECHR Article 6 violations. Again we are just fitting the claims into our analytical tables for ease of comparison. The applicant claimed he was not likely to receive a fair trial based on his treatment at the US military detention. If we assume that there was procedural unfairness as alleged by the applicant, then we can apply table 4.1.2c for purposes of our analysis. However, based on my own research and extensive reading of the literature on this case, my reading shows that the applicant was eventually accorded a fair hearing by the US Supreme Court. Since we are assuming that a procedural fairness was finally accorded, when we apply table 4.1.2d we find that the applicant seem to have won fairly twice in the domestic courts (District court, and the Supreme Court). The US government won in just one Court (US Court of Appeals).

Since the US is not subject to the ECHR regime, that makes it impossible to apply table 4.1.2e in our analysis. Turning to figure 4.1.3, we can say that *Hamdi* was an impartial disposition based on decisional independence of judges of the District Court and the Supreme Court. We can also say that *Hamdi* received partial disposition based on decisional independence of the US Court of Appeals judges. We may conclude that the US courts present mixed responses when it comes to adjudicating terrorism-related cases in the post-9/11 era. While District Courts and the Supreme Court appear to be fair, impartial and independent while adjudicating terrorism-related cases, Court of Appeals appear to be less fair, less impartial, and less independent, hence deferring to government on national security.

(iv) *Padilla v. Bush*[167]

In 2002, the applicant (Mr. Jose Padilla), who is a United States citizen, was arrested at O'Hare International Airport by FBI agents who were executing a material witness arrest warrant. The applicant was then transferred to New York, where he was held as a material witness in connection with a grand jury investigation of the terrorist attacks of September 11, 2001. The US President had issued an order[168] naming Padilla an "enemy combatant" after which the defendant's custody was transferred to the Department of Defense. The defendant was then immediately seized and, without notice to counsel, transported to a high security military brig in South Carolina. The defendant's appointed counsel immediately filed a *habeas corpus* petition on his behalf. For years, the government filed no charges against the defendant, but held him incommunicado, not even allowing visits from his attorney. The case eventually reached the Supreme Court, which then held that the defendant had filed his *habeas* petition in the wrong court.[169]

On December 4, 2002, Mukasey J ruled that Newman, (Padilla's attorney), had standing as ''next friend''. He further declared that the secretary of defense, rather than the president, was the proper respondent in the case. Mukasey J also declared that the District Court in New York retained jurisdiction to hear the case. He also declared that President Bush had authority to order Padilla's detention despite his United States citizenship. He made further declaration that Padilla could consult with counsel while pursuing his petition. Moreover, Mukasey J declared that the ''same evidence'' standard applied in determining whether Padilla was lawfully detained. At the same time, Mukasey J acknowledged that the government could invoke enemy combatant law and classify citizens as enemy combatants even in the absence of a declaration of war. In reaching this conclusion, the court seemed to have relied heavily both on *Ex parte Quirin*.[170]

In 2004, the defendant's counsel filed a new *habeas corpus* petition in the U.S. District Court for South Carolina. The District Court ruled that the defendant's detention had not been authorized by Congress and was therefore unlawful. The government appealed to the Fourth

[167] United States District Court, S.D. New York, Dec 4, 2002: 233 F. Supp. 2d 564 (S.D.N.Y. 2002).
[168] The Joint Resolution provides also, in section 2(b) (1), that it "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." Authorization for Use of Military Force, Pub. Law No. 107-40, § 2(b) (1), 115 Stat. 224, 224 (2001).
[169] https://www.americanbar.org › padillabriefjuly03PDF.

[170] Ibid, Supra n 175.

Circuit. The *amicus* brief in support of the defendant argued that the indefinite military detention of the defendant violated the core constitutional principles of due process of law and the supremacy of civilian authority over military. On September 9, 2005, the Fourth Circuit Court of Appeals reversed the trial court's decision and held that the US President was authorized to detain enemy combatants under the Authorization of Use of Military Force passed by Congress[171] in the wake of September 11. The defendant then filed a petition for *certiorari* in the US Supreme Court, which was then denied on April 3, 2006. While the Supreme Court was considering the defendant's petition for review, the government transferred him to civilian custody in an attempt to sidestep the Court's review, and charged him with terrorism-related offenses. The Supreme Court declined to hear Padilla's appeal.

In 2007, Mr. Padilla was sentenced to 17 years after being found guilty of terrorism charges. His original sentence took into account three years that he spent in the U.S. navy jail before being charged. Padilla alleged, however, that he was tortured while in the navy jail. In handing out the longer sentence, Federal District Judge Marcia Cooke, who passed the original 17-year sentence, said she remained concerned about Padilla's treatment in the navy jail in South Carolina. "I was then, and am now, dismayed by the harshness of Mr Padilla's prior confinement,"[172] she said in the Miami courtroom. By contrast, in considering Jose Padilla's challenge to detention as an ''enemy combatant,'' Federal District Mukasey J accorded greater weight to procedural requirements. He reaffirmed Padilla's right to consult counsel.

One scholar opines that over the past years, "American courts have, with few exceptions, been unwilling to limit the president's war-making power". It is also believed that despite the "strong inclination toward judicial deference, however, the Supreme Court and lower courts as well have nurtured the principle of judicial review. Even in the aftermath of 9/11, courts seem unwilling to relinquish this ultimate authority" (Stephens, 2004, p.82).

[171] "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title." 18 U.S.C. § 3144 (2000).

[172] 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

4.3.2.2 Summary of Analysis

In this analysis, *Padilla* is a post-9/11 era case. We are assuming that the US government had already shifted the CLGP to position MR from position CI of the continuum. If at all the US government had moved the CLGP to position MR for security reasons, then we should expect domestic courts to remedy that by restoring it to position CI. Moreover, our assumption is that *Padilla* being a post-9/11 era, based on our previous indication, terrorist threats were perceived to be at high-level at the time. In *Padilla,* we find myriad reasons to believe that the US government had moved the CLGP to position MR from the normal (optimal) position CI. This was evidenced by the military detention of Mr. Padilla, longer detention without trial, lack of access to a counsel, and lack of due process. Because of the 9/11 terrorist attacks, the US developed the Patriot Act,[173] which limited freedom and fundamental rights. That means that terrorism offenses were at this time now treated under a special penology statute different from that of ordinary crimes. It means therefore that the US courts adjudicated *Padilla* when the government had shifted the CLGP to position MR from position CI. Consequently, based on our ideological space model analytical tool in figure 4.1.1, we are able to see that while the US District Court was appearing to take a civilian criminal justice model, the US Court of Appeals of the Fourth Circuit was appearing to be supporting the military justice model. At the same time, we can see that the US Supreme Court avoided *Padilla* by refusing to grant certiorari.

Based on our ideological space model in figure 4.1.1, we are able to say that the US courts present mixed results in terms of fairness, impartiality and independence with regard to adjudicating terrorism-related cases in the post-9/11 era. We can say that the US District Court appear to be fair, impartial and independent when adjudicating terrorism related cases. However, the US Court of Appeals appear to be less fair, less impartial and less independent when adjudicating terrorism-related cases. We can also say that the US District Court succeeded in restoring the CLGP to position CI from position MR, while the US Court of Appeals was unable to restore the CLGP to position CI. We are also able to see that while the US Court of Appeals are supportive of the government's expanded national security laws, the US District Court is keen on

[173] https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf.

ensuring that the government does not abuse its discretion with regard to the expanded national security laws.

Based on our analytical table, 4.1.2a, the applicant alleged procedural unfairness. He was denied access to counsel, due process rights and subjected to longer detention. That means the investigating authorities under the military regime did not accord him a fair trial right. However, we see that the US District Court is able to remedy the procedural unfairness and ensuring that Mr. Padilla receives a fair trial. However, the US Court of Appeals appear to support the military justice model, which does not fully provide the right to a fair trial. This means there was actually Article 6 violation, hence we find table 4.1.2a applicable to our analysis. Although the US is not a High Contracting Member of the ECHR, it is still necessary to use these templates for ease of comparison.

Based on table 4.1.2b, the applicant claimed ICCPR Article 14(1-3 and ECHR Article 6 violations. Again we are just fitting the claims into our analytical tables for ease of comparison. The applicant claimed he was not likely to receive a fair trial based on his treatment at the US military detention. If we assume that there was procedural unfairness as alleged by the applicant, then we can apply table 4.1.2c for purposes of our analysis. However, based on my own research and extensive reading of the literature on this case, my reading shows that the applicant was eventually accorded a fair hearing by the US District Court. Since we are assuming that a procedural fairness was finally accorded, when we apply table 4.1.2d we find that the applicant seem to have won fairly on the question of the right to a fair trial. However, in terms of substantive judgement, the District Court subsequently convicted and sentenced Mr. Padilla. The US government eventually won in the trial.

Since the US is not subject to the ECHR regime, that makes it impossible to apply table 4.1.2e in our analysis. Turning to figure 4.1.3, we can say that *Padilla* was an impartial disposition based on decisional independence of judges of the District Court. We can also say that *Padilla* received partial disposition based on decisional independence of the US Court of Appeals judges. We may conclude that the US courts present mixed responses when it comes to adjudicating terrorism-related cases in the post-9/11 era. While US District Courts appear to be fair, impartial and independent while adjudicating terrorism-related cases, US Court of Appeals appear to be less fair, less impartial, and less independent, hence deferring to government on national security. At

the same time, the US Supreme Court turned down Padilla probably because it was deliberately avoiding a clash with democratic institutions (electoral branches of government).

Altogether, in both *Hamdi* and *Padilla*, we can conclude that while the US lower courts and the US Supreme Court are more likely to support civilian justice model for terrorism offenders, the US Court of Appeals appear to support the military justice model for terrorism offenders. We can also conclude that while the US lower courts and the US Supreme Court are perceived to be fair, impartial, and independent in their adjudication of terrorism-related cases, the US Court of Appeals appear less fair, less impartial and less independent.

4.3.3 The UK Jurisprudential Analysis of Terrorism Cases in the Pre-9/11 Era

(i) *Brannigan and McBride v. the United Kingdom*.[174]

I start my analysis with judicial opinion prior to the 9/11. In particular, *Brannigan and McBride* is a pre-9/11 judicial opinion. The analysis herein is intended to examine judicial response to national security threat vis-a-vis with liberty, before the 9/11. Brannigan and McBride were two suspects residing in Northern Ireland and were arrested and detained under section 12 (1) (b) of the Prevention of Terrorism (Temporary Provisions) Act 1984. At the time of their arrest, there were incidents of terrorist threat in Northern Ireland. They were detained for periods of six days, fourteen hours and thirty minutes, and four days, six hours and twenty-five minutes respectively, without being brought before an open court.

The arrest and longer detention was contrary to Article 5 § 3 of the ECHR Convention. This provision provides that if a person is arrested then he or she has the right to stand trial soon, or be released until the trial takes place and if such detention was invalid, then remedy for compensation must apply. The applicants had also alleged violation of Article 13 (art. 13). On point of law was whether the UK government had a valid reason to request for derogation under Article 15 of the Convention. Article 15 permits derogation whenever a Contracting Party has reason to believe that the nation's life is in danger, particularly during a state of emergency.

[174] *Brannigan and McBride v. the United Kingdom* - 14553/89 and 14554/89
Judgment 26.5.1993: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9555%22]}.

The UK government had the option of applying for judicial control but it did not. Instead, it applied for derogation. The ECtHR argued that the government did not exceed their margin of appreciation in deciding against judicial control. The margin of appreciation is a judicial doctrine whereby international courts allow states to have some latitude of diversity in their interpretation of human rights obligations. The UK High Court had found the United Kingdom government to be in breach of Article 5 § 3.

The ECtHR on its part agreed that there was an emergency situation in the UK at the time of arrest. Since the UK government had applied for derogation under Article 15, the ECtHR, however, failed to determine whether derogation was a genuine response by the UK government at the time of application. The ECtHR ruled that derogation satisfied requirements of Article 15 and defendants could not validly complain of violation of Article 5 § 3. The ECtHR also held that no obligation under Article 5 § 5 to provide applicants with enforceable right to compensation. The decision was twenty-two votes to four. Since there were no particular procedural unfairness alleged by the applicants, we are assuming that the trial was fair.

4.3.3.1 Summary of Analysis

Since *Brannigan and McBride* happened in the pre-9/11 era, we are assuming that the CLGP was at position CI of the continuum. If at all the UK government had moved it to position MR for security reasons, then we should expect domestic courts to remedy that by restoring it to position CI because our assumption is that *Brannigan and McBride* is a pre-9/11 trial and generally, terrorist threats were at low-level at the time. In *Brannigan and McBride*, we see that the UK government had actually moved the CLGP to position MR from the normal (optimal) position CI. However, the UK courts failed to restore the CLGP to position CI, meaning that the judiciary supported the government's national security policy even though it tended to impinge upon liberty. Based on this analysis, we can say that the UK courts deferred to government on security matters in the pre-9/11 era. In *Brannigan and McBride*, we see that the applicants lost both in domestic tribunal and in the international Court. The UK government, however, wins in both instances.

Based on our analytical table, 4.1.2a, the applicants did not allege Article 6 violation, hence we find table 4.1.2a not applicable. Based on table 4.1.2b, the applicants claimed Article 5 and 13

violations of fundamental rights. Since we are assuming that there was no procedural unfairness alleged by the applicants, we cannot therefore apply table 4.1.2c. However, since we are assuming that there was procedural fairness, when we apply table 4.1.2d we find that the applicants seem to have lost fairly in the domestic courts.

Based on table 4.1.2e, we see that the applicants lost both in domestic tribunal and in the international Court. The UK government, however, won in both instances. We can say that the UK judiciary was perceived to be fair, impartial and independent, prior to the 9/11. Turning to figure 4.1.3, we can say that *Brannigan and McBride* was an impartial disposition based on decisional independence. We may conclude that the UK courts appeared to be fair, impartial and independent during *Brannigan and McBride.*

It is, however, surprising that we would have expected the UK courts to actually restore the CLGP to position CI from position MR, but that is clearly not the case in *Brannigan and McBride*. Most strikingly, we see that despite the UK courts being perceived as fair, impartial, and independent, they tend to defer to the executive policy on national security even during a low-level crisis situation.

(ii) *Brogan and Others v. the United Kingdom*[175]

It this analysis, *Brogan and Others v. the United Kingdom* is a pre-9/11 judicial opinion. The main applicant in this case was Mr. Brogan. He was arrested at his home at 6.15 a.m. on 17 September 1984 by police officers under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 ("the 1984 Act"). Interestingly, the UK government had informed the Secretary General of the Council of Europe on 22 August 1984 that they were withdrawing a notice of derogation under Article 15 (art. 15) which had relied on an emergency situation in Northern Ireland. The applicant was detained for a period of five days and eleven hours. He was interrogated concerning his suspected membership of the Provisional Irish Republican Army ("IRA"). He was questioned about his suspected involvement in an attack on a police mobile patrol that occurred on 11 August 1984 resulting in the death of a police sergeant. Brogan and Others (his co-accused) were, however, duly informed by the security agency about the reason for their arrest.

[175] https://hudoc.echr.coe.int/fre?i=001-57450; *Brogan and Others v. the United Kingdom*, ECtHR: Application no. 11209/84; 11234/84; 11266/84; 11386/85.

The applicants alleged breach of Article 5 paragraph 1 (art. 5-1) of the Convention, which, provides that:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: part c says, (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...". The ECtHR ruled in favor of the UK government on this question.

There was also alleged breach of Article 5 paragraph 3 of the Convention, which provides that:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." The ECtHR ruled in favor of the applicant on this question.

There was also alleged breach of Article 5 paragraph 4 of the Convention, which provides that:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." The ECtHR ruled in favor of the UK government on this question.

Alleged breach of Article 5 paragraph 5, which provides that:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation." The ECtHR ruled in favor of the applicant on this question.

There was also an alleged breach of Article 13, which provides that:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The ECtHR ruled in favor of the UK government on this question.

Altogether, the ECtHR held that there had been violation of Article 5 para. 3 (art. 5-3). The Court also held that there had been a violation of Article 5 para. 5 (art. 5-5).

4.3.3.2 Summary of Analysis

Since *Brogan and Others* happened in the pre-9/11 era, we are assuming that the CLGP was at position CI of the continuum. If at all the UK government had moved it to position MR for security reasons, then we should expect domestic courts to remedy that by restoring it to position CI because our assumption is that *Brogan and Others* is a pre-9/11 trial and generally, terrorist threats were at low-level at the time. In *Brogan and Others,* we see that the UK government had actually moved the CLGP to position MR from the normal (optimal) position CI. This is evidenced by the fact that the government had applied for withdrawal from derogation shortly before Brogan and his co-accused were arrested. However, the government handled the arrest as if it was still keeping derogation.

We see that the UK courts failed to restore the CLGP to position CI, meaning that the judiciary supported the government's national security policy even though it tended to impinge upon liberty. Based on this analysis, we can say that the UK courts deferred to government on security matters in the pre-9/11 era. In *Brogan and Others*, we see that the applicants lost in domestic courts, but partly won in the international Court. The UK government, however, wins in domestic courts, but partly loses in the international Court.

Based on our analytical table, 4.1.2a, the applicants did not allege Article 6 violation, hence we find table 4.1.2a not applicable for now. Based on table 4.1.2b, the applicants claimed Article 5 para. 3 and 5 para. 5 violations of fundamental rights. Since there was no procedural unfairness alleged by the applicants, we cannot apply table 4.1.2c. On the other hand, we are assuming that there was procedural fairness, and when we apply table 4.1.2d we find that the applicants seem to have lost fairly in the domestic courts.

However, based on table 4.1.2e, we see that the applicants lost in domestic courts, but won in the international Court. In *Brogan and Others*, we see the UK government winning the three of the five most important questions and the applicants winning only two. We can say that even though the UK courts appeared to be conducting fair trials in the pre-9/11 era, they appeared to be less impartial and less independent in handling terrorism-related cases when scrutinized against international standards. Turning to figure 4.1.3, we can say that *Brogan and Others* was a product of partial disposition based on decisional independence of the UK judges, but an impartial

disposition based on decisional independence of the ECtHR judges. We also see the ECtHR shifting the CLGP a little bit towards position CI from position MR, something that the UK courts failed to do. We can conclude that despite the UK courts appearing to be fair when handling domestic terrorism-related cases, international standard scrutiny shows that the courts were less impartial and less independent when handling terrorist-related cases in the pre-9/11 era.

It is, however, surprising that we would have expected the UK courts to actually restore the CLGP to position CI from position MR, but that is clearly not the case in *Brogan and Others*. Most strikingly, despite the UK courts being perceived as fair by local standards, they tended to defer to the executive policy on national security even during low-level crisis situation. This implies that the courts were likely less impartial and less independent when handling terrorism-related cases.

Overall, in both *Brannigan and McBride* and *Brogan and Others*, we can conclude that the UK courts seemed to defer to government on matters related to national security. At the same time, the UK Courts presented mixed results when it comes to fairness, impartiality, and independence. In both cases, 50 percent of the times the courts appeared impartial and independent while 50 percent of the time they seemed less impartial and independent.

4.3.4 The UK Jurisprudential Analysis of Counterterrorism in the Post-9/11 Era

(iii) *Al-Jedda v. the United Kingdom* [176]

In *Al-Jedda,* the applicant was a dual British and Iraqi citizen who was detained indefinitely in a Basra facility run by British forces. An application by Mr Al-Jedda alleged that he was detained by British troops in Iraq in breach of Article 5(1) of the Convention. As to the facts reveal that Mr Al-Jedda was detained between 10 October 2004 and 30 December 2007. The British authorities believed that he had been recruiting terrorists outside Iraq and also that he had engaged in other activities with a view to committing acts of terrorism in Iraq. The British authority said Mr Al-Jedda's detention was said to be necessary for the maintenance of security in Iraq. The intelligence supporting these allegations was, however, not disclosed to him and no criminal charges were brought against him. In June 2005 he brought judicial-review proceedings in the UK

[176] https://hudoc.echr.coe.int/fre?i=001-105612; *Al-Jedda v. the United Kingdom,* ECtHR: *Application no. 27021/08, 2011.*

challenging the lawfulness of his continued detention and the refusal of the UK government to return him to the UK.

The UK government argued on its part that Mr Al-Jedda's detention was attributable to the United Nations and not the United Kingdom. The government further argued that the act of detaining Mr Al-Jedda was carried out pursuant to the United Nations Security Council Resolution 1546. The government argued that this obligation overrode obligations under the ECHR. This is because the operation of Articles 25 and 103 of the UN Charter requires states to accept and carry out the decisions of the United Nations Security Council (UNSC). Article 103 provides that Charter obligations override other international obligations.

Mr Al-Jedda argued on his part that the UNSC Resolution 1546, while giving the power to the UK to detain him, did not mandate the UK to do so in violation of Article 5 of the ECHR. While the Resolution provided the authority to take measures to provide security and stability in Iraq, it did not, however, require the UK to take action that was incompatible with its human rights obligations. Mr Al-Jedda further argued that since respect for human rights was one of the paramount principles of the UN Charter, if the UNSC had intended to oblige the UK to act in breach of its international human rights obligations, then it would have used very clear and unequivocal language to do so.

The point of law then became whether UNSC Resolution 1546 placed the UK under obligation to hold the applicant in detention. In 2007, the House of Lords ruled unanimously that the detention was lawful because the UK government had been authorized by UN Security Council resolution 1546. However, the ECtHR considered the purpose of the UN Charter in protecting human rights and decided that there was a presumption against requiring Member States to breach fundamental principles of human rights. Ultimately, the ECtHR determined by 16 votes to one that Mr Al-Jedda's rights under the Convention had been violated. The UK government was found to have violated Article 1 of the Convention since the applicant was within the United Kingdom jurisdiction under Article 1 of the Convention, which the UK was disputing.

Article 1 of the Convention reads as follows:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

The ECtHR in a unanimous decision determined that the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention. Also, the UK government was found to be in violation of Article 5 § 1.

4.3.4.1 Summary of Analysis

Although *Al-Jedda* happened in the post-9/11 era, we are assuming that the CLGP was still at position CI of the continuum. If at all the UK government had moved it to position MR for security reasons, then we should expect domestic courts to remedy that by restoring it to position CI. Our assumption is that *Al-Jedda* is a post-9/11 trial and generally, terrorist threats were at high-level at the time. In *Al-Jedda*, we see that the UK government had actually moved the CLGP to position MR from the normal (optimal) position CI. This is evidenced by the fact that the government was actually operating under the UNSC Resolution 1456. The government was therefore operating outside and far beyond the CLGP. It had shifted the CLGP to position MR from position CI.

We see that the UK courts failed to restore the CLGP to position CI, meaning that the judiciary supported the government's national security policy as well as the UNSC Resolution 1456 even though it impinged upon right to liberty. Based on this analysis, we can say that the UK courts deferred to government on security matters in the post-9/11 era. *In Al-Jedda*, we see that the applicant lost in domestic courts, but won in the international Court. The UK government, however, wins in domestic courts, but loses in the international Court.

Based on our analytical table, 4.1.2a, the applicants did not allege Article 6 violation, hence we find table 4.1.2a not applicable for now. Based on table 4.1.2b, the applicants claimed Article 5 para. 1 violation and Article 1 violation of obligation to respect human rights. Since there was no procedural unfairness alleged by the applicants, we cannot apply table 4.1.2c. On the other hand, we are assuming that there was procedural fairness, and when we apply table 4.1.2d we find that the applicants seem to have lost fairly in the domestic courts as shown on the party score board.

However, based on table 4.1.2e, we see that the applicant lost in domestic courts, but won in the international Court. In *Al-Jedda*, we can say that even though the UK courts appeared to be conducting fair trials in the post-9/11 era, they appeared to be less impartial and less independent

in handling terrorism-related cases when scrutinized against international standards. Turning to figure 4.1.3, we can say that *Al-Jedda* was a product of partial disposition based on decisional independence of the UK judges, but an impartial disposition based on decisional independence of the ECtHR judges. We also see the ECtHR shifting the CLGP to position CI from position MR, something that the UK courts failed to do. We can conclude that despite the UK courts appearing to be fair when handling domestic terrorism-related cases, international standard scrutiny shows that the courts are actually less impartial and less independent in handling terrorism-related cases in the post-9/11 era.

It is, however, surprising that we would have expected the UK courts to actually restore the CLGP to position CI from position MR, but that is clearly not the case in *Al-Jedda*. Most strikingly, despite the UK courts being perceived as fair by local standards, they tend to defer to the executive policy on national security during a high-level crisis situation. This implies that the UK courts are more likely to be less impartial and less independent when handling terrorism-related cases.in the post-9/11 era.

(iv) *A. and Others v. the United Kingdom* [177]

This was a post-9/11 case. It relates to eleven applicants who were detained in high security conditions as suspected terrorists by the UK government, pursuant to antiterrorist legislation passed after the 9/11 attacks. The applicants were all alleged to have been involved in extreme Islamist terrorist groups linked to Al-Qaeda. They were also suspected of providing financial support to those groups through fund raising, fraud or forgery activities. Since they could not be deported because doing so would put them at risk of ill-treatment in their countries of origin, they were instead detained as international terrorists under the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"). Two of the applicants were released because they had chosen to voluntarily leave the United Kingdom, three of them were transferred to a Psychiatric Hospital and one was released on conditions that he would be put under house arrest. The other remaining eight

[177] https://hudoc.echr.coe.int › app › conversion › pdf.

applicants remained in prison until the 2001 Act was repealed by Parliament in March 2005. Upon their release, they were subject to restrictive regimes and were placed in immigration custody awaiting removal to their countries of origin. The applicants alleged that their detention breached their rights under Article 3 of the Convention and that they were denied an effective remedy for their claim, in breach of Article 13 of the Convention. Further, they also alleged that it was completely discriminatory and in breach of Article 14 of the Convention detaining them when the UK nationals suspected of involvement with Al-Qaeda were left at liberty. The applicants also contended that the procedure before the domestic courts to challenge their detention did not comply with the requirements of Article 5 para 4.

The applicants alleged the violation of Article 3 of the Convention, that is, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. However, the ECtHR concluded unanimously that there was no violation in respect of ten applicants, and the other complaint was inadmissible in respect of remaining applicant.

The applicants also alleged Article 5 paragraph 4 violation, which states that:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." The ECtHR unanimously concluded that there was violation of Article 5 paragraph 4 in respect of four applicants but not the five others, and the complaints of the remaining two others were inadmissible.

The applicants alleged Article 5 paragraph 5 violation, which states that:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation." The ECtHR unanimously concluded that there was violation of Article 5 paragraph 5 in respect of all but the second and fourth applicants.

4.3.4.2 Summary of Analysis

Although *A. and Others* happened in the post-9/11 era, we are assuming that the CLGP was still at position CI of the continuum. If at all the UK government had moved it to position MR for security reasons, then we should expect domestic courts to remedy that by restoring it to position CI. Our assumption is that *A. and Others* is a post-9/11 trial and generally, terrorist threats

were at high-level at the time. In *A. and Others*, we see that the UK government had actually moved the CLGP to position MR from the normal (optimal) position CI. This is evidenced by the fact that the government had applied a lot or restrictions and longer detentions for suspects without actually presenting them before a public court.

We see that the UK courts failed to restore the CLGP to position CI, meaning that the judiciary supported the government's national security policy even though it tended to impinge upon liberty. Based on this analysis, we can say that the UK courts deferred to government on security matters in the post-9/11 era. In *A. and Others*, we see that the applicants lost in domestic courts, but partly won in the international Court. The UK government, however, won in domestic courts, but partly lost in the international Court.

Based on our analytical table, 4.1.2a, the applicants did not allege Article 6 violation, hence we find table 4.1.2a not applicable for now. Based on table 4.1.2b, the applicants claimed Article 5 para. 4 and Article 5 para. 5 violations of liberty and security rights. Since there was no procedural unfairness alleged by the applicants, we cannot apply table 4.1.2c. On the other hand, we are assuming that there was procedural fairness, and when we apply table 4.1.2d we find that the applicants seem to have lost fairly in the UK domestic courts.

However, based on table 4.1.2e, we see that the applicants lost in domestic courts, but won in the international Court. In *A. and Others*, we can say that even though the UK courts appeared to be conducting fair trials in the post-9/11 era, a scrutiny of the courts against international standards indicates that the courts seem to be less impartial and less independent in handling terrorism-related cases. Turning to figure 4.1.3, we can say that *A. and Others* was a product of partial disposition based on decisional independence of the UK judges, but an impartial disposition based on decisional independence of the ECtHR judges. We also see the ECtHR shifting the CLGP to position CI from position MR, something that the UK courts failed to do. We may conclude that despite the UK courts appearing to be fair, scrutiny by international standards show that the courts are more likely to be less impartial and less independent when handling terrorism-related cases in the post-9/11 era.

It is surprising, however, that we would have expected the UK courts to actually restore the CLGP to position CI from position MR, but that is clearly not the case in *A. and Others*. Most strikingly, despite the UK courts being perceived as fair in their handling of terrorism-related

cases, they tend to defer to the executive policy on national security during high-level crisis situation. This implies that the UK courts are likely to be less impartial and less independent while adjudicating terrorism-related cases in the post-9/11 era.

Overall, in both *Al-Jedda and A. and Others*, we can conclude that the UK courts seem to defer to government on matters related to national security. At the same time, the UK Courts appear to be less fair, less impartial, and less independent when adjudicating terrorism-related cases. In both cases, 100 percent of the times the UK courts appeared less impartial and less independent while adjudicating terrorism-related cases.

4.3.5 The German Jurisprudential Analysis of Terrorism in Pre-9/11 Era

(i) *Weber and Saravia v. Germany*[178]

This case involved the restrictions on the secrecy of mails, post and telecommunications. In 1994 the Act of 13 August 1968 on Restrictions on the Secrecy of Mail, Post and Telecommunications (aka "the G 10 Act") was amended to accommodate the so-called strategic monitoring of telecommunications. This allowed for the collection of information by intercepting telecommunications in order to identify and avert serious dangers facing the Federal Republic of Germany. Such threats included an armed attack on its territory or the commission of international terrorist attacks and certain other serious offences. The changes noticeably concerned the extension of the powers of the Federal Intelligence Service (Bundesnachrichtendienst) with regard to the recording of telecommunications in the course of strategic monitoring. It also concerned the use of personal data obtained by the Federal Intelligence Service and, hence their transmission to other authorities. The first applicant, a German national, was a freelance journalist; the second applicant, was a Uruguayan national who took telephone messages for the first applicant and passed them on to her.

In 1995 the applicants alleged that certain provisions of the Fight against Crime Act amending the G 10 Act disregarded their fundamental rights, notably the right to secrecy of telecommunications (Article 10 of the Basic Law), the right to self-determination in the sphere of information (Article 2 § 1 and Article 1 § 1 of the Basic Law), freedom of the press (Article 5 § 1

[178] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-76586%22]}.

of the Basic Law) and the right to effective recourse to the courts (Article 19 § 4 of the Basic Law). The applicants lodged a constitutional complaint with the German Federal Constitutional Court challenging the new amendments.

In the applicants' submission, she argued that technological progress had made it possible to intercept telecommunications everywhere in the world and to collect personal data. Numerous telecommunications could be monitored, in the absence of any concrete suspicions, with the aid of catchwords which remained secret. Strategic monitoring could then be used in respect of individuals, preventing the press from carrying out effective investigations into sensitive areas covered by the Act.[179] The applicant further submitted that the amended G 10 Act prejudiced the work of journalists investigating issues targeted by surveillance measures. She could no longer guarantee that information she received in the course of her journalistic activities remained confidential. In the Court's view, the threat of surveillance constitutes an interference to her right, in her capacity as a journalist, to freedom of expression.

In a judgment of 14 July 1999, the Federal Constitutional Court held that the second applicant had no locus standi but upheld the first applicant's complaint in part. The application was based on the applicants' remaining complaints. A new version of the G 10 Act entered into force on 29 June 2001. The Federal Constitutional Court held that the constitutional complaint lodged by the second applicant was inadmissible. The court asserted that a constitutional complaint could be lodged directly against a statute if the person concerned could not know whether there had actually been an implementing measure applying the statute to him or her. The complainant (second applicant), however, needed to substantiate sufficiently, his or her argument that his or her fundamental rights were likely to be infringed upon by measures taken on the basis of the impugned statute.

The Federal Constitutional Court noted, however, that it was irrelevant that the applicants did not reside in Germany since the impugned provisions were aimed at monitoring international telecommunications. The Court, however, held that, unlike the first applicant, the second applicant had failed to substantiate sufficiently, his claim that his rights under the Basic Law were likely to be interfered with by measures based on the impugned provisions of the amended G 10 Act. The

[179] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-76586%22]}, para 9.

Court affirmed that in the absence of any further details, the mere fact that the second applicant dealt with the first applicant's telecommunications in her absence was not sufficient to demonstrate this. The German Federal Constitutional Court, however, partly allowed Weber's constitutional complaint. The Federal Constitutional Court held that certain provisions of the Fight Against Crime Act were incompatible or only partly compatible with the principles laid down in the Basic Law.

In *Weber*, the ECtHR was competent to determine whether the interception of foreign telecommunications falls within the jurisdiction of Germany and within the meaning of Article 1 (obligation to respect human rights) of the European Convention on Human Rights. Secondly, the Court was also to determine whether the interception of foreign telecommunications was in accordance with the law, including rules of public international law and therefore justified under Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

In *Weber*, the ECtHR reiterated its earlier decision in *Klass*[180] and asserted that legislation which by its mere existence entailed a threat of surveillance for all those to whom it might be applied necessarily struck at freedom of communication between users of the telecommunications services and thereby amounted in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them.

In *Weber*, the ECtHR by a majority declared the application inadmissible. The Court found that the substantive complaints under Articles 8 (right to respect for private and family life) and 10 (freedom of expression) of the Convention were manifestly ill-founded. For similar reasons, the applicants did not have an "arguable claim" for the purposes of Article 13 (right to an effective remedy), which was therefore not applicable to their case. It followed that, that part of the application was also manifestly ill-founded within the meaning of Article 35 § 3 (inadmissibility due to incompatibility) of the Convention and, hence its rejection pursuant to Article 35 § 4 (rejection of application due to inadmissibility).

[180] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57510%22]}.

4.3.5.1 Summary of Analysis

In *Weber*, we first acknowledge that the judicial decision was rendered in the pre-9/11 era. The case was heard in two different court precincts, both domestic (Federal Constitutional Court) and international (ECtHR). Again, going back to our analytical tools and starting with our Ideological Space Model, figure 4.1.1, we are assuming that the state had not yet shifted the CLGP to position MR from position CI, since the case is a pre-9/11 era. We expect that if Weber alleged procedural or substantive unfairness or lack of due process, then the courts would be able to correct that by providing remedy with the CLGP still remaining at position CI.

In *Weber*, we are unable to find if at all the applicant made claim of violation of procedural rights. However, the applicant presented two major complaints: Articles 8 (right to respect for private and family life) and 10 (freedom of expression) of the Convention. Based on our ideological space model, figure 4.1.1, we can say that the Germany courts approved the government policy on national security. We are assuming that the CLGP remained at position CI and the government was well bound by the rule of law. Even though the German government had tried to develop incremental national security laws, we are assuming that the pre-9/11 national security laws were not as expansive and intrusive as the post-9/11 era expanded national security laws.

We are assuming that during *Weber* the German authorities were able to abide by the rule of law as required by CLGP at position CI. We can see that although the applicant did not raise procedural unfairness, her primary complaint was on substantive law which she believed were intrusive of her right to privacy. We see that the German Federal Constitutional Court only partly agreed with the applicant's complaint by asserting that certain parts of the statute were incompatible with the Basic Law. The Federal Constitutional Court, however, supported the government policy on national security. Based on our figure 4.1.1 analysis, we can say that the German Federal Court gave security more weight than liberty.

In regard to table 4.1.2a on fair trial attributes, we can see that the applicant did not allege violation of procedural right (right to a fair trial). Figure 4.1.2b provides substantive law touching on violations claimed by applicant (i.e. ECHR article 8 and article 10).

Regarding tables 4.1.2c and 4.1.2d, since the applicant did not claim right to a fair trial violation, table 4.1.2c is therefore not useful for our analysis. However, table 4.1.2d assumes that the applicant was accorded procedural fairness and the German Federal Constitutional Court dismissed the applicant's claim. Based on the party score list, the state won against the applicant. Table 4.1.2d simply tells us that the applicant's complaint lacked substance and was ill-founded. But still, we are unable to conclude whether or not German Federal Constitutional Court is impartial and independent based on our analyses so far.

Table 4.1.2e analysis now reveals to us more clearly that the state won both in domestic jurisdiction and in international jurisdiction. Based on the party score list, the state had won twice against the applicant since the ECtHR dismissed the claims as inadmissible. Based on our table 4.1.2e analysis, we can say that German Federal Constitutional Court was impartial and independent in the pre-9/11 era. When courts are perceived to be impartial, it means that they not only convey a strong signal of being independent, but also a strong signal of having the ability to protect human rights. It also means that such courts send a strong signal on their ability to ensure the rule of law is maintained even in times of high-level national security threats.

Looking at figure 4.1.3, our analysis reveals that, *Weber* was an impartial disposition based on decisional independence of judges. It would not be very convincing to imagine that the judges in both domestic court and international court would be less impartial and less independent in *Weber*. It is reasonable to conclude that German Federal Constitutional Court was perceived to be impartial and independent in the pre-9/11 adjudication of national security cases. This conclusion is drawn on *Weber*.

(ii) *Uzun v. Germany* [181]

It is important to state from the onset that *Uzun* is an interesting or rather unique case in this analysis in the sense that it commenced way back on December 12, 1997, before 9/11 and overlapped, that is, snailed past 9/11. This is a case of surveillance and right to respect for private and family life. My analysis will focus more on domestic jurisdiction rather than international jurisdiction. In 1995 October, the German Federal Public Prosecutor General kick started a

[181] Echr, no. 35623/05, ECHR 2010.

criminal investigation against Mr. Uzun as well as his accomplice on charges of having taking part in bomb attacks for which the cell of anti-imperialists had claimed responsibility. This organization following the abandoned armed combat since 1992 by the Red Army Faction, a left-wing extremist movement for terrorists.

The ECHR records[182] show that the applicant (Mr Uzun) was occasionally kept under visual surveillance by staff members of the Department for the Protection of the Constitution and the entries to his flats were filmed by video cameras. The Department also intercepted the telephones in the house in which the applicant lived with his mother (from 26 April 1993 to 4 April 1996) and in a telephone box situated nearby (from 11 January 1995 until 25 February 1996). Moreover, post addressed to him was opened and checked (from 29 April 1993 to 29 March 1996). In the criminal trial that was opened against the applicant and his accomplice, the Düsseldorf Court of Appeal, by a decision of 12 December 1997, dismissed the applicant's objection to the use as evidence of the results obtained by his surveillance with the help of GPS. It found that Article 100c § 1 no. 1 (b) of the Code of Criminal Procedure authorized the use of GPS in the instant case.

Article 100c § 1 no. 1 was inserted into the German Code of Criminal Procedure by the Act on the fight against drug trafficking and other forms of organized crime (Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der organisierten Kriminalität) of 15 July 1992. It is important to understand that the relevant parts of Article 100c of the Code of Criminal Procedure, in its version in force at the relevant time, provided:

"(1) Without the knowledge of the person concerned no. 1 a) photographs may be taken and visual recordings be made, b) other special technical means intended for the purpose of surveillance may be used to investigate the facts of the case or to detect the perpetrator's whereabouts if the investigation concerns a criminal offence of considerable gravity and if other means of investigating the facts of the case or of detecting the perpetrator's whereabouts had less prospect of success or were more difficult, no. 2 private speech may be listened to and recorded using technical means ... (2) Measures pursuant to paragraph 1 may only be taken against the accused. ... Measures pursuant to paragraph 1 no. 1 (b) ... may be ordered against third persons only if it can be assumed, on the basis of specific facts, that they are in contact with or will contact the perpetrator and that the measure will make it possible to establish the facts or to determine

[182] ECHR_case_Uzun_v_Germany_2010_en

the perpetrator's whereabouts and if other means would offer no prospect of success or would be considerably more difficult."[183]

Subsequently, in an appeal on points of law, the applicant complained, in particular, about the use as evidence at trial of the information obtained by his allegedly illegal surveillance notably with the help of GPS. By a judgment of 24 January 2001 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded. Instead, it found that the collection of data by GPS had a legal basis, namely Article 100c § 1 no. 1 (b) of the Code of Criminal Procedure. Therefore, the information obtained in this manner could be used in the criminal proceedings against the applicant.[184] "Endorsing the reasons given by the Court of Appeal, the Federal Court of Justice further found that the aggregation of several measures of investigation did not necessitate an additional legal basis or make a court order necessary".[185]

The applicant subsequently lodged a complaint with the German Federal Constitutional Court. He claimed, in particular, that his surveillance until February 1996 and the judgments of the Court of Appeal and the Federal Court of Justice had infringed his right to privacy. He further argued that Article 100c § 1 no. 1 (b) of the Code of Criminal Procedure could not be considered a sufficiently precise legal basis for his surveillance with the help of GPS. He claimed further that there was no effective judicial control of this measure and the use of several means of surveillance at the same time would have necessitated a separate basis in law. Moreover, the use at trial of the information obtained by the said measures without a basis in law had infringed upon his right to a fair hearing.[186]

The German Constitutional Court, which is the apex Court of the land, on 12 April 2005, having held a hearing, dismissed the applicant's constitutional complaint.[187] It found that his complaint was ill-founded in so far as he had complained about the use in the proceedings of evidence obtained by his observation via GPS in addition to other surveillance measures and that these measures were illegal.[188]

[183] https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.
[184] Ibid 125, par 18 and 18.
[185] Ibid 125, par 21.
[186] Ibid 125, par 23.
[187] File no. 2 BvR 581/01.
[188] Ibid 125, par 24.

The applicant later filed his appeal with the ECtHR, which delivered its judgment on 2 September 2010. The ECtHR in its decision, upheld the decision of the domestic Court and dismissed the applicant's claim of Article 8 violation: "Everyone has the right to respect for his private and family life, his home and his correspondence."

4.3.5.2 Summary of Analysis

I use the four analytical techniques provided in this chapter to do my analytical summary. In *Uzun*, we see that all levels of the German domestic courts were in agreement that the applicant's right to respect for private and family life was not violated by the German authorities because the existing law allowed for surveillance of those individuals who were suspected of being involved in or planning criminal acts. The ECtHR later upheld the decision of domestic courts.

Based on the on the Ideological Space Model, 4.1.1, we can say that through statute, the German government had already moved the CLPG from position CI to position MR. This was done before the 9/11. We also see that domestic courts are comfortable leaving the right to respect for private and family life to the discretion of government rather than to an effective protection under the Constitution. While citizens would prefer the issue of privacy rights to be at position ML, the government prefers to have it at position MR for purposes of national security. We would have expected to courts, both domestic and ECtHR to restore it to position CI, but that is not happening. We see that the courts, both domestic and international deferring to government policy on security at the expense of liberty.

Since we are assuming that *Uzun* followed procedural fairness, we are then bound to use table 4.1.2d for our analysis. But this time, we see a case where the defendant loses 3 times and the government winning 3 times in the domestic courts. All the domestic courts can be perceived to be fair, impartial and independent. Table 4.1.2e tells us that the defendant lost in both domestic and international courts. This then implies that German domestic courts are strong and impartial. Figure 4.1.3 also tells us that *Uzun* is a product of impartial disposition based on decisional independence. We conclude that German courts defer to government policy on national security during national security threats. We are also able to conclude that the German judiciary is independent. We are also able to say that *Uzun* received a fair trial.

The overall results based on our analyses of Germany courts in *Weber* and *Uzun,* (pre-9/11 era), indicate that out of the 2 cases subjected to rigorous analyses, two out of two (i.e. 100 percent), Germany courts are perceived to be fair, impartial and independent in adjudicating terrorism-related cases in the pre-9/11 era.

4.3.6 The Germany Jurisprudential Analysis of Counterterrorism in the Post-9/11 Era

(iii) *Germany v El Motassadeq*[189]

Shortly after the 9/11, intelligence services inside and outside Germany concentrated on Hamburg as one of the places where the pilots who hijacked planes on the September 11, 2001 and their supporters hatched the terrorist attacks. In particular, the Maroccan national Mounir El Motassadeq was the first to be arrested and charged by the General Federal Prosecutor with two counts: abetting murder in 3066 cases; and being a member of a terrorist organization.

In February 2003, the Higher Regional Court of Hamburg sentenced El Motassadeq to fifteen years imprisonment for abetting the hijacker terrorists in the September 11, 2001 terrorist attacks on the U.S. soil, whereby 3066 people lost their lives.[190] The defendant was also found to be a member of a terrorist cell (organization). The guilty verdict was the first verdict one ever reached against those suspected to have been directly or indirectly involved in the 9/11 terrorist attacks. *El Motassadeq* presents a clash between secrecy and disclosure with regard to national security trials. In *El Motassadeq* defense counsel sought to subpoena one Ramzi Binalshibh, who was a member of the Hamburg cell and believed to be a close ally of El Motassadeq. The defense argued that Binalshibh could present exculpating evidence that the hijackers did not, in fact, inform Motassadeq about the terrorist plot, despite his close links to the Hamburg cell. Binalshibh was reportedly arrested in Pakistan in September 2002, and placed under the U.S. custody. The U.S. authorities, however, refused to produce him as a witness. Instead, "Agent W," who served with the U.S. Federal Bureau of Investigation, tendered evidence about the September 11th attacks to

[189] eur230022011eng; https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/DEU/INT_CCPR_NGO_DEU_105_8523_E.pdf. Retrieved 17 April 2021.

[190] See Trial court for selected criminal matters and court of appeals [OLG] Hamburg, No. 2 StE 4/02- 5, Feb. 19, 2003 (F.R.G.), available at http://www.jurawelt.de/gerichtsurteile/8919 (last visited Nov. 15, 2004); Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 4, 2004, 57 Neue Juristische Wochenschrift [NJW] 1259 (2004) (F.R.G.). Also found at: Higher Regional Court of Hamburg - case Motassadeq II 19-08-2005 German.pdf.

German authorities. It turned out, however, that Agent W was not allowed to discuss Binalshibh or the interrogation transcripts. Excerpts from the transcripts were, however, provided to the German Federal Office for the Protection of the Constitution (Bundesverfassungsschutz) and the Federal Criminal Investigation Office (Bundeskriminalamt), but on condition that they could not be used in prosecution.

Motassadeq's attorney filed an appeal to the Federal Court of Justice (Bundesgerichtshof) challenging the decision of the lower court. In March 2004, the Federal Court of Justice reversed the guilty verdict, asserting that the lower court had failed to consider the prejudice arising from the missing and potentially exculpatory evidence from Binalshibh. The lower court was wrong in assuming that the state's national security interest in maintaining the secrecy of such evidence may not prejudice the defendant's right to a fair trial. Since the defense did not have an opportunity to present evidence from Binalshibh, it was perceived that Motassadeq's right to a fair trial might have been compromised. The lower court had failed to consider whether the non-disclosure of evidence had any potential bearing on the degree of fault required for criminal liability.

While the Federal Court of Justice acknowledged that German's criminal procedure, particularly section 244(3) of the Code of Criminal Procedure, does permit the non-disclosure of evidence under certain conditions,[191] the Court, however, noted that the conditions did not apply to *El Motassadeq*. The Court further argued that, even though a literal interpretation might indicate otherwise, section 244(3)'s several conditions that permit non-disclosure, the defense's request for evidence from Binalshibh could have hypothetically been rejected on the grounds that the evidence was "unobtainable."[192] In this case, however, the evidence was only "unobtainable" because the German government had entered into an agreement with the US government to prohibit the defendant's witness from testifying. The Court ruled that it was an unacceptable interpretation of the "unobtainable evidence" condition. The Federal Court of Justice advised that the lower court should consider this interpretation in the retrial of Motassadeq.

The retrial began in August 2004 and the U.S. Department of Justice announced its willingness to comply with the German court's request for evidence from Binalshibh. The evidence was then sent via fax detailing summaries of Binalshibh's interrogations. Eventually, El-

[191] 3 § 244(3) StPO.
[192] Ibid.

Motassadeq was, however, released from detention pending re-trial on 8 April 2004. On re-trial El-Motassadeq was convicted on August 19, 2005, of "membership in a "terrorist organization. On 15 November 2006, the German Federal Court of Justice ruled on the appeals and considered the evidence as sufficient to prove that El-Motassadeq knew about and was actually involved in the preparation of the plan to hijack the planes. He was found guilty as an accessory in 246 counts of murder. El-Motassadeq was sentenced to 15 years in prison, after which he was to be deported to Morocco and banned from re-entering Germany until April 2064. The Federal Constitutional Court of Germany refused to revise his sentence.

4.3.6.1 Summary of Analysis

In *El Motassadeq*, we can see that equality of arms was not ensured since the defense counsel was denied access to those documents in the investigating file. The material evidence that was denied was essential in effectively challenging the lawfulness of his client's detention. In view of the dramatic impact of deprivation of crucial evidence in *El Motassadeq*, a fair trial right was not guaranteed. Liberty on the fundamental rights of the accused person should be of great concern to trial courts in the course of criminal proceedings. Moreover, proceedings conducted to review detention should in principle meet, to a large extent, the basic requirements of a fair trial. In *El Motassadeq*, we see that right to a fair trial was violated as shown in table 4.1.2.a. The substantive law that formed the applicant complaint is article 6 of the Convention see table 4.1.2b). The procedural unfairness was condoned by the first-instance court. However, the German Federal Court was able to remedy this unfairness and ordered for investigation transcripts to be disclosed to the defense party, thus effectively ensuring equality of arms.

We observe that *El Motassadeq* hinged upon the criminal procedures in respect of the disclosure and protection of classified information. We also see that two important competing rights and interests were involved: due process rights; and the government’s national security interest in protecting classified information. We see the German Court demanding for due process since lack of it was likely to undermine the government’s case against the defendant. *El Motassadeq* is a classic example of how the courts can examine an alternative approach to disclosure of classified information.

Since *El Motassadeq* is a post-9/11 case, we are assuming that the German government had actually moved the CLGP to position MR from position CI. We see the first-instance court's to restore CLGP to CI. However, we see that the German Federal Court is able to restore CLGP to position CI from MR. Based on our figure 4.1.1 analysis, we can say that the lower court was biased (partial) in favor of the government and less independent. However, we are able to say that the German Federal Court appears impartial and strongly independent.

Table 4.1.2c tells us that the first-instance case condoned procedural unfairness and the state won against the applicant. We can say that German lower courts are partial and less independent. However, table 4.1.2d tells us that the German Federal Court allowed for procedural fairness but the government still won against the applicant. This tells us that the German Federal courts are impartial and independent. Since the case did not get to the international jurisdiction, we are unable to use table 4.1.2e to conduct our analysis. Turning to figure 4.1.3, we can say that while the first-instance court made a partial disposition based on decisional independence, the German Federal Court made an impartial decision based on decisional independence.

In *El Motassadeq,* we can conclude that German lower courts appear to be less fair, less impartial and less independent when adjudicating terrorism-related cases in the post-9/11 era. However, German Federal Courts appear to be fair, impartial and independent when adjudicating terrorism-related cases in the post-9/11 era.

(iv) *Germany v Mzoudi*[193]

Abdelghani Mzoudi was alleged to be a friend of lead hijacker, Mohamed Atta, and other members of the Hamburg terrorist cell that was believed to have led the attacks on the United States on Sept. 11, 2001. Abdelghani Mzoudi's trial commenced in August 2003. He faced the similar charges as El-Motassadeq as he was accused of being an accessory to murder in 3066 cases and being a member of a terrorist group.[194] However, the Higher Regional Court of Hamburg acquitted him in February 2004 for lack of inculpating evidence. This was because evidence obtained from the US indicated that the defendant was not in any way involved in planning the September 11th attacks. The prosecution, however, filed an appeal, but the German Federal Court

[193] https://irp.fas.org/crs/RL32710.pdf.
[194] For more information, see Roland Meyer & Thomas Schroeter, The Hamburg Terror Trial – Part 1, http://www.jurawelt.com/anwaelte/8812 (last visited Nov. 15, 2004).

ruled that the acquittal of Abdelghani Mzoudi was sound and turned down the prosecution appeal. In *Mzoudi*, it needs to be pointed out that even as the US authorities refused to produce Binalshibh for trial, German authorities continued to seize and take legal custody of the transcripts of Binalshibh's evidence, which they would not share such evidence with defense attorney. While German authorities could have availed themselves of sections 54[195] and 96[196] of the Code of Criminal Procedure that permits for the disclosure of secret evidence, the authorities felt it was too risky to disclose such information to the public.

It was, however, vindicating for Mzoudi when the President of the German Secret Service, Heinz Fromm, provided testimony that exonerated Mzoudi. By his own account, he informed the Court that a high-level Al Qaeda leaders not based in the Hamburg cell, actually planned the September 11th attacks. *Mzoudi*, however, took an unprecedented twist in terms of disclosure of classified information. This was after a respected media Der Spiegel published and disclosed classified information on Mzoudi. This incident further agitated the Court. How could Der Spiegel, a German news magazine, publish a leaked copy of the interrogation transcript of Binalshibh? This puzzled the Court. The leaked interrogation transcript was so damaging that it cast doubt on the prosecution's case. In another twist, just hours before the completion of hearing of evidence, the trial court received an anonymous 3-page fax from the Federal Criminal Investigation Office alleging that Mzoudi was not involved in the terrorist plot.

After the Court had received the anonymous fax, it lifted the arrest warrant against Mzoudi. The prosecution tried to appeal the decision, but the Court declined. The Court eventually acquitted Mzoudi for lack of evidence. In its closing remarks, the Court rebuked the German Secret Service and the Federal Criminal Investigation Office for withholding crucial evidence, which already leaked in the press.

[195] The special provisions of the law concerning public officials shall apply to the examination of judges, officials, and other persons in the public service as witnesses concerning circumstances covered by their official obligation of secrecy, as well as to permission to testify.
[196] Submission or delivery of files or of other documents officially impounded by authorities or public officials shall not be requested if their superior authority declares that the publication of these files or documents would be detrimental to the welfare of the Federation or of a German Land.

4.3.6.2 Summary of Analysis

Since *Mzoudi* is a post-9/11 case and we are assuming that the state had moved CLPG to position MR from position CI. In *Mzoudi*, we can see that equality of arms was not ensured since the defense counsel was denied access to those documents in the investigating file. However, we see the German first-instance court and the German Higher Regional Court acquitting Mzoudi for lack of inculpating evidence. The state then filed an appeal against the decision of the Regional Court, but that appeal is turned down by the German Federal Court.

The material evidence that was denied to the defense counsel was essential in effectively challenging the lawfulness of his client's detention. In view of the dramatic impact of deprivation of crucial evidence in *Mzoudi*, right to a fair trial was not guaranteed. In *Mzoudi*, we see that right to a fair trial was violated as shown in table 4.1.2.a. The substantive law that formed the applicant complaint is article 6 of the Convention see table 4.1.2b). The procedural unfairness was condoned by the investigating agencies. However, the German courts stood firm in ensuring that Mr. Mzoudi received a fair trial. We see that firmness of the courts prevail and the government realized that it did not have enough inculpating evidence against Mr. Mzoudi and, hence requested the court to acquit him. We see that the German courts were able to remedy the perceived unfairness in the trial.

We observe that *Mzoudi* hinged upon the criminal procedures in respect of the disclosure and protection of classified information. We also see that two important competing rights and interests were involved: due process rights; and the government's national security interest in protecting classified information. We see the German Court demanding for due process since lack of it was likely to undermine the government's case against the defendant. *Mzoudi* is also a classic example of how the courts can examine an alternative approach to disclosure of classified information.

Since *Mzoudi* is a post-9/11 case, we are assuming that the German government had actually moved the CLGP to position MR from position CI. We expect the courts to restore the CLGP to position CI from position MR. We are able to see that the German courts actually managed to restore the CLGP to position CI from MR. Based on our figure 4.1.1 analysis, we can

say that the German courts are fair, impartial and independent in their adjudication of terrorism-related cases in the post-9/11 era.

Since the courts remedied the perceived procedural unfairness, table 4.1.2c is not applicable in this case. However, table 4.1.2d tells us that the German courts allowed for procedural fairness and the government lost against the applicant. This tells us that the German courts are fair, impartial and independent. Since the case did not get to the international jurisdiction, we are unable to use table 4.1.2e to conduct our analysis. Turning to figure 4.1.3, we can say that *Mzoudi* received impartial disposition based on decisional independence of judges.

Altogether, in both *El Motassadeq* and *Mzoudi*, we can say that in almost 100 percent of the times, German High Courts appear to be fair, impartial and independent when adjudicating terrorism-related cases in the post-9/11 era. However, in 50 percent of the times, German lower courts appear to be less far, less impartial and less independent when adjudicating terrorism related cases in the post-9/11 era.

4.3.7 The French Jurisprudential Analysis of Terrorism in Pre-9/11 Era

(i) *Arana v France*[197]

This is a pre-9/11 case concerning deportation of the defendant in circumstances requiring extradition of an alleged terrorist. The applicant who was also an author had been convicted in France for his links with ETA, which was a terror cell based in Basque, France and in Spain. He had also been sought by the Spanish police and had been suspected of holding an important position within that organization.

The applicant was arrested in March 199 and charged with belonging to ETA. He was then sentenced by first-instance court to eight years imprisonment for criminal conspiracy. He commenced serving his sentence at Saint-Maur Prison and he was to be released on 13 January, 1997. However, he was further sentenced to a three-year ban from the French-territory on 10 July, 1992. He then filed an appeal in October 1996 with the Paris Court of Major Jurisdiction against the decision to ban him from France. However, no action was taken. On 15 November, 1996, the French Ministry of the Interior commenced a deportation proceeding against the applicant to expel

[197] https://atlas-of-torture.org.

him from the French territory. The applicant applied to the Administrative Court of Limoges on 13 December 1996, requesting the annulment of his deportation. He wanted a stay of execution of that order. However, his application for a stay of execution was rejected by a ruling of 15 January 1997. The Court took the view that handing over the applicant to the Spanish authority would not likely have irreversible consequences for him. An appeal from this ruling was not possible since the deportation measure had already been implemented.

However, on 10 December 1996, the applicant commenced a hunger strike to protest against his deportation. On 17 December 1996 the applicant was informed that the Deportation Board of the Indre Prefecture had rendered an opinion in favor of his deportation. The Board argued that the applicant's presence in French territory constituted a serious threat to public order. The Board, however, reminded the Ministry of the Interior of the law stipulating that an alien could not be removed to another country where his life or liberty might be threatened or where he could be exposed to treatment contrary to article 3 of the European Convention on Human Rights.[198] Despite this caution, ministerial deportation order was still issued on 13 January 1997 and communicated to the applicant. The deportation measure was then implemented the same day.

Following his arrest, there had been suspicions that were expressed by some non-governmental organizations that the applicant together with some other persons had been subjected to torture on being returned to Spain from France. He was also subjected to incommunicado detention. His deportation to Spain had been effected under an administrative procedure, which the Administrative Court of Pau, France, had later found out to be illegal, since it entailed a direct handover from police to police.

The final appeal by the applicant was heard before the UN Committee Against Torture. The Committee expressed its own fear at the practice whereby the police handed over individuals to their counterparts in another country without the intervention of a judicial authority and without any possibility for the applicant to contact his lawyer. That implied that a detainee's rights had not been respected and, thus, had placed the applicant in a situation where he was particularly vulnerable to possible torture and other forms of abuse. The Committee, thus, recognized the need for close cooperation between governments in the fight against crime such as terrorism and for

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effective measures to be agreed upon for that purpose.[199] The Committee believed, however, that such measures must fully recognize and respect the rights and fundamental freedoms of the persons concerned.

Arana in his pleading (motion) moved that he left Spain in 1983 following numerous arrests of persons reportedly belonging to ETA. He alleged that many of the persons arrested, some of whom were his childhood friends, were subjected to torture. He further alleged that during the interrogations and torture sessions, his name (Josu Arkauz Arana) had been one of those most frequently mentioned. Believing that he was a wanted person in Spain but needed to avoid being tortured, he fled to France. In 1984 his own brother was arrested and severally tortured. Spanish security agents then asked his brother about his (Arana's) whereabouts. Spanish security agents were alleged to have threatened that Josu Arkauz Arana would be executed by the Anti-Terrorist Liberation Groups (GAL).[200]

Arana claimed that his forcible return to Spain and handing over to the Spanish security forces constituted a violation by France of Articles 3 and 16 of the Convention against Torture. He also claimed that when he was notified of the deportation order and of the decision indicating Spain as the country of destination, he was prevented by the authorities from communicating with his wife and counsel. However, the state party rebutted that the real risks mentioned by the author were evaluated by the national authorities prior to implementation of the deportation procedure, according to the criteria defined in Article 3 of the Convention.[201] On the issue of admissibility, the state party disputed the admissibility of the communication. It argued that on 13 January 1997, the day on which the deportation order was issued and carried out, it had actually not known of the Committee's request for a stay of execution, which was received on 14 January 1997. The Committee against Torture found that there were violations of Article 3 of the Convention against Torture as well as due-process rights.

4.3.7.1 Summary of Analysis

In *Arana*, we first acknowledge that the judicial decision was rendered in the pre-9/11 era. The case was heard in four different court precincts, three domestic and one international. Again,

[199] https://atlas-of-torture.org/en/entity/1by6k89xjd8px793h02pvz33di?page=2. Retrieved on 12 February, 2021.
[200] https://www.refworld.org/cases,CAT,3f588ed80.html. Retrieved on December 17, 2001.
[201] https://www.echr.coe.int/documents/convention_eng.pdf.

going back to our analytical tools and starting with our Ideological Space Model, figure 4.1.1, we assume that the state had not yet shifted the CLGP to position MR from position CI since the case is a pre-9/11 era. We are assuming that the CLGP remained at position CI and the government was well bound by the rule of law. This means that the French government had not yet developed expanded national security laws against terrorism. We expect that if Arana alleged procedural or substantive unfairness or lack of due process, then the courts would be able to correct that by ensuring that French authorities abide by the rule of law as required by CLGP at position CI. In *Arana,* we are told the applicant claimed one violation: Article 3 (prohibition of torture) violation. The applicant received torture and other cruel, inhuman and degrading treatment. However, all the three domestic courts were in agreement that the applicant would not be subjected to any torture even if he was deported to Spain. Based on figure 4.1.1 analytical model, we can say that the French domestic courts approved the government policy on national security and allowed the government to abuse its discretional powers while maintaining the CLGP at position CI. We see a lot of judicial deference in *Arana*.

In regard to table 4.1.2a on fair trial attributes, we can see that the applicant did not allege any violation of right to a fair trial. The applicant only opposed his deportation on the basis of torture claim. However, domestic courts dismissed his torture claim. Figure 4.1.2b provides substantive law touching on torture claim by the applicant (i.e. ICCPR article 7 and ECHR article 3.

Tables 4.1.2c and 4.1.2d seem to provide captivating analysis of *Arana*. Since the applicant had not claimed procedural fairness violation, we are unable to use table 4.1.2c for analysis. However, we are assuming that the applicant received procedural fairness and that therefore makes table 4.1.2d more relevant for our analysis. If we assume that the applicant was accorded procedural fairness, we may as well now assume that French domestic courts are indeed impartial and independent. This is contrary to our earlier analysis using the ideological space model (figure 4.1.1) in which we suspected that French domestic courts are biased in favor of the government. Based on the party score list (figure 4.1.2d), we can see that the state won against the applicant 3 to 0. Table 4.1.2d simply tells us that the applicant was probably guilty as charged. But still, we should not be tempted to conclude early that French domestic courts are impartial and independent based on our analyses so far.

Table 4.1.2e analysis now reveals to us more clearly that the state only won the impugned deportation when the case was heard before domestic courts, but lost when the case was heard before an international tribunal. We are able to see in table 4.1.2e that, the state managed to win 3 times (in domestic decisions) and has lost 1 (in international decision) against the applicant who now wins in the international jurisdiction. The winning streak by the state party in domestic courts and the loss suffered in the international jurisdiction provide a strong indication for French domestic courts. Based on our table 4.1.2e analysis, we can say that French domestic courts were biased or partial, and less independent in the pre-9/11 era. When courts are perceived to be biased in favor of the state, they convey signals of being less independent and, thus, lack the ability to protect human rights violation. It also means that such courts send a signal of their inability to ensure the rule of law is maintained in times of high-level national security threats.

Looking at figure 4.1.3, our analysis reveals that, it would appear to us that the applicant's case received partial disposition based on decisional independence of judges of French domestic courts. In regard to the international jurisdiction, however, we can say that the applicant's case received impartial disposition based on decisional independence of judges of the international tribunal. It is reasonable to conclude that French courts were perceived to be partial, in the pre-9/11 adjudication of terrorism-related cases. It can also be reasonably said that French courts were perceived to be less independent in the pre-9/11 adjudication of terrorism-related cases. This conclusion is drawn on *Arana*.

(ii) *France v Bensaid*[202]

Boualem Bensaid, an Algerian national, was convicted and sentenced on 1 November 2002, for the 1995 bombing at Paris Saint-Michel Metro station.[203] The bombing at Paris Saint-Michel Metro station was first of seven others conducted over subsequent three months; altogether 8 killed, 157 wounded; GIA terror cell claimed responsibility. Bensaid was arrested and charged in 1995.[204] Bensaid, appeared in court accused of using home-made bombs to target civilians at

[202] https://www.nytimes.com/2002/11/01/world/french-court-sentences-2-for-role-in-1995-bombings-that-killed-8.html. Retrieved on 12 January 2022.
[203] Ibid.
[204] https://apnews.com/article/bbf2080b590a39f87ef1314ec6916728. Retrieved on 12 January, 2022.

Paris metro stations in a 1995 terrorist campaign that killed eight people and injured several other people.[205]

However, prior to the 2002 conviction, Bensaid was first convicted and sentenced to 30 years imprisonment in November 2000 for a failed August 1995 attack on a TGV high-speed train and a shootout with security forces.[206] After subsequent investigations and more charges, a special French court also convicted and sentenced Bensaid for being a member of Algeria's Armed Islamic Group to life imprisonment for his role in three bombings that killed eight people and wounded more than 200 others here in 1995. The trial, however, dragged up to 2002, despite the terrorist incident and arrest of suspects happening in 1995 prior to 9/11. The case delayed to be completed because one of the key suspects and witnesses in the case, Mr. Rachid Ramda was still facing extradition charges in Britain. French officials, thus, questioned the British government's commitment to combating Islamic extremism "at the start of a high-profile trial in Paris whose key defendant Britain has refused to extradite."[207] The "presiding judge postponed the trial of the cell's alleged banker and logistics expert, Rachid Ramda, after the British High Court overturned an extradition order in June granted by the Home Secretary, David Blunkett, shortly after last year's September 11 attacks."[208]

In 2002, a seven-judge French antiterrorist court convicted Boualem Bensaïd, 34, for placing a bomb in a trash bin near the Maison-Blanche Métro station on Oct. 16 and for complicity in both the St.-Michel bombing and another regional train bombing near the Musée d'Orsay Métro station on Oct. 17.[209]

4.3.7.2 Summary of Analysis

In *Bensaid*, we first acknowledge that the judicial decision was rendered partly in the pre-9/11 era and partly in the post-9/11 era. The case is unique and does not fit in neatly in all our analytical model. However, it was necessary to use it since it was not possible to find a good replacement. The case is also connected to Rachid Ramda as discussed in *Ramda v France*. Again,

[205] https://www.theguardian.com/world/2002/oct/02/september11.france.
[206] https://www.irishexaminer.com/world/arid-30074836.html. Retrieved on September 7, 2021.
[207] Ibid, Supra n 178.
[208] Ibid, Supra n 178.
[209] https://www.nytimes.com/2002/11/01/world/french-court-sentences-2-for-role-in-1995-bombings-that-killed-8.html. Retrieved on 7 March, 2022.

starting with our Ideological Space Model analytical tool, figure 4.1.1, we assume that the state had not yet shifted the CLGP to position MR from position CI since the case is a pre-9/11 era. We are assuming that the CLGP remained at position CI and the government was well bound by the rule of law. This means that the French government had not yet developed expanded national security laws against terrorism. We expect that if Bensaid alleged procedural or substantive unfairness or lack of due process, then the courts would be able to correct that by ensuring that French authorities abide by the rule of law as required by CLGP at position CI.

In *Bensaid*, based on our figure 4.1.1 analytical model, we can say that the French domestic courts approved the government policy on national security. Despite the unavoidable delay in the conclusion of the case, we can say that the French courts followed the legal procedure to adjudicate, convict and sentence the defendant to imprisonment. In *Bensaid*, we are unable to see any disturbance of CLGP at position CI. This is a clear indication that *Bensaid* was adjudicated when the French authorities respected the rule of law and the courts were not under any pressure or influence. At the same time, we are able to see that there was first and second convictions and sentencing of the defendant.

In regard to table 4.1.2a on fair trial attributes, we are able to confirm that the defendant did not receive a timely or speedy trial due to the fact that one of the key suspects in the case, Rachid Ramda, was still facing extradition proceeding in the UK. The trial that began in 1995 dragged all the way to 2002. In essence, we can say that the defendant claimed violation of Article 6 § 1 (right to a fair trial) of the Covenant. Figure 4.1.2b provides substantive law touching on right to fair trial claim by the defendant (i.e. ICCPR article 14(1-3) and ECHR article 6 § 1.

Tables 4.1.2c and 4.1.2d seem to provide captivating analysis of *Bensaid*. Since the applicant had one claim on violation (speedy trial), we are able to use table 4.1.2c for analysis. We can say that despite the defendant not having the immediate opportunity to have one of the key suspects and witnesses available for cross-examination, French courts tried to cure that by waiting for the availability of the key witness before concluding the case. In other words, the French courts acted impartially by allowing all the key suspects and witnesses involved in the case to be heard before disposing of the case. Even though there was a perceived lack of fair trial in *Bensaid*, French courts did their best to remedy the situation. This action makes French courts look impartial and

independent. On the party score list, we see that the state party won in all instances against the defendant.

Despite the delay in concluding the case, we are aware that the delay problem was not caused directly by the court but by circumstances out of the courts purview. We are therefore still able to say that the defendant received procedural fairness and that makes table 4.1.2d relevant for our analysis. If we assume that the defendant was accorded procedural fairness, we may as well now assume that French domestic courts were indeed impartial and independent in the pre-9/11 era. This also confirms our earlier analysis using the ideological space model (figure 4.1.1) in which we believed that French domestic courts were impartial and independent. Based on the party score list (figure 4.1.2d), we can see that the state won in all instances against the defendant. Table 4.1.2d simply tells us that the applicant was probably guilty as charged.

Since we don't have much information on the decision of the international court (I believe there was none), it makes it difficult to us table 4.1.2e for our analysis. However, looking at figure 4.1.3, our analysis reveals that, it would appear to us that the applicant's case received an impartial disposition based on decisional independence of judges of the French domestic courts. It is reasonable to conclude that French courts were perceived to be impartial and independent, in the pre-9/11 adjudication of terrorism-related cases. This conclusion is drawn on *Bensaid*.

The overall results based on our analyses of French courts in *Arana* and *Bensaid*, pre-9/11 era, provide conflicting views. In *Arana*, French courts portray themselves as partial and less independent while in *Bensaid*, the courts portray themselves as impartial and independent. When the 2 cases are subjected to rigorous analyses, half of the times (i.e. 50 percent), French courts are perceived to be impartial and independent. Perception of less independent and less impartial also takes 50 percent. We can, hence, conclude that in the pre-9/11 era, French courts sometimes came out as less impartial and less independent and sometimes as impartial and independent, depending on the nature of the case.

4.3.8 The French Jurisprudential Analysis of Counterterrorism in the Post-9/11 Era

(iii) *Ramda v. Franc*[210]

Rachid Ramda (applicant) is an Algerian national. On 6 April, 2005, the UK Secretary of State instituted a court proceeding for the applicant's extradition to France under Section 12 of the Extradition Act 1989. The applicant was wanted by the French authorities for trial in connection with a series of terrorist attacks in France between July and October 1995. The applicant faced trial in the French ordinary criminal courts. By judgment of 29 March 2006, the Paris Criminal Court found the applicant guilty of criminal association in the framework of a terrorist conspiracy, and sentenced him to ten years' imprisonment, and banning him from French territory for life.[211] The applicant launched an appeal at the Paris Court of Appeal. On 18 December 2006 the Paris Court of Appeal upheld the lower court's judgment. The applicant further launched an appeal at the Paris Assize Court.

On 26 October 2007 the special bench of the Paris Assize Court, made up of seven professional judges, found the applicant guilty as charged in the framework of the three terrorist attacks. It sentenced him to life imprisonment, stipulating a twenty-two-year minimum term.[212] Yet, the applicant further moved to the Paris Assize Court of Appeal. On 13 October 2009 the special bench of the Assize Court of Appel found the applicant guilty as charged and sentenced him to life imprisonment, specifying a twenty-two-year minimum term and banning him definitively from French territory.[213] Finally, the applicant launched another appeal at the Court of Cassation (French apex Court). On 15 June 2011 the Court of Cassation dismissed the applicant's appeal on points of law, rejecting in particular his pleas concerning the failure of the Assize Court of Appeal to give reasons for its judgment and the alleged violation of the *ne bis in idem* (not twice about the same) principle owing to his previous final conviction by the Paris Court of Appeal on 18 December 2006.[214]

[210] 78477/11, [2017] ECHR 1172.

[211] ECHR- *Ramda v. France* (application no. 78477/11).
[212] Ibid.
[213] Ibid n, 142.
[214] Ibid n. 142.

The applicant then turned to the ECtHR and alleged Article 6 § 1 (right to a fair trial) and Article 4 of Protocol No. 7 (right not to be tried or punished twice) violations. The ECtHR by a majority, held that there had been no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, and no violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice).[215]

4.3.8.1 Summary of Analysis

In *Ramda*, we first acknowledge that the judicial decision was rendered in the post-9/11 era. The case was heard in six different court precincts, both domestic and international. Again, going back to our analytical tools and starting with our Ideological Space Model, figure 4.1.1, we assume that the state had shifted the CLGP to position MR from position CI since the case is a post-9/11 era. We expect that if Ramda alleged procedural or substantive unfairness or lack of due process, then the courts would be able to correct that by restoring CLGP to position CI from position MR. In *Ramda*, we are told the defendant only claimed two violations ('unfairness'): right to a fair trial, and (*ne bis in idem*) – being punished twice. However, all the six courts were in agreement that there were no violations of article 6 § 1 and article 4 of Protocol No. 7 of the Convention. Based on this analytical model, we can only say that the courts approved the government policy on national security and portrayed the CLGP at position CI even though we theoretically make an assumption that French authorities had moved CLGP to position MR from position CI in the post-9/11 era.

In regard to table 4.1.2a on fair trial attributes, we can see that the applicant alleged right to a fair trial violation and another violation of item number 11 in the table. However, the courts dismissed both claims. Did the defendant receive a fair trial? We can say he did since all the six courts, both local and international dismissed unfairness claims. Figure 4.1.2b provides substantive law touching on violations claimed by applicant (i.e. ICCPR article 14(1-3) and ECHR article 6).

Tables 4.1.2c and 4.1.2d provide interesting analysis of *Ramda*. Since the applicant had claimed right to a fair trial violation, table 4.1.2c assumes that there was lack of procedural fairness for the applicant. Yet, when we look at our party score list, we are able to see that the state had 5 wins in the domestic courts while the applicant had 0 win in the domestic courts. The 5 wins for

[215] Ibid n.142

the state against 0 for applicant in the domestic courts in the face of procedural unfairness would certainly make the applicant to believe that French domestic courts are partial, biased in favor of government, and lack independence. On the contrary, table 4.1.2d assumes that the applicant was accorded procedural fairness and French domestic courts are indeed impartial and independent. Based on the party score list, the state won against the applicant 5 to 0. Table 4.1.2d simply tells us that the applicant was guilty as charged. But still, we are unable to conclude whether or not French domestic courts are impartial and independent based on our analyses so far.

Table 4.1.2e analysis now reveals to us more clearly that the state continues to win against the defendant even when the case is heard outside domestic jurisdiction. We are able to see that in table 4.1.2e, the state has now won 6 times (5 domestic and 1 international) against defendant who so far has won nothing (0). The winning streak by the state party both local and international provides a strong indication for domestic courts. Based on our table 4.1.2e analysis, we can say that French domestic courts are strong and impartial in the post-9/11 era. When courts are strong and impartial, it means that they are independent and they also have the ability to protect procedural fairness. Such courts also have the ability to ensure that the rule of law is maintained even in periods of high-level national security threats.

Looking at figure 4.1.3, our analysis reveals that, it would appear to the applicant that his case received partial disposition based on decisional independence of judges. However, according to the state party, the case received impartial disposition based on decisional independence of judges. But it would not be very convincing to imagine that the judges in all the six courts, both local and international, were partial and lacked independence in *Ramda*. It is reasonable to conclude that French courts are perceived to be impartial, strong, and independent in *Ramda*.

(iv) *Leroy v. France*[216]

This case involved condoning terrorism through a satirical drawing representing the attack on the 9/11 twin towers attack of the World Trade Center. As point of law, would such prosecution be seen as lawful interference with freedom of expression? Article 10 of the ECHR Convention provides for freedom of expression. “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without

[216] Leroy v. France, No. 36109/03, ECtHR (Fifth Section), 2 October 2008.

interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[217]

The applicant was mainly convicted for condoning terrorism following the artistic publication of his drawing of the twin towers following shortly after the 9/11 attacks. He authored a drawing showing the twin towers attack with a caption: "We have all dreamt of it… Hamas did it" to *Ekaitza*'s editorial team. Based on the publication of this drawing, the French public prosecutor brought criminal proceedings against the applicant and the newspaper's publishing director, whereby charges of complicity in condoning terrorism were drawn. In January 2002, the Court convicted them of the charges and ordered them to pay a fine of EUR 1,500 each. The applicants' appeals were rejected.

The Court carefully assessed the impugned speech and took into account the fact that the applicant authored a drawing on the day of the 9/11 attacks and published it on 13 September, with no precautions on his part as to the language used. In the court's opinion, the impact of such a message was immeasurable given that it was distributed in a politically sensitive region, namely the Basque Country. The Court noted that the drawing's publication provoked a certain public reaction which was capable of starting violence in the region. In January 2002 the court convicted the applicant of the charges and ordered him to pay a fine of EUR 1,500 to publish the judgment at his own expense in *Ekaitza* and two other newspapers and to pay costs.

The applicant appealed the decision of the trial court. However, in September 2002 the Pau Court of Appeal upheld the judgment of the first-instance court. In particular, the French Court of Appeal held that "by making a direct allusion to the massive attacks in which Manhattan was the theater, by attributing these events to a notorious terrorist organization, and by idealizing this disastrous project by the use of the verb dream, giving an unequivocal valuation to an act of death, the applicant justifies the use of terrorism, adhering by the use of the first person in the plural ("we" to this means) of destruction, presented as the outcome of a dream and indirectly encouraging ultimately the potential reader to positively appreciate the success of a crime."[218] The applicant further appealed to the French Cassation (apex) Court. However, the Court of Cassation dismissed the main part of an appeal on points of law lodged by the applicant.

[217] ECHR: Convention, art. 10.
[218] Leroy v. France, No. 36109/03, ECtHR (Fifth Section), 2 October 2008.

Leroy appealed the decision of the French domestic courts to the ECtHR. The Court found that the drawing was capable of having a negative impact on public order. This was because it supported and glorified the violent destruction of the American interests. Since domestic courts had also imposed a modest fine on the applicant, the ECtHR found that the measure taken by national authorities had not been disproportionate to the legitimate aim pursued. Accordingly, the ECtHR held that there had not been a violation of Article 10 ECHR. The Court argued that political satire may be subject to restrictions as the exercise of freedom of expression involves "duties and responsibilities", as it is established by article 10, para. 2 ECHR.[219]

In *Leroy*, the ECtHR held unanimously that there had been: no violation of Article 10 (freedom of expression) of the European Convention on Human Rights in respect of the applicant's conviction for complicity in condoning terrorism. At the same time, the Court held that there was a violation of Article 6 § 1 (right to a fair hearing within a reasonable time) of the Convention on account of the failure to communicate to the applicant the judge's report to the Court of Cassation.

The decision in *Leroy* was rather controversial. The ECtHR seemed to generally exempt from the protection of freedom of expression law as demonstrated in *Leroy*. The contrast with the Anglo-American common-law tradition was remarkable. The U.S. Supreme Court has in the past repeatedly refused to condemn hate speech. For instance, American law has regarded First Amendment freedoms as very important to be curtailed in a democratic society unless the consequences can be proved to be so severe as to outweigh the exercise of such freedoms. In *Leroy*, we see that the risk to national security takes precedence over an individual's human rights in post 9/11. It is interesting that although France had not applied for derogation from Article 15 of the Convention to avail itself of the margin of appreciation, the ECtHR treated *Leroy* as though France was acting under the operationalization of Article 15 of the Convention, which would in essence allow for the margin of appreciation. It should not be surprising that different courts in different jurisdictions might shape legal norms that differ both domestically and internationally when it comes to terrorism-related human rights adjudication.

[219] European Convention on Human Rightshttps://www.echr.coe.int.

4.3.8.2 Summary of Analysis

In *Leroy*, we first acknowledge that the judicial decision was rendered in the post-9/11 era. The case was heard in four different court precincts, both domestic and international. Again, going back to our analytical tools and starting with our Ideological Space Model, figure 4.1.1, we assume that the state had shifted the CLGP to position MR from position CI since the case is a post-9/11 era. We expect that if Leroy alleged procedural or substantive unfairness or lack of due process, then the courts would be able to correct that by restoring CLGP to position CI from position MR. In *Leroy*, we are told the applicant only claimed two violations ('unfairness'): Article 6 § 1 (right to a fair trial) violation, and Article 10 (freedom of expression) violation. However, all the three domestic courts were in agreement that there were no violations of article 6 § 1 and article 10 of the Convention. Based on this analytical model, we can only say that the French domestic courts approved the government policy on national security and portrayed the CLGP at position CI even though we theoretically make an assumption that French authorities had moved CLGP to position MR from position CI in the post-9/11 era.

In regard to table 4.1.2a on fair trial attributes, we can see that the applicant alleged right to a fair trial violation and another violation of freedom of expression. However, domestic courts dismissed both claims. Did the applicant receive a fair trial in French domestic courts? We cannot say he did since of all the four courts, both local and international, all the three domestic courts were in agreement that he received a fair trial and dismissed unfairness claim. However, the ECtHR ruled that the applicant did not get a fair trial. Figure 4.1.2b provides substantive law touching on violations claimed by applicant (i.e. ICCPR article 14(1-3) and ECHR article 6).

Tables 4.1.2c and 4.1.2d seem to provide interesting analysis of *Leroy*. Since the applicant had claimed right to a fair trial violation, table 4.1.2c assumes that there was lack of procedural fairness for the applicant. Yet, when we look at our party score list, we are able to see that the state had 3 wins in the domestic courts while the applicant had 0 win in the domestic courts. The 3 wins for the state against 0 for applicant in the domestic courts in the face of alleged procedural unfairness would certainly make the applicant to believe that French domestic courts are partial, biased in favor of government, and lack independence. On the contrary, table 4.1.2d assumes that the applicant was accorded procedural fairness and French domestic courts are indeed impartial and independent. Based on the party score list, the state won against the applicant 3 to 0. Table

4.1.2d simply tells us that the applicant was guilty as charged. But still, we are unable to conclude whether or not French domestic courts are impartial and independent based on our analyses so far.

Table 4.1.2e analysis now reveals to us more clearly that the state only wins partially and partially loses against the applicant when the case is heard outside domestic jurisdiction. We are able to see in table 4.1.2e that, the state has won 3 times (3 domestic decisions) and has partially lost 1 in international decision against the applicant who now partly wins and partly loses in the international jurisdiction. The winning streak by the state party both local and international provides a strong indication for domestic courts. Based on our table 4.1.2e analysis, we can say that French domestic courts are strong, but partly impartial and partly partial in the post-9/11 era. When courts are perceived to be strong, but convey signals of being partly impartial and partly partial, it means that they not only convey mixed signals of being independent, but also mixed signals on their ability to protect procedural fairness and human rights. It also means that such courts send mixed signals on their ability to ensure the rule of law is maintained in times of high-level national security threats.

Looking at figure 4.1.3, our analysis reveals that, it would appear to the applicant that his case received partial disposition based on decisional independence of judges of domestic courts, and a bit of impartial disposition based on decisional independence of ECtHR judges. However, according to the state party, the case received impartial disposition based on decisional independence of domestic judges and a bit of partial disposition based on decisional independence of ECtHR judges. But it would not be very convincing to imagine that the judges in all the four courts, both local and international, were partial and lacked independence in *Leroy*. It is reasonable to conclude that French courts are sometimes perceived to be impartial and sometimes partial, in the post-9/11 adjudication of terrorism-related cases. It can also be reasonably said that French courts are sometimes perceived to be impartial and independent and sometimes as less impartial and less independent in the post-9/11 adjudication of terrorism-related cases. This conclusion is drawn on *Leroy*.

The overall results based on our analyses of French courts in *Ramda* and *Leroy,* post-9/11 era, indicate that out of the 2 cases subjected to rigorous analyses, one and half times out of two (i.e. 75 percent), French courts are perceived to be strong, impartial and independent. Perception of less independent and less impartiality only takes 25 percent.

4.4 Interpretation of Results

First and foremost, it is important to recap that I induced variation in the independent variable – terrorism laws (national security laws). I then obtained a binary independent variable: terrorism laws (national security laws); and expanded national security laws (counterterrorism laws). It is also important to understand that 'terrorism laws' represents the pre-9/11 era, and 'expanded national security laws' ('counterterrorism laws') represents the post-9/11era. Having manipulated the independent variable (i.e. inducing variation), it is then the effect of expanded national security laws on judicial independence and fair trial that the present research is interested in. To be able to understand how to interpret results, we must pay considerable attention to table 4.4b. For instance, looking at U.S., we are able to see a constant in judicial behavior for both case 1 and case 2 in pre-9/11. However, looking at case 1 and 2 in post-9/11, we see variation in the judicial behavior, from being fair, impartial, and independent to being fair, impartial, independent + less fair, less impartial, and less independent. That variation is attributed to counterterrorism laws.

Table 4.4a Measuring Judicial Independence and Fair Trial.

U.S. Measurement of Judicial Independence and Fair Trial
Pre-9/11 -1st case = fair, impartial, and independent.
-2nd case = fair, impartial, and independent.
Post-9/11 -1st case = fair, impartial, independent + less fair, less impartial, and less independent.
-2nd case = fair, impartial, independent + less fair, less impartial, and less independent.
UK Measurement of Judicial Independence and Fair Trial
Pre-9/11 -1st case = fair, impartial, and independent.
-2nd case = fair, impartial, and independent + less fair, less impartial and less independent.
Post-9/11 -1st case = less fair, less impartial, and less independent.
-2nd case = less fair, less impartial, and less independent.
Germany Measurement of Judicial Independence and Fair Trial
Pre-9/11 –1st case = fair, impartial, and independent.
-2nd case = fair, impartial, and independent.
Post-9/11 -1st case = fair, impartial, and independent.
-2nd case = fair, impartial, and independent + less fair, less impartial, and less independent.
France Measurement of Judicial Independence and Fair Trial
Pre-9/11 -1st case = less fair, less impartial, and less independent.
-2nd case = less fair, less impartial, and less independent.
Post-9/11 -1st case = fair, impartial, and independent.
-2nd case = fair, impartial, and independent + less fair, less impartial, and less independent.

Source: author.

Table 4.4b below provides a compelling summary of how the results are interpreted. When interpreting table 4.4 below, it is important to note that the research is assuming that the pre-9/11 era terrorism laws did not have any effect on the independence of the judicial systems. It assumes that the courts were adjudicating with optimality and without being under the pressure of counterterrorism laws (expanded national security laws). It assumes that judicial systems were fair, impartial and independent before the 9/11. This was the case with all the judicial systems except the UK where there appeared to be some little influence. The influence with the UK judicial system is checked negative as indicated in table 4.4b below because it partly resulted in the judicial system being perceived as less fair, less impartial and less independent.

Table 4.4b Effects of Expanded National Security Laws on Judicial Independence.

Interpretation of Results Based on the Pre-9/11 Era and Post-9/11 Era						
Country	Pre-9/11 Effect	Positive	Negative	Post/911 Effect	Positive	Negative
US	No			Yes		✓
UK	No/Yes		✓	Yes		✓
Germany	No			Yes		✓
France	No			Yes	✓	

Source: author.

The results in table 4.4b above tell us that with the exception of France, all other judicial systems were significantly negatively affected by counterterrorism laws (post-9/11 era). Although France was equally affected, but the effect resulted in positive judicial outcomes (i.e. more fair, more impartial and more independent). The rest of the judicial systems were negatively affected with negative judicial outcomes (i.e. less fair, less impartial and less independent). This test was based on a quasi-experimental design whereby we assign no treatment (no expanded national security laws) to one group (pre-9/11 judicial systems) and then assign treatment (expanded national security laws) to another group (post-9/11 judicial systems), then observe the temporal differences in the two groups. Any difference that arise as a result of the quasi-experiment is more likely attributed to (i.e. as a result of) the treatment (i.e. expanded national security laws).

CHAPTER FIVE

FINDINGS

5. Introduction

In this chapter, I discuss the findings by drawing on my sets of analyses as presented in chapter four above. More importantly, I compare the analyses for each country and then I do additional comparisons based on the most similar and the most different. Legal scholars agree that comparative research, even in a small number of jurisdictions, is valuable as it permits theories to be tested across political, social and cultural boundaries and also varied historical contexts (George and Bennett, 2005). The focus on this chapter is primarily to assess the impact of terrorist threats on judicial independence and fair trial in liberal democracies.

Due to a lack of the official definition of terrorism, it thus made case law analysis for the present study a little difficult. The purpose of analyzing terrorism jurisprudence (case law), however, was to be able to clearly understand the history of the case, legal substance, legal argumentation, judicial strategy, and proper institutional roles. With regard to the history of the case, it was necessary to understand the cause of action, the doctrines applied and whether such doctrines could be renounced and superseded due to constitutionalism (Murphy et al., 2003, 27). In terms of appreciating the legal substance, it was necessary to understand what questions each case posed, and what the dispute between the parties to the case was all about (the issue). At the same time, it was necessary to understand what answers the judges offered, which side of the disputants won, and what rule or principle of law was implicated by judges (the holding). It terms of legal argumentation, the present study was of the opinion that it was important to understand how the holding of the case by judges was justified. For instance, was the justification intellectually powerful and persuasive? Was the justification based on authoritative material? Were there gaps in the argument? Do the arguments stand up to criticism?

On the point of judicial strategy, it was necessary for the present study to clearly understand the reasoning that judges provided and the strategies they deployed to shape or influence public policy. In regard to proper institutional roles, the present study was interested in understanding the proper role of the judiciary and judges to make policy decisions that they made without

overstepping their limits. On the point of political impact, the present study was interested in understanding the political impact of constitutional interpretation on terrorism jurisprudence.

I begin reporting my findings as follows. First, I compare each of the four countries under the present study based on their judicial response to terrorism before the 9/11 era and after the 9/11 era. This is followed by the most similar design comparisons (i.e. intra-common law legal traditions and intra-civil law legal traditions). This is then followed by the most different design (i.e. directly comparing between common law legal traditions and civil law legal traditions). The focus here is to establish the impact of terrorist threats on judicial independence and fair trial practices both in the pre-9/11 era and post-9/11 era.

5.1 Impact of Terrorist Threats on Judicial Independence in the U.S. in the Pre-9/11 Era and Post-9/11 Era

The findings of this study reveal that the U.S. courts were more likely to support government policy on national security in the pre-9/11 era. However, the courts were still perceived to be fair, impartial, and independent in their adjudication of terrorism-related cases. The pre-9/11 era analysis tells us that although the U.S. is a Western liberal democracy, it still had its national security challenges which required criminal justice response. But since such threats were perceived to be low-level, the US criminal justice system was perceived to be well guided by the rule of law. Investigating agencies and courts of law discharged their responsibilities based on the rule of law since the executive institution was well bound by the constitutional ideology of limited power government. There were no expanded national security laws to pose threats to the judiciary and we can tell from our analysis that the US courts were perceived to be fair, impartial, and independent in their adjudication of terrorism-related cases. The pre-9/11 era.

However, in the post 9/11 era, we are able to see mixed results in the judicial behavior of the US courts. The post-9/11 era present great challenges to the US judiciary. Immediately after the 9/11, the U.S. government developed the Patriot Act, which led to the expanded national security laws. It also led to the formation of a military commission to try terrorism-related cases. However, we are able to see a fierce clash between the executive and the judiciary. This means that high-level terrorist threats put great pressure on courts on how to make judicial decisions related to national security. The clash is about liberty impingement in the name of national security preservation. We are able to see that while the US government is bent on impinging individuals'

liberty to maintain security, the courts are able to remedy the violations of freedom and fundamental rights. Sections of the courts are able to restore the CLPG to CI position from the MR position. Sections of the US courts are able to strike a balance between security and liberty.

At the same time, we are also able to see that in some instances, the courts are divided in terms of their decisions. The findings of the study reveal that in the post-9/11 era, a section of the US judges believe that national security should be best left in the hands of the executive instead of being brought before civilian courts for adjudication. This is the feeling of the US Court of Appeals judges. This is the reason why the US Court of Appeals judges appear to support the military justice model for terrorism offenders instead of the civilian justice model.

We are able to conclude that the US courts appeared to be impartial, and independent in their adjudication of terrorism-related cases in the pre-9/11 era. However, the US courts now appear to be divided in terms of their impartiality and independence in adjudicating terrorism-related cases in the post-9/11 era with the district courts and the Supreme Court appearing impartial and independent while the Court of Appeals appearing less impartial and less independent in regard to adjudicating terrorism-related cases in the post-9/11 era. This is probably because the judges serving in the US Court of Appeals are more likely to be nominated for appointment to the US Supreme Court, hence their inclination to supporting the government security policies that tend to undermine freedom and human rights.

5.1.1 Impact of Terrorist Threats on Fair Trial in the U.S. in the Pre-9/11 Era and Post-9/11 Era

We are able to conclude that while the US courts appeared to guarantee the right to a fair trial in the adjudicating of terrorism-related cases in the pre-9/11 era, the US courts now appear to be divided in guaranteeing the right to a fair trial. While the district courts and the Supreme Court appear determined to guarantee the right to a fair trial, the US Court of Appeals seem to be less committed to guaranteeing the right to a fair trial when it comes to adjudicating terrorism-related cases in the post-9/11 era. This is probably because the judges serving in the US Court of Appeals are more likely to be nominated for appointment to the US Supreme Court, hence their inclination to supporting the government security policies that tend to undermine freedom and human rights.

5.2 Impact of Terrorist Threats on Judicial Independence in the UK in the Pre-9/11 Era and Post-9/11 Era

The UK present interesting results in my analyses of its judicial behavior in the pre-9/11 era. It must be emphasized here that the UK had been experiencing several terrorist attacks, particularly in the Northern Ireland even prior to the 9/11. This means that it had already put in place some national security regime on terrorist threats. However, in our analysis, we are assuming that despite those threats, the government did not radically shift the CLGP to position MR from position CI. But even if the government did, the UK's political structure is totally different from that of the US so much so that the UK courts cannot reverse government statutory legislations due to Parliamentary sovereignty.

In the pre-9/11 era, we can conclude that the UK courts seemed to defer to government on matters related to national security. At the same time, the UK courts presented mixed results when it comes to fairness, impartiality, and independence. In both instances, 50 percent of the time the courts appeared fair, impartial and independent when adjudicating terrorism-related cases in the pre-9/11 era. At the same time, 50 percent of the time the courts seemed less fair, less impartial and less independent when adjudicating terrorism-related cases in the pre-9/11 era. This is probably because prior to the 1998 Human Rights Act, the UK courts did not have much powers to challenge the government on human rights commitment. However, the 1998 Human Rights Act provided the UK courts with much powers to adjudicate on human rights disputes and to ensure that the UK government was committed to abiding by the ECHR Convention.

In the post-9/11 era, we are assuming that due to high-level terrorist threats, the UK government shifted the CLGP to position MR from position CI. This means that the judiciary was already feeling the pressure of ensuring that the government did not abuse its discretion by curtailing freedom and fundamental rights. The UK courts had increased powers to challenge the government on its commitment to human rights. We conclude that the UK courts seem to defer to government on matters related to national security. At the same time, my findings reveal that despite the powers of the UK courts having been increased through the 1998 Act to fully protect human rights, the UK courts appear to be less fair, less impartiality, and less independent when

adjudicating terrorism-related cases in the post-9/11 era. In both instances, 100 percent of the time the UK courts appear less fair, less impartial and less independent when adjudicating terrorism-related cases the post-9/11 era. This is probably because the UK judiciary seem to be more supportive of the government's effort in maintaining national security and the judiciary probably believes that security is more important than liberty.

5.2.1 Impact of Terrorist Threats on Fair Trial in the UK in the Pre-9/11 Era and Post-9/11 Era

It is important to note that in all the four cases that were subjected to rigorous analyses, there were almost no fair trial violations that were alleged by the defendants (applicants). The UK being a common law tradition is perceived to have a strong regime on fair trial practices. However, our analyses on fair trial herein is primarily based on abstract. This means that had the defendants complained of procedural unfairness, then we are able to predict the behavior of the courts and the likely outcome. The findings provided below are based on abstraction.

The UK courts seem to have more faith in government when it comes to matters of national security. We see the courts defer to government on matters related to national security. My findings reveal that the UK courts were only 50 percent of the time able to ensure procedural fairness when handling terrorism-related cases in the pre-9/11 era. Moreover, my findings also reveal that the UK courts appear to be 100 percent of the time less likely to ensure procedural fairness when adjudicating terrorism-related cases in the post-9/11 era. Despite the powers of the UK courts having been increased through the 1998 Human Rights Act to fully protect human rights, the UK courts appear less likely to guarantee procedural fairness when adjudicating terrorism-related cases in the post-9/11 era.

5.3 Impact of Terrorist Threats on Judicial Independence in Germany in the Pre-9/11 Era and Post-9/11 Era

My analysis of judicial behavior in Germany presents fascinating results. Germany is known to have suffered the most serious atrocities against humanity during the Nazi regime. However, the call for respect for human rights became very strong following the fall of the Nazi regime. The new Constitution commonly called the 'Basic Law' put human dignity at the care of human rights protection. German courts as the custodian of human dignity had to assume a greater

role in human rights protection. In my pre-9/11 analyses of court behavior with regard to terrorism-related cases, my findings reveal that out of the 2 cases subjected to rigorous analyses (two out of two, i.e. 100 percent of the time), Germany courts were perceived to be fair, impartial and independent in adjudicating terrorism-related cases in the pre-9/11 era. This was probably because the Federal Republic of Germany was very much committed to respecting the human dignity and the judiciary was given powers to exercise its independence in ensuring that human dignity was protected at all times.

In the post-9/11 era, my analyses reveal that despite the German government developing its expanded national security laws and probably trying to shift the CLGP to position MR from position CI, German courts remained committed to ensuring the protection of human dignity. My analyses indicate that in almost 100 percent of the time, German High Courts appear to be fair, impartial and independent when adjudicating terrorism-related cases in the post-9/11 era. However, in 50 percent of the time, German lower courts appear to be less fair, less impartial and less independent when adjudicating terrorism related cases in the post-9/11 era. We can deduce that German lower courts exercise a lot of judicial deference (deferring to government) when adjudicating terrorism-related cases in the post-9/11 era as opposed to the German High Courts.

5.3.1 Impact of Terrorist Threats on Fair Trial in Germany in the Pre-9/11 Era and Post-9/11 Era

In cases relating to Germany, we see half of the applicants claiming Article 6 violation (right to a fair trial). In the pre-9/11 era, German courts appeared to be committed to ensuring procedural rights when adjudicating terrorism-related cases. However, in the post-9/11 era, German courts appear to be somewhat divided in their commitment to ensuring procedural fairness. In particular, while German High Courts appear to be more committed to ensuring procedural fairness in adjudicating terrorism-related cases in the post-9/11 era, German lower courts appear to be less committed in ensuring procedural fairness when adjudicating terrorism related cases in the post-9/11 era.

5.4 Impact of Terrorist Threats on Judicial Independence in France in the Pre-9/11 Era and Post-9/11 Era

French had been experiencing serious terrorist threats even prior to the 9/11. This means that its penal code already recognized terrorism as a serious crime. French courts were therefore not new to terrorism criminality. My analysis of the French judicial behavior with regard to adjudicating terrorism-related cases in the pre-9/11 era provide mixed results. In *Arana*, French courts portray themselves as less impartial and less independent while in *Bensaid*, the courts portray themselves as impartial and independent. When the 2 cases are subjected to rigorous analyses, half of the time (i.e. 50 percent), French courts were perceived to be fair, impartial, and independent. At the same time, 50 percent of the time, French courts were perceived to be less fair, less impartial, and less independent when adjudicating terrorism-related cases in the pre-9/11 era. This is probably because France had many foreign immigrants and some were perceived to be members of terrorist organizations and therefore French courts were probably discriminatory of foreign immigrants perceived to be perpetrators of terrorism.

However, in the post-9/11 era, my analysis of judicial behavior in France indicates that out of the 2 cases subjected to rigorous analyses, one and half times out of two (i.e. 75 percent), French courts are perceived to be fair, impartial and independent when adjudicating terrorism-related cases. Perception of less independent and less impartiality only takes 25 percent. In the post-9/11 era France created a special centralized court for trying terrorist suspects. France has also trained new investigating judges and trial judges that are only specialized in terrorism investigations and trial. This has more likely strengthened the criminal justice for terrorist suspects in the post-9/11 era as opposed to the pre-9/11 era.

5.4.1 Impact of Terrorist Threats on Fair Trial in France in the Pre-9/11 Era and Post-9/11 Era

My analysis reveal that while French courts appeared less committed to procedural fairness when adjudicating terrorism-related cases on the pre-9/11 era, the courts now appear more committed to ensuring procedural fairness in the post-9/11 era. This might be attributed to French decision to train new investigating judges and trial judges that are only specialized in the investigation and trial of terrorist suspects.

5.5 Comparisons Based on Most-Similar Designs

In the sub-sections below, I make comparisons based on the most-similar systems design.

5.5.1 U.S. and UK Comparisons

The present study also sought to examine the differences in judicial response to terrorism in common law jurisdictions (i.e. the U.S., and U.K.). The idea here is to compare judicial systems constitutional and human rights agendas during periods of high-level and low-level national security threats and then use that as a basis to examine how courts in the two countries tend to respond to government policy on national security during periods of high-level and low-level national security threats.

Comparing two periods of national security threats (i.e. high-level and low-level) provides the present study with a temporal advantage for appropriate analysis. In comparing the two systems under the common law tradition, the present study makes an assumption that criminal justice in both systems share similarities in terms of decision stages. However, despite the similarities, the two traditions still present important variances in how, for instance, in how cases are selected and in how they arrive at judicial decision-making process. Also, there are probably some forces operating within each of the legal system that are responsible for pushing substantive principles that serve to influence or affect judicial outcomes. For instance, Salter and Mason (2007) make the point that "it is possible that legal institutions and their impact are in some important sense cultural-specific" (p.186) and that means, therefore, that the models of law have to be adapted or refined to take account of cultural variables.

Using the most-similar design, we are able to compare Western liberal democracies that have similar legal characteristics. For instance, both the U.S. and the UK share similar legal characteristics in the sense that their legal systems derive from common law tradition. At the same time, both Germany and France share similar legal characteristics in the sense that their legal systems derive from civil law tradition.

It is therefore important to compare the impact of terrorist threats on the judicial independence and fair trial in both U.S. and UK. Since both countries have common law legal systems, they have an adversarial criminal justice system. Table 5.5 below illustrates the

characteristics of adversarial criminal justice systems. We are comparing the US with the UK because as already shown in table 5.5, they share similar characteristics that define adversarial criminal justice systems. Comparison is only possible with two things that appear similar.

In making comparison using most similar systems design, however, we shall vary our independent variable by assuming that in the pre-9/11, both judicial systems were similar and everything was constant. In this instance, we want to assume that only the U.S. developed and enforced expanded national security laws in the pre-9/11 era, but the UK did not. Then we shall then be able to see what subsequently happened to the U.S judicial system after adopting the expanded national security laws as compared with the UK, which we assume did not.

Based on my analyses of the impact of terrorist threats on judicial independence and fair trial in the U.S. and UK, my findings reveal that while the US courts appeared impartial and independent in their adjudication of terrorism-related cases in the pre-9/11 era, UK courts appeared less impartial and less independent. However, after experiencing the post 9/11 expanded national security laws, the US judicial systems now appear divided in being impartial and being independent when adjudicating terrorism-related cases in the post-9/11 era. Compared to the UK courts in the Pre-9/11 era, we see that there is some change in the U.S. judicial system's behavior, which now makes it behave somewhat different and somewhat similar as compared with the UK judicial system. The 'somewhat' difference that we observe in the U.S. judicial system is attributable to the expanded national security laws.

In terms of fair trial guarantee, while the US courts appeared to guarantee the right to a fair trial in their adjudication of terrorism-related cases in the pre-9/11 era, the UK courts appeared less committed in guaranteeing the right to a fair trial. However, after experiencing the post 9/11 expanded national security laws, the US judicial systems now appear divided in being fair when adjudicating terrorism-related cases in the post-9/11 era. Compared to the UK courts in the Pre-9/11 era, we see that there is some change in the U.S. judicial system's behavior, which now makes it behave somewhat different and somewhat similar as compared with the UK judicial system. The 'somewhat' difference that we observe in the U.S. judicial system is attributable to the expanded national security laws.

In terms of political systems individual characteristics, the differences in judicial systems response to terrorism may also be attributed to other factors. For instance, the US judiciary is

considered a significant political veto player in the US political system. This means that the US courts enjoy greater powers than the UK courts. Parliamentary sovereignty associated with the UK system appear to curtail the power of the judiciary to be fully independent and impartial because the UK judges constantly bear in mind that their decisions cannot reverse legislations passed by Parliament.

Table 4.5 Differences in Criminal Justice Systems in Liberal Democracies.

Adversarial Criminal Justice Systems	**Inquisitorial Criminal Justice Systems**
1. Due process model is emphasized.	1. Crime control model is emphasized.
2. Legal guilt is emphasized.	2. Factual guilt is emphasized.
3. Proof oriented.	3. Truth oriented.
4. Greater time is spent on trial.	4. Lesser time might be spent on trial.
5. Police does investigation.	5. Investigating judge does investigation.
6. Police might use torture to obtain evidence.	6. Investigating judges not likely to use torture to obtain evidence.
7. Prosecutors and defense counsels actively examines witnesses.	7. The judges actively examine witnesses.
8. Truth is discovered through competition between parties.	8. Truth is discovered by way of investigative procedure.
9. Parties on either side may have an interest in hiding the truth.	9. Parties on either side do not have much latitude to hide the truth.
10. Plea bargaining is common and truth might be subjective.	10. Truth bargaining is less common and truth is more objective.
11. Procedurally passive Judge.	11. Procedurally active Judge.
12. Procedurally active prosecutor and defense counsels.	12. Procedurally passive defense counsel.
13. Both oral and written submissions.	13. Only written submission.
14. Truth is determined from competition between opposing sides.	14. Truth is determined from a continuing investigation and screening process.

Source: author based on the readings of the literature

5.5.2 Germany and France Comparisons

As demonstrated in table 5.5 above, we are also able to compare German with France because as already shown in table 5.5, the two countries share civil legal tradition with similar legal characteristics. In particular, both countries practice inquisitorial criminal justice systems. Comparison is only possible with two things that appear similar. We shall do the same thing for German and France since they also share civil law judicial systems. We shall vary the independent variable by assuming that it is only German developed and enforced expanded national security laws, but France did not. Then we shall be able to assess the effect of expanded national security laws on the German judicial system as opposed to that of France, which we assume did not develop and enforce the expanded national security laws.

My analyses reveal that while Germany courts were perceived to be fair, impartial and independent when adjudicating terrorism-related cases in the pre-9/11 era, French courts were, however, perceived to be less fair, less impartial, and less independent when adjudicating terrorism-related cases in the pre-9/11 era. However, after experiencing the post 9/11 expanded national security laws, the Germany judicial systems now appear divided in being impartial and independent when adjudicating terrorism-related cases in the post-9/11 era. Compared to the French courts in the pre-9/11 era, we observe that there is some change in the German judicial system's behavior, which now makes it behave somewhat different and somewhat similar as compared with the French judicial system. The 'somewhat' difference that we observe in the German judicial system is attributed to the expanded national security laws.

In terms of fair trial guarantee, while the German courts appeared to guarantee the right to a fair trial in their adjudication of terrorism-related cases in the pre-9/11 era, the French courts appeared less committed to guaranteeing the right to a fair trial. However, after experiencing the post 9/11 expanded national security laws, the German judicial systems now appear divided in being fair when adjudicating terrorism-related cases in the post-9/11 era. Compared with the French courts in the pre-9/11 era, we see that there is some change in the German judicial system's behavior, which now makes it behave somewhat different and somewhat similar as compared with

the French judicial system. The ‘somewhat’ difference that we observe in the German judicial system is attributable to the expanded national security laws.

5.6 Comparisons Based on Most-Different Designs

In the sub-sections below, I make comparisons based on the most-different systems design.

5.6.1 Comparing Common Law Tradition with Civil Law Tradition

The present research is of the view that the nature and characteristics of different legal traditions (i.e. common law and civil law) may significantly contribute to differences in the justice outcomes. The present study is also of the view that both legal systems are not generally coherent and seamless. In civil law legal tradition, judges are required to strictly follow the clear meaning and implications of the established rules. This is expected to allow the judiciary to make ‘legally correct’ decisions on a regular basis. This is said to be made possible by judges logically deducing the implications of rules and principles for the relevant facts of a specific case under criminal proceeding. However, under the common law tradition, precedent and stare decisis tend to be strictly followed in similar cases and judges find it difficult to deviate from them.

It is expected, however, that in both legal traditions, judges are expected to demonstrate rigorous and objective legal reasoning so that they are then capable of arriving at the single correct answer to any legal problem by properly analyzing the implications of prior legal doctrine for the material facts of any dispute or issue. But the differences again arises because civil law judges tend to approach legal interpretations with rationally governed internal relations, which then makes them to apply almost ‘mechanical process’ of legal reasoning to engender specific answers to

particular cases. Table 5.6.1 below illustrate the differences between common law justice system and civil law justice system. In using the most-different designs, we are able to compare the two legal systems and understand how despite the differences, the two legal traditions are able to produce similar justice outcomes (dependent variable). In other words, whereas we recognize the differences between common law and civil law legal traditions, these differences do not cause different justice outcomes. Instead, they produce similar justice outcomes. This is the essence of the most-different systems design.

In the pre-9/11 era, my analyses of the impact of terrorist threats on judicial independence and fair trial in the common law legal tradition (U.S. and UK) reveal that the US courts appeared fair, impartial and independent in their adjudication of terrorism-related cases in the pre-9/11 era. On the contrary the UK courts appeared less impartial and less independent. Compared with the civil law legal tradition (German and France), my analyses reveal that the Germany courts were perceived to be fair, impartial and independent in adjudicating terrorism-related cases in the pre-9/11 era. On the contrary, French courts were perceived to be less fair, less impartial, and less independent when adjudicating terrorism-related cases in the pre-9/11 era. This shows that both the US courts and German courts displayed similar characteristics of being fair, impartial and independent when adjudicating terrorism-related cases, while both the UK courts and French courts displayed similar characteristics of being less fair, less impartial, and less independent when adjudicating terrorism-related cases. It can be concluded that both common law and civil law legal systems presented differences within themselves, but similarities between themselves in their adjudication of terrorism-related cases in the pre-9/11 era.

In the post-9/11 era, my analyses of the impact of terrorist threats on judicial independence and fair trial in the common law legal tradition (U.S. and UK) reveal that while the US courts appear divided in being impartial and being independent in their adjudication of terrorism-related cases in the post-9/11 era, the UK courts appear united in being less impartial and less independent. Compared with the civil law legal tradition (German and France), my analyses reveal that the Germany High Courts appear to be almost 100 percent fair, impartial and independent when adjudicating terrorism-related cases in the post-9/11 era with lower courts appearing to be less fair, less impartial, and less independent (i.e. Germany courts like the U.S. courts also appear divided) , French courts are, however, 75 of the time perceived to be likely fair, impartial and independent

when adjudicating terrorism-related cases in the post-9/11 era. A comparison of the two legal systems reveals that both the U.S. and Germany, despite their different legal traditions, their judicial systems are still able to produce similar justice outcomes. While the UK and France do not produce exactly similar judicial outcomes, this is probably attributed to the other extraneous factors which the present research could not fathom out.

In terms of fair trial guarantee by common law countries (i.e. US and UK) in the pre-9/11 era, the US courts appeared to guarantee the right to a fair trial in their adjudication of terrorism-related cases in the pre-9/11 era. However, the UK courts appeared less committed to guaranteeing the right to a fair trial. Compared with civil law countries (Germany and France), German courts appeared to be committed to ensuring procedural rights when adjudicating terrorism-related cases in the pre-9/11 era. However, the French courts were less likely to guarantee the right to a fair trial in the pre-9/11 era. Again, in terms of the right to a fair trial both common law legal systems and civil law legal systems presented differences within their judicial systems and similarities between their judicial systems in their commitment to ensuring the right to a fair trial in the pre-9/11 era. For instance, we observe similar justice outcomes for both U.S. and Germany and also similar justice outcomes for both UK and France.

Table 5.6.1 Similarities in Criminal Justice Systems in Liberal Democracies.

Adversarial Criminal Justice Systems	Inquisitorial Criminal Justice Systems
1. Finding the truth is a fundamental aim.	1. Truth finding is a fundamental truth
2. The guilty should be punished.	2. The guilty deserves punishment.
3. The not guilty should be left alone.	3. The not guilty should not face trial.
4. If due process rights are violated then defendant might not be found guilty.	4. If due process is violated, then the defendant's trial terminates.
5. Burden of proof is on the prosecutor. government.	5. Burden of proof is on the trial judge/ government.
6. The process aims to punish the guilty.	6. The process aims to punish the guilty.
7. The defendant not required to cooperate with investigation.	7. The defendant is not required to cooperate with investigation.
8. Handles terrorism crime.	8. Handles terrorism crime.
9. Believe in due process rights.	9. Believe in due process rights.
10. Judiciary should be independent and impartial.	10. The judiciary should be independent and impartial.
11. The accused is innocent till proved guilty.	11. The accused is innocent till proved guilty.
12. Believe in fair trial practices.	12. Believe in fair trial practices.
13. Apply counter-terrorism law.	13. Apply counter-terrorism law.
14. Plea bargaining is allowed.	14. Plea bargaining allowed in some instances, eg. in France.

Source: author based on readings of the literature.

In the post-9/11 era common law practice, while the US courts appear divided in guaranteeing a fair trial when adjudicating terrorism-related cases, the UK courts appear less likely to guarantee a fair trial when adjudicating terrorism-related cases in the post-9/11 era. Compared with the civil law practice, German High Courts appear committed to ensuring a fair trial guarantee, but with the lower courts less committed to ensuring the right to a fair trial when adjudicating terrorism-related cases in the post-9/11 era. In comparing with French, my analysis reveal that French courts appear more likely to guarantee a fair trial when adjudicating terrorism-related cases in the post-9/11 era. Again, we can see that both the U.S. and Germany judicial systems are producing similar outcomes. Altogether, my analyses find less support for fair trail commitment in common law countries. On the contrary, my analyses find more support for fair trial commitment in civil law countries.

5.7 Discussions on the Impact of Terrorist Threats on Judicial Independence and Fair Trial

The findings presented herein deserve further illumination. The question that should be asked is whether courts respond differently to national security threats in times of low-level crisis and high-level crisis. The executive's assessment of a threat to national security has been varied in Western liberal democracies. There are cases where the assessment has led to responses that infringe upon individual rights. Such responses normally require the courts to intervene through a judicial review. Scholarship on this topic indicate that the executive response to terrorist threats in the pre-9/11 era was well balanced and did not infringe more on the freedom and fundamental rights as is the case with post-9/11 era which negatively characterize the government as disrespectful of human rights.

In the pre-9/11 era, it can be argued that the judicial deference to executive policy on national security was strong. For instance, in *Korematsu v United States*,[220] the U.S. Supreme Court issued one of its least respected opinions, holding nominally that the exclusion of Japanese U.S. citizens from West Coast was within the war power of the military. It also held that internment camps on the basis of race alone were permissible. However, in *Padilla*, for example, we see a totally different court system whereby the courts are very bold and challenge the executive on certain measures of national security.

A deeper issue is whether the recently introduced counterterrorism law and policy undermine safeguards for human rights. Does the judiciary has the constraint of deference to the executive branch? Notwithstanding the heinous crimes commissioned by terrorism actors, Western democracies still bear the primary responsibility in ensuring the protection of human rights (Feinberg, 2016, p. 180). In the U.S, for example, the Supreme Court has been able to intervene and correct the government on security matters where the government response is perceived to infringe human rights. The Supreme Court has held that the detainees at Guantanamo Bay will have, prior to being charged, the right to have U.S. civilian courts determine the appropriateness of their detention (Sulmasy, 2009, p.113). The U.S. Supreme Court declared in *Hamdi* that the use of military commissions to try foreign terror suspects was illegal.

[220] 323 U.S. 214 (1944); https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-korematsu-v-us.

The military commission seems to abolish the *writ* of *habeas corpus.* It then becomes a clear indication that the post-911 government response to national security threats infringed upon fundamental rights. This then put a lot of pressure on the judiciary to correct. Contrary to what a section of the literature says that the U.S. court system does to interview with the executive on national security matters (i.e. Fandl, 2019), the present study finds a contrary opinion. My findings indicate that the U.S. court system is actually actively engaged in the executive's handling of national security matters. Contrary to what the previous literature says that the U.S. courts have been of the view that the courts are not equipped to second-guess the executive branch on matters involving the nation's security (Fandl, 2019), my findings reveal that the U.S. courts actually have powers to check the excesses of government's powers on national security.

When it comes to counterterrorism judicial review of civil liberty infringement, the judiciary should have the most effective means of controlling executive power. For instance, Fiona de Londras has recently called for a more "virtuous" politics to improve counterterrorist law and policies both before and in response to judicial intervention (De Londras, 2014). For example, it should be seen that in *Ex parte Milligan,*[221] the U.S. Supreme Court held that President Lincoln's use of Military tribunals in Northern states was unconstitutional when civilian courts were open and operating. This verdict bore great significance for U.S. handling of terrorism suspects.

In the UK judicial system, my findings reveal a puzzling pattern that mirrors a sharp contradiction to the U.S. judicial system. While the 1998 Human Rights Act essentially gave more powers to the courts to protect human rights, the courts seem not to be able to curtail the scheme of government in upholding the rule of law. In *A. and Others v. the United Kingdom,* for example, the Chief Justice of the Court of Appeal, Lord Woolf, held that "the court was required to show considerable deference to the Home Secretary because he was better qualified to make assessment as to what action was called for" (see Alexander and Brenner, 2003, p. xxvii). My findings show that most terrorism-related adjudications in the UK ended up being reversed by the ECtHR. This is a clear pointer as, Lord Chief Justice Woolf, said, that the UK courts tended to abandon the Constitution on cases that involved government actions with regard to national security even if such actions tended to infringe on freedom and fundamental rights. This means terrorist threats

[221] 71 U.S. 2 (1866); https://supreme.justia.com/cases/federal/us/71/2/.

had great effect on the UK judicial system and the courts were abandoning the constitution in support of government policy on national security.

According to the UN Security Council, "any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians."[222] The implication being that the UN Security Council recognizes terrorism as a crime, not as a warfare or conventional warfare as has been perceived by some government officials. This means that courts should never be drawn into thinking that terrorism acts are synonymous with war fares. Courts of law must therefore treat terrorist acts as criminality.

One scholar Jenkins (2014) contends, judicial deference to government's national security policy was more pronounced in the pre-9/11 era. He further argues that in the post-9/11 era, there has been a break from the past patterns of judicial deference when reviewing national security powers. "Courts have bravely sought to constrain preventive detention regimes" (p.95). He further contends that courts have also been able to guarantee some meaningful procedural protections for those subject to trials and imprisonment. However, my findings on the UK judicial system seem to contradict Jenskins' observation. The UK judicial system still seem to live in an age of judicial deference when it comes to matters that touch on national security.

We may recall that Alexis de Tocqueville remarkably praised the role of the judiciary in the new political system, arguing that the power granted to the courts to pronounce on the constitutionality of laws is one of the most powerful barriers ever erected against the tyranny of political systems (see Vanberg, 2005). Moreover, constitution writers following World War II, and again in the wake of the peaceful revolutions of 1989 in Eastern Europe, turned to courts armed with the power of constitutional review in the hope of creating effective limitations on the power of legislative majorities.[223] These observations essentially amplify the judicial role in human rights protection and constitutionalism.

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[222] UN Security Council Resolution 1456 (2003). Adopted by the Security Council at its 4688th meeting, on 20 January 2003, p 2.

[223]1 See, for example, Konrad Adenauer's remarks during the West German Constitutional Convention: "Dictatorship is not necessarily dictatorship by a single person. There is also dictatorship by a parliamentary majority. And we want protection against such dictatorship in the form of a constitutional court" (Verhandlungen des Parlamentarischen Rates, 2nd session, p. 25)

In regard to Germany judicial system's response to terrorist threats, my findings reveal that the judicial system has sustained a high level of fairness, impartiality and independence when adjudicating terrorism-related cases, both in the pre-9/11 era and post-9/11 era. Germany appears to be more committed to observing the rule of law, both in times of peace and it times of war. Germany also does not have preemptive criminal law in its legal system as is the case in France. As one scholar points out, police in Germany are prohibited from collecting intelligence and can only begin an investigation when there is a probable cause that a crime has been committed (Levy, 2007, p.15). Moreover, intelligence agencies cannot make arrests and information collected covertly cannot be used in court (Levy, 2007, p.17). German also places strong emphasis on human dignity, which serves as a strong defender of civil liberties. It also has strong privacy protections and surveillance is not used as a preemptive mechanism for terrorism prosecution. This implies that Germany prefers transparency rather than secrecy in its judicial system. For instance, in both *El Motassadeq* and *Mzoudi,* we see that the courts rejecting secrecy as a legitimate response to national security. Instead, the courts are strongly demanding for transparency in the procurement of inculpatory evidence against the two terror suspects.

France presents varying results in its judicial response to terrorist threats. In the pre9/11 era, French courts appeared less impartial and less independent when adjudicating terrorism-related cases. However, in the post-9/11 era, French courts appear more impartial and more independent when adjudicating terrorism-related cases. French government has an integrated system of justice for terrorism cases (Foley, 2013, p.232). A section of scholars argue that France puts a lot of emphasis on national security protection, hence French judiciary has been accused of putting itself on the side of the government and the national security agencies for the fight against terrorism (Foley, 2013, p. 236). France has also put much emphasis on anticipating risks. Its national security strategy is based on five function: knowledge and anticipation, prevention and deterrence, protection and intervention (Louka, 2011, p.55-6). The political climate in France has been mainly dominated by national security concerns. These factors are likely to influence the way French judicial system responds to terrorist threats. In the pre-9/11 era, French courts appeared less impartial and less independent. However, in the post-9/11 era, French court appear more impartial and more independent. This might be attributed to the restructuring of its judicial system. The restructuring has seen the creation of specialized investigating judges as well as trial judges who are now specialized to handle terrorism-related offenses.

More importantly, in recent years after the 9/11, France has also endeavored to pursue reforms that are more protective of individual liberties (Stigall, 2021). Although the reforms have also augmented police powers, there is a well worked out balance between security and liberty rules and regulations. This balance now ensures that while the French authorities have enhanced powers to pursue terrorists, they have to do so within the confines of the rule of low. This has eased pressure on the courts who were previously being seen as more supportive of government national security polices at the expense of liberty. This is likely to explain why French courts are now appearing more impartial and more independent in the post-9/11 era when adjudicating terrorism-related cases.

Scholars contend that one of the great divides between Anglo-American (common law) and the continental (civil law) systems involves criminal investigation and prosecution. In civil law systems, the development of the investigative record leading to prosecution and the decision whether to prosecute typically lies in the hands of government officers who are labeled judges (Shapiro 2013). In some instances these officers rotate between judicial duties and those of investigation and prosecution, and in other instances the officers are separated from the rest of the judiciary, but nonetheless hold a judicial title. In common law systems, criminal investigation and prosecution are never in the hands of judges. Despite these sharp differences between common law traditions and civil law traditions, my findings do not reveal significant differences in terms of judicial outcomes of the two traditions.

5.8 Conclusion

Scholars contend that the judiciary has a central and quite visible role in the promotion, preservation and protection of fundamental rights and democratic norms in general. Whenever democratic governments design counter-terrorism law and policy as legitimate protection mechanism, such law and policy should be subject to judicial scrutiny. Undoubtedly, the judicial interpretation and enforcement of terrorism-related national security rules potentially raises the matter of judicial independence. As Lynch (2019) observes, emergency and anti-terrorism legislation foster various forms of rights violations that can be easily used by state actors to secure protection from criminal prosecution. The state always fall back to the legitimizing force of law to defend its violation of fundamental rights. However, judicial independence can come to bear in promoting and protecting human rights and can be an avenue for curing governments' violation of

rights. If judicial independence exists, then the power of the courts enjoys protection and judges secure the necessary ability to review the actions of other government agencies without the fear of being punished.

CHAPTER SIX

CONCLUSION

6. Conclusion

The aim of the present study was primarily to investigate a largely unexplored tension between democratic institutions (i.e. executive and legislature) on one side and the judiciary on the other side in the era of terrorist threats. This tension is brought about by an attempt by the democratic representatives to constrict freedom and fundamental rights in the name of national security preservation. In democratic societies, the executive is normally in charge of security preservation while the judiciary is normally in charge of justice and rule of law protection. However, in times of high-level national security threats, the executive may decide to abandon the constitution by exercising emergency powers. This action is likely to curtail the justice system and render it ineffective. However, the judiciary has a role to play in ensuring that the executive abided by the rule of law both in times of peace and in times of emergency. This implies that the executive's interest in security and the Judiciary's interest in the rule of law are likely to clash in times of national security threats.

The primary goal of the present study was to investigate judicial response to national security threats in Western liberal democracies (U.S., UK, Germany, and France). Having thoroughly scrutinized scholarship on democratic response to terrorist threats, I found a lot of persuasive arguments that point to liberty restrictions and human rights violations as a result of new counterterrorism legislations. These legislations have been referred to as expanded national security laws in this study work. Even though there appeared to be a lot of work done on the effects of counterterrorism laws on human rights, there appeared to be very little systematic work done to understand the effect of terrorist threats on judicial independence and fair trial. This curiosity gave impetus for the present study. After many years of research on judicial independence, criminal law, constitutional law, human rights law, international law, and comparative law, I formulated my topic, assembled the necessary tools and resources and went to work.

In this chapter, I provide conclusions based on my research findings. It is first and foremost important to understand that the research mainly focused on two phases of national security threats:

the pre-9/11 phase and the post-9/11 phase. The research also made it abundantly clear that the national security laws (terrorism laws) was the main independent variable. The study then varied the independent variable with the pre-9/11 maintaining the national security laws and post-9/11 acquiring the label 'expanded national security laws' (counterterrorism laws). It is therefore apparent that the research was mainly testing the effect of varying the national security laws on judicial independence and fair trial practices. In other words, how do expanded national security laws (counterterrorism laws) affect judicial independence and fair trail practices differently from national security laws (terrorism laws)?

I developed unique models for studying judicial response to terrorist threats that not only ensured robustness, but also safeguarded the validity and reliability of the study. Drawing on sixteen case law studies, I obtained strong evidence (support) for the view that terrorist threats pose significant challenge to judicial independence and fair trial practices, and when threats are high, this challenge is reinforced, particularly in the U.S., UK, and Germany. France, however, recorded a positive influence in terms of judicial outcomes. Detailed reporting of my research findings are as provided in the paragraph below.

Starting with the U.S., the pre-9/11 terrorism law did not affect how the U.S. judicial system responded to adjudication of terrorism-related cases. The entire judicial system appeared fair, impartial and independent. However, in the post-9/11, the effect of counterterrorism laws (expanded national security laws) most likely affected the U.S. judicial system. My findings reveal that the Court of Appeals appeared less fair, less impartial and less independent when adjudicating terrorism-related cases. This can be mainly attributed to the effect of counterterrorism laws.

In the UK, the pre-9/11 terrorism law did not affect much how the UK judicial system responded to adjudication of terrorism-related cases. The judicial system appeared fair, impartial and independent, only occasionally being seen as less fair, less impartial and less independent. However, in the post-9/11, the effect of counterterrorism laws (expanded national security laws) most likely affected the UK judicial system. My findings reveal that the entire UK judicial system appear less fair, less impartial and less independent when adjudicating terrorism-related cases. My findings also indicate that the UK courts exercised a lot of judicial deference and in most cases unreservedly supported the government policy on national security. The UK Judicial behavior can be mainly attributed to the effect of counterterrorism laws.

In regard to Germany, the pre-9/11 terrorism law did not affect much how the Germany judicial system responded to adjudication of terrorism-related cases. The entire judicial system appeared fair, impartial and independent when adjudicating terrorism-related cases. However, in the post-9/11, the effect of counterterrorism laws (expanded national security laws) most likely affected the German judicial system. My findings reveal that the German lower courts appeared less fair, less impartial and less independent when adjudicating terrorism-related cases. This judicial behavior can be mainly attributed to the effect of counterterrorism laws.

France, however, presented interesting results. The pre-9/11 terrorism law did not affect much how the French judicial system responded to adjudication of terrorism-related cases. The entire judicial system appeared less fair, less impartial and less independent when adjudicating terrorism-related cases. However, in the post-9/11, the effect of counterterrorism laws (expanded national security laws) most likely affected the French judicial system. My findings reveal that the French courts appeared, for the most part, fair, impartial and independent when adjudicating terrorism-related cases. This judicial behavior can be mainly attributed to the effect of counterterrorism laws. The question as to why counterterrorism laws appeared to have only positively influenced the French judicial response to terrorist threats is a good one, and I believe future research would be able to explore further that phenomenon.

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