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The Impact of Countering Terrorism on Human Rights: A Comparative Study with a Focus on the Freedoms of Religion and Expression.

DISSERTATION

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DEDICATION

I dedicate this thesis to my Mother, Father and Wife, whom have been a source of enlightenment and encouragement throughout my entire life.

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I would like to thank the Graduate Institute for granting me this priceless opportunity to do my Master's in International Law, and all the brilliant Professors I have been a student to. All the appreciations to Professors Clapham, Bianchi, and Chetail for teaching me the true meaning and value of human rights.

ABSTRACT

The proposed thesis explores the implications that rise from the measures of counter-terrorism taken by several countries on human rights with a focus on the freedom of religion and freedom of expression. The thesis begins with mentioning several attempts done by the international community to set a comprehensive definition of terrorism and afterwards examines counter-terrorism laws in different countries and how they affected human rights in general. The thesis then critically examines the general approaches of several countries towards both freedoms of religion and expression and whether or not changes have occurred to these approaches following major terrorist attacks. Afterwards, the thesis observes how international law and international jurisprudence perceive both freedoms and then critically examines the general approach taken with regards to these rights and whether or not this treatment varied following major terrorist attacks. The thesis finally proposes recommendations for national and international legal systems to minimize any possible encroachments upon these freedoms.

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Introduction and Background

Following the horrors of World War II, the international community has been striving for protecting human dignity through the adoption of several human rights treaties. The first step towards this endeavor was the creation of the UN Charter where its preamble asserted on the necessity to respect human rights. Afterwards came the Universal Declaration of Human Rights which encompassed most of the human rights known at that time and has been followed by many other international and regional human rights covenants. During the process of formulating these covenants, states have realized that some of the rights agreed upon cannot be fully respected in certain conditions and thus granted themselves a space to maneuver by complete or partial derogation from some of them. Declaring a state of emergency has always been the key for states either to confront real threats to the nation such as wars or as a political tool for oppression where in both cases some of the rights are completely denounced. In addition, International Humanitarian Law was formulated as a body of law to be applied during armed conflicts as it was perceptible that human rights law would be unfit in such conditions. Here thereof, states unanimously agreed while framing human rights law that wars are almost the only exception for the inapplicability of such a law. This was the case until an anomaly appeared on the scene, namely international terrorism. Since terrorism began to strike nations across the world, many people were victimized where in some cases exceeded the number of losses resulting from wars. Almost all the international human rights body of law was not prepared for this new enemy which led to all the actions taken in this parameter being legally questioned and debated as for example the issue of the use of force against non-state actors and the applicability of International Humanitarian Law in such cases.

This controversy extended to include the demarcation of the enemy itself as there was an extreme intricacy among states in finding a definition of terrorism. Amidst such events, many states enacted different laws either to facilitate countering terrorism that they already suffered from or as a defensive tool to obstruct any potential attacks. The overwhelming emotions which were predominant among wounded or sympathetic nations at the time of enacting such laws made them almost unquestionable. Who would dare to question an act called 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'[1] drafted following the bloody 9/11 attacks? The global prevailing language was

[1] Pub.L. 107−56, 115 Stat. 272, H.R. 3162, enacted October 26, 2001.

'either you are with us, or with the terrorists' which opened doors to many human rights infringements in the name of 'fighting terrorism'. An illustration of one of the inclement laws is the British 'Anti-terrorism, Crime and Security Act 2001' which granted authorities the power to detain non-British residents as terrorist suspects indefinitely. Lord Hoffman foresaw that such laws, not terrorism, that pose a 'real threat to the life of the nation'.[2]

On the contrary, laws of discriminatory nature contrary to human rights were upheld by the judiciary such as the Trump's travel ban,[3] which was lately allowed to take effect by the Supreme Court.[4] Such measures adopted by states were not confined to discriminatory or abusive detentions but also included limitations on the freedom of expression and practice of religion. In the Holder v. Humanitarian Law Project case,[5] the US Supreme Court ruled that "the prohibition of material support to terrorist organizations is constitutional…although it was fully cognizant that its ruling limits the scope of freedom of expression."[6] It is inevitably absurd to speak of terrorist incitement as 'freedom of speech' shielded by human rights law. However, due to the generality of 'terrorism incitement' argument, several states took dubious steps to limit the freedom of expression based on this claim such as Saudi Arabia and UAE banning of Aljazeera news channel because of Qatar terrorist funding allegations.[7]

A similar ground for speech stifling and criminalization adopted by states is called "extremism". Due to the lack of definition to this behavior, the Special Rapporteur on the protection and promotion of human rights while countering terrorism, Ben Emmerson, noted that "peaceful expression of views that are considered 'extreme' should never be criminalized unless they are associated with violence."[8] He also acknowledges it as a cause used by states to "suppress political opposition or ideological dissent from mainstream values."[9]

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2 (2005) UKHL 71.

[3] 82 FR 8977

[4] Donald J. Trump, President of the United States v. Hawaii, Application (17A550), 4 December 2017.

[5] 130 S.Ct. 2705

[6] (Barak-Erez & Scharia, 2011), at 2.

[7] http://money.cnn.com/2017/05/24/media/al-jazeera-blocked-saudi-arabia-uae/index.html

[8]http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17229&LangID=E

[9] ibid.

In this research, my aim is to identify how the judicial, legislative and executive authorities pole apart in different countries with respect to striking the balance between countering terrorism and human rights. This descriptive aspect of the research hopes to reveal the points of concurrence, and divergence in different modalities of legal systems. The research also aims to seek the most expedient and efficient model in this field and also propose new institutional structures on a national and international basis to guarantee the effectiveness of countering terrorism without encroachment to human rights.

The first chapter discusses the different definitions of terrorism, mentioning human rights that might get violated while taking measures in preventing and investigating crimes of terrorism and how these violations take place during the process of countering terrorism.

The second chapter examines the comparative judicial approaches in reviewing counter-terrorism acts that its application leads to human rights violations. Also, it will analyze the judicial trends in examining the executive authority in exercising measures of countering terrorism in the light of human rights.

The third chapter discusses different international judicial doctrines, this is to evaluate several national judiciary and legislative systems in their confrontation to terrorism and how relevant they are to human rights.

The fourth chapter, the research attempts to propose recommendations and regulations for national systems found to be violating human rights in the light of the examined best international practices.

Chapter 1: Definitions of Terrorism

Terrorism; Is it the crime of crimes, a political conjuncture, or heroism?

If anyone, anywhere in the world, listens to the world terrorist, the first thing that strikes his or her mind is the dark skinned Arab looking man with a shaggy beard, wearing either a completely white or black creepy clothes grasping an AK47 and shouting gibberish. Such visualization is pretty much plausible and even legitimate as long as this man is affiliated to the most atrocious terrorist group ever known to man kind known as ISIS or "Daesh" or any other radical Islamist groups that embrace the same ideology. But what if this man with the same looks and specifications was actually defending against an invader to his homeland? Indeed, it is hard to find any terrorist campaign without being a response to a particular situation but this does not entail that such violence is either inevitable or justified. As Bianchi puts it, "even in the most difficult circumstances there are moral and strategic choices, and it is far from self-evident that terrorism has superior claims over other forms of action."[10]

Any crime in any penal code in the world is almost uncontroversial whether among jurists or ordinary people as long as all its elements have been realized. However, terrorism is not the same. If, for instance, one of the Rohingyas was arrested by Myanmar police and charged of committing terrorist acts, the Rohingya protagonists will perceive this man as a freedom fighter while their opponents would love to see him locked behind bars. In such a scenario, when can one draw a line between the end of political violence and the start of terrorism? According to Nafziger, an operational definition remains the "Holy Grail of the terrorism debate."[11] Still, it is difficult to deny the importance of a definition of terrorism because of its necessity to discuss and analyze any anti-terrorist legislation. Establishing a definition is also of a paramount importance in not only identifying those to be targeted by the laws, but also to justify the extraordinary measures that might be deployed during the course of countering terrorism. In the following section, attempts by several international bodies to set a comprehensive definition of terrorism is going to be examined.

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[10] (Bianchi & Keller, 2008), at 4.

[11] NFZIGER JAR. 2005. The Grave New World of Terrorism: A Lawyer's view. In Law in the War on International Terrorism, ed. VP Nanda, p64.

1) The United Nations and the Definition of Terrorism:

Although the definition exists in almost all national legislations, the UN General Assembly did not approve a universal legal definition of terrorism and thus no international consensus has been reached. An attempt was made by the UN GA in 1972 to enumerate acts that could be regarded as 'terrorism' when it issued 'Friendly Relations Declaration'.[12] However, it focused more on state terrorism and neglected that committed by non-state actors.[13]

The first attempt made by the GA to set a definition of terrorism perpetrated by non-state actors was the 1994 Declaration on Measures to Eliminate Terrorism. Although it was not presented as to lay down a definition of terrorism, "it implicitly served that function, at least as a working premise for the Assembly."[14] Article 3 of the resolution defined terrorism as "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 are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, and religious or any other nature that may be invoked to justify them."[15] It is obvious from this definition that the international community has acknowledged the fact that acts of terrorism are not exclusive to states. Also, Saul stated several factors for evaluating the definition's normative weight giving it an advantage over any previous attempts for defining terrorism. First, the definition was incorporated in a declaration rather than an ordinary resolution which makes it of a paramount importance. Second, the manner in which the declaration is adopted suggests a degree of consensus as it was adopted without voting. Lastly, mentioning 'criminal acts' in the definition "invokes a normative language, rather than mere exhortation or aspiration."[16]

In an attempt to promulgate a comprehensive convention on international terrorism, the United Nations General Assembly in its resolution 54/110, entitled the Ad Hoc Committee,

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[12] Declaration on Principles of International Law Concerning Friendly Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN, GA Res 2625 UN Doc A/2625 (24 October 1970)

[13] ibid at Annex 1 ('every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to ... involve a threat or use of force. Another provision of the declaration urged states to 'refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state'.

[14] (Saul, 2008) at 209.

[15] Measures to eliminate international terrorism, GA resolution 49/60. (9 December 1994)

[16] (Saul, 2008) at 209

established by GA resolution 51/210 in 1996, to consider a view to the "elaboration of a comprehensive convention on international terrorism within a comprehensive legal framework of conventions dealing with international terrorism."[17] One of the first drafts presented in the Working Group by India included a definition of terrorist acts which assimilates that in the International Convention for the Suppression of Terrorist Bombing while neglecting the specific method mentioned in this convention.[18] The draft also provides for jurisdiction, and introduces the principle of *aut dedere aut judicare*.[19] Nevertheless, it has been evident since this draft that delegations could not agree on three major areas, namely: A uniform definition of terrorism and terrorist offence, the scope of the convention, and the relationship between the Comprehensive Convention when concluded and other sectoral conventions.[20] In fact, although the Ad Hoc committee succeeded in negotiating several texts resulting in the adoption of International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and the International Convention for the Suppression of Acts of Nuclear Terrorism, until today the Committee failed to bring the comprehensive convention into light principally because of the aforementioned disagreements.

2) The Security Council and the Definition of Terrorism:

The attacks of 2001 on the United States can be regarded as a turning point to how the Security Council has dealt with terrorism as an international crime on both legal and political levels. Prior to 2001, the SC actions towards terrorism were restricted to issuing resolutions of condemnation without touching upon setting a definition of terrorism. Following the 9/11 attacks, the SC issued several resolutions which precisely addresses terrorism including resolutions 1368, 1373 and 1566. These resolutions were different from the previous ones which only required states to take or abstain from a certain action. In fact, they gave effects to the powers granted to the SC under Chapter VI and appeared to "establish new binding rules of International law and create a mechanism for monitoring compliance with them."[21] Although resolution 1373 was limited to the condemnation of all terrorist acts and enumerated

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[17] General Assembly resolution 54/110, issued in December 9, 1999.

[18] Report of the Working Group, UN Doc A/C.6/55/L.2, 19 October 2000

[19] ibid.

[20] (Hmoud, 2006), at 1032.

[21] (Szasz, 2002).

a set of obligations on member states, resolution 1566 adopted in 2004 included what can be regarded as a definition of terrorism. Section 3 recalls that:

> "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."[22]

Martin Scheinin, the UN Special Rapporteur on the Promotion and the Protection of Human Rights and Fundamental Freedoms regarded this definition as a yardstick for domestic legislators in defining terrorism and asserted that a "definition of terrorism that goes beyond the 'definition in SC resolution 1566' would be problematic from a human rights perspective."[23]

3) Definition of Terrorism in International Conventions and Treaties:

Numerous treaties and protocol were conducted to address specific types of criminal and violent conducts perceived by states to be acts of terrorism. Some but not all of these treaties are the 1963 Tokyo Convention which applies in respect of "acts which … may or do jeopardize the safety of the aircraft or of persons or property therein…"[24], the Hostages Convention which introduced in it's preamble the principle of '*aut dedere aut judicare*' which prescribes universal jurisdiction over crimes included in the convention[25], and last but not least

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[22] S/RES/1566 (8 October 2004).

[23] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Sixth Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Commission on Human Rights, UN Doc A/65/258 (6 August 2010), by Martin Scheinin.

[24] Convention of Offences and Certain Other Acts Committed on Board Aircraft, Signed at Tokyo, On 14 September 1963, at Art. 1.

[25] International Convention Against the Taking of Hostages, Signed in New York On 17 December 1979.

the Terrorist Bombings Convention which scope of application only covers terrorists acts of an 'international nature'.[26]

Most of the conventions of that kind were concluded as a response to incidents that resulted in grave losses whether to life or property. It is hard to tell that there was an intention by the drafters to conclude a normative definition of terrorism but rather the main goal was to condemn the concerned incident and calling upon states to criminalize those conducts. However, the 1999 Terrorist Financing Convention took a different path than its predecessors by promulgating what can be regarded as a generic definition of terrorism. The convention bans all the funding for the intention to carry out "… Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."[27] It is worth mentioning that the Special Tribunal for Lebanon placed this convention over many other instruments while discussing the definition of terrorism because it was ratified by a very high number of member states and neither of them made any reservations with regard to its definition of terrorism.[28]

4) European Union Definition of Terrorism:

The EU following the 9/11 attacks adopted what is known as the 'Framework Decision on Combating Terrorism' (FDCT), which requires member states to "align their legislation and introduce minimum penalties regarding terrorist offences."[29] The Framework contained in Article 1 what can be regarded as a definition of terrorism which deemed certain acts to be terrorist offences if "given their nature or context, may seriously damage a country or an international organization, where offences are committed with a particular aim."[30] It is obvious

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[26] Article 3 of the International Convention for the Suppression of Terrorist Bombings (15 December 1997) suspends its application if the offence is committed within a single state or the alleged offender and the victims are nationals of that state.

[27] International Convention for the Suppression of the Financing of Terrorism, adopted by the GA of the UN 54/109 (9 December 1999).

[28] Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging. Case No. 11-01/1 (16 February 2011), at para 108.

[29] Summaries of EU Legislation; EU Rules on Terrorist Offences and Related Penalties, Framework Decision (2002/475/JHA); available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l33168

[30] (Murphy, 2015), at 55.

that the drafters of this definition aimed at setting a higher threshold than any other definition mentioned before. The definition requires the conduct to reach a certain gravity to be regarded as a terrorist act which it has to seriously cause damage to the state. This high threshold can be said to be assimilating the threshold required by the ECHR to derogate from certain rights where the emergency has to threaten the 'life of the nation'.[31] In this context, Lord Hoffman doubted the ability of terrorist acts to actually pose a threat to the life of the nations. He did not underestimate the terrorist's ability to kill and destroy, however, "they do not threaten the life of the nation."[32] Also, some academics argues that the Framework excluded state terrorism from the definition. Dumitriu sees that the liability of heads of states or even members of the government cannot be realized under the FDCT as Article 7(1) entails that the perpetrator must be holding a leading position within the legal person for the latter to be liable and the offence must be for the benefit of this legal person which means that it would be almost impossible to indict a head of state or a government official under those conditions.[33]

5) The STL's Definition of Terrorism:

The Special Tribunal of Lebanon is considered to be the first international court that recognizes terrorism as a customary law crime and therefore laid down a definition for it based on this inference. Although Article 2 of the Tribunal's statute confined the court's applicable law to be that of the Lebanese Criminal Code, the court did not hesitate to consider international and customary law as a guidance to the interpretation of this Code.[34] While the Court admitted that there is no widely accepted definition of terrorism,[35] it explained that several international treaties, UN resolution and practice of states reveal the presence of a *opinion juris* accompanied by practice, "to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged."[36] The court, based on these findings, identified the three elements that constitute a crime of terrorism as namely:

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[31] Article 15, European Convention of Human Rights.

[32] Lord Hoffman in House of Lords, A (FC) and others (FC) v Secretary of State for the Home Department, (2005) UKHL 71, at para 96.

[33] (Murphy, 2015) at 61, citing E Dumitriu, The EU's Definition of Terrorism: The Council framework Decision on Combatting Terrorism (2004), pp600-02,

34 Interlocutory Decision, at para 45.

35 Ibid, at para 83.

36 Ibid, at para 85.

"i) The perpetration of a criminal act... or threatening such act; ii) the intent to spread fear ... or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; iii) when the act involves a transnational element."[37]

These elements do not go far beyond the definitions established by the international bodies mentioned earlier. They almost all agree that, in order to characterize an act as being terrorist, the conduct has to be of a criminal nature, the *mens rea* of the perpetrator which is, apart of the intent of committing the underlying crime, spreading fear among a population. Finally, the transnational requirement of the crime which is also included in the Terrorist Bombings Convention as a condition to take effect.[38]

6) Academic Opinion on the Definition of Terrorism:

The dilemma of agreeing on a comprehensive definition of terrorism was not only present within the international community, but also existed between jurists. The controversy was not limited to the agreement upon a proper definition but also questioned the existence of such a definition. Baxter, for instance, denies the operative legal purpose of the definition.[39] Higgins also has a similar view as she notes that "terrorism is not a discrete topic of international law with its own substantive legal norms', but 'a pernicious contemporary phenomenon which … presents complicated legal problems."[40] In contrast, Cassese claims that terrorism is ingrained in customary international law which its definition is deriving from a combination of mutually reinforcing sources such as the Terrorist Financing Convention which reiterates the 1994 GA declaration and numerous converging national law definitions and many more.[41] He defined terrorism as being "the commission of serious, politically motivated, criminal violence, aimed at spreading terror, regardless of the status of the perpetrator. Such conduct must also have a nexus with armed conflict, or be of the magnitude of crimes against humanity, or involve State authorities and exhibit a transnational dimension, such as by jeopardizing the security of other

37 Ibid.

38 Terrorist Bombings Convention.

[39] (McDermott, 2013), citing R Baxter, 'A Skeptical Look at the Concept of Terrorism' (1974).

[40] Ibid, citing R Higgins, 'The General International Law of Terrorism' in R Higgins and M Flory (eds), Terrorism and International Law (Routledge, London, 1997).

[41] (Saul, 2008) at 129, citing A Cassese, International Criminal Law (OUP, Oxford, 2003) 120–131.

States."[42] Schmid and Jongman after analyzing 109 different definitions of terrorism, combined all the elements that characterize terrorism and the result was the following:

> "an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine, individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby – in contrast to assassination – the direct targets of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence based communication processes between terrorist (organization), imperiled victims and main targets are used to manipulate the main target (audience), turning it into a target of terror, target of demands, or a target of attention, depending on whether intimidation, coercion or propaganda is primarily thought."[43]

Murphy viewed this definition to be the lowest common denominator which includes aspects of political violence that some states would otherwise exclude.[44] This definition also covers equally the three elements that constitute the crime, namely: the action taken, the motivation for the action, and the actor involved.[45] Most of the definitions mentioned earlier either neglect the one of the elements, the third in particular, or stresses on one of them over the other.

From another perspective, states tend to set broad definitions of terrorism to encompass as many crimes as possible that can 'legally' be classified as terrorism since the perpetrators of such crimes usually aim at weakening or even total destruction of the state. Although the concept of terrorism has been present long time ago, states are continuously adopting and renovating their legislations to maintain security while minimizing encroachment of human rights as much as possible. In the next section, I am going to examine several domestic counter-terrorism legislations including definitions and some of the powers accorded to the authorities during the course of fighting this threat. This serves as an introduction to the next chapter of this thesis and focus more on the rights affected by anti-terrorist measures and how the judiciary in different legal systems dealt with this issue.

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[42] ibid.

[43] (P. Schmid & Jongman, 1988) at 28.

[44] (Murphy, 2015), at 53.

[45] ibid.

National Counter-terrorism Legislations:

1) Counter-terrorism Laws in the United Kingdom.

The United Kingdom has a long history of respecting human rights dating back as early as 1215 when the Magna Carta Charter was adopted. One of the main principles that this charter comprised, is that everybody, even the King himself, is subject to the rule of law. In addition to that, it embraced voluminous human rights principles that are currently included in almost all of the modern human rights treaties and covenants. To give an example, Article 29 of the Charter reads "No freeman is to be taken or imprisoned or disseized of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice."[46] Apart from the inapplicability of this provision to whom considered not to be 'free', according to the British standards at that time, this provision encompassed numerous human rights principles that the international community still calls to be respected in many parts of the world. Those rights are contemporarily known as the right to life, right to fair trial, right not to be arbitrarily detained, *Habeas Corpus,* and the right to property.

In the 20th century, the UK has been struck by terrorist attacks relatively more than any country in Europe. It was very challenging for the legislator to enact laws that preserve the British values with respect to human rights concurrently with facing the imminent danger the society was facing. Several laws were enacted to facilitate the process of maintaining security while taking into account "the secret nature of terrorist groups and the ability to intimidate the community, witnesses and jurors."[47] The first modernly recognized terrorist attacks in the UK were carried out by people from the West, not yet from the East, namely from Northern Ireland. The first Statute adopted to face this menace was the Civil Authorities (Special Powers) Act of 1922 issued during the Irish War of Independence.[48] The Act provided exceptional regulations and enormous powers to the executive such as special trials without jury, imposing a curfew, proscribe organizations, censor printed, audio, and visual materials, ban meetings, processions,

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[46] Nicholas Vincent, Translation of the Magna Carta Charter, issued by the National Archives and Records Administration, Washington DC, available at: https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf

[47] Bonner D. 2000. The United Kingdom Response to Terrorism: the Impact of Decisions of European Judicial Institutions and of the Northern Ireland 'Peace Process'. In European Democracies Against Terrorism. Governamental Policies and Intergovernmental Cooperation, ed. F Reinares.

[48] (Oehmichen, 2009) p. 137.

and gatherings; restrict the movement of individuals within specified areas and detain and interview suspects without bringing charges.[49] Later on, *internment* was introduced, in which the Secretary of State had the authority to detain suspects without charge if it appears to be in the interests of public safety.[50]

The reformations were not only limited to extending police powers but also included a dramatic shift at the judiciary stage. At the time of the 'Troubles', where the level of civil disturbances had climaxed, the Diplock Report[51] was introduced that gave up one of the most distinct features of the Common Law legal systems, namely the 'jury' which is considered by some as the "most potent symbol, the fulcrum of the adversarial trial system."[52] The main aim of creating the Diplock courts was to avoid the partiality and of the jury members. The system resulted in a higher rate of guilty pleas and thus was criticized to be weighted against the accused.[53] However, the system also had a brighter side as it resulted in convictions of law enforcement personnel who were accused of committing offences in the course of anti-terrorist actions who might otherwise get acquitted by the sentimental jury. For instance in the case of R v. Clegg, where the defendant was a British soldier serving in Northern Ireland was convicted of murder after a trial without a jury for killing a person thought to be a terrorist.[54]

Following the Northern Ireland peace process and the rise of a new kind of terrorism based on false religious beliefs, the UK adopted the new Terrorist Act of 2000 which encompassed provisions applicable to all types of terrorism and are made available permanently throughout the UK and the definition was broadened to include the new rising kind of terrorism, namely the religiously motivated terrorism.[55]

The Terrorist Act of 2000 defined terrorism as being "acts of persons acting on behalf of, or in connection with, any organization which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United

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[49] (Donohue, 2000), at 4.

[50] (Oehmichen, 2009), at 137.

[51] Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, Cmnd. 5185, London, 1972.

[52] (Jackson J, 1995), at 1.

[53] Ibid at 510.

[54] Regina v. Clegg, 19th of January 1995, House of Lords.

[55] (Oehmichen, 2009) at 161.

Kingdom or any other government de jure or de facto".[56] The act has been subjected to enormous critiques due to its viability to be imposed on cases that cannot be fully regarded as 'terrorist acts' such as the publication of news articles by journalists that might contain "material that is thought to endanger life or to create a serious risk to the health or safety of the public."[57]

Also, the Act criminalized the possession of of an article if the circumstances give rise to a reasonable suspicion that the possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.[58] Putting this article under scrutiny leads us to the conclusion that the law does not require the possessor to have a terrorist purpose, nor any connection with organizations classified as terrorist.[59] In addition, ss 44-47 of the act granted the authorization for the police to stop and search anyone without the presence of any reasonable suspicion. The provisions were challenged before the British courts all the way to the House of Lords which decided that they are in conformity with Articles 5 and 8 of the ECHR. Lord Bingham considered that the applicants could not be regarded "as being detained in the sense of confined or kept in custody, but more properly of being detained in the sense of kept from proceeding or kept waiting."[60] In addition, Lord Bingham made an analogy to justify the consistency of the examined statute with Article 8 by noting that "an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports' could 'scarcely be said' to show a lack of respect for personal autonomy."[61] However, the European Court of Human Rights were not impressed that much with the decision made by the Lords and found a violation of Article 8. The Court noted that it considers the "use of coercive powers conferred by the legislation to require an individual to submit to a

[56] The Definition of Terrorism. A Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation, Presented to Parliament by the Secretary of State for the Home Department, by Command of Her Majesty, March 2007.

[57] David Anderson Q.C., the UK's Independent Reviewer of Terrorism Legislation, annual report on the operation of the Terrorism Acts, July 2014.

[58] S.57 of the TA 2000.

[59] (Walker, 2002), at 171

[60] [2006] UKHL 12, Opinion of the House of Lords of Appeal for the Judgement in the Cause, R (on the application of Gillan (FC) and another (FC)) (Appellants) v.Commissioner of Police for the Metropolis and another (Respondents), at para 25.

[61] Ibid, at para 28.

detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life."[62]

Following 9/11 attacks, it was certain for the British that a new peril has emerged with a different style of attacking and new tactics for planning and thus foresaw that the existing Anti-Terrorism Act will not be sufficient to tackle the current danger that almost no part of the world has not been spared from. Thus, several laws were adopted which gave the executive enormous powers regarding the actions taken for countering terrorism. One of them is the Anti-Terrorism, Crime and Security (ATCSA) act 2001, which included the draconian measure that granted the authorities to indefinitely detain foreign terrorist suspects. Lord Hoffman noted in a case challenging this measure that "the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, come not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for the Parliament to decide whether to give the terrorists such a victory.*"*[63] Later on, this measure was abolished in 2005 following this decision. I believe that what Lord Hoffman stated was not just his opinion regarding an abusive counter-terrorism measure. It carried between its lines several messages that address the core conundrum of not only the British but many other Anti-Terrorism acts which prioritize the fight against terrorism over the fundamental principles of human rights.

In response to the July 7 attacks, the UK parliament enacted the Terrorism Act of 2006,[64] which, in addition to extending the pre-charge detention period to 28 days, introduced a prohibition to publications likely to be understood as encouragement to terrorism. This Act was a major cause of concern for many scholars because of its wideness of applicability as the new offences of encouragement and dissemination of terrorist publications are very broad in their meaning and lacks the requirement for the presence of an intention to incite others to commit criminal acts.[65] Accordingly, the Act might lead to the prosecution and criminalization of persons for their otherwise lawful right to hold and impart their ideologies, or in other words,

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62 Case of Gillan and Quinton v. The United Kingdom (Application no. 4158/05) 12 January 2010, at para 63.

63 Lord Hoffman in House of Lords, A (FC) and others (FC) v Secretary of State for the Home Department, (2005) UKHL 71.

64 2006 c. 11.

65 (Awan, 2008), at 4.

their freedom of expression.[66] In the same year and in a step to incorporate the international efforts to fight terrorist financing in the domestic legal system, the UK issued the Terrorism Order of 2006,[67] which gave effect to Security Council Resolution 1373 that principally calls states to prevent and suppress the financing of terrorist acts, and refrain from providing any form of support to entities or persons involved in such acts.[68]

After reviewing some, not all, of the UK laws in the field of counter-terrorism, it is obvious that almost every act contains a human right-restraining provision which limits some of the liberties agreed upon universally. In the following section, the American Counter-terrorism acts will be examined.

2) US Counter-Terrorism Laws:

If we consider mass-shooting incidents in the US as terrorist acts, no one can deny that the US is immersed with terrorism throughout its history. However, if terrorism is perceived by its modern delineation, the US was not domestically a target to international terrorism up until the 9/11 attacks albeit the 1993 World Trade Center bombing which was carried out by Al-Qaeda and the Oklahoma City bombing in 1995. The US reacted to those drastic incidents especially the latter by enacting the Comprehensive Terrorism Prevention Act of 1995 and later on the the Antiterrorism and Effective Death Penalty Act of 1996. The latter Act has been criticized for its potential violation of the due process rights and civil liberties of legal aliens residing in the US.[69] It granted the Board of Immigration Appeals the authority to issue final deportation orders while depriving the affected from seeking justice to review such orders,[70] although such orders were previously reviewed by federal courts.[71] The controversy over this Act did not end here but also addressed the retroactive application of the aforementioned Section because the Congress omitted the specification of the Statute's effective date.[72] In fact, some courts agreed

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[66] ibid, at 5.

[67] The Terrorism (United Nations Measures) Order 2006.

[68] S/RES/1373 (2001)

[69] (Candioto, 1997), at 160.

[70] Section 440(a) of the AEDPA reads as follows: Any final order of deportation against an alien who is deportable by reason of having committing a criminal offence …, shall not be subject to review by any court."

[71] Title 8, US Code, Section 1105a(a) (1994) provides that federal courts possess "the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States .... "

72 (Candioto, 1997), at 161.

on its retroactivity on the basis of the jurisdictional nature of the statute and thus does not deprive any parties involved from their substantive rights.[73]

Following the 9/11 attacks the US adopted the PATRIOT Act which granted the government immense powers in an effort to prevent any future terrorist attacks. The Act is not considered as being a single statute addressing a specific issue but rather it is a combination of amendments to previously enacted laws with several new sections as well. The declared purpose of this law is to "deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes."[74] However, the act was not spared of being criticized due to its possible encroachment to several human rights especially those included in the US Constitution's Bill of Rights.

The US PATRIOT act defines an act of terrorism as being "dangerous to human life" that is a violation of the criminal laws of a state or the United States, if the terrorist act appears to be intended to: (i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping."[75] This definition is considered as a broad definition that might encompass some acts far away from being considered as 'terrorism'. The American Civil Liberties Union (ACLU) noted in one of its reports that activities of several prominent activist campaigns and organizations can be liable to criminal prosecution under the PATRIOT Act and gave an example of the Vieques Island protests where protesters illegally entered the military base and tried to obstruct the bombing exercises only because they were harmed by the regular US army engagement in military exercise.[76] It is undeniable that such acts of violence have to be punishable, but still, without taking it to the extreme. Although most of the countries that adopted strict laws to fight terrorism have been either real or potential victims, most of these laws have been criticized by human rights advocates either because of their mal-use and degradation of some of those rights or the fear of utilizing them to achieve political aims.

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[73] Hincapie-Nieto v. Immigration and Naturalization Serv., 92 F.3d 27 (2d Cir. 1996).

74 Preamble of the USA PATRIOT Act of 2001.

[75] Section 802 of the USA PATRIOT Act (Pub. L. No. 107-52)

[76] The American Civil Liabilities Union, How The USA PATRIOT Act Redefines "Domestic Terrorism", found at: 'https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism'.

Following the invalidation of the Guantanamo Military Commissions by the Supreme Court in Hamdan v. Rumsfeld on the basis of its violation to the Uniform Code of Military Justice and the Geneva Conventions, the Congress subsequently passed the Military Commissions Act of 2006 in an attempt to adjust the defects in the old system. The act authorizes military commission trials of non-citizen 'unlawful enemy combatants'. It defines what is meant by a 'lawful and unlawful enemy combatant'[77] where the latter almost re-iterates the conditions in the Geneva Convention (III) where a combatant is regarded as 'privileged' and thus can be regarded as a 'Prisoner of War'.[78] Besides giving an expansive definition encompassing those considered eligible for military trials, the Act prevents courts from exercising its *habeas* jurisdiction over challenges of the detention of enemy combatants.[79] Also, it assimilates the infamous UK Terrorist Act of 2000 which in a sense creates discrimination between US citizen and non citizens where the latter are only those subject to the degraded proceedings of the military commissions.

3) Egypt's Anti-Terrorism laws:

Before moving on to the next chapter, I would also like to mention the definition of terrorism under the new Egyptian Terrorism Law adopted in 2015. While Egypt has been suffering from fierce terrorist attacks since 2011 which ranked her the eleventh most affected country in the world by terrorism in 2017[80], she is still considered as one of the most politically stable countries with active institutions compared to others that experienced the what so called 'Arab Spring' where most of them have become safe havens for the bloodiest terrorist groups ever existed.

The law has a unique method of defining terrorism where it explains the meaning of each element that the main definition of a terrorist act encompasses. First, it begins with defining a terrorist group as being:

> "a group, or an association, or an institution, or an agency, or an organization, or a gang consisted of at least three people, or any entity with a similar status, whatever its real or legal form is, whether it resides inside or outside the country, regardless of its nationality

77 PUBLIC LAW 109–366—OCT. 17, 2006, 948(a)(2)

78 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, at Article 4.

79 (Ahmad, 2007), at 11.

80 Global Terrorism Index found at: 'http://globalterrorismindex.org'

or the nationality of its members, aiming to commit an act or more of terrorism, or adopts terrorism as one of its methods in fulfilling or executing its criminal purposes."[81]

Then the Act goes on by stating that a terrorist is:

" every person who commits, or attempts to commit, or incites, or threatens, or plans, inside or outside the country, a terrorist crime regardless of the way of committing it, even if this person is alone, or contributes in this crime in the framework of a joint criminal project, or assumed leadership, or commanding, or administering, or setting up, or establishing, or assuming a membership in any terrorist entity identified in Article 1 of the Presidential Decree No. 8/2015 which deals with organizing terrorists and terrorist organizations lists or whom who finance them, or contributes to their activities while knowing its criminal nature."[82]

Afterwards, the Act defines terrorism as being:

"every use of force, or violence, or threat, or intimidation, inside or outside the country, for the purpose of breaching public order, or endangering the safety of society, or its interests, or its security, or hurting the people, or terrifying them, or endangering their lives, freedom, rights or security guaranteed by the constitution, or endangering national unity or social and national security, or harming the environment, or the natural resources or archaeological artefacts, or public funds or buildings or any public property..."[83]

This article almost reiterates the definition of terrorism that is included in the previous Egypt's Terrorist Act 97 of 1992.

It is apparent from the aforementioned definition that the terms used are very broad to the extent that it can encompass acts that by itself might not be regarded as a crime. The intensity of the elements that constitute the *actus reus* is also very loose and indeterminate like 'use of force or violence' as any act of hostility, even if harmless, can be classified as being 'violent'. Also, the terms used to identify the psychological elements came very malleable and did not include precise expressions that are easily interpreted. For instance, what can be regarded as breaching 'public order' can range from breaking traffic lights all the way to detonating a dirty

[81] Egyptian Counter-Terrorism Act No. 94/2015, Article 1/A, translated by the author.

[82] Ibid, Article 1/B.

[83] ibid, Article 2.

bomb in the middle of a crowd. Such broad expressions can open doors to the malicious exercise of power by the government as they incorporate conducts far away from being classified as terrorism according to the international definitions mentioned earlier.

4) Implications of Domestic Counter-Terrorism Laws on Human Rights:

As we observed while examining different national legislations addressing terrorism, the main target of such laws is not only suppressing crimes of this type, but can sometimes also limit human rights. Some of those rights are directly affected by statutes that clearly degrade or completely take them away. Some but not all of these rights are: the right to fair trial[84], the right to privacy[85], inviolability of the home, right to liberty of movement, and the right to non-discrimination/equality before the law[86]. Other rights are indirectly affected by such laws either because of its broadness in terms of definitions or the use of ambiguous texts which open doors for interpreting them, either by the executive or judiciary, in a manner that serves their needs. Those rights can be the free exercise of religion and/or the freedom of expression. Frankly speaking, the demarcation of such rights can serve the cause of fighting terrorism and sometimes can be justified either legally through the mechanism of derogation included in almost all universal or regional rights conventions, or politically by deluding the audience that such measures are the only means to preserve national security and thus creating a significant atmosphere of public acceptance. The latter modality is seen to be followed nowadays by several countries, most notably in the United States to justify several actions such as the Muslim ban and building the wall on the borders with Mexico. However, it must be understood that the limitation of human rights also has limits. If these limits are exceeded, the limitation can be no longer be justified or otherwise the justification or legitimization will have negative implications on the credibility of its issuer. Such measures can also extend to reach, mistakenly or deliberately, not only terrorist suspects but also non-terrorists who broke the law and even innocent people. Accordingly, the steady departure from human rights principles will eventually lead to the destabilization of the criminal justice system and eventually destroying it.[87] Here, I would like to quote one of Benjamin Franklin's famous speeches when he once

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[84] For example, the US Military Commissions Act of 2006.

[85] For example, the US PATRIOT Act of 2001.

[86] For example, the UK Terrorist Act of 2000.

[87] (Murphy, 2015) at 347.

said: “those, who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.”[88]

In the next chapter, I will examine more thoroughly the measures taken by several national legal systems that affect directly or indirectly the freedom of speech and free practice of religion and the manner in which the judiciary challenged those measures.

[88] B Franklin - Speech to the Pennsylvania Assembly, 1755.

Chapter 2: Free Practice of Religion, Freedom of expression and Terrorism

A View from a National Perspective

Preface:

Freedom of conscience is of an imperative importance in almost every democratic society. This right includes: the freedom of thought, speech and religious conduct.[89] Almost every national constitution or human rights act asserts the people's right to enjoy freedom of belief and consecutively exercise their religious rituals provided that they do not interfere with other principal rights or legal norms agreed upon in the society.[90] Some people even regard freedom of religion as having priority over all other freedoms being "not just an important liberty, but the very foundation of liberty."[91]In the US Bill of Rights, the free practice of religion and speech is stipulated in the first Amendment which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…"[92] Also, the UK, although it has not promulgated any constitutional written statement on human rights, incorporated the ECHR into its law by the adoption of the Human Rights Act of 1998 where the former in Article 9 stipulates that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."[93] While in France, although the 'loi sur la séparation de l'Église et de l'État' of 1905 ensured the secularism nature of the state, the French Constitution of 1958 assured respect for all religious beliefs.[94] Likewise, the Egyptian Constitution also guarantees the free exercise of religion where article 64 reads: " Freedom of belief is absolute, and the free exercise of religious rituals and the establishment of houses of worship for divine religions, is a right

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[89] (Guiora, 2009) at 9.

[90] For example, Polygamy is allowed in Islam, however banned in all western countries.

[91] (Mondal, 2016), at 4.

[92] (America's Founding Documents), The Bill of Rights.

[93] European Convention on Human Rights, at Art 9.

[94] (French Government: Secularism and religious freedom)

regulated by the law."[95] It is possible to conclude from the ordinary meaning of this article, that the free exercise of religion is limited for those who are only adherents to the Abrahamic religions. But at least for the purposes of our study, this partial protection would be sufficient.

The essence of guaranteeing this freedom is stemmed from the fact that religion usually promotes the positive development of society in the form of calling for peace, respectable and fair treatment of people, and avoiding sins. Nevertheless, Evans stated that, "a religion or belief can be so all embracing that it dictates the way in which some people live almost every aspect of their lives. This will tend to lead to conflict with the plans of states and the way in which other individuals wish to live their lives and exercise their rights."[96] This assumption raises several questions about religious freedom like what if religion, in the eyes of decision makers, could be a source of danger that can lead to tearing the fabric of society? Should it be restricted? Would it be legitimate to take pre-emptive measures against whom suspected to believe in extremist thoughts even if they abide by laws? It is undeniable that religion can sometimes be the trigger of committing wide-scale acts of terrorism. However, it is doubted that restricting freedoms will bear fruit. Kuhne in this respect observed that "in the history of states it was always the real or pre-textual concern of the state for security – thus also freedom – of its citizens which led to the building up of a perfect system of control, where no more space remained free from state control, and which eventually ended in totalitarianism and fascism."[97]

Before examining the national judicial trends in reviewing counter-terrorism measures which might jeopardize the free practice of religion and speech, lets first discuss if the free exercise of religion and speech is an absolute right with no limits, or only protected until a certain point where it can be subject to limitation. I will focus on the American, British and Egyptian approaches.

The American Approach:

1) Free Exercise of Religion:

America's Founding Fathers realized the importance of religion in society and thus placed its freedom of practice at the top of the ten amendments that constitute the Bill of Rights.

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[95] Egyptian Constitution of 2014, at Art 64, Translated by the Author.

[96] (Janis & Evans, 1999)

[97] (Oehmichen, 2009) at 24, citing (Kuhne 2004) at 4.

Since then, precedents challenging any potential infringement of this right were at minimal until Mr. Reynolds was indicted of violating the Morrill Anti-Bigamy Act which outlawed the practice of polygamy. In 1874, Mr. Reynolds challenged this law before the Supreme Court which in turn decided that it goes inline with the constitution since it neither restricted religious belief nor criminalized religious practice. Chief Justice Morrison Waite wrote in the decision that "permitting this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[98] The decision here set a line between practices of worships such as prayers, fasting, etc.. and conducts made available under a specific religion such as polygamy, inhumane treatment, etc... The court considered only the first category to be under the umbrella of protection assigned under the First Amendment. Any practices other than the elements that constitute the religious faith would be deemed unlawful if they violate a valid law.

A critical question arises from this analysis namely the legal status of practices of worship if they constitute conducts which violate the law. The Supreme Court dealt with this situation in the case of 'Church of the Lukumi-Babalu Aye v. Hialeah', where the petitioner church and its congregants practice Santeria religion, which employs animal sacrifice as one of its principal forms of devotion.[99] The city council later on passed several resolutions which prohibit such practices on the grounds of its inconsistency with public morals, peace and safety. The Church challenged the resolutions all the way to the Supreme Court which ruled in favor of the Church on the basis of its violation of the Free Exercise Clause. Justice Kennedy in this respect wrote: "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of it practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[100] This decision and others of similar orientation stem from what so called the 'Sherbert test' established in 1963 by Justice Brennan in the Sherbert v. Verner case[101]. The court found that the Constitution exempts religiously motivated people

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[98] Reynolds v. United States, 98 U.S. 145 (, 25 L.Ed. 244)

[99] 508 U.S. 520, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah. (11 June 1993).

[100] ibid. Available at: http://www.uscourts.gov/educational-resources/educational-activities/exercise-religious-practices-rule-law#church.

[101] 374 U.S. 398 (1963).

from otherwise valid laws unless "the imposition of those laws was necessary to secure a compelling state of interest."[102] Hence, the individual has to prove his/her sincere religious beliefs in addition to the absence of any compelling reasons for the government to limit any religious practice.

However, the test did not last more than thirty years after its termination by Justice Scalia in the case of Employment Division v. Smith.[103] The case is not significantly different from the Reynold's case except in having the religious practice being examined. In the Smith case, the respondents Smith and Black were fired for ingesting a hallucinogenic drug called peyote. They pleaded that consumption was for sacramental purposes at a ceremony of their native American Church. The court held that:

> "the compelling government interest requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race … or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields -- equality of treatment, and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly."[104]

In other words, the court asserted its vision that the constitution did not intend to privilege religiously motivated persons over others in the form of disobeying laws that everybody else is obliged to follow. Hence, the judgment eliminated the requirement established in the Sherbert case that the government must have a compelling interest to justify any burdens limiting the free exercise of religion. After this decision, the US congress became concerned with the religious freedoms' status and consequently passed the Religious Freedom Restoration Act of 1993 (RFRA)[105] which legislatively reestablished the Sherbert test. The law stipulates that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except if it only demonstrates that

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[102] (Eisgruber & Sager, 2000), at 253.

[103] 494 US 872. (1990)

[104] ibid, at p 885-886.

[105] 42 U.S. Code Chapter 21B.

application is (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[106]

After examining the aforementioned precedents and the later issued RFRA Act, it can be concluded that there is consensus, either by the legislator or the judiciary, in the US to retain the free exercise of religion in the light of the First Amendment. This approach is not only limited to grant this freedom in its abstract meaning, but extended to prioritize this freedom over the laws of the country which in turn cannot limit the former unless it is met with certain conditions. While some scholars considered this act as a historic vindication of the US commitment to religious liberty, others condemned it as a threat to the judicial discretion and the states' rights. [107]

However, evaluating the overall status of this freedom must be performed without neglecting the freedom of speech being one of the three intertwined elements which constitute the practice of religion, namely: belief, speech, and conduct,[108] the former and the latter have already been examined.

2) Freedom of Speech:

Religious speech is sometimes very hard to be separated from practice of religion as they usually converge in many situations.[109] For this reason, free exercise of religion and freedom of speech were both mentioned in the same amendment. As mentioned earlier, religions exist to promote prosperity among societies and this is the main reason behind its prevalence in many nations whether civilized or still developing. However, this is always not the case. Religion can also sometimes be inspiring to commit wide-scale acts of terrorism by justifying and encouraging them, usually through speech which can either be written or verbal. I want to assert the fact that by writing this, does not entail the questioning of any religion's purity or its divine message, but rather how individuals can abusively interpret or utilize their religions to commit such conducts. It is also significant to understand that radical religious violence is not exclusive to a specific religion. As Da'esh and Al-Qaeda are affiliated to Islam and commit their crimes under its alleged auspices, the KKK also committed terrorist attacks on behalf of

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[106] ibid at § 2000bb–1 (a),(b).

[107] (Neuman, 1997), at 36.

[108] (Guiora, 2009), at 19.

[109] For example, Friday or 'Al Gomaa' prayers for Muslims must be preceded by a religious speech given by the Imam.

what they perceive as their God, Yigal Amir's assassination of the Israeli Prime Minister Isaac Rabin was thought to be an order from God, and many more.

Religious violence is one of the forms of religious extremism which is usually delivered to individuals who might embrace this ideology by reading books, written or online articles, attending public assemblies and behind the doors associations. Amnesty International defined freedom of speech as being "the right to seek, receive and impart information and ideas of all kinds, by any means."[110] Thus, all those aforementioned methods of communication fall within the ambit of this definition. However, unlike free practice of religion, limitations are usually imposed on this freedom in certain conditions which differ in their intensity from one country to another.

One form of religious extremism which can promote acts of terrorism is "when the actor believes that his or her tenets and principles are infallible and that any action, even violence, taken on behalf of those beliefs is justified."[111] However, this definition raises the question of whether or not a speech which falls within its ambit can be limited by the government to prevent any potential violence. In other words, does a speech that incites violence is enough to be eligible for limitation under US law or other conditions have to be met? In this context, the case of Brandenburg v. Ohio[112] is mostly known to be speech protective and creates what is known as the 'Brandenburg test' which lays down certain conditions that have to be observed before the government can take actions against any advocacy of violence. The speech has to satisfy three elements which, if all are realized, trigger the government's authority to prohibit it, namely:

1- The speech promotes imminent lawless action.
2- The speech will likely result in such action.
3- The speaker intended to cause such harm.[113]

The test, according to these conditions, aimed to set a very high threshold for protecting the freedom of speech as promoting violence alone is not enough to impose any restrictions.

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[110] Amnesty International UK, Freedom of Speech. Available at: https://www.amnesty.org.uk/free-speech-freedom-expression-human-right

[111] (Guiora, 2009), at 10.

[112] 395 US 444 (1969).

[113] (Guiora, 2009), at 39.

By scrutinizing the wording of each element and consequently assuming several hypotheses, it is straightforward to conclude that speech that might entail a situation of possible unrest can still be covered by the protection accorded by this test.

Immanency in the first condition presupposes that the speech has to call directly and immediately for violence without being conditional to any other occasion. Hence, if one supposes that a speech calls for 'confronting all supporters of a specific presidential candidate' before the elections take place, the speaker will be under protection according to the Brandenburg test as imminence, in this case, is not achieved. For the second condition to be realized, the verb 'confronting' can encompass conducts ranging from verbal abuse to physical violence, while the condition requires all listeners to perceive it only as a call for participating in illegal action which is practically impossible. The last condition makes it more difficult for the US government to impose any limitation on speech as it is very hard to check its existence in a case by case analysis. Verifying the existence of a certain *mens rea* is always the hardest stage in evidence collecting due to its intangible nature and thus it is usually proved by the circumstances surrounding the incident.

The maximum protection of the freedom of speech is undeniably a key pillar in every democratic society seeking progression and development. However, it can also be a double edged sword because many crimes of terrorism are committed under the influence of speech which cannot be limited under such stringent rules. It must be understood that the influence of religious clerics upon their congregants is never the same compared to politicians or journalists where the former can reach the level of 'blind obedience' and thus the high degree of protection might not help in cases of terrorism induced by religion. In this context, I might recall the words of UK's Home Secretary, David Blunkett, when he stated immediately after 9/11 attacks that: "We could live in a world which is airy-fairy, libertarian, where everyone does precisely what they like and we believe the best of everybody and then they destroy us."[114]

The UK Approach:

[114] (Thomas, 2003), at 1202.

The UK has a long history of respecting rights and freedoms which predates any other international conventions or national constitutions. However, since the UK lacks a written constitution or any self-promulgating human rights act, there is nothing equivalent to the US First Amendment or the RFRA Act discussed earlier which explicitly protects both the free exercise of religion and freedom of speech. In addition, the UK courts have refrained from creating positive rights within their rulings.[115] The English law has developed on the presumption that individuals are free to do what they want so far it does not violate any laws.[116] Hence, there was no need for the English legislator to pass any acts firming any of the fundamental rights including the free practice of religion and freedom of speech. In the UK, "the right to freedom of expression remains unlimited unless there is positive restriction."[117] The only written texts that could be said to assimilate America's First Amendment are Articles 9 and 10 of the ECHR.[118] However, while the First Amendment was silent on setting any limitations on the freedoms of religion and expression, the ECHR allowed the imposition of restrictions and even penalties on both freedoms. For the freedom of religion, the Convention granted governments the authority to interfere in certain condition namely: If the interference has a legitimate aim, or it is in accordance with the law, or it is necessary in a democratic society. Although these grounds for limiting the freedom of religion seems plausible, the scope of protection in the US is still much broader than that under the ECHR and particularly when states enjoy the broad margin of appreciation the court established in determining how to give effect to their responsibilities.[119]

One of the landmark cases in the UK which defines the manifestation of religious beliefs is the R (Begum) v Head teacher and Governors of Denbigh High School.[120] Begum, a secondary education student, insisted on wearing 'jilbab' instead of the school uniform which she thinks that it does not comply with the strict standards of Islam. As a result, Begum was banned from entering the school premises unless she complies to the school's policies and wear the proper uniform. She then challenged the school's decision before the Court of First Instance which

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[115] (Slynn, 2004), at 480

[116] ibid.

[117] ibid.

[118] See n78.

[119] (Evans, 2009), at 83-84.

[120] [2004] EWHC 1389 R. (on the application of Begum) v Denbigh High School Governors.

was later dismissed on the grounds that her religious freedom under Article 9(1) had not been breached. The Judge held: "it is clear from the evidence that there are a not insignificant number of Muslim female pupils at Denbigh High School who do not wish to wear the jilbab and either do, or will, feel pressure on them either from inside or outside the school. The present school uniform policy aims to protect their rights and freedoms".[121] In contrast, the court of appeal held that Begum's freedom to manifest her religion or belief in public was being limited, and as a matter of Convention law it would be for the School, as an emanation of the state, to justify the limitation on her freedom created by the School's uniform code and by the way in which it was enforced."[122] The court then accepted the plurality of interpretations among different schools of thought of Islam where the strictest of them may prescribe that a Muslim woman must wear a loose-fitting jilbab.[123] Ultimately, the House of Lords over ruled the Court of appeal by concluding unanimously that hat Begum's right to religious freedom had not been violated under Art. 9(1) of the Convention.[124] The decision reiterated a substantive principle in which it distinguished between the right to hold a belief, considering it as absolute, and the right to manifest a belief as being qualified.[125] This distinction matches with the wording in Art 9(2) which cleared out the provisional nature of the exercise of religion. Moreover, the Lordships were inspired in their decision to deny a breach of Art 9 by the European Court of Human Rights principle that "a rule of a particular public institution that requires, or prohibits, certain behavior on the part of those who avail themselves of its services does not constitute an infringement of the right of an individual to manifest his or her religion merely because the rule in question does not conform to the religious beliefs of that individual."[126] It is worth noting that this approach has been criticized by the English courts as being overly restrictive. In the Copsey v. WWB Devon Clays Ltd case[127], commenting on the ruling of European Commission for Human Rights in Stedman v. United Kingdom[128], Justice Mummery held:

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[121] ibid at para 90.

[122] R. (on the application of Begum) v Denbigh High School Governors, 2005 WL 437737

[123] ibid.

[124] R (Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15 [2006] 2 WLR 719.

[125] ibid, para 20.

[126] ibid at para 87.

[127] [2005] EWCA Civ 932

[128] (1997) 23 EHHR CD168. In this case, the applicant was dismissed for her refusal to work for her private sector employer on Sundays. The Commission said: "" The Commission thus considers that, had the applicant been employed by the State and dismissed in similar circumstances, such dismissal would not have amounted to an interference with her rights under Article

> "I am convinced that it is not the function of this court to question the non-interference approach taken in the Commission rulings. Like Rix LJ, the House of Lords or the Strasbourg Court may take a different view of the Commission's rulings if the matter arises for their consideration. My own view, for what it is worth, is that in some sections of the community this is a controversial question which will not go away and that its resolution requires a political solution following full consultation between government, leaders of employers and the trade unions, and religious leaders."[129]

It is apparent by these words that Justice Mummery is not comfortable with the margin of appreciation that courts enjoy in weighing the extent of intervention in people's manifestation of their religious beliefs and only a legislation would be possible to settle this wallow.

After discussing the approach adopted by the British courts in deciding the manifestation of religious beliefs, now the approach regarding the freedom of speech will be discussed. Meanwhile the US Supreme Court, in 1969, established the Brandenburg test which extended the scope of protection on the freedom of speech, the British government went to seize hundreds of books published by Richard Handyside on the grounds of comprising obscene content and later he was convicted for publication of gain copies of an obscene book. Although the Strasbourg Court held that the conviction constituted an interference with the right to freedom.[130] It chose the path of granting space to states to interpret and apply rules that restrict or penalize the freedom of expression through its self-made 'margin of appreciation' doctrine, rather than establishing a yardstick for legislators or judicial bodies to adjust their yieldings upon.

It is palpable the variation between the American and the British systems in terms of protecting the freedoms of religion and speech. While the American system considered the free practice of religion as almost an absolute right, trumping it over domestic laws even if it encroaches upon any of them, the British system narrowed down this right putting it under the mercy of the domestic legal bodies to interpret what is viable to limit this right and what is not. In addition to the broad meanings of the grounds of limitations mentioned in Art 9(2), the

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9(1). A fortiori the United Kingdom cannot be expected to have legislation that would protect employees against such dismissals by private employers…"

[129] n 111, at para 39.

[130] ECtHR, Case of Handyside v. The United Kingdom. (Application no. 5493/72)

Strasbourg court granted governments more space to maneuver by the margin of appreciation doctrine and hence subjecting such liberty to limitations that could be validated in Strasbourg inasmuch as the respondent had plausible grounds for limitations which commensurate with the otherwise malleable Art 9(2). The same variation also applies for the freedom of speech as the grounds of restrictions on speech in the US is minimal while Art 10(2) encompasses as much as eleven conditions in which government can legitimately restrict and penalize speech. Although the Strasbourg Court has established a comprehensive framework for the protection of human rights, still the effect of its decisions depend mainly on member states' domestic law.[131] In other words, respondent states may, at their will, refuse the execution of ECtHR judgments within their domestic legal systems. [132]

After taking a broad view over the range of protections to the free exercise of religion and speech in both the American and British system, the consistency of these precedents and approaches will now be examined in relation to reviewing procedures taken post 9/11 with respect to countering terrorism.

Freedom of Religion Post 9/11: Same Level of Protection?

Following the attacks of 9/11 that took the lives of more than 2000 innocent civilians, which were executed by 19 militants all associated to Al-Qaeda, a terrorist organization affiliated to the religion of Islam, Islamophobia aggressively began to spread all over the Western hemisphere. This pattern of fear was not only limited to individuals but reached governments which in turn started to take measures to maintain their national security which became a major concern around the world. Some of these measures were heavily criticized for not meeting the universal human rights standards either because of the governments' over vigilance to stop any future attacks, or the limited amount of time these measures were drafted within. Following the attacks of Madrid, London and the establishment of ISIS which is deemed responsible for many ruthless terrorist attacks all over the world, the correlation between Islam and violence reached its climax which resulted in using terminologies like 'Islamic Terrorism' by the highest ranking officials that discursively link a specific religion with terrorism. Many Muslims perceived the wars waged allegedly on terror following those attacks and subsequently the laws enacted to counter terrorism not to be exclusively targeting terrorists, but Muslims in general.

[131] (Ress, 2005) at 359, 374.

[132] ibid.

These perceptions did not come from a vacuum, rather, it was fueled by ill statements made by the highest category of officials[133], the huge number of civilians victimized during the course of these wars, and the inhumane and degrading treatment of terrorist suspects whose exact legal status is denied whether under the Geneva Conventions or domestic laws. Although this thesis is faraway from discussing any religion's divine message, all the factors that accompanied Islam post 9/11 made it legitimately plausible for governments who were harmed by Islam's radical affiliates to take pre-emptive measures against many of its followers, whether in a direct or indirect manner, including whom lacking any evidence of extremism. However, an imperative question in this regard has to be taken into account which is whether or not this mindset of politicians has also been transferred to the judiciary. In other words, did the legal bodies accept these measures as being inline with human rights protection clauses even though it is difficult to digest this approach especially when such measures clearly diminish this protection? Or did they approve that national security will never trump over human rights even in the most difficult circumstances. In this section, different measures taken by the US and several European governments and legislators to counter terrorism which allegedly affected certain people's rights to religion and speech will be examined and the reaction of the judiciary towards these measures will be analyzed to conclude whether or not counter terrorism had a negative impact upon those rights.

1) The US Response:

One of the leading cases that illustrates the compromise of governmental interference in free exercise of religion by the judiciary for reasons of national security post 9/11 is Freeman v. State of Florida.[134] Ms. Sultaana Freeman, an American-Muslim woman who has already issued a driving license in February 2001 including a picture of her wearing a veil. After the 9/11 attacks, she was asked by the Florida Department of Highway Safety and Motor Vehicles to have her photo retaken without a veil and the order was met by her refusal. Accordingly, the refusal resulted in the revocation of her license by the State. Afterwards, she challenged the decision and pleaded that the State violated her right to freely exercise her religion guaranteed by both the First Amendment and the Florida's RFRA act. After utilizing the "strict scrutiny"

[133] US President George W. Bush, a week after 9/11 attacks stated in a press conference: "This Crusade, this war on terror, is gonna take a while." Video available at: https://www.youtube.com/watch?v=7TRVcnX8Vsw

[134] 2003 WL 21338619.

standard for analyzing alleged infringements to fundamental rights,[135] the court decided to outweigh the protection of the public from criminal activities and security threats over the plaintiff's right to freely exercise her religion.[136]

However, earlier cases that dealt with the issue of photos in driving licenses took a different path than that taken in the Freeman case. In Quaring v. Peterson,[137] the applicant sued the authorities to compel them to issue a driving license notwithstanding her refusal to be photographed based on her religious beliefs. Although the Court of first instance refused her application, the Court of Appeals reversed the former decision. The Court held that:

> "Nebraska driver's licensing requirement that applicants submit to having color photograph taken for affixing on the license **unconstitutionally burdened subject applicant's free exercise of her sincerely held religious beliefs**, supported by historical and biblical tradition and implemented in her daily life, that the taking of her photograph would violate the Second Commandment's express forbidding of the making of any graven image or likeness of anything in creation".[138]

The Court did not find any of the State's arguments to qualify as a compelling state interest to burden the plaintiff's free exercise of her religious beliefs, although one of the interests the officials based their refusal upon is 'public safety'. In addition, the Court examined the Second Commandment which the plaintiff argues that it indirectly forbids the taking of photographs of God's creations and cited one of the Biblical verses that supports her allegations.[139] Based on this examination, the court characterized the plaintiff's beliefs as being 'sincerely held religious belief'.[140] Similarly, the Supreme Court of Indiana in Bureau of Motor Vehicles v. Pentecostal House of Prayer[141] examined the religious grounds of the plaintiffs as a basis for refusing to take photographs of them. The Court ultimately held that "the state's interest in the photograph requirement, such as it is, is not so compelling that it may be allowed to infringe upon the

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[135] ibid, at 4.

[136] ibid, at 7-8.

[137] Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), aff'd sub nom. Jensen v. Quaring, 472 U.S. 478, 105 S. Ct. 3492, 86 L. Ed. 2d 383 (1985)

[138] ibid.

[139] Ibid. The Court cited in the 3rd footnote, one of the verses included in the Bible (Exodus 20:4)

[140] ibid, at 1125.

[141] 380 N.E.2d 1225 (1978)

appellees' fundamental right to freely exercise their religious beliefs"[142] although the argued state interest relied on public safety.

Going back to the case of Mrs. Freeman, I would like to make some comments on the reasoning of this case in the light of the aforementioned cases to conclude whether or not the court might have prejudiced this lady's right to free exercise of her religious beliefs. **First,** the court decided not to choose between any competing experts on Islam to verify whether or not her beliefs are truly imposed upon Muslim women.[143] The court directly found that the "Plaintiff is motivated by a sincerely-held religious belief to remain veiled."[144] Afterwards, the Court questioned the Plaintiff's consistency of her testimony on her religious beliefs which, in the Court's view, "undermined Plaintiff's claims that in her family's practice of religion, all images of living things are banned."[145] Accordingly the Court found that "a ban on all image-making of living things is not a sincerely held religious belief of the Plaintiff."[146] The court decided to weigh the sincerity of her beliefs based on her testimony which might carry some discrepancies that is completely possible especially when the speaker is not a religious expert. This disposition abandoned the path taken in previous cases to examine the religious bases of the alleged belief to decide its sincerity followed in both the Quaring and Pentecostal House of Prayer cases.

In this case, the Court would have found its calling if it followed this path as the issue of wearing the veil is very debatable in Islam,[147] and one of the main Islamic principles that govern the implementation of rules is that if something is not unequivocally known to be part of the religion (no unequivocal consensus among the Imams), then it is not necessarily obligatory to follow.

Second, the court utilized the 'strict scrutiny' standard to analyze alleged infringements to fundamental rights and held that the Stat has "always had a compelling interest in promoting

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[142] ibid, at 1229.

[143] Freeman v. State of Florida, at 2.

[144] ibid.

[145] ibid.

[146] ibid.

[147] A Fatwa which confirms that the issue of the obligatory wearing of a veil is debatable in Islam. Available at: http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=64763 (In Arabic)

public safety."[148] It emphasized the argument that photographs are "still the best available means to make crucial identifications in the shortest possible time"[149] and relied this finding on the testimony of a law enforcement witness who has 40 years experience in this field.

Besides the fact that the two other cases were decided within the witness's period of expertise, the Court did not present any plausible causes to depart from the previous precedents which considered the States' public safety argument as not being a compelling state interest. Instead, the Court justified the State's behavior against Freeman's religious freedom by stressing on the emerging threat of public safety which includes both foreign and domestic terrorism.[150] Using this justification as an absolute ground for limiting anyone's rights, without an individual case by case analysis, would open doors for Courts to "ease the burden to infringe on protected rights."[151] According to Currier, if this analysis "gives any indication of what may come in post-September 11th courts, long-standing constitutional tests certainly will be compromised."[152]

However, it seems that Currier's speculations were not totally correct. One of the seminal cases that defines the legal approach of US Courts toward Muslims Post-September 11 attacks is Hassan v. City of New York.[153] What remains unique about this case is that the targets of the disputed surveillance procedures were not specific individuals, but rather a Muslim population without having any history of extremism involvement. The sole premise of the pervasive surveillance, as the plaintiffs argued is that "that Muslim religious identity is a permissible proxy for criminality."[154]

This case was brought by a group of Muslim Americans and organizations against the New York Police Department (NYPD), challenging its adoption of surveillance operations against Muslims, as being in violation of the Free Exercise and Establishment Clause. The plaintiffs claimed that the NYPD program was initiated following September 11 attacks with the sole

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[148] Freeman v. State of Florida, at 7.

[149] ibid.

[150] ibid.

[151] (Currier, 2004), at 937.

[152] Ibid, at 939.

[153] 804 F.3d 277 (3rd Cir. 2015)

[154] ibid, at 284.

purpose of targeting Muslim entities and individuals only because they are Muslims or believed to be Muslims rather than the existence of wrongdoing evidence.[155] This spying program included "snap pictures, take videos and collect license plate numbers of mosque congregants…and sending undercover officers to Muslim-affiliated locations to engage in perpetual conversations to elicit information from proprietors and patrons."[156] However, the District Court was not persuaded by the plaintiffs' pleadings and held, in February 2014, that the "more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies than a desire to discriminate and… the motive for the Program was not solely to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary."[157]

By these words, the Court supposedly made an assumption that terrorism is exclusively ingrained in the religion of Islam eliminating any other possibilities of its existence outside this ambit. In addition, the Court did not make any cognitive distinction between the discrimination against Muslims and searching for Muslim terrorists as the latter is supposed to be based on diligent evidence of criminal involvement which, in turn, if unavailable will denote that this search is in fact a discriminatory act against Muslims.

However, the Court of Appeals did not uphold this decision and had a completely different view with regards to the plaintiffs' pleadings. For the City's argument of standing, the District Court, after examining the three elements of 'constitutional minimum of standing' test[158], decided that the Plaintiffs failed to satisfy the first two prongs of it.[159] Conversely, the Court of Appeals reversed this decision and held that "there is standing to complain and which present constitutional concerns that must be addressed and, if true, redressed."[160] With regards to the first element, the Court found that discrimination on the basis of one's religious calling is enough to trigger a Court's jurisdiction.[161] It based this finding on previous precedents that recognized personal injury inflicted by discrimination is by itself judicially cognizable and

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[155] ibid, at 285.

[156] ibid.

[157] 2014 WL 654604, at 7.

[158] ibid, at 3.

[159] ibid: The three elements of the test are: **(1)** Plaintiff must have suffered an Injury-in-Fact, **(2)** Causation: Meaning that there must be a casual connection between the injury and the conduct complained, and **(3)** Redressabilty**:** It must be likely that the injury will be redressed by a favorable decision.

[160] 804 F.3d 277 (3rd Cir. 2015), at 309.

[161] ibid, at 289.

qualifies to be considered as a penalty.[162] For the second element, the Court affirmed the direct relation between the injury inflicted and the City as being the cause of that injury and hence the realization of this element.[163] It is rather peculiar that the District Court relied on the City's argument that the spying program was revealed by the press without the City's permission to deny the Causation element.[164] The Court of Appeals implicitly trifled this defense by noting that it is similar of arguing "'What you don't know can't hurt you. And, if you do know, don't shoot us. Shoot the messenger."[165] Also, the Court decided to apply the Intermediate Scrutiny test[166] explicitly for the first time on classifications based on religious affiliation[167] which presumes the existence of discrimination based on religion. The City's justification under this test was based on national security and public safety concerns which the court did not find it enough to overcome the test.[168] it required the "relationship between the asserted justification and discriminatory means employed be substantiated by objective evidence"[169] which was apparently missing in this case. Even though the Court described these standards as rigorous, it did not hesitate to apply them "even where national security is at stake".[170] It is hard to tell if this decision would be delivered in the same manner if it was presented before the court in close proximity with September 11 attacks as Lord Hoffman wrote in a case decided in 2001:

> "I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for

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[162] ibid.

[163] ibid, at 293.

[164] 2014 WL 654604, at 4.

[165] 804 F.3d 277 (3rd Cir. 2015), at 292.

[166] Intermediate Scrutiny is a test used in the American Courts to decide a statute's constitutionality and invoked when a state or the federal government passes a statute which negatively affect certain protected classes. Under this test, challenged law must (1) further an important government interest, and (2) must do so by means that are substantially related to that interest. Cornell Law School, Legal Information Institute (LII). Available at: https://www.law.cornell.edu/wex/intermediate_scrutiny.

[167]804 F.3d 277 (3rd Cir. 2015), at 299. The Court noted that "neither our Court nor the Supreme Court has considered whether classifications based on religious affiliation trigger heightened scrutiny under the Equal Protection Clause".

[168] ibid, at 306.

[169] ibid.

[170] ibid. The Court elaborated this point by noting that "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."

terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."[171]

It is almost impossible to tell that these words are written by the Lordship who later wrote his famous passage concerning the indefinite detention of non-British terrorist suspects. In *Rehman,* Lord Hoffman showed clear judicial deference to anti-terrorism measures taken by the executive and legislative authorities whilst implying possible upholding of laws that might otherwise be deemed unconstitutional.

2) The UK response:

Similar to the USA, the United Kingdom following the 9/11 attacks promulgated several acts to help in the fight against terrorism and prevent any potential attacks that might take place in the future. However, it is almost impossible to realize the perfect equation of balancing counter-terrorism measures with basic human rights even in one of most democratic, freedoms respecting countries like the UK. As mentioned earlier, the UK human rights body of law is governed by the ECHR rules that is incorporated within its domestic legal system pursuant to the Human Rights Act of 1998. Compared to the US constitution and consecutive Supreme Court precedents, one can tell that the space of enjoying freedoms of religion and expression in the US is far wider than that in the UK. This prerogative was cleverly exploited by the British which led to the existence of acts mired with rigorous measures that can easily be classified, even by non-jurists, as discriminate.[172]

Some of those measures were aimed directly towards individuals only because of their religious beliefs. For instance, the Terrorism Act of 2000 granted the police the authority to stop and search which has resulted in discrimination with the Muslim society in UK.[173]

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[171] Rehman v Secretary of State for the Home Department, [2001] UKHL 47, at para

[172] For example, the ATCSA act of 2001, which included the measure that granted the powers to detain foreign terrorist suspects indefinitely.

[173] (Moran & Phythian, 2008), at 121.

Moreover, the Anti-Terrorism, Crime and Security Act 2001 added more burden on Muslims by allowing the police to order individuals to remove any item that is considered to conceal his/her identity.[174] The Muslim Council of Britain (MCB) made a press release to comment on police practice against Muslims. Iqbal Sacranie, Secretary-General of the Muslim Council of Britain noted that: "Just as an entire generation of young black people were alienated through Stop and Search practice, we are deeply worried that the same could now be occurring again, this time to young Muslim men."[175]

These concerns were officially acknowledged by the British government. Ms. Hazel Blears, Home Office Minister, in one of the parliament questioning held by the Select Committee on Home affairs said:

> "I think I share the concern of the Committee about reassuring the Muslim community and I am not going to come here today and say that everything is wonderful and the Muslim community are perfectly reassured about our powers because I think there is still a great deal of work to do. Dealing with the terrorist threat and the fact that at the moment the threat is most likely to come from those people associated with an extreme form of Islam, or falsely hiding behind Islam, if you like, in terms of justifying their activities, inevitably means that some of our counter-terrorist powers will be disproportionately experienced by people in the Muslim community."[176]

Despite the fact that the Act did not require any reasonable suspicion to exercise such powers[177], the Court in R (Gillan) v. Commissioner of Police for the Metropolis decided that these measures are still in line with the Convention rights.[178]

One of the repercussions to the overwhelming Islamophobia that struck Britain following the Radical Islamic terrorist attacks which led to numerous offences based on religious hatred is the enactment of Racial and Religious Hatred Act of 2006 which complements the Public

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[174] ATCSA of 2001, Section 94/228 reads: Subsection (2) of section 60AA confers power on any constable in uniform: **(i)**to require the removal of any item which he reasonably believes a person is wearing wholly or mainly for the purpose of concealing his identity; **(ii)** to seize any item which he reasonably believes any person intends to wear wholly or mainly for that purpose.

[175] (Police using Stop and Search Practice Indiscriminately Against British Muslims, 2004)

[176] (Select Committee on Home Affairs; Minutes of Evidence, 2005)

[177] Terrorism Act of 2000, Section 45/1(b) reads: The power conferred by an authorization… may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind

[178] [2006] UKHL 12.

Order Act of 1998. Under this Act, it is an offence if a person "uses threatening words or behavior, or displays any written material which is threatening…if he intends thereby to stir up religious hatred."[179] The Act faced intensive criticism due to its negative effect on the freedom of speech, arguing that the government exploited the international crisis of terrorism to decide on issues outside the ambit of countering terrorism.[180] The house of lords reacted to this criticism in 2007 by drafting a new provision which allows a whole range of speech conducts to take place with relation to religious beliefs without any prejudice to the speaker.[181] In the light of this new provision, in reality, it is very hard to bring the Racial and Religious Act into force. Most of the hatred conducts against religions include, beside physical abuse to the believers, which is already criminalized by regular laws, verbal assault where the most extreme form of it (abuse) is already permitted by the new provision. It is worth mentioning that the introductory text of the 2006 Act entails that it criminalized acts which stir up hatred against person on religious grounds. The question that this text puts forward in this sense is what can be considered to generate hatred among people more than verbally abusing their religion which is already permitted. What is, then, the borderline between threatening words which is criminalized, and the abuse of a religion which is legally allowed?

3) The Egyptian approach and Response:

Egypt can be said to be one of the first countries to suffer from radical religious terrorism that yielded many innocent lives. This agony dates back to 1928 when the Muslim Brotherhood was established, according to its patriarch Hassan Al-Bannah, for the sole purpose of preaching and spreading the noble teachings of Islam to contribute in individual and social morality reformations. However, the brotherhood's special or secret organization which was founded to be its military wing held responsible for committing heinous terrorist crimes such as the assassination of Prime Minister Ahmed Maher Pasha, in 1945, the assassination of Prime Minister Al-Nokrashi Pasha in 1948, the assassination of Judge Al-Khazindar in 1948 who sentenced several members of the brotherhood to imprisonment, and an attempt to assassinate Prime Minister at that time Gamal Abdul Nasser in 1954. In addition to this, one of the

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[179] Racial and Religious Hatred Act 2006, Part 3A/29B.

[180] (Moran & Phythian, 2008), at 125.

[181] Public order Act 1998, Section 29J reads: Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytizing or urging adherents of a different religion or belief system to cease practicing their religion or belief system.

brotherhood's leaders named Sayed Kotb was responsible for spreading one of the most radical religious ideologies through his writings which is until recently cited by modern terrorist organizations leaders such as Ayman Al-Zawahri, who himself was one of the brotherhood's sincerest affiliates.[182] Later on, the Islamic Group terrorist organization emerged in the 1970's which was held responsible for the assassination of President Anwar Al-Sadat, and many other incidents of targeting police officers and foreign tourists throughout Egypt. Terrorist attacks reached its peak in Egypt following the ousting of the Muslim Brotherhood's regime in July 2013 during which hundreds of police and military personnel, judges, prosecutors, worshippers and civilians were victimized by members of either the Muslim Brotherhood, ISIS or other radical Islamic terrorist groups.

I aim by this introductory note to show that there was no specific turning point throughout Egypt's modern history in relation to terrorism as it appears that Egypt was, and still, a victim of radical ideologies since almost one hundred years ago. Therefore, for the purposes of the research, I will focus on the period when the Muslim Brotherhood was in office in mid 2012 and the period following its overthrowing after mid 2013 as being a period riddled with intense and serious terrorist attacks that resulted in the death of thousands of innocent people and thus may have the same impact and equivalency on Egypt as the September 11 attacks on the West.

When Former President Morsi, one of the Muslim Brotherhood leaders, started his tenure of office, the level of ambitions with respect to the manifestation of some Islamic religious beliefs elevated among public servants which were known to be forbidden before. One of the prominent practices that began to be followed is the growing of beards which some Islamic interpretations consider it as obligatory upon all Muslim male adults. During this period, a police officer decided to grow his beard in conformity with, according to their beliefs, the Islamic teachings which impose this conduct, although violating the internal codes and instructions of the Ministry of Interior which forbid it. As a result of this conduct, he was set to retirement by an executive order issued by the Minister of Interior. The police officer challenged this decision before the State Council which held that the there were no legal grounds for this decision because it was preceded by another decision to refer the police officers to a disciplinary board entailing that the authorities did not recognize their

[182] (Ibrahim), at 1.

forbidden conduct to amount to the level of jeopardizing public interests.[183] The Court decided that it is not possible for the authorities to refer a police officer to a disciplinary board and simultaneously referring him to retirement for the same illegal conduct. Although the Court did not address the conduct of growing the beard as being a religious right for police officers or not, the State Commissioner report did so by noting that this conduct is a well established practice in the Islamic rules of Sharia and one of the manifestations of personal freedoms and therefore the authorities must not set any limitations on this right upon any Muslim.[184] The Court ultimately annulled the Minister of Interior's decision to refer the applicant to retirement.

Three years later, a case which carries the same context was raised before the courts while the only difference was its period of adjudication which followed the ousting of the Muslim Brotherhood and the dramatic increase in terrorist attacks carried out by radical Islamists. In Ahmed Hamdy v. Minister of Interior and others, [185] the Court followed a completely different course of reasoning than that discussed in the previous case and decided to engage with the issue of whether or not the conduct of growing a beard is considered as a right for a police officer to practice. The court primarily addressed the nature of the police as being a regulatory civil body which distinguishes it from any other civil institution.[186] This special nature necessarily entails the full compliance of any instructions or orders related to the police personnel's field of work, including their form of dress, external appearance, and general conduct whether on or off duty. The Court also considered the conduct as far away from being an individual act, but a conduct of an extended influence which bears an ideological dimension that can negatively affect the work of the police service which must be characterized by neutrality and avoid any tendencies, even if superficial. Based on these reasons, the Court decided that the applicant's conduct would jeopardize the public interest which is sufficient enough to terminate his job. The Court also addressed the Islamic rules on growing a beard and listed several interpretations ranging

[183] Case of Mohamed Mohamed Salah v. Minister of Interior and others (Application no. 14660/66) 4 July 2012. Translated by Author.

[184] Ibid. It is important to note that the Police Service Act of 1971 in Article 67(2) grants the Minister of Interior, after the advisory of the Supreme Police Council, the authority to refer a police officer to retirement if it is necessary due to serious grounds related to the public interest.

[185] Case of Ahmed Hamdy v. Minister of Interior and others (Appeal no. 5232/45) 22 January 2015. Translated by Author.

[186] ibid.

from being an obligatory conduct that has to be followed by all Muslims to being an Islamic tradition that is not necessary to be followed.[187] The Court concluded that according to these interpretations, growing beards cannot be regarded as an Islamic rule that cannot be violated due to the absence of an explicit directive that tells so.[188] Based on these reasoning, the Court dismissed the applicant's appeal and upheld the Minister of Interior's decision to refer him to retirement.

4) Overview on US, UK and Egypt's Response:

> "Terrorism as we ordinarily understand it is innately media-related . . . The September 11th attack wasn't just a direct hit on the twin towers and the Pentagon, the footage burned into the collective psyche of everyone alive to see it. It was the antithesis of Neil Armstrong stepping onto the surface of the moon."[189]

One of the adverse reactions of terrorism is the emotions it generates among those affected by it. Terrorism not only targets tangible valuables of the people, but also their souls and feelings. The feelings of sympathy, vigilance, fear or even hate combined with the surprise and vile nature of terrorism lead only to one conclusion; taking extraordinary measures.

Almost every country in the world that suffered from terrorist attacks took extreme measures to either search for the perpetrators or to obstruct any future attacks. The level of these measures' intensity varies from one country to another no matter how good its history on respecting human rights. The sincerest supporter of these measures which grants it the pass of legitimacy even if they encroach upon basic freedoms is emotions. This psychological status is not only exclusive to ordinary people, but also takes over politicians, parliament members, and even judges. However, this status is not permanent and usually changes by time until awareness and reasonability are the main drivers of actions. At this stage, the level of acceptance of such measures might also change until it reaches revulsion.

Both the US and the UK's response to terrorism is a perfect demonstration of this analysis. Before September 11 attacks, US courts took a definite path regarding the issue of Muslim women veiling their faces in driving license photographs. Subsequently after the attacks, the

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[187] ibid.

[188] ibid.

[189] (Iyer, 2014), at 511 citing William Gibson 2004.

Court reversed these holdings by reasoning far away from being persuasive compared to the previous precedents. In Hassan v. City of New York, the wide temporal distance between the attacks and the claim maybe was the catalyst for deciding in favor of the plaintiffs. It would have been so difficult for the Court of Appeals to take the same decision amid the terrorist attacks especially when the case is preceded with a dismissal by the District Court with a reasoning which might not seem unpersuasive to the judges. Similarly, in the UK, while Lord Hoffman expressed clear deference to government measures against anti-terrorism measures and the necessity for the government to have a 'judicial arm', his Lordship later on criticized the very exact measures describing them as a threat to the nations more than terrorism itself. In both scenarios, nothing has changed except the prolongation of the time gap which in turn reversed the praising of these measures to denouncing them.

This analysis might be applicable also to the Egyptian Scenario with the only exception that the applicants' primary motive for maintaining their conduct of growing a beard is linked to the country's political status at the time they did so. Although Egypt is a country that is considered as Islamic and the Sharia principles are the primary source of legislation,[190] the phenomenon of active police officers to decide growing their beards never existed up until the Muslim Brotherhood started ruling Egypt in mid 2012. Although public servants in Egypt are not usually banned from growing their beards whether for religious or other reasons, several institutions like the police and the military ban such practice and teach their students such regulations from day one for reasons like good appearance and neutrality.[191] Nevertheless, the applicants only decided to grow their beards when they thought that such conduct would not be intercepted by their superiors since the highest governing body, the presidency, is led by a man who himself is bearded. The Court in Mohamed Salah v. Minister of Interior, although failed to address the issue within a human rights discourse, annulled the challenged decision on the basis of an administrative procedural mistake done by the authorities. A judgment which can be characterized to be inline with the prevailing political atmosphere at the time of its issuance. In contrast, the decision in Ahmed Hamdy v. Minister of Interior resorted to the style of analyzing the conduct from a human right perspective to decide on its legitimacy. The court

[190] As a result of the political instability throughout the past 200 years, the Egyptian constitution was changed and amended several times. The current 2014 Constitution, in addition to 1971 and 2012 annulled Constitutions all stipulate in their Article 2 that the Islamic Sharia principles are the primary source of legislation.

[191] There is a common stereotype among Egyptians that growing beards is associated with Islamist political movements although this is not always the case. Thus, a police or military officer with a long beard might have a negative effect on his neutrality, which will be reflected on the institution as a whole if it allowed such conduct to take place.

seemed to adopt the mindset of rejecting such conduct as it deeply analyzed the justifications behind the ban and sailed in the deep rules of Islamic interpretations to conclude that such a ban is in conformity with the law and the Police Service regulations. A judgment which can also be described to correspond to the current political situation towards Islamic fundamentalism which is usually correlated with growing beards.

Chapter 3: The International Dimension of the Free Exercise of Religion and Speech:

The International Legal Framework:

The right of religious freedom has been of an international concern even before the formulation of the UN Charter and subsequently the UDHR, in fact it is dated back to the 17th century. Following the religious wars waged between the European super powers and amid the inquisitional courts which both resulted in the death of thousands of people, many states adopted the Peace of Westphalia which emphasized on the freedom of religion being the exodus to the misery Europe was facing. The text of the Treaty of Osnabruck provided that:

> "Subjects who in 1627 had been debarred from the free exercise of their religion, other than that of their ruler, were by the Peace granted the right of conducting private worship, and of educating their children, at home or abroad, in conformity with their own faith; they were not to suffer in any civil capacity nor to be denied religious burial, but were to be at liberty to emigrate, selling their estates or leaving them to be managed by others."[192]

The Treaty granted enormous liberties to whom who had been deprived of it before the adoption of the Peace of Westphalia. These freedoms include the free exercise of worshipping and its rituals, the right to religious education, and the equality in civil treatment.

Freedoms of Religion and Speech Post WWII:

1) Freedom of Religion:

Although the UN Charter cannot be described as either being of a theistic or a non-theistic character, Article 1 which lists the purposes of the UN implicitly asserted on the freedom of religion which include in its third section: "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[193] Shortly afterwards, 48 nations participated in drafting the Universal Declaration of Human Rights which is much more precise on affirming explicitly the right to exercise religious beliefs. Article 18 of the UDHR states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and

[192] (Gross, 1948), at 22.

[193] Article 1(3) of the United Nations Charter.

freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[194]

Later on, this Article was reiterated but in a more legal and obligatory form in the ICCPR. With respect to the obligatory form, the architects of the ICCPR in Article 18 used the word 'shall have the right' instead of 'has the right' in the Declaration which bestowed a binding nature to the right. In addition, the Covenant prohibited any practices which might impair anyone from adopting any religion and belief of his choice. However, it allowed limitations to be set upon by states only if it is necessary for the protection of public safety, order, health or morals or the fundamental rights and freedoms of others. According to the Human Rights Committee, this limitation only applies to the right to manifest religion or belief while the freedoms of thought, conscience and religion being unconditionally protected.[195] It is noteworthy that religious freedom lacked any binding instrument exclusively for its protection or monitoring bodies as in the case with several human rights conventions like the Convention Against Torture (CAT), Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and many more. Drinan depicts this shortage by noting that "the uncertainty around the world concerning the extent to which governments should guarantee religious freedom is one of the major reasons why the United Nations has not pursued a covenant or a legally binding instrument on freedom of religion, as it has done with respect to such issues as the rights of minorities, women, and children."[196] However, ICERD briefly mentioned the right to freedom of thought, conscience and religion prohibiting any discrimination based on them.[197]

One of the efforts made by the international community with regards to the right of religion is the UN General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief issued in 1981.[198] Beside reiterating Article 18 of the ICCPR, the Declaration called for states to take effective measures to prevent and eliminate discrimination on the grounds of religion or belief and prohibiting any forms of

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[194] Article 18 of the Universal Declaration of Human Rights.

[195] (CCPR General Comment No. 22 at para 3)

[196] (Drinan, 2004), at 3.

[197] Article 5 (vii); International Convention on the Elimination of All Forms of Racial Discrimination.

[198] A/RES/36/55 (25 November 1981).

discrimination based on this right.[199] Furthermore, the GA succeeded in promulgating an additional declaration to fortify the protection of religious freedom which focuses on the elimination of all forms of religious intolerance.[200] As per this resolution, the United Nations Commission on Human Rights appointed a Special Rapporteur on religious intolerance and the later mandate was changed to be the Special Rapporteur on freedom of religion and belief. The primary objectives for the Rapporteur is promoting the adoption of protection measures at the national, regional and international levels, and examining incidents and governmental accidents not in conformity with the provisions of the Declaration.[201]

The freedom of religion was later recognized by almost all regional human rights instruments such as the American Convention on Human Rights ACHR),[202] African Charter on Human and Peoples' Rights (ACHPR),[203] and the European Convention on Human Rights(ECHR).[204] In 1998, and as a result of the elevating religious tensions worldwide, more than 150 representatives of governments, religious communities and academic institutions attended the Oslo Conference and succeeded in drafting the Oslo Declaration on Freedom of Religion or Belief which asserted on the implementation of religious freedom protection clauses both in the ICCPR and the UN's Declaration on Religious Freedom.

2) Freedom of Expression:

Freedom of expression is considered as one of the most paramount liberties for the development of societies, being the kernel of all successful democratic systems. In fact, freedom of expression is a necessary precondition for other fundamental rights to be enjoyable such as the right to assembly, the exercise of political life, and the freedom of association. The UN Human Rights committee in this perspective noted that the "freedom of opinion and freedom of expression are indispensable conditions for the full development of the person.

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[199] Ibid, Article 5.

[200] A/RES/41/112 (4 December 1986)

[201] (Special Rapporteur on Freedom of Religion and Belief, 2018)

[202] Article 12 of the Convention reiterates Article 18 of the ICCPR.

[203] Article 8 of the Charter reads: Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

[204] Article 9.

They are essential for any society and constitute the foundation stone for every free and democratic society."[205]

The UDHR recognized the protection of this right in Article 19 which reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[206] Later on, this right got incorporated in international human rights instruments including the ICCPR,[207] ECHR,[208] ACHPR,[209] and ACHR.[210] The forms of expression protected, according to the HRC include "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.[211] As in the case with free practice of religion, the freedom of expression is not considered as an absolute right by the international and regional human rights instruments and thus can be subject to certain limitations by states' laws.[212] In the next section, I will discuss how the international jurisprudence handled the freedoms of expression and religion to identify whether there is a judicial approach related to these particular rights.

Freedom of Religion in the Eyes of International Jurisprudence:

The primary objective for the establishment of international courts is the settlement of disputes which arises between only states under international law. Thus, it is seldom found an opportunity for international courts like the PCIJ and ICJ that directly questions the freedom

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[205] (CCPR General comment No. 34, 2011), at para 2.

[206] Universal Declaration of Human Rights, Article 19.

[207] Article 19 (2) reads: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[208] Article 10 (1) reads: "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 interference by public authority and regardless of frontiers."

[209] Article 9 (2) reads: "Every individual shall have the right to express and disseminate his opinions within the law."

[210] Article 13 (1), reiterates Article 19 (2) of the ICCPR.

[211] CCPR General Comment No. 34, at para 11.

[212] Article 19 (3) of the ICCPR which inspired all other international, regional and domestic HR instruments reads:

The exercise of the rights provided for in paragraph 2 (freedom of expression) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: **(a)** For respect of the rights or reputations of others; **(b)** For the protection of national security or of public order (ordre public), or of public health or morals.

of religion because the encroachment upon this right usually occurs within the boarders of a particular state by one or more of its institutions. One of the rare opinions proclaimed by the ICJ in relation to the free exercise of religion is its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory. The Court did not explicitly touch upon the right to free exercise of religion, rather it affirmed on the freedom of movement enunciated in Article 12 of the ICCPR, which includes the right to access the Holy Places,[213] a freedom considered as one of the dimensions of exercising religious beliefs. Nevertheless, the opinion cannot be regarded as a landmark legal draft for the freedom of religion as the main focal point was the Wall itself, while providing a slight discourse on this right.

The European Court of Human rights and Freedom of Expression:

Although the Strasbourg Court decided numerous cases that are linked to the freedom of expression, only a very few of them can said to be relevant to this study. One of the most prominent cases decided by the Court which is directly related to religious incitement and the freedom of expression and defines the Court's approach with regards to this subject is the Case of Gunduz v. Turkey.[214] Mr. Gunduz appeared in a Turkish television program broadcasted live and made very critical statements concerning democracy by describing contemporary secular institutions as 'impious' and against Sharia law. He was later prosecuted based on the fact that his speech involved sentences that incited people to hatred and hostility. The Court mentioned three pivotal points that were decided in previous cases. First, the Court reiterated the principle mentioned in the case of Handyside v. UK, namely that the freedom of expression "is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb".[215] Second, in the context related to religious opinions, the Court asserted on the obligation "to avoid as far as possible expressions that are gratuitously offensive to others" because such expression does not "contribute to any form of public debate capable of furthering progress in human affairs".[216] Third, the Court made clear that there is a certain

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[213] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ 136, at para 129.

[214] Case of Gunduz v. Turkey, Application no. 35071/97, 4 December 2003.

215 ibid, at para 37.

216 ibid.

margin of appreciation available for Contracting States when it comes to regulating the freedom of expression. By applying these principles, the Court held that "it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread incite, promote or justify hatred based on intolerance, provided that any formalities conditions, restrictions, or penalties imposed are proportionate to the legitimate aim pursued." [217] Thus, the Court made clear that speech, even if it is flowing from a specific religious belief or opinion, is subject to limitation and even sanctioned if it calls for hatred or violence.

The European Court of Human Rights and Freedom of Religion:

The European Court of Human Rights (ECtHR) has undeniably evolved to be one of the most robust and a key player in defending all forms of human rights including the free exercise of religion both for its huge geographical jurisdiction which covers more than 800 million people living in 47 countries, and supervising over the most human rights abiding legal systems in the world. The court has been described by scholars as being the most successful international human rights adjudication and enforcement regime in the world today,[218] and even labeled it as a world court of human rights.[219] Hence, for these reasons, ECtHR case law will be discussed in this chapter to examine whether or not counter terrorism measures influenced the Court's approach of adjudication.

1) The European Court of Human Rights General Approach:

As mentioned earlier, the right to freely exercise religion and speech are not absolute under the Convention and are subject to limitations. Pursuant to these limitations, governments have the authority to interfere by suspending some patterns of exercising those rights supported by the Court's Margin of Appreciation doctrine which extends the governments' powers to lay down restrictions necessary to preserve public order and protecting the rights and freedom of others in a democratic society.[220] This doctrine is most commonly used lately by the Court in cases related to the manifestation of religious beliefs, especially in cases where states ban the wearing of religious symbols. The history of this doctrine dates back way before the Court's modern

217 ibid, at para 40.

[218] (Moravcsik, 2000), at 243.

[219] (Attansio, 1996) at 383.

[220] (Nigro, 2010), at 531.

jurisprudence, precisely in 1978 in Ireland v. United Kingdom, where the Court for the first time explicitly refers to the subject of the domestic margin of appreciation.[221] The Court held:

> "It falls in the first place to each Contracting State, with its responsibility for the life of its nation, to determine whether that life is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation."[222]

The context in which the doctrine was invented shows that its main justification was to respond to concerns of national governments that international jurisprudence could jeopardize their national security.[223] However, the doctrine's scope of application was later extended to allow countries to set limitations on matters not related to national security concerns such as the right to private and family life, the right to manifest one's religion and the freedom of speech.

Proponents of this doctrine presupposes the existence of democracy in the Contracting States as a requirement for the its enforcement, as the Court will not grant such a discretionary power if there is doubt that each state would satisfy the requirements necessary to protect human rights.[224] Others also argue that this doctrine is pivotal for respecting the sovereignty of Contracting States by balancing the relationship between this sovereignty and the Court's control function in reviewing domestic conducts solving the question of sovereignty of Contracting States.[225] Other opinions perceive the doctrine as an answer to the question of the so-called 'uncertain expressions' that is assigned only by a judgment that goes beyond the ordinary interpretation of the prescriptive test.[226] In contrast, opponents of the doctrine consider it as a threat to the homogeneity of the European System as it produces a variety of conclusions

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[221] (Brems, 1996), at 250

[222] ECtHR Case of Ireland v. The United Kingdom. Application no. 5310/71 (18 January 1978), at para 207.

[223] (Benvenisti, 1999), at 845.

[224] (Mahoney, 1998), at 4.

[225] (Hutchinson, 1999).

[226] (Nigro, 2010), at 536.

in a crucial topic such as the protection of human rights.[227] Moreover, this doctrine raises the fear of being an arbitrary instrument used by the Court to delegate the objective of protecting human rights to the Contracting States.[228]

The idea of restraining a Court's power to review a state's decision which negatively affects any form of human right is kind of peculiar, but when this restriction is decided by the Court itself is indescribable. The Court's main reasoning for granting states a space of freedom to derogate or limit certain rights is the assumption that they are in a better decision to assess the pressing needs of the society. This proclamation, in my opinion, degrades the power and authority of the Court to supervise a state's decision, whether a positive or a negative one, allegedly affecting an individual's conventional right irrespective of the circumstances in which the decision was formulated. If the state argues that the circumstances required the limitation, the Court's principle objective is to scrutinize them to decide on their sufficiency to justify a human right restriction. The Court qualified states to be in a higher position than it in terms of assessing a domestic situation whilst it possesses all the legal tools which facilitates this job to be also done by it. The parties under Rule 44A has the duty "to cooperate fully in the conducts of the proceedings, and…to take such action within their power as the Court considers necessary for the proper administration of justice."[229] Thus, the Court should be fully knowledgeable of any pressing needs that pushed a state to take a certain decision, and in case of any vagueness the Court has the authority to ask for incremental documents to reveal any ambiguity and to provide more clarity for the issue under adjudication. Even more, the Chamber has the authority to, at the request of a party or of its own motion, "adopt any investigative measure which it considers capable of clarifying the facts of the case ... it may invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carry out its tasks."[230] In conclusion, the Court's margin of appreciation doctrine can be said to be more of a political nature rather than of being legally exigent.

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[227] ibid, at 537.

[228] ibid.

[229] European Court of Human Rights, Rules of Court, Rule no. 44A.

[230] ibid, Rule A1: Investigative Measures.

Now let's examine how the Court utilized the Margin of Appreciation doctrine in relation to restrictions of rights believed to be as a result of the terrorist attacks that struck Europe recently. I will first examine cases predating September 11 attacks, and afterwards cases of the same topic following the attacks will be scrutinized to observe any difference between both epochs within the Court's judgments.

2) The Strasbourg Court before September 11 Attacks:

The Strasbourg Court decided several cases in which the claimants alleged that their governments encroached upon their rights to manifest their religious beliefs. Among those is the is Dahlab v. Switzerland,[231] which can be considered as one of the most prominent cases in relation to Article 9 of the Convention. The case involves a Swiss school teacher who converted to Islam and decided to abide by its teachings to wear loose clothing and a headscarf. Ms. Dahlab kept wearing this garment for more than four years with no single complaint from either her colleagues, students, or their parents. She also insisted on telling her students false justifications when they inquired about the reason behind covering her head to keep away from being accused of proselytizing. Later on, the Director General of Public Education issued an executive order banning her from wearing such garments in school which was later challenged before the Swiss Courts that ultimately refused her claim. Then, the case was brought before Strasbourg which was dismissed on grounds of a jurisdictional matter.

The key paragraph which identifies the Court's view of the harms posed by wearing a headscarf and can be considered as being central in reaching the final decision is:

> "The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that **the wearing of a headscarf might have some kind of proselytizing effect**, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, **is hard to square with the principle of gender equality**. It therefore appears **difficult to reconcile the wearing of an Islamic headscarf with the**

[231] Dahlab v Switzerland, ECHR 2001-V 449.

message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[232]

The reasoning consisted of three main harms which the Court concluded from assessing the wearing of an Islamic headscarf as being the primary source of them. These harms are namely: (1) Proselytizing effect of wearing a headscarf, (2) Being against gender equality, and (3) its incompatibility with tolerance, respect to others, and equality. This analysis seems to have changed the status of Ms. Dahlab from a right seeker to a wrongdoer, accusing her of acts without presenting any substantive evidence to such allegations. First, the Court implicitly denoted that by wearing an Islamic headscarf, Ms. Dahlab might have indirectly exercised proselytizing acts towards her students. By this conclusion the Court neglected all the *prima facie* evidence that she did not clear out any of the true reasons behind wearing the headscarf to her pupils, and even gave wrongful excuses when she was asked for the causes. Furthermore, the Court's precedents indicate that the act of convincing others of someone's religion is not found to be in violation of Article 9 of the Convention. In Kokkinakis v. Greece,[233] the Court made a distinction between bearing Christian Witness and improper proselytism, the former corresponding to true evangelism and therefore permissible, while the latter represents a "corruption or deformation of it."[234] The Court then elaborated more to identify what type of acts can constitute improperness and listed some examples such as taking the form of offering material or social advantages, exerting improper pressure on people in distress or in need, and the use of violence or brainwashing.[235] Beside the fact that it was not proven that Ms. Dahlab exercised any verbal proselytism, the papers lacked any condemnations or accusations of any acts of improperness performed by her towards any of her surroundings. Thus, the grounds that the Court based its reasoning of indirect proselytism performed by the claimant is virtually non-existent. Finally, the Court referred to the vulnerability of young pupils and as a consequence they can get easily influenced by their teacher's behavior which I totally agree with. However, I also believe that the power to influence young students is not only exclusive to teachers but extends to include, according to their limited knowledge, the unknown force that has led to the dismissal of their teacher that they did not experience anything with her but

[232] ibid, at 13.

[233] Kokkinakis v. Greece, 3/1992/348/421

[234] ibid, at para 48.

[235] ibid.

goodness. It would be very difficult for them to digest the teachings of tolerance, accepting others' beliefs and non-discrimination when they know that their teacher was fired only because of what she used to wear.

Second, the court referred to the Quran as the primary source of imposing the wearing of hijab by women without engaging into the complexity of this argument. In fact, some Islamic scholars noted that the Quran is not explicit with respect to this particular issue and thus has been subject to interpretation which varied between the obligation to wear the headscarf to the sufficiency of only wearing loose clothes.[236] As Evans puts it, the Court seemed to rely on the popular Western view towards the Quran and Islam as being arbitrary to women and thus there was no need to go more into detail on a matter which is, according to her view, self-evident, shared understanding of Islam.[237] In addition, the Court considered the hijab as being a reflection to gender inequality by describing it as a 'powerful external symbol', neglecting all the circumstances that surrounded the applicant's choice of wearing it. The case lacked any evidence that highlights any kind of subordination of the applicant to any man, but her choice of wearing the Islamic garment was completely voluntary based on her own beliefs that no one interfered with. In the case of Sahin v. Turkey,[238] which carries almost the same circumstances and decision of Ms. Dahlab's case, the dissenting opinion of Judge Tulkens might have answered all the wonderings that might have roamed in the applicants' minds. She noted:

> "Turning to equality, the majority focus on the protection of women's rights and the principle of sexual equality … By converse implication, wearing the headscarf is considered synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. Indeed, what is the signification of wearing the headscarf? As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons. It does not necessarily symbolize the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women. What is lacking in this

[236] (Abilmouna, 2011), at 121.

[237] (Evans C. , 2006)

[238] Leyla Sahin v. Turkey (Application no. 44774/98) 10 November 2005.

debate is the opinion of women, both those who wear the headscarf and those who choose not to."[239]

Third, the Court viewed the Islamic headscarf as a sign of intolerance, disrespecting others and discriminatory without stressing on any facts that promote those descriptions. Beside the negative language the Court used to reach its conclusion, there was no proof that Ms. Dahlab exercised any conducts that reflect her intolerance or being disrespectful to others. The court's failure to explain the nexus between the Islamic headscarf and those strong depictions makes me wonder what if the case was introduced in the context of wearing 'only' a headscarf without presenting any religious justifications. In other words, what if the judges were to decide a case of a woman wearing a headscarf only because she just wants to, like the Queen of England, or maybe because she is in the course of a cancer treatment and does not want to show her hairless scalp to everybody.

Finally, the Court relied on the margin of appreciation doctrine while assessing the necessity of the restrictive measures in a democratic society. The Court found that the authorities acted within this margin in prohibiting the wearing of hijab and thus the measure they took was therefore not unreasonable.[240]

In sum, Ms. Dahlab knocked the Court's doors voluntarily to seek her dignity, her freedom, and above all her rights. She appeared before the Court to prove that no harm she made, no religious oppression she faced, and upholding her rights is the only hope she gazed. In return, the Court not only rendered her status as unemployed, it deployed all its weapons to make her arguments void, ranging from describing her beliefs as being discriminative, unrespectable to others and regressive, to utilizing the margin of appreciation to deem the authorities' restrictions as reasonable. In this respect, I would like to refer to the case of Lautsi v. Italy in which the Grand Chamber overturned the Chamber's decision that deemed the displaying of a crucifix in classrooms is in violation of Article 9 of the Convention. The Grand Chamber held that "there is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils, and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose

[239] ibid, Dissenting Opinion of Judge Tulkens, at para 11.

[240] n205, at 13.

convictions are still in the process of being formed."[241] While the Chamber Court referred to the crucifix as a 'powerful external symbol'[242] which borrowed this description from the Dahlab case, the Grand Chamber refused the Court's analogy without making any reasonable explanation, therefore deeming the crucifix as a passive symbol while the Islamic headscarf being an active one.[243]

It is worth noting that the European Commission of Human Rights rendered a decision in 1993 similar to that of Dahlab v. Switzerland. In Karaduman v. Turkey[244], the Commission decided to dismiss the application of Ms. Karaduman whose university refused to issue her a provisional certificate because she supplied the administration with her photo wearing a headscarf which did not comply with the university regulations. The Commission noted that the authorities right to regulate students' dresses and refusing them administrative services does not constitute an interference with the freedom of religion without even resorting to the margin of appreciation.[245]

At this stage of analysis, one can say that there is no specific legal mechanism the Court resorted to that can be blamed for causing this unfairness when it comes to issues related to the manifestation of religion as the the margin of appreciation, although utilized in certain cases, was not the primary actor when deciding cases of this kind. The Court 'sealed the deal' for being obviously biased in favor of Christianity when it comes to religious symbols. Although the Chamber Court made an effort to conceal this bias in the case of Lautzi, the Grand Chamber explicitly revealed the Court's deference to the religious traditions of Christianity although the differnces between this case and Dahlab is almost non-existent.

3) The Court's Approach Post September 11 Attacks:

The Strasbourg Court decided several cases within the last two decades which underlined its mainstream in relation to the right to practice religion during this crucial epoch. In this regard, one of the most prominent cases the Court decided which arose due to the controversial French legislation that banned the concealing of a woman's face and placed a punishment on

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[241] Case of Lautsi and others v. Italy (Application no. 30814/06) 18 March 2011, at para

[242] Case of Lautsi v. Italy (Application no. 30814/06) 3 November 2009, at para 54.

[243] (Zucca, 2013), at 220.

[244] Senay Karaduman v. Turkey (Application No. 16278/90) 3 May 1993.

[245] ibid, at 109.

whoever does so issued in 2010 is S.A.S v. France.[246] One of the main grounds for enacting this ban is the prevention of radical behavior and terrorism as being a security concern for the government.[247] The applicant, in this case, pleaded that she is a devout Muslim, and no one forced her to wear the veil, and she was ready to show her face upon request to reveal her identity. Her main arguments were that this act will lead to her harassment and discrimination, and encroaching upon her freedom of thought, conscience, religion and her right to private life. Also, she argued that this prohibition constituted a 'blanket ban' and was not intended for the purpose of protecting public safety. To refute the argument of gender equality, she claimed that her wearing of this veil is emanated from her free will and that nobody forced her to do so. On the other side, although the French government declared that the law would put a limitation on the right to practice religion, there was a pursuit for legitimate aims which are necessary for a democratic society to meet these aims. The respondent state also argued that this law protects the rights and freedoms of others by ensuring the minimum respect of values of an open and democratic society. It claimed that the face plays a very important role in the interaction between people and covering it will be a violation of the principle of 'vivre ensemble' or 'living together'. Although the court disregarded the respondent's argument of public safety, it based its verdict of not finding the law in violation of the Convention by considering the right of the state to have a margin of appreciation when deciding on issues related to the organizing of societies within its ambit of jurisdiction. The court in this judgment clearly departed from its former reasoning in Dahlab case where it mentioned the Quran and considered it as a tool of imposition of rules that significantly provides for sexual discrimination and violates the principle of equality. Although the respondent state raised the argument of state equality, the court regarded the practice of wearing veils is in fact defended by women who wear it and thus an argument as such will be deemed implausible.[248] The court also made a very important citation to the principle of pluralism when it rejected the respondent's argument of 'protection of human dignity'. The court pointed out that "it is aware that that the clothing in question is perceived as strange by many of those who observe it. It would point, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in

[246] Case of S.A.S v. France (Application no 43835/11) 1 July 2014.

[247] (Heider, 2012), at 118.

[248] n 220, at para 119.

democracy."[249] What the court meant by pluralism in this sense is people's respect of what reasons they have to value. In addition, the court brilliantly trashed the respondent's argument of necessity in relation to public safety by relying on the right to enjoy cultural identity among minority groups. The court decided that:

> "as to the women concerned, they are thus obliged to give up completely an element of their identity that they consider important, together with their chosen manner of manifesting their religion or beliefs, whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established...It cannot, therefore, be found that the blanket ban imposed by the Law of 11 October 2010 is necessary, in a democratic society, for public safety, within the meaning of Articles 8 and 9 of the Convention."[250]

The court here negatively asserted on the right of women to enjoy their identity practices while the state does not have the right to deprive them of such right except only in cases of general threat to public safety. The court reiterated the right to enjoying cultural identity again when it stated that the ban would have a negative impact on women who voluntarily chose to wear the veil for reasons related to their beliefs, by isolating them and restricting their autonomy.[251] It is very clear by now that the court wants to depart from its previous framing of similar cases where it intentionally meant to make a direct comparison between Islam and human rights and prevailing the latter. In this judgment, the court highlights multiculturalism and the right of minority groups to have their own identity. However, it seems that the court was preparing its audience for something different than was expected. Although the court admits that the notion of living together is broad in meaning, it accepted it by favoring the respondent state claim that the face concealing breaches "the right of others to live in a space of socialization which makes living together easier."[252] Then, the court alluded to the vast 'margin of appreciation' the state enjoys with regards to weighing the interaction between individuals and what can adversely affect this interaction, which is obviously the concealing of women's faces.[253] Although the

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[249] ibid, at para 120.

[250] ibid, at para 139.

[251] ibid, at para 146.

[252] ibid, at para 122.

[253] ibid, at para 129.

court admitted that the ban constitutes a threat to the identity of whom affected and may cause disappointment among the Muslim community, it considered the ban not to limit the freedom of wearing any other clothes in public other than the veil. [254] In addition, the Court decided to restrain its authority to review the convention compliance by considering that such reviewing will lead to assessing a balance that has been made through a democratic process.[255] In other words, by accepting that when France passed this law, it was acting within the ambit of its margin of appreciation.

In conclusion, I believe that the court chose the weakest argument to strike down the case and ultimately upholding the French law. Although the court stressed several times on the right of multiculturalism throughout the judgment, it trashed it without even discussing whether or not this particular identity feature violated any explicit conventional right. The court preferred to validate the law by giving effect to article 9(2) of the Convention which allows limitation, *inter alia*, for the protection of the rights and freedoms of others. If the court wanted to choose this course of reasoning, it should at least have struck a balance between those alleged rights and freedoms the state wants to protect, and the danger this identity feature poses on such freedoms and rights. The court accepted the state's argument of living together and ignored the fact that "accommodating individual rights can be and typically are used to sustain a wide range of social relationships."[256] Thus, accommodation of identity rights would never, according to this view, negatively affect the 'requirements of life negatively within a society'.

Another case that was recently decided by the Court in the realm of restricting the freedom of religion for the purposes of countering terrorism is Guler and Ugur v. Turkey.[257] Both applicants participated in a religious service in memory of three PKK members who had been killed by the Turkish security forces. They were later prosecuted for propaganda in favor of a terrorist organization and were ultimately sentenced to ten months' imprisonment. The convicted challenged the judgment before Strasbourg Court under the premises of violating their conventional rights to freedom of religion which took the form of participating in a religious ceremony which had consisted of a "mere public manifestation of their religious

[254] ibid, at para 151.

[255] ibid, at para 154.

[256] (Kymlicka, 1995), at 26.

[257] Case of Guler and Ugur v. Turkey (Application nos. 31706/10 and 33088/10) 2 December 2014.

observance."[258] The Court decided that the sentencing of the applicants constituted an interference with their right to manifest their religion.[259] However, the Court had to determine whether or not the impugned measure can be regarded as being 'prescribed by law' to decide if there is a violation of Article 9. The Court established two requirements for this purpose. First, the measure should have some basis in domestic law and, it should be accessible to the person concerned who must be able to foresee its consequences for him.[260] For these prerequisites to be realized, the Court set a presumptive proviso which is to integrate a "measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention."[261] The Court by this condition aimed to curbing the authorities' power in setting limitations on the fundamental rights enshrined in the Convention. The Court also made a distinction between an abstract exercise of propaganda which only aims for the deliberate dissemination of information to influence individuals in one direction and exploiting this propaganda for the indoctrination of terrorist ideologies.[262] The latter being a legitimate subject for limitation while the former is not sufficient by itself to limit freedoms. Ultimately, the Court found that the impugned measure could not mount to be prescribed by law because it did not meet the aforementioned requirements and thus found the challenged judgment to be in violation with Article 9 of the Convention.[263]

What makes this judgment unique is how the Court delved into what constitutes a 'law' to observe whether or not the challenged measure qualifies to be one under article 9(2) of the Convention and thus giving effect to the respective limitation. It is the first time for the Court to use the clarity and foreseeability test within the ambit of Article 9 to assess if the limitation is set by a genuine law. However, this test was used previously by the Court but within a different context. In the Sunday Times v. United Kingdom, a case which reviews an alleged violation of Article 10 that provides the freedom of expression, the Court noted that a prescribed law must be adequately accessible by the citizens, and formulated with

[258] ibid, at para 26.

[259] ibid, at para 43.

[260] ibid, at para 47.

[261] ibid, at para 48.

[262] ibid, at para 52.

[263] ibid, at para 55.

sufficient precision to enable them to regulate their conduct.[264] It is worth noting that in S.A.S v. France, the Court found the measure of limitation to be prescribed by law at first glance without applying the criteria laid down in previous case-law.[265]

Furthermore, the Court referenced the Human Rights Committee General Comment no. 22 in its reasoning when concluding that there has been an interference to the right to free practice of religion[266]. The Comment considers ritual and ceremonial acts including ceremonial following deaths as being a freedom to manifest religion. By doing so, the Court showed a high degree of professionalism and broadness which if have been followed in previous cases previously discussed would result in a complete alteration in its trajectory towards the manifestation of religion. This is because the very same Comment encompasses not only ceremonial acts but also the wearing of distinctive clothing or headcoverings as being one the forms of manifesting religion.[267] The most adequate explanation that reflects the Court's basic line of reasoning is that it intentionally redacts the legal principles in order to fit in its purposes and the mindset of the majority within a particular case.

4) Overview:

In any legal system, the process of adjudication from a judge's perspective usually takes three stages to be completed. First, the judge analyzes the dispute to be fully knowledgeable of the facts surrounding the case concurrently with developing a preliminary vision of the case which reflects his/her mindset. Second, the judge interprets the applicable law in a form that fits within his/her mindset towards the given facts of the case. Finally, the judge applies the rules generated from the interpretation of law on the given dispute. It is uncontestable that the method of observing the facts of a case and the applicable law differs from one judge to another. A judge's conclusion in these stages depends on several internal and external factors. Internal factors may include the degree of intelligence, education, personal values, morals and ideologies, and religious beliefs. On the other hand, external factors may include public policy, social custom, social morals and values, politics, current major events and the media. The Majority of these factors affect the judge subconsciously in the process

[264] The Sunday Times v. the United Kingdom. (Application no. 6538/74), 26 April 1979, at para 49.

[265] S.A.S v. France, at para 112.

[266] Guler and Ugur v. Turkey at para 41.

[267] HRC General Comment no. 22 (1993), at para 4.

of conceiving the facts of any given case and subsequently the method of interpreting the law and the reasoning of the final decision. However, this state of mind can be said to depend mainly on how constant or variable these factors are. Constant factors are those acquired through a long period of time which inevitably became an integral part of a judge's personality which include all of the internal factors and some of the external ones, for example, social moral and values. While variable factors are those emanating from a contemporary condition which surrounds the judge, either in his normal life as a citizen, or in his professional career as a judge. The former includes major incidents taking place domestically or globally, the state's general policy, and even his current psychological mood. The latter includes the media when focusing on the particular topic of adjudication, and the political spectrum towards this topic. It is noteworthy to mention that variable factors are always external according to the aforementioned classification.

By applying this analysis to the cases previously discussed, it is fair to conclude that the internal constant factors were the main drive of the majority of Strasbourg judges when deciding such cases which overcome the variable factors. The specific superficial perception of Islam was obviously the principal cause of Dahlab's decision as the Court decided that the Quran is discriminatory against women without addressing any of its verses that does so and solely depending on the Swiss Courts' reasoning on this issue. Also, in the case of S.A.S, although the Court departed from its previous negative language towards Islam, it chose the least persuasive argument to uphold France's face veil ban. Comparing those cases with the case of Lautsi v. Italy proves that the European Court's religious tolerance to Christianity is far more than that to Islam which reflects the historical nature of Europe and verifies the role of the internal factors in shaping the Court's verdicts.

With regards to the case of Guler and Ugur v. Turkey, I believe that the external variable factors played a crucial role in reaching the final decision being the bloody conflict between the Turkish government and the Kurds which resulted in numerous human rights violations committed by the Turkish authorities.[268] The Court chose to frame the case within the context of Article 9 while being the least Conventional right that got affected by the practices of the Turkish authorities as it is obvious that the applicants were prosecuted not

[268] For more information about the human rights violations committed by the Turkish authorities which includes extrajudicial killings, see the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions issued on 5 May 2015 which covers the period before adjudicating the case of Guler and Ugur v. Turkey. Available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_37_Add_4_en.doc

because of practicing one of their religious rights but for propaganda in favor of a terrorist organization even if the religious right was the avowed conduct. By doing so, it is much easier for the Court to apply the foreseeability and clarity test to strike down the case by not recognizing the punishment as prescribed by law because section 7(2) of Law no. 3713 obviously does not explicitly address any religious limitations.[269] Judges Sajo and Keller seem to agree with this analysis as they noted in their dissenting opinion that "where a gathering takes on a hybrid character as in the present case, it is often difficult to distinguish between political goals, on the one hand, and religious goals, on the other. There is also a risk that such confusion might be deliberate, to enable those who foster it to rely improperly on a fundamental right… we are of the opinion that it would have been better to examine the case under Article 11 of the Convention alone."[270]

[269] section 7(2) of Law no. 3713, reads: Those who assist members of organizations constituted in the manner described above or make propaganda in connection with such organizations shall be punished with imprisonment of between 1 and 5 years and with a fine of between 50 million and 100 million Turkish liras, even if their offence constitutes a separate crime.

[270] Case of Guler and Ugur v. Turkey, Dissenting Opinion at para 7-8.

Chapter 4: Proposed Recommendations and Regulations for a better Protection

Living in a state of Utopia is nothing but a dream that everybody wishes to come true, but unfortunately it seems that it will never exceed the sphere of being just a dream. Neither human cruelty will diminish nor the implications of such cruelty which mostly affect innocent individuals will halt. That being so, some scholars believe that one of the most important steps that has to be taken in order to downsize this cruelty, in our case being terrorism, is the curtailment of religious freedom as being the primary instigator for such conduct. In this respect, Guiora proposed the idea of limiting the freedom of speech in a house of worship, the freedom of association and any practice of religious extremism including headscarves if they endanger national security or the rights and freedoms of a member of an internal community.[271] He also noted that judicially created instruments for the protection of the freedom of speech such as the Brandenburg test should be abolished as it does not allow the state to interfere until it is too late and the threat will arrive already before this test's elements are realized. [272] No one can disagree with the fact that religious extremism which promotes violence must be prohibited and even criminalized, but which is the main state body responsible for identifying how extreme the religious speech or conduct is? If all the tests and regulations created by the judiciary are abolished, then the answer will be that the executive will have the ultimate power to legalize and prohibit whatever conducts according to its policies in this regard and neglecting the judiciary's authority to review this particular state practice. It is irrational to say that because some people practice religion in an ill manner, then the practice of religion should be prohibited. It is similar to saying that because reckless drivers exist, then driving should be banned.

It is clear by now that almost all universal and regional human rights covenants adopt the concept of permitting states to impose limitations on the freedoms of religion. Nevertheless, these limitations may be applied only "for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated."[273] These limitations take the form of an escape clause which allows governments to deny any religious practice found to be encroaching upon fundamental rights and the freedoms of

[271] (Guiora A. N., 2009), at 751.

[272] ibid, at 748.

[273] HRC General Comment no. 22 (1993), at para 26.

others.[274] The balancing between those practices and to what extent they affect the fundamental rights and freedoms of others is what is described as proportionality. Balancing usually takes the form of weighing considerations in favor of a course of action on one side, and on the other side considerations against it, while the outcome of this process would be the purported fair decision.[275] However this approach has been fiercely criticized as the objects weighed are not always clear, the tool of weighing is ambiguous, and the vagueness of who actually responsible to undertake this process.[276] These questions will lead to one definite conclusion; the instability of the protection granted by the conventions and/or domestic laws as it will always be dependent on the different circumstances and the sequels of the weighing process which will definitely diverge from one case to another. Therefore, the primary hurdle that impedes the freedom of religion is not related to the wording statutes concerning this particular right, but rather how this right is weighed against how the weigher perceives the general interest of the community.

The United States RFRA, which was a legislative response to the Supreme Court's decision in the Smith case that was considered as a pervasive regulation of religion,[277] might be considered as the best solution for this dilemma with some slight alterations to its core. This Act sets forth a pre-established scale for weighing both considerations while leaning the weighing platform more towards the contested right by prohibiting any state or federal law from substantially burdening a person's exercise of religion.[278] If the domestic legal systems adopt this approach, it would be very intricate for the government to promulgate any restrictions on the freedom of religion. The only exception which would place this burden in a predominant position is only if this burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering this interest.[279] The act here presumes the superiority of religious freedom over any state or federal law if it restricts this liberty. The only exception to this equation is if the government succeeded in demonstrating the compelling government interest of the burden and being the least restrictive means of furthering this

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[274] For example, Article 18(3) of the ICCPR, and Article 9(2) of the ECHR.

[275] (Tsakyrakis, 2009), at 469.

[276] ibid, at 470.

[277] (Laycock, 1993), at 221.

[278] 42 U.S. Code § 2000bb–1 (a).

[279] ibid, at (b).

interest.[280] Moreover, the religious exemption does not apply only to federal laws preceding this act but also subject to application for later acts unless it explicitly excludes such application by referencing it.[281]

What makes this act 'religious freedom friendly' is not only granting it superiority over other religiously burdening acts, but also the fact that the scope of the Court's discretionary power in deciding which interest prevails is limited compared to that in utilizing the ordinary necessity test. Reasons for this are that, first, burdening is a clear cut verb not very opened to interpretations, which entails a heavy load or a cause of worry.[282] If the claimant succeeds in proving this burden, the Court is obliged to move on to the second stage of litigation which is assessing whether the government interest is 'compelling' enough to accept this burden. Second, a compelling interest suggests that "certain concerns are so important that they outweigh or override the reach of otherwise applicable constitutional rights."[283] Compelling in this sense does not mean " a reasonable means of promoting a legitimate public interest... Rather, compelling interests include only those interests of the highest order, or in a similar formulation, only the gravest abuses, endangering paramount interests." Under these robust terms, the form of balancing will be much more rigorous than any other one found in any legal system that lacks the compelling interests test as it requires a higher standard of strict scrutiny by the Court and very persuasive arguments by the government in defense to its restrictions.

Mere proportionality suggests, according to the former president of the ECtHR Rolv Rysdall, "striking a balance between the general interest of the community and the protection of the individual's fundamental rights."[284] The RFRA in contrast, presupposes that this public interest cannot be violable by any practice of religious right except in very narrow cases that is considered as compelling. Thus, occasions where the religious right is contested, the foregone conclusion will most probably be in favor of this right because the tool of 'striking the balance' did not always prove to be a fair mechanism especially in the realm of religious rights.

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[280] 42 U.S. Code § 2000bb-1 (b)

[281] 42 U.S. Code § 2000bb–3

[282] Black's Law Dictionary.

[283] (Gottlieb, 1992), at 549, citing Supreme Court cases of Hobbie v. Unemployment Appeals Comm'n, Thomas v. Review Bd, and Employment Div. v. Smith respectively.

[284] (Ryssdal, 1996), at 18.

One of the most plausible critiques that was directed towards the RFRA is that it may create discrimination among individuals because some people will be exempted from being subject to certain laws pursuant to this act. A proposed solution for this dilemma would be incorporating a list of statutes to which the protections of the act would not apply to. This approach has already been followed by the State of Pennsylvania which exempted the drug, medical licensing, and abuse reporting laws from the protection of the RFRA. [285]

In cases such as Dahlab, Sahin, S.A.S and Mohamed Mohamed Salah, the domestic judges will not have any other choice but to uphold their right to manifest their religious beliefs as none of the arguments presented by their respective governments could be deemed as compelling according to the aforementioned articulation.

On the international level, it appears to be that what makes the judges successfully frame their reasoning to be inline with how they envisage the facts of the case is the judicially made margin of appreciation doctrine. As previously mentioned, this doctrine grants states an enormous discretionary power in limiting freedoms without any statutory criteria, the Court being the sole moderator for evaluating the legitimacy of its applicability. It is utterly obvious by now how the Court in many incidents depended on this doctrine in reaching several decisions which appeared to be biased against whom seeking their rights. The Court's main reasons for leaving the discretion to national courts were mainly the better position of state authorities compared to international judges with regards to assessing any given restriction or penalty, the difficulty of identifying a uniform European Standard of human rights, the supervisory nature of the Court rather than acting as a Court, and refraining from interfering with the sovereignty of states in political issues.[286] In addition to giving national authorities an unjustified power to limit rights, these reasons actually contradict with the establishment clause found in the Convention which specifies the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols as being the Court's primary and only role.[287] The obscure nature of this doctrine prompted several jurists to extensively criticize it. Lord Lester expressed his deep concern towards this doctrine by noting that:

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[285] § 2406 of the RFRA of Pennsylvania lists several laws that this act shall not apply to.

[286] (Law teacher, 2013)

[287] ECHR, Article 19.

> "The danger of continuing to use the standardless doctrine of the margin of appreciation is that, especially in the enlarged Council of Europe, it will become the source of a pernicious, variable geometry of human rights, eroding the acquis of existing jurisprudence and giving undue deference to local conditions, traditions, and practices".[288]

A major solution to the inconsistency that this doctrine causes is found in in this very passage which is standardizing the doctrine. This process can be done by codifying the margin of appreciation in the Convention while mentioning its definition, scope of application, and the limits to which it is allowed. The lack of a standard definition to the doctrine opens doors to national and international courts for the abuse of process under the umbrella of discretion which affects the clarity, precision and impartiality of judgments. Nevertheless, the codification of the doctrine will oblige the courts to follow the path drawn by the respective provisions with regards to utilizing the doctrine and thus will result in a systematic and detailed justification for its use rather than the randomness that led to the hibernation of many of the Conventional rights.

Conclusion:

Despite all the efforts made by the international community to set a comprehensive definition of terrorism, all these endeavors ended up with failure which negatively affected the states' level of compliance to human rights. Almost all states perceive terrorism as a threat to 'national security', and thus respond to this type of crime with the same magnitude as this term represents at all the institutional scales. The repercussions of the states' response to national security threats are not always devoid of human rights violations if not being one of the global primary reasons for such violations. The international vacuum with respect to setting a comprehensive definition has led states to randomly set definitions that only serve their domestic policies and interests while taking national security as a pretext for encroaching upon many fundamental human rights. This state of fear allowed states to take measures ranging from stop and search to indefinite detention all the way to declaring states of emergency which grant authorities the permission to derogate from several rights and taking extreme measures

[288] (Lester, 1998)

against individuals. Some of these rights are directly targeted by the measures such as the right not to be arbitrarily detained and the right to fair trial while other rights are indirectly affected such as the right to freely practice religion. Although it is unquestionable that almost all the contemporary terrorist groups and their attacks are a product of religious extremism, it is seldom noticeable that any of the states has taken explicit measures for limiting religious freedom. Almost all the restrictive measures were either undercover, such as the surveillance procedures against Muslims discussed earlier in the case of Hassan v. New York, or a ban of a specific garment that conceals parts of the facial characteristics such as the veil or headscarf. However, although some of these measures might appear, in its wording, not to be targeting individuals of a specific religion, almost all of their victims were. In addition, the wide discretionary powers given to national and international courts fostered these restrictive measures by upholding almost all of them. The only country that did not show extreme judicial deference to such measures, although being the mostly affected by terrorist attacks, is the United States thanks to the legislative and judicially created tests that defined protections for both freedoms of religion and expression.

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